

**The Politics of Torture, Human Rights, and Oversight:
The Canadian Experience with the UN's Optional Protocol to
the Convention Against Torture (OPCAT)**

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Abstract

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Key words: torture, human rights instruments, correctional oversight, correctional abuse, OPCAT, Optional Protocol to the Convention Against Torture, policy analysis, policy cycle

Torture has long been denounced by the international community; the need to protect citizens from abuse at the hands of the state is a principle enshrined in international law. One area where abuse is common is within the correctional system and as a result, there is a need for oversight in places of detention. The Optional Protocol to the UN's Convention Against Torture (OPCAT) is an international human rights instrument that acts as a preventive measure to monitor all places of detention through regular visits. Supportive of the OPCAT since its adoption, Canada has considered signature/ratification since 2002 but has yet to commit. The purpose of this study is to identify factors that have led to a delay in Canada becoming a State Party to the OPCAT despite adherence to the principles that this instrument embodies. A policy analysis framework was utilized to conduct stakeholder interviews and review government documents. The concept of agenda-setting received special attention and content analysis of media reports and a review of government legislative activity were conducted to provide insight into the prevalence of the issue on the public and political agendas. The author argues that while there are real challenges that policymakers must overcome, the absence of political leadership has resulted in stagnation in the decision-making process. As a result, the issue has disappeared from both the public and political agenda. In order for progress to be made, political will must be created and the impetus to act ('re-setting the agenda') must come from civil society in the absence of government engagement on this issue.

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In closing, I would like to present a few words from the man who I view as the most influential politician of my generation. I was fortunate enough to speak with Mr. Layton about human rights issues on more than one occasion when he visited the University of Ottawa during my undergraduate days.

"Canada is a great country, one of the hopes of the world. We can be a better one – a country of greater equality, justice, and opportunity."

As Canadians, I believe that we should embody Jack's parting message and be loving, hopeful, and optimistic so that we may change the world through a continued commitment to the promotion and protection of human rights.

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Acronyms and Abbreviations

AANDC	Aboriginal Affairs and Northern Development Canada
AI	Amnesty International
APT	Association for the Prevention of Torture
ATIP	Access to Information and Privacy
CAT	Committee Against Torture
CBSA	Canadian Border Services Agency
CCOHR	Continuing Committee of Officials on Human Rights
CCRA	Corrections and Conditional Release Act
Charter	Canadian Charter of Rights and Freedoms
CI	Correctional Investigator
CPC	Commission for Public Complaints (RCMP)
CRPD	UN Convention on the Rights of Persons with Disabilities
CSC	Correctional Service of Canada
CSIS	Canadian Security Intelligence Service
DFAIT	Department of Foreign Affairs and International Trade Canada
DOJ	Department of Justice Canada
ECOSOC	United Nations Economic and Social Council
Globe	The Globe & Mail
IERT	Institutional Emergency Response Team
MP	Member of Parliament
NGO	Non-governmental organization
NHRI	National human rights institutions
NPM	National preventive mechanism
OCI	Office of the Correctional Investigator
OHCHR	Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention Against Torture
P4W	Prison for Women, Kingston
PS	Public Safety Canada
RCAP	Royal Commission on Aboriginal Peoples
RCMP	Royal Canadian Mounted Police
SIHR	Parliamentary Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development Subcommittee
SMRTP	Standard Minimum Rules for the Treatment of Prisoners
SPT	Subcommittee on Prevention of Torture
UN	United Nations
UNCAT	Convention Against Torture
UNCHR	United Nations Commission on Human Rights
UNICEF	United Nations Children's Fund

Introduction

The guarantee and protection of human rights has become enshrined in international jurisprudence within the last half century. The international community under the auspices of the United Nations (UN) has collaborated and become party to multiple conventions, declarations, protocols, and initiatives in an effort to prevent torture, abuse, discrimination, and mistreatment of the world's citizens. Progress has indeed been made as more nations have been willing to extend rights to their people (albeit sometimes only in promise and not in practice; commitment without compliance). However, there is more work that needs to be done and this work is not solely within the arena of the developing world. On the contrary, developed western nations are called upon to enact new measures to protect their most marginalized of citizens and to throw off shrouds of secrecy for the sake of greater transparency.

The rights of even those most marginalized must be guaranteed and protected in accordance with international law. This of course includes individuals who are deprived of their liberty and are held in a nation's jails, prisons, or other places of detention. The modern correctional system creates the conditions whereby abuse can occur as what takes place behind the walls of these institutions is often obscured from public view. For example, within the Canadian correctional system there are many systemic issues that require attention including the psychological effects of incarceration, lack of access to adequate healthcare and mental healthcare services, the use of administrative segregation, overcrowding, and so forth. Many of these issues are not related to isolated incidents but instead are prevalent through the system as a whole.

The lack of public scrutiny coupled with an absence of political accountability and general indifference to the plight of prisoners or those on the fringes of society allows practices to occur that violate basic human rights (McCulloch and Scranton, 2008). Too often, prisoners are constructed as 'the other' or viewed as lesser than law-abiding citizens. There is a general lack of respect for offenders as they are thought to 'get what they deserve.' Subsequently it is argued, what is needed is the promotion of less discriminatory attitudes and a focus on maintaining humanity within places of detention (Nowak, 1998). It is for this reason that there is a need for transparency within the correctional systems of all nations, even democratized nations that do not have questionable human rights records.

The recognition of the need to protect and promote human rights within places of detention led to the development of an international instrument that aims to reduce the occurrence of torture and cruel, inhuman, or degrading treatment in places of detention worldwide through a preventive approach. The

emphasis on the prevention of abuse prior to its occurrence is in contrast with the traditional reactive oversight approach utilized by most states. The Optional Protocol to the Convention Against Torture (OPCAT) calls for the creation of oversight and emphasizes principles of accountability, openness, transparency, and collaboration. The Protocol includes provisions for regular visits to all places of detention by a national preventive mechanism (NPM) as well as visits made by an international monitoring body, the Subcommittee on the Prevention of Torture (SPT) on a less frequent basis.

The Protocol is not designed merely for those states that practice torture (in the traditional conceptualization of the word), but for all states that seek to follow the rule of law and to protect the rights of even those who are marginalized from society (e.g., prisoners). By becoming a State Party to the OPCAT, a nation is not admitting to the practice of torture but rather committing to doing everything possible to ensure that human rights abuses in any form do not occur within places of detention. Canada is one such nation that has continually voiced support for the principles embodied within the OPCAT. However, the commitment to the Protocol has yet to materialize in a meaningful way through signature and/or ratification.

The following thesis examines why Canada, an advanced democratic nation with a reputation as a leader in the promotion and protection of human rights internationally, has yet to become a State Party to the United Nation's Optional Protocol to the Convention Against Torture (OPCAT) nearly ten years after it was first adopted by the UN General Assembly in 2002.

A policy analysis framework was utilized to examine government documents and conduct first-person interviews with policy actors and stakeholders in an attempt to identify and discuss factors that have led to the delay in Canada becoming a State Party to the OPCAT. Media content analysis and an examination of government legislative activities were also done to determine the prevalence of a constellation of issues relating to human rights, correctional oversight, and the OPCAT on both the public and political policy agendas in Canada. The hope is that this study will provide insight into why Canada has not taken a leadership role in implementing the OPCAT through an examination of the policy cycle, the current decision-making process, and the barriers that must be overcome.

The following is a summary of the content contained within this thesis:

Chapter one identifies the need for transparency and oversight within correctional systems and introduces the OPCAT. A discussion of the parent treaty, the Convention Against Torture (UNCAT), as well as Canada's commitment to the provisions of this treaty is included. A detailed presentation of the OPCAT's path to its adoption, the provisions contained within the instrument, and how its approach to

oversight (prevention vs. reaction) is a unique form of monitoring are also a focus of the chapter. The Correctional Service of Canada's (CSC) existing oversight mechanisms are identified as are the common types of abuse/issues that arise in a detention context (e.g., psychological effects of incarceration, lack of adequate mental healthcare services, overcrowding, etc.). The closure of the Kingston Prison for Women (P4W) and the Ashley Smith case are cited as examples of how more can be done to prevent abuse and indifference to deaths in custody in the Canadian prison system. The chapter concludes with a discussion of how signature of the OPCAT can potentially fill a gap in the existing oversight system by adding a preventive element through the establishment of national preventive mechanisms.

Chapter two contains the theoretical framework for this study. A policy analysis approach was utilized and the concepts of the policy cycle, policy actors, and challenges in the policy-making process are defined and discussed. A discussion of human rights as politics is also included within this chapter with special emphasis on the theories and arguments for commitment to international human rights treaties. Attention is also paid to the concept of agenda-setting as it applies to both public and political agendas with a discussion on the media's role in the process.

Chapter three outlines the methodological approach used in this study which includes a description of data collection methods (through examination of government documents, Access to Information (ATIP) Requests, interviews with policy actors, content analysis of media reports, and review of legislative activities) and associated challenges, and justification for use of multiple methods. This chapter also describes how the 'analysis' or interpretation of findings was conducted and identifies validity and reliability issues as well as study benefits and limitations.

Chapter four contains the results of the study. This chapter is divided into nine different sections that examine various findings stemming from the data collected. The first subsections examine Canada's stated commitment to the OPCAT and the process the country must follow when seeking to become a State Party to an international human rights instrument. The next sections identify the challenges and barriers that could potentially account for the delay in decision-making. This leads into a discussion of the perceptions of policy actors about Canada's inaction and whether the political will is present to move forward on this issue. The chapter concludes with an exploration of the extent to which issues of correctional oversight and the OPCAT are on the public agenda and the extent to which bills with 'human rights' provisions are on the legislative agenda.

Chapter five discusses the findings of the study as they relate to the concepts presented in the analytical framework. In examining the information obtained from government documents and stakeholder

interviews, it became apparent that the challenges in the OPCAT decision-making process are surmountable and this chapter identifies how they can be addressed. The primary obstacle to moving the process forward is identified and the notion of 're-setting' the agenda and giving the issue of OPCAT commitment priority is put forward.

Chapter six contains the concluding remarks for this study as well as recommendations for a future course of action that calls upon the government to assume a leadership role and demonstrate political will by committing to a decision. In the absence of such leadership, civil society and civil interest groups must place the issue of Canada becoming a State Party to the OPCAT on the public agenda and apply pressure to the government to respond. There is also a discussion of the potential for future research.

Chapter 1 – OPCAT and the Need for Correctional Oversight in Canada

The creation of correctional oversight limits liability and is a way to improve correctional practices and demonstrate due diligence on the part of government agencies. Canada recognizes the need and value of correctional oversight and as such, has already developed and implemented several mechanisms. Through the cultivation of a culture of transparency and accountability where there is recognition that “corrections is in the human rights business,” systemic issues within the correctional system can be addressed (Zinger, 2006, 132). The OPCAT is an international human rights instrument that emphasizes the importance of oversight and monitoring in a preventive capacity to eliminate the occurrence of torture or abuse within places of detention around the world. Through visits of an international body as well as consistent monitoring carried out by a National Preventive Mechanism (NPM), systemic issues inherent to correctional systems can be identified and addressed such that they do not continue to occur. An oversight mechanism such as this is complimentary to existing reactionary measures and closes a gap in the process by taking a preventive approach.

1.1 Correctional oversight: The need for transparency

Prisons are closed environments; what occurs behind the walls happens in a private sphere where the public (and media) has little to no access (Fathi, 2010). It has been suggested that the prison is one of the last great vestiges of secrecy within society (Coyle, 2003). This is why the need for transparency is of such importance. Inevitably, having openness will ensure that what happens in the prison is subject to a certain degree of monitoring which leads to accountability. This could then serve as a deterrent to reduce the likelihood of cruel or inhuman treatment within places of detention (Coyle, 2008).

One viable solution for protecting human rights in places of detention is the use of oversight and monitoring (APT, 2004). The need for oversight has been recognized in Canada with the creation of both internal and external mechanisms for the federal correctional system. The creation of a strong human rights legislative framework along with effective external monitoring mechanisms can counter the shift toward increasingly punitive policies that is currently occurring in corrections worldwide. As the Correctional Investigator notes “effective and safe corrections cannot be separated from transparency, openness, and accountability” (Sapers, 2010) and the existing literature on oversight and monitoring supports these sentiments.

The creation of new oversight mechanisms alone however, does not guarantee reductions in the occurrence of abuse. Particularly given that correctional oversight mechanisms are traditionally reactive in nature (an incident must occur before there is a response). The goal of monitoring should be to identify and resolve the root causes of issues that lead to human rights abuses and to have consistent follow-up (APT, 2004). Again, this can be challenging given the reactive approach of existing oversight mechanisms. While problems that are systemic can be identified and recommendations for improvement offered, there is reliance on officials to make necessary changes to structures, policies, and practices.

If oversight is the answer, then how should it be implemented? In order to be effective, an oversight agency should have unimpeded access to institutions and data about imprisonment so as to gain an accurate understanding of the operation of a detention system and some insight into the issues that exist (Bouloukos and Dammann, 2001). A system of unannounced and regular visits by an independent oversight body that emphasizes transparency and accountability is the recommended model (APT, 2004).

These key principles form the basis of a new international instrument – the OPCAT – aimed at the prevention of torture and abuse in places of detention internationally.

1.2 The Optional Protocol to the Convention Against Torture: An instrument for oversight

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is an addition to the UNCAT. The OPCAT was first adopted on December 18th, 2002 at the 57th session of the General Assembly of the UN by resolution A/RES/57/199. It went into force on June 22nd, 2006.

The creation of this Optional Protocol came out of a long recognized need to monitor places of detention internationally. The objective of the OPCAT is to not only address systemic abuse or mistreatment but to prevent it from occurring through increased transparency and openness. The Protocol was adopted on the premise that a system of regular visits to international detention facilities would be effective in combating torture and human rights violations (APT, 2008). The visitation is to be carried out by “independent international and national bodies” that will then make recommendations to authorities on how best to prevent torture and improve conditions in prisons/detention facilities (APT, 2008). The OPCAT is unique in this sense because it is a preventive approach. Most human rights

mechanisms that currently exist monitor situations *a posteriori* – once allegations of abuse have already been received (APT, 2005).

1.2.1 UN conventions and optional protocols

Declarations and conventions (treaties) are powerful tools in the fight to protect human rights as they impose obligations on states and have the ability to influence the creation of international laws.¹ The effectiveness of these instruments can be further enhanced when there are articles that establish the creation of an oversight body (e.g., committee, commission, or rapporteur) that has the authority to monitor and enforce state compliance to convention provisions. These declarations and conventions are adopted and entered into force by the UN General Assembly after which point nations may become States Parties (sign, ratify, or accede to the treaty).² [Appendix A](#) contains a list of some of the more important human rights instruments established in the 20th and 21st centuries as well as a list of UN commissions and committees.

In addition to monitoring bodies, some conventions have optional protocols. The protocols commonly provide for procedures that relate to the original convention or address an area related to the convention (OHCHR, 2012). The ‘optional’ portion of the title indicates that nations who are States Parties to the convention of which the protocol is attached are not automatically Party to the protocol. Optional protocols are treaties themselves and as such, countries must sign, ratify, or accede to the protocol to become Party to it.

1.2.2 The Convention Against Torture (UNCAT) – the parent treaty

The Convention Against Torture (UNCAT) is an international human rights instrument that was adopted by the UN General Assembly on December 10th, 1984 (exactly 36 years to the day after the Universal Declaration of Human Rights was adopted) and entered into force on June 26th, 1987. For the full text of the UNCAT, please refer to [Appendix B](#).

¹A treaty is a formal agreement between two or more states. When a treaty is drafted within the UN structure, it is normally referred to as a convention (subsequently, the terms can be used interchangeably). These documents are legally binding on signatory states (Bouloukos and Damman, 2001). Declarations are not legally binding and are usually the basis for future conventions.

²Becoming a signatory constitutes a preliminary endorsement of a convention or protocol. Signing the instrument does not create a binding legal obligation but does demonstrate that the state is considering ratification. The signing of a convention does not constitute a commitment to ratify however, that state is required to refrain from acts that would defeat or undermine treaty obligations (UNICEF, 2005). Ratification or accession is an agreement to be legally bound by the terms of the convention/protocol. The difference between the two is the process by which the state becomes bound to the treaty. Ratification occurs after signature, accession skips the signature phase (UNICEF, 2005).

The impetus for the creation of this Convention was the recognition that torture was pervasive worldwide and that not enough was being done to hold accountable states that allowed its commission. Some governments, motivated by Amnesty International's 1972 *Campaign for the Abolition of Torture* brought the question of torture to the UN General Assembly in 1973 (Murdoch, 2006). This led to the adoption of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment and Punishment in 1975. Shortly thereafter, work began on the drafting of a convention and after seven years of work (1977-1984), the UNCAT was formally adopted.

The Convention aims to strengthen the existing prohibitions against torture under international law.³ It requires all States Parties to create domestic legislation abolishing the use of torture and outlining punishments for those found guilty of committing the act (Article 2). As previously noted, there are no circumstances in which the use of torture is permissible even if they are exceptional in nature (e.g., war time, periods of political instability, social upheaval, etc.). There is also a prohibition from extraditing a person to another state when there is a risk that they could be tortured (Article 3). This is called the principle of non-refoulement and has been the subject of some controversy, particularly in the current climate of terrorism as states are looking to extradite terror suspects.

States Parties are also required to formally investigate any acts of alleged torture in an impartial manner (Articles 12-13). An additional requirement is ensuring that confessions or statements made as a result of torture are not admitted into evidence during court proceedings (Article 15); this article is important in addressing the use of force and unlawful interrogation techniques by law enforcement in order to elicit confessions from suspects. Lastly, the state is responsible for creating a mechanism to compensate identified victims of torture and provide for any necessary treatment (Article 14).

Treaty-based monitoring body

The UNCAT is one of several UN conventions that have their own oversight or monitoring body to observe and enforce the compliance of States Parties to the convention's provisions. Article 17 of the UNCAT established the Committee Against Torture (CAT). The CAT consists of ten experts (from States Parties) with a recognized competency and experience in the field of human rights. The experts are

³The definition of torture, as worded in the UNCAT is: "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." It should be noted that the UNCAT's definition of torture was intended to be interpreted in a relatively limited fashion, corresponding to the understanding of torture (and associated abuse) as a universally condemned practice (McPhee, 2006).

elected by States Parties through a secret ballot to four year terms (Kelberg, 1998). Committee members may be re-elected after serving their term. The CAT meets twice a year in Geneva and will submit an annual report to the UN General Assembly outlining the activities of the States Parties..⁴

The activities of the CAT are largely responsive in nature. The provisions outlined in UNCAT allow for action following complaints as opposed to the promotion of preventative measures. The rationale behind the construction of the Convention and the subsequent reporting procedures of the Committee is that the public recording of State Party violations in the annual report will motivate states (primarily as a result of international scrutiny) to take actions to prevent future violations. The downside to this approach is that a violation must occur in order for the issue of torture to be addressed.

Status of States Parties to the UNCAT

As of August 2012, there are 78 signatories and 151 States Parties to the Convention Against Torture (one of which is Canada). For a complete list of all States Parties, please refer to [Appendix C](#).

Canada, human rights, and the UNCAT

Canada was a strong supporter of the UNCAT and became a signatory shortly after the instrument was adopted (August 23rd, 1985) and later ratified it on June 24th, 1987. A declaration was also made stating that the country recognizes the competency of the Committee Against Torture on November 13th, 1989..⁵

Canada has been identified as a leader in the area of international human rights and has been recognized for promoting the protection of human rights, fighting against apartheid, assisting in the establishment of the first global war crimes tribunal, and participating in multiple UN peacekeeping missions across the globe. Notable contributions include intervention in the Congo (1960-1964), Cyprus (1964-1993); the Middle East (1973-1979), Kuwait (1990-1991), the Balkans (1992-1995 and with NATO from 1995-1997), Rwanda (1993-1996), Kosovo (1999), Ethiopia (2000-2003), and Haiti (multiple missions) (United Nations Association in Canada, 2001).

⁴ Duties of the CAT include studying and commenting on reports submitted by States Parties on the measures that they have taken to adhere to Convention obligations (Article 19); investigating allegations of systemic torture within a State Party's jurisdiction when reliable information is presented (Article 20); receiving and investigating complaints made by one State Party of violations of Convention obligations in another State Party (Article 21); and receiving and investigating complaints made by individual citizens regarding acts of torture in a State Party (Article 22).

⁵ "The Government of Canada declares that it recognizes the competence of the Committee Against Torture, pursuant to article 21 of the said Convention, to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. The Government of Canada also declares that it recognizes the competence of the Committee Against Torture, pursuant to article 22 of the said Convention, to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention" (UN Treaty Collection, 2012).

Domestically, Canada has several instruments in place to protect the human rights of Canadian citizens including the *Canadian Human Rights Acts* (1978), the *Charter of Rights and Freedoms* (1982), and Human Rights Commissions at the federal and provincial levels that have been put in place to investigate and address reported human rights violations. These commissions also work to promote equality within the larger society and end all forms of discrimination in Canada.

The Canadian government has continually affirmed its support of the abolition of torture and has denounced its practice internationally. Canada sat on the UN's Human Rights Council from 2006-2009 and has taken the lead on several resolutions calling for the end of torture in other nations.

Despite these noble efforts, in recent years the Canadian human rights record has come under increased scrutiny as a result of incidents such as the extraordinary rendition of Maher Arar⁶, the failure to request the return of Omar Khadr⁷, and the Afghan detainee scandal⁸. This recently culminated in Canada losing a bid for a seat on the UN's Security Council (comprised of ten members with two seats reserved for Western nations) in October 2010. Over the course of the last sixty years, Canada had always won the seat when a bid for it was placed but instead lost to Germany and Portugal electing to withdraw the bid after it was evident that the loss would occur (Edwards, 2010). The loss reflects the growing frustration directed at Canada's foreign policies in the last decade. As Human Rights Watch Executive Director Kenneth Roth (2010) put it:

⁶ Maher Arar is a Canadian citizen who was subject to extraordinary rendition (on account of being a suspected terrorist) and subsequent torture in Syria in 2002. Upon Arar's return to Canada a year later inquiries were launched into the Canadian government's culpability in Arar's rendition and torture. In the 2004 Garvie Report it was revealed that the RCMP, under instruction from Deputy Prime Minister John Manley, was responsible for giving American authorities sensitive information on Arar without making stipulations as to how that information could be used. The RCMP may also have been aware of the American plans to transfer Arar to Syrian authorities. A formal Commission of Inquiry issued findings that the U.S. had likely acted upon inaccurate information provided by the RCMP. Arar was later issued a formal apology by the Canadian government and the RCMP; he was awarded a \$10.5 million settlement for the suffering he endured.

⁷ Khadr, a Canadian citizen, was captured by the U.S. military in Afghanistan in 2002 at the age of 15. Following his capture, Khadr was imprisoned in Guantanamo Bay and subjected to 'enhanced interrogation techniques.' As a result of his juvenile status, many international organizations identified him as a child soldier who should be released from custody. Khadr was the last remaining western citizen held at Guantanamo because Canada chose not to seek extradition or repatriation which has drawn harsh criticism from the international community. The Canadian government has also been identified as complicit in Khadr's mistreatment by sending CSIS agents to Guantanamo to interrogate him and then turning over the findings to the Americans for use in his military trial. In 2010, the Supreme Court of Canada issued a ruling that Khadr's constitutional rights had been violated. However, the court did not order Khadr's return and subsequently, the government has yet to seek his return to Canada.

⁸ Allegations surfaced that Canada violated the Geneva Conventions by intentionally handing over detainees to the Afghan National Army and Afghan security forces even though there was the reasonable expectation that they would be tortured. The Conservative government refused to hold an official public inquiry or release classified documents. The Canadian government has continued to deny access to this information and went so far as to prorogue Parliament in December 2009 to March 2010 in what the opposition claimed was, in part, an attempt to shut down their efforts to expose the truth surrounding the Afghan detainee issue.

One can quibble with whether Canada is right or wrong on any single issue, but the pattern is deeply disappointing - reflecting Canada's transformation from a government that regularly stood with victims of human rights abuse to one that, these days, mostly stands aside.

1.2.3 The OPCAT's long road to adoption

The process to create the OPCAT began before UNCAT was adopted. Jean-Jacques Gautier, a retired Swiss banker and humanitarian first suggested the idea of creating a protocol that would aim to prevent torture internationally through the use of regular visits to places of detention (APT, 2010). In 1977 he established the Swiss Committee Against Torture (now the Association for the Prevention of Torture) and three years later the Costa Rican government submitted a draft protocol to the UN that outlined Gauthier's ideas of preventing torture through collaborative efforts of state governments and the international community (UN). At this time, the protocol had little support as nations were focusing on implementing UNCAT. In Europe the reception to the proposal was stronger and in 1987 the European Convention for the Prevention of Torture was adopted and its monitoring body, the Committee for the Prevention of Torture (CPT) began inspections in 1990 (CPT, 2010).

Based on the success of the CPT in Europe, a new draft of the optional protocol was submitted to the UN Commission on Human Rights (UNCHR) in 1991 with Costa Rica once again serving as its sponsor. This time, there was greater interest in the initiative. The UN Special Rapporteur on Torture, Pieter Kooijmans, stated that establishing a system of visiting places of detention worldwide would be "the final stone in the edifice which the United Nations has built in their campaign against torture" (APT, 2005, 42). The UNCHR subsequently ordered the establishment of a Working Group on March 3rd, 1992. The purpose of the Working Group would be to draft the optional protocol however, this task proved to be exceedingly difficult.

It would take the Working Group ten years (meeting annually) to submit a draft to the General Assembly for adoption. For a complete account of each of the Working Group sessions, please refer to [Appendix D](#). There were several points of contention that certain nations used as stall tactics to block the finalization of a draft. Some of these issues included:

- > The establishment of multiple human rights mechanisms (i.e., the international oversight mechanism and the national oversight mechanism);
- > Funding for the national oversight mechanism;
- > Granting unrestricted access to all place of detention and allowing unannounced visits; and,
- > Conflicts with domestic legislation (APT, 2005).

By 2002, a consensus could not be reached among Working Group members and a submission of the current text along with the original draft of the protocol and drafts created over the last two years of Working Group discussions were provided to the UNCHR by Costa Rica in the hopes of beginning the adoption process.⁹ For the OPCAT to be formally adopted it first had to be approved by several UN bodies through a majority vote and series of resolutions. The following outlines the OPCAT's adoption process:

- > April 25th, 2002 – resolution is approved by the UNCHR (29 in favour; 10 against; 14 abstentions)
- > July 2002 – draft of the OPCAT is presented to the Economic and Social Council (ECOSOC)
- > July 24th, 2002 – resolution is approved by the ECOSOC (35 in favour; 8 against; 10 abstentions)
- > November 2002 – draft of the OPCAT is presented to the Third Committee of the General Assembly
- > November 7th, 2002 – resolution is approved by the Third Committee (104 in favour; 8 against; 37 abstentions)
- > December 18th, 2002 – UN General Assembly adopts the OPCAT (127 in favour; 4 against; 42 abstentions)

At the final General Assembly vote, member nations overwhelmingly voted in favour of adopting the OPCAT. Only four nations were against its adoption – the Marshall Islands, Nigeria, Palau, and the United States (APT, 2005).

1.2.4 A new approach to oversight – prevention and collaboration

The OPCAT is comprised of six parts and a preamble that reaffirms the obligations outlined in the UNCAT. The preamble also notes that States Parties to the OPCAT recognize that

The protection of persons deprived of their liberty against torture and other cruel, inhuman, or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention.

Part I of the OPCAT outlines the general principles of the protocol. It sets out the main obligations of States Parties which include recognition of and cooperation with the Subcommittee on Prevention of Torture (SPT) (Article 2), the establishment or designation of a visiting body at the domestic level (Article

⁹ A note on the adoption of international human rights instruments – in order for an instrument to be approved within the UN system it must be approved by a succession of bodies in the form of either a consensus or majority vote. These bodies include the UNCHR, the ECOSOC, the Third Committee of the UN General Assembly, and then finally the UN General Assembly (APT, 2005).

3), and allowing access by international and domestic bodies to any place of detention under the state's jurisdiction (Article 4).

The SPT is described in greater detail in Part II and III of the OPCAT. Here it is noted that the Committee will initially consist of ten members and then be increased to twenty-five following the fiftieth ratification of the protocol. SPT members, similar to those on the CAT, are to have experience in the field of human rights and the treatment of persons deprived of their liberty (Article 5). States Parties can nominate up to two candidates for the SPT and members are chosen via secret ballot (Articles 6-7). Members serve a four year term and can be re-elected to a second term if they are re-nominated (Article 9).

The National Preventive Mechanisms (NPMs) are discussed in Part IV of the OPCAT. These domestic oversight bodies are an integral component in ensuring effective monitoring of places of detention. The SPT is available to provide technical support to NPMs, maintaining a collaborative relationship between the international and national oversight mechanisms. A more detailed discussion of NPMs will follow.

The final three parts of the OPCAT enable states to temporarily opt out of obligations relating to implementation issues for either the SPT or the NPM (for a period not to exceed three years) (Article 24); sets out financial provisions for the functioning of the SPT and for special funding that can be provided to States Parties to assist them in implementing the recommendations made by the SPT (Articles 25-26); and final provisions that relate to the scope of the OPCAT's application, proposing amendments, etc. (Articles 27-37). For the full text of the OPCAT, please refer to [Appendix E](#).

The mandate and activities of the Subcommittee on Prevention of Torture

Part III of the OPCAT outlines the mandate and responsibilities of the SPT in its capacity as the international preventive mechanism. Article 11 establishes that the SPT is responsible for:

- > Visiting places where persons are deprived of their liberty;
- > Advising and assisting States Parties in the establishment of national preventive mechanisms;
- > Maintaining direct contact with the NPMs and providing training and/or technical assistance as necessary;
- > Advising and assisting the NPMs in evaluating the needs and means necessary to protect persons from torture and cruel treatment;
- > Making observations and recommendations to States Parties to assist in strengthening the capacity and mandates of the NPMs;

- Co-operating with other UN bodies and relevant international, regional, and national bodies for the common purpose of preventing torture and cruel treatment.

The OPCAT gives the SPT the right to visit all places of detention located within a State Party's jurisdiction and it also stipulates that SPT members are to have access to any detainee or any information (e.g., records) that is considered necessary to the investigation (Article 14). The definition of 'place of detention' is left fairly vague and can include police stations, jails, remand facilities (pre-trial detention), prisons, juvenile detention centres, military detention centres, immigration holding facilities, mental health institutions, or any other location where a person is deprived of their liberty.

The SPT examines the daily living conditions in places of detention and interviews individuals in custody in private settings to gain insight into the realities of these locations for detainees (Article 14). Staff, government officials, medical practitioners, lawyers, and other involved parties can also be interviewed by members of the SPT. Such interviews are to be conducted using the principles of confidentiality and anonymity and those who are interviewed are not to be subject to repercussions for providing information (Article 15).

The preventive visits undertaken by the SPT looks at system features as well as practices and policies in order to identify gaps in the protection against human rights abuses and to determine where existing safeguards can be strengthened (OHCHR, 2007). Issues that are commonly examined include treatment of persons deprived of their liberty (e.g., torture/ill-treatment, isolation, restraint, use of force), protection measures (e.g., disciplinary procedures and sanctions, complaint and grievance procedures), material conditions (e.g., capacity of facilities, hygiene conditions, food), regimes and activities (e.g., administration of time on an average day, availability of work and education, contact with the outside world) medical services, and prison staff (e.g., training of staff, relationship between authority and detainees)(APT, 2004). The Committee highlights what is being done well and where improvements are needed.

A program of these visits is to be established in advance and the state is made aware that the SPT intends to investigate so that arrangements can be made to facilitate the arrival of the Committee. Follow-up visits are also a possibility. After the visits have been completed, the SPT submits a confidential report to the State Party and NPM outlining observations and recommendations (Article 16). The State Party then has the opportunity to review the report and respond. They also have the option of releasing the report or giving the SPT permission to release it.

The SPT is required to submit an annual report to the CAT detailing its activities over the last year and reporting what their findings are for each of the visits conducted. The CAT has the ability to release the report thus voiding confidentiality if a State Party refuses to cooperate with the SPT or fails to take corrective actions based on the SPT's recommendations (Article 16).

The mandate of the SPT differs from other UN committees in that it works collaboratively with the State Party and seeks to establish a relationship based on fairness, confidentiality, and impartiality. If human rights violations are found to be occurring in places of detention, recommendations are made and a dialogue is established in an effort to correct the situation, rather than merely releasing the information publicly so as to shame the offending nation before the international community.

One of the issues that the SPT faces is a lack of resources to be able to carry out visits with a high level of frequency. In its first annual report, the SPT (2008) notes that there are approximately 8 visits conducted which means that a State Party would only be visited an average of once every four to five years. This greatly reduces the deterrent effect of the monitoring which is why national preventive mechanisms (NPMs) are such an integral part of the OPCAT.

National Preventive Mechanisms (NPMs) – a powerful oversight mechanism and the key to the OPCAT

Within one year of OPCAT ratification/accession the State is required to establish or designate a NPM (Article 17). There are a variety of models available which range from a single NPM, multiple NPMs, or multiple NPMs with a central oversight that coordinates the activities of its branches (APT, 2006). Part IV of the OPCAT also outlines the requirement that NPMs be independent (i.e., the NPM could not be an internal correctional oversight; it would have to function much like the Office of the Correctional Investigator does). The NPM also must have the authority to make recommendations for improvements with regards to conditions and treatment of detainees (Article 19).

The SPT (2008) has provided guidelines to assist States Parties in establishing NPMs. Some of the important points to consider include:

- > Establishing the mandate and powers of the NPM in national legislation as a constitutional or legislative text;
- > Establishing the NPM through a public and transparent process;
- > Ensuring independence by appointing members openly and guaranteeing that they do not hold a position that could lead to a conflict of interest;
- > Developing a schedule of visits to all places of detention that ensures effective monitoring (i.e., high level of frequency);

- > Encouraging NPMs to report on what is being done well and where gaps exist and provide recommendations for improvement; and,
- > Promoting open channels of dialogue between NPMs and authorities.

The NPMs are to be given the same unrestricted access as the SPT to all places where individuals are deprived of liberty. They are also to be given access to all information concerning the number of persons detained and their treatment. The interview privileges are identical to those of the SPT. The NPM also has the right to maintain dialogue with the SPT and transmit information to the international body (Article 20).

The primary differences between a NPM and the SPT are that the NPM conducts visits with much greater frequency, will visit unannounced, and publishes/disseminates an annual report regardless of whether the State wants it made public or not.

1.2.5 The Canadian experience with the OPCAT

Canada has given support to international instruments and mechanisms adopted to protect human rights and eliminate the use of torture. Canada has frequently sponsored resolutions submitted to the Commission on Human Rights or the UN General Assembly (e.g., resolution for Iran to stop using torture adopted in 2010). In demonstrating a continued and vocal opposition to the practice of torture, Canada was one of the first states to sign and subsequently ratify the UNCAT and has remained one of the leading contributors to the UN Fund for Victims of Torture (Tremblay, SIHR, June 5, 2007). The Canadian government also issued an open invitation to all special proceedings of the UN human rights protection system to visit Canada in 1999. This included the Special Rapporteur on Torture and demonstrates a willingness to be transparent with regard to places of detention.

With respect to the OPCAT, Canada was involved in both its drafting and adoption. Canada was a member of the Working Group from 1992 to 2001 as a result of a request made by the Commission on Human Rights (Tremblay, SIHR, June 5, 2007). Canada voted in favour of the adoption of the OPCAT at the Commission on Human Rights and again at the UN General Assembly. This continued involvement and support of the OPCAT led many to believe that Canada would sign and ratify the protocol relatively quickly, as had been the case with the UNCAT. However, this did not occur.

The issue of becoming party to the OPCAT remained on the political radar in the coming years. In December 2005, Amnesty International Canada, the Canadian Association of Elizabeth Fry Societies (CAEFS), and the APT wrote a joint letter to each of the federal political parties, asking them to make their position on the OPCAT public before the upcoming election (APT, 2009). The only response

received was from the Conservative Party of Canada, which pledged to bring the matter before parliament if they won the election. The Conservatives won, assuming power in early 2006 and remaining there (as of the writing of this thesis), albeit for most of this time as a minority government.

The OPCAT was adopted in 2002 but did not go into force until 2006. At this time, Canada wanted to secure a seat on the UN Human Rights Council. As part of the bid for the seat, Canada stated that the protection and promotion of human rights are an important part of Canadian domestic and foreign policies (Ilango, 2007). A pledge was also made to consider becoming a State Party to human rights instruments such as the OPCAT. Canada was elected to the Council for a term of three years (2006 to 2009) but the pledge remains unfulfilled.

A Parliamentary Subcommittee on International Human Rights (SIHR) was convened in the summer of 2007 to hold hearings on the OPCAT. However, when Parliament was suspended during the summer and resumed in the fall, the OPCAT was no longer on SIHR's agenda. To date, these hearings have not led to the production of any reports or recommendations regarding Canada's position on the OPCAT.

1.2.6 The status of States Parties to the OPCAT

As of August 2012, there are 63 States Parties to the OPCAT and an additional 22 signatories. For a complete list of all States Parties, please refer to [Appendix F](#). Of these States Parties, 42 have already designated their NPM ([Appendix G](#) provides a list of these nations and identifies their official NPMs).

Canada is not on the list having yet to sign or ratify the OPCAT. Even Nigeria, one of four nations who voted against the adoption of the OPCAT in 2002 ratified the protocol in July 2009 and has since designated an NPM (APT, 2011).

Canada acknowledges the need and value in having correctional oversight mechanisms in place as evidenced by the establishment of both internal and external monitoring for the federal correctional system. Canada was also instrumental in supporting the development and adoption of the UN's Optional Protocol to the Convention Against Torture which provides oversight in a preventive capacity. Given that oversight is not a foreign concept and that Canada supports the principles of the OPCAT, it is curious that the country has yet to become a State Party to this human rights instrument.

1.3 Abuse within places of detention

Places of detention have conditions that create an environment where abuse can easily occur. Many would not classify traditional penal practices as reaching the level of torture (as it is commonly conceptualized), but some of these acts can be interpreted as ill-treatment. Common practices in

domestic penitentiaries such as placing prisoners in administrative segregation (solitary confinement) for long periods of time, denial of adequate and timely medical or mental healthcare, overcrowding and unhealthy living conditions, reduction in diet, and forced labour could all potentially meet the criteria for cruel or inhuman treatment (Coyle, 2003; Andrews and Bonta; 2010). Canada is a nation that follows the rule of law and does not permit acts of abuse within places of detention. Moreover, Canada has departed from its closest ally and denounced the use of capital punishment (which is often described as cruel and unusual punishment – see: Neumayer, 2008), formally abolishing its use in 1976.

There is recognition in Canadian correctional policy that a balance must be struck between security and rehabilitation and subsequently, the rights of prisoners are not to be limited unless absolutely necessary as a means to protect the public. Within the context of the Canadian correctional system, steps are in place to ensure that there is a certain level of scrutiny and accountability to address instances of human rights abuse. The mission of CSC (2012) is to “contribute to public safety by actively encouraging and assisting offenders to become law-abiding citizens, while exercising reasonable, safe, secure, and humane control.” However, there have been multiple examples of abuse and cruel and/or inhuman treatment within the last two decades and cases of preventable deaths in custody occur on an annual basis. As a result, there is still much room for improvement. The following section identifies some of the common issues inherent within correctional systems that increased oversight could potentially address.

1.3.1 The psychological effects of prison

It has been argued that modern prisons institutionalize offenders and strip them of their identity in an effort to elicit compliance. In effect, the system is designed to break the will of the prisoner such that they do not offer resistance or create unrest. In this way, there is a very obvious parallel to one of the goals of torture which is breaking down one’s will to destroy their sense of autonomy and agency (Kupers, 2008). Loss of identity and status as individuals also makes it easier for prisoners to be dehumanized by those in a position of authority, which creates the conditions for abuse to occur (Finley, 2008).

Foucault (1977) described prisons as ‘complete and austere institutions’ where total power is exerted over prisoners. The prison has internal mechanisms of repression and punishment that is reinforced through isolation. Prisoners become anonymous figures within an inferior group in an environment where there is a pronounced power imbalance (Clemmer, 1938). Prisoners come to accept their role as subordinates and begin to exhibit signs of powerlessness as the prison exerts control over every aspect of their daily lives. Goffman (1961) further explains how human identity is stripped upon entrance into

what he referred to as ‘total institutions.’ He claims that obedience tests and will-breaking contests are to be expected. The prisoners will quickly come to the realization that resistance against those in power is futile and is met with swift punishment.

1.3.2 Administrative segregation

The use of administrative segregation in particular has continually been identified as a practice that borders on cruel, inhuman, and degrading punishment. At the time of its conception, the use of solitary confinement was thought to be not only a punishment but also a transformative process as a prisoner would have time to reflect in isolation without distraction resulting in the recognition of wrongdoing and the expression of remorse (Ignatieff, 1978). The ‘Auburn’ model of incarceration¹⁰ also assisted the institution in further solidifying control over the prisoner as solitude is the “primary condition of total submission” (Foucault, 1977, 237). Today, administrative segregation commonly refers to physical isolation in a cell for 23 to 24 hours per day with little to no contact with others.

International and regional human rights bodies have strongly criticized extended solitary confinement under harsh conditions of deprivation (Fellner and Metzner, 2010). In October 2009 the UN Special Rapporteur on Torture formally recognized the harm (such as hallucinations, psychosis, suicide, etc.) caused by the use of administrative segregation and stated that its use should be kept to a minimum. Research has shown that as many as 90% of prisoners who are placed in administrative segregation suffer from psychological and physiological ailments as a result of their prolonged confinement (Istanbul Statement, 2007). There is debate however, to the validity of such research. In a longitudinal study that examined the effects of solitary confinement on 60 prisoners, it was found that there was no decrease in psychological functioning after 60 days in administrative segregation (Zinger, 1998). This same study did find that those prisoners who were segregated had a higher rate of mental health issues, psychiatric symptoms (particularly depression and anxiety), and interpersonal distress than non-segregated prisoners. Follow-up research has yet to be conducted to determine if psychological functioning is diminished as a result of longer periods in solitary confinement.

In many civil and criminal cases, the use of administrative segregation has been found to be unlawful (in Canada see *McCann v. The Queen*, [1976]). Yet this practice continues to be utilized as a strategy for dealing with prisoners who are considered problematic. CSC Commissioner’s Directive 709 states that administrative segregation should only occur “when specific legal requirements are met, subject to the

¹⁰ The New York state prison at Auburn in 1816 led to a new prison model and regime under the guiding principles “Industry, obedience, and silence,” designed to keep prisoners in forced labour separate and unable to communicate.

least restrictive measures” and that “an inmate placed in administrative segregation will be returned to the general population at the earliest appropriate time”. According to the Correctional Investigator, there are approximately 7,500 placements in administrative segregation annually within Canadian federal prisons and of these placements, 16% are for 120 or more days (Sapers, 2011).

1.3.3 Mental health care

The issues inherent to most correctional systems are compounded by growing prison populations. In particular, aging prison populations and an increasing number of prisoners with mental health issues highlights the need for more medical care in the prison system however, it is often not provided. Research has established that offenders have a higher incidence of mental health issues than the general public and often these prisoners are disciplined for disobedience and placed in segregation where they can deteriorate further to the point of complete mental decompensation (Kupers, 1998; Ogloff et al., 2007).¹¹ The net-widening of the criminal justice system and passage of ‘get-tough’ crime legislation can result in offenders being placed in prisons when they should actually be treated in mental health facilities.

In the 2010-2011 *Annual Report of the Office of the Correctional Investigator* (OCI) the need for greater access to mental health services was highlighted as a priority as current access in the prison system is inadequate. The report also notes that many offenders with “acute mental health symptoms” are placed in segregation (Sapers, 2011). CSC (2010) studies have also identified the growing nature of the problem. Out of a sample of 1,300 adult male offenders admitted to the federal system between 2008 and 2009, 38.4% were assessed as having a mental health issue that required follow-up. For female offenders, this number is even higher (50%). Further complicating the issue is the high prevalence of co-occurring disorders which require treatment for substance abuse and mental illness; 78% of offenders with severe alcohol dependence had dual diagnoses (CSC, 2010). The suicide rate among federal prisoners is also seven times higher than that of the general public (Service, 2010).

1.3.4 Overcrowding

Despite reductions in crime rates, the incarceration rate in Canada continues to climb. Yet, the police-reported crime rate in 2011 was the lowest that it has been since 1972 and the Crime Severity Index¹² has declined by 26% since 2001 (Statistics Canada, 2012). Nonetheless, the incarceration rate has

¹¹The Istanbul Protocol calls for the abolition of using administrative segregation for mentally ill offenders.

¹² For more information on Statistics Canada’s CSI, please refer to: <http://www.statcan.gc.ca/pub/85-004-x/2009001/part-partie1-eng.htm>

continued to climb since 1999 and nationally, there were 141 adults in custody per 100,000 adults in the general population in 2008-2009 (Calverley, 2010). In an attempt to accommodate an increased number of prisoners, which can be attributed to more punitive sentencing policies (e.g., the introduction of mandatory minimum sentences for certain offences), double-bunking is often instituted. This practice can lead to unhygienic living conditions, the spread of disease, and increased frustration on the part of prisoners who are forced to share an already small space (Doyle and Walby, 2007). In many instances, this practice can incite acts of violence. In recent years, federal institutions in Canada have returned to the use of this practice despite the fact that it goes against Section 9 of the UN's *Standard Minimum Rules for the Treatment of Prisoners* (SMRTP) to which Canada is a signatory. The practice also contradicts the recommendations found in CSC Commissioner's Directive 550 which states that "single occupancy accommodation is the most desirable and correctionally appropriate method of housing offenders."

Despite single cell occupancy being the stated policy, currently approximately 13% of the total inmate population is 'double-bunked' (i.e., more than one inmate accommodated in a cell designed for one person). CSC estimates that the number of double-bunked offenders will increase to 30% of the overall inmate population in the next three years; exceeds 60% in some institutions (Sapers, 2011).

1.3.5 Common grievances

Not surprisingly, it is these issues along with parole board decisions, case overview, abuse at the hands of staff, access to programs/services, and involuntary transfers that prisoners most commonly cite as grievances (O'Reilly-Flemming, 1992). However, grievance systems (internal oversight mechanisms) do not always produce tangible results for complainants. The process is often long and drawn-out and even if abuse is found to have occurred, correctional officers or fellow prisoners are rarely prosecuted effectively (Jackson 2002; Finley, 2008).

Fig. 1 Areas of concern most commonly cited by prisoners based on number of grievances (2010-2011)

Grievance	Number	Percentage of Total Grievances
Healthcare	741	12.53%
Conditions of confinement	469	7.93%
Cell effects	407	6.88%
Transfer	369	6.24%
Staff	347	5.87%
Administrative segregation	346	5.85%

Grievance	284	4.80%
Information	202	3.42%
Programs/services	188	3.18%
Telephone	168	2.84%

*(Sapers, 2011)

The above figure (which contains information compiled by the OCI) identifies the most common types of grievances made by offenders in federal correctional institutions in 2010-2011. Overwhelmingly, healthcare (access to, decisions, and medication) grievances were made most frequently. There are four levels in the grievance process (discussed in more detail in Section 1.4.1). Initially, the response time set for a grievance was 40 working days (10 days per level) but due to backlog, CSC has continually extended this timeframe and it currently is 25 to 80 days for 'routine grievances' and 15 to 60 days for 'high priority' grievances (Sapers, SECU, April 24, 2012). This translates into a period of approximately seven months to address routine grievances and five months to address high priority grievances.

1.4 The Correctional Service of Canada (CSC) and human rights

The Correctional Service of Canada is responsible for overseeing federal penitentiaries across the country and supervising offenders who are released on parole in the community.¹³ Currently, there are 57 federal institutions and 16 community correctional centres of varying security levels spread out over five regions housing approximately 13,500 prisoners (Sapers, 2010). As part of the criminal justice system, CSC is faced with the aforementioned dilemma of trying to strike a balance between guaranteeing public safety while also attempting to rehabilitate prisoners. The mission of the agency is to "contribute to public safety by actively encouraging and assisting offenders to become law-abiding citizens, while exercising reasonable, safe, secure and humane control" (CSC, 2012). Respect of the rule of law is also noted as an important part of this mission. Additional values that guide the work done in Canada's prisons include respecting the dignity of individuals and recognizing that offenders have the potential to re-join the community as law-abiding members of society (CSC, 2012).

As such, CSC aims to meet both international treaty obligations as well as provisions that are outlined in other international human rights instruments. There are also domestic laws and regulations that prison officials are required to follow to ensure that the rights of prisoners are not violated. The following figures outline these requirements:

¹³ Prisoners in the federal system are those offenders who receive a sentence of two or more years. Any sentence under two years means that an offender will serve their time in a provincial jail overseen by the province/territory.

Fig. 2 –International Instruments that Pertain to CSC

General Human Rights	Human Rights of Prisoners	Human Rights Relating to Prison and Law Enforcement Staff
> Universal Declaration of Human Rights > Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities	> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment >Standard Minimum Rules for the Treatment of Prisoners > Basic Principles for the Treatment of Prisoners > Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment > Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physical, in the Protection of Prisoners and Detainees Against Torture > United Nations Standard Minimum Rules for Non-custodial Measures	> Code of Conduct for Law Enforcement Officials > Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

Fig. 3 – Canada’s Domestic Human Rights Obligations with Respect to Prisoners

Constitutional Documents	Domestic Statutes Affecting Human Rights	Domestic Laws Affecting Prisoners
> Canadian Charter of Rights and Freedoms > Part II of the Constitution Act (1982)	> Canadian Bill of Rights > Canadian Human Rights Act > Privacy Act > Access to Information Act > Official Languages Act	> Corrections and Conditional Release Act (CCRA) > Corrections and Conditional Release Regulations > Canadian Criminal Code

* (Yalden, 1997)

In addition to these treaties, instruments, and acts, CSC is also bound by Commissioner’s Directives and Standard Operating Practices which detail CSC policy on how to best ensure that control is maintained in a safe and humane way. The *Corrections and Conditional Release Act* (CCRA) is the most important document pertaining to the treatment of prisons as it forms the legislative framework of CSC. Section 4(e) of the CCRA (1992) outlines the principles that guide CSC and states that “offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence.”

The agency notes that it seeks to operate from a ‘human rights framework’ and that the principles and provisions that are contained within the CCRA are derived from the standards found within the human rights instruments outlined above. CSC claims to hold “itself accountable to those standards... [and] is

actively committed to making them work in federal correctional institutions” (Yalden, 1997). For a list of the milestones that CSC identifies for human rights in Canadian corrections please refer to [Appendix H](#).

CSC clearly acknowledges the importance of treating prisoners humanely and respecting their basic human rights. Accordingly, the agency has established both internal and external monitoring mechanisms. The CCRA establishes a grievance procedure “for fairly and expeditiously resolving offenders’ grievances on matters within the jurisdiction of the Commissioner” and further denotes that “every offender shall have complete access to the offender grievance procedure without negative consequences” (1992, c.20, s.90-91).

1.4.1 The Inmate Complaint and Grievance System – internal oversight/monitoring

Through an internal Inmate Complaint and Grievance System, prisoners can seek redress for mistreatment. This system is maintained under the authority of the Offender Affairs Division of CSC who seeks to respect a prisoner’s right to be heard while also identifying and responding to problems within institutions by bringing them to the attention of the appropriate authorities (CSC, 2011). The process has four different levels beginning with the complaint stage, which if no resolution can be arrived at, will move up a chain for review at the institutional, regional, and then national level. Along the way, grievances are also classified in terms of priority and separated into either ‘high’ or ‘routine’ (Yalden, 1997).¹⁴ Most grievances are resolved at the initial complaint stage, but prisoners may be forced to seek redress at higher levels (CSC, 2011). If a grievance has to be reviewed multiple times, the process can become long and arduous, which combined with the low percentage of grievances that are upheld may be a deterrent to reporting instances of mistreatment.¹⁵ The provincial/territorial correctional systems have ombudsmen offices in place to investigate grievances.

1.4.2 The Office of the Correctional Investigator – independent external oversight

In terms of external monitoring, the CCRA contains provisions (s. 157-198) for the establishment of the Office of the Correctional Investigator (OCI). The OCI acts as an ombudsman for federal prisoners receiving complaints and working toward redress. As an independent oversight mechanism, OCI also makes recommendations to the Commissioner of the Correctional Service of Canada and the Minister of Public Safety regarding issues in the federal correctional system (OCI, 2010). An annual report is

¹⁴ A grievance classified as ‘high’ priority would relate to administrative segregation, involuntary transfer, accusations of abuse, denial of visitation, etc.

¹⁵ For example, in 2002-2003, there were 23,220 grievances recorded. 1,765 of these grievances made it to the national level. Of all of the grievances made, only 14.3% (3,323) were upheld (CSC, 2003).

released that identifies the common areas of complaint and offers suggestions on how they can be addressed.

The basis for the creation of the OCI is the recognized need for an *independent* body that can respond to complaints in a fair and unbiased manner and conduct investigations (i.e., interviews with prisoners and prison officials, review of documents, meeting with inmate committees, etc.) to keep the correctional system accountable for what occurs in federal institutions. The investigations themselves can be conducted as a result of a complaint or by the OCI's own discretion. It is important to note that the OCI does not act on a preventive basis and is instead reactionary in nature. In other words, an issue must first be brought to the attention of the OCI before any investigative activities are carried out. During the course of an investigation, the Correctional Investigator (CI) is afforded great authority in terms of requesting information although there are strict guidelines that provide for minimal disclosure of information attained so as not to compromise the CI's position as an ombudsman (OCI, 2010).

If an investigation yields findings that a decision, act, or omission is contrary to or violates laws, obligations, or policies the Commissioner of Corrections is to be made aware of the problem in an attempt to resolve it, particularly if the nature of said problem is systemic. At this time, the CI may also make recommendations on how the problem could be resolved. The OCI notes that its authority:

Lies in its ability to thoroughly and objectively investigate a wide spectrum of administrative actions and present its findings and recommendations to an equally broad spectrum of decision makers, inclusive of Parliament, which can cause reasonable corrective action to be taken if earlier attempts at resolutions have failed (OCI, 2010).

The OCI plays an integral role in keeping the correctional system accountable and for establishing transparency. In the past year, the OCI received a total of over 5,700 complaints, conducted more than 2,100 interviews, and conducted 844 formal investigations (Sapers, 2011). More than 1,000 reviews of the use of force were also completed during this time. As a result of this work, several areas for improvement, many of which are the common issues inherent within most correctional systems and discussed in the preceding section, were identified. These include access to medical care, the provision of treatment for mental illness, deaths in custody, conditions of confinement, access to programs, and issues specific to Aboriginal and female prisoners. Of these issues, health care is identified as the primary area of concern for the total prisoner population (Sapers, 2011).

While the OCI appears to offer adequate oversight, it is important to note that the Office is very limited in its ability to enforce any of its recommendations. The OCI reports must go through the Minister of

Public Safety before reaching Parliament. This has the potential for a conflict of interest given that the Solicitor General is also the minister responsible for CSC (Yalden, 1997). Without the proper authority to institute positive reform, the impact that the OCI can have is greatly compromised.

Despite the noted efforts of CSC to identify and address complaints brought to its attention via internal and external channels, incidents that could be classified as cruel, inhuman, or degrading treatment/punishment still occur in federal corrections. Two particular incidents, both extremely controversial, highlight the inherent need for more evaluation, oversight, and reform in Canada's correctional system.

1.4.3 Why oversight is necessary in Canada

Correctional oversight is implemented in an effort to identify and address issues as they arise within places of detention. While several of these mechanisms have been established in Canada, several incidences crystallize the need to expand the reach of oversight. Not all issues that arise receive either adequate attention or priority. When issues such as a lack of proper mental healthcare continue to proliferate within the system, conditions are created that can lead to tragedy. Unfortunately, it often requires one of these tragic cases reaching the front pages of the newspapers before real action is taken. Two such examples of why oversight is important in Canada are the abuses that occurred at Kingston's Prison for Women and the death of Ashley Smith.

The Arbour Report: Condemnation of a system and closure of P4W

Until the mid-1990s, any woman who received a federal sentence in Canada was required to serve their time at the only federal institution for females, the Prison for Women (P4W) in Kingston, Ontario. Given the challenges associated with transferring women across the country and away from their communities and families, plans were made to construct and open five regional facilities (Barrett et al., 2010). Before this could take place however, incidents at P4W brought national attention to the state of corrections in Canada and caused both the public and the government to call for an investigation into the violation of human rights that was occurring in the Canadian correctional system.

P4W was opened in 1934 and over the course of the next 60 years it was considered to be an institution with a poor record for upholding the rule of law and adhering to CSC's mandate of treating prisoners with humanity. In total, P4W was the subject of at least 15 inquiries, commissions, and reports that denounced poor physical living conditions, the inaccurate classification of prisoner security levels, a lack of programming, and cultural insensitivity (Zinger, 2006).

These issues culminated in a highly publicized violation of the human rights of eight prisoners in April 1994. On the 22nd, a brief physical altercation took place between six prisoners and correctional staff which resulted in the women being placed in administrative segregation (Dell et al., 2009). Four days later, after the situation in the segregation unit escalated as a result of verbal abuse and acts of self-harm, the warden of the institution decided to call in an all-male Institutional Emergency Response Team (IERT) from Kingston Penitentiary to extract and strip search the women in segregation (the six involved in the original altercation and two others) (Arbour, 1996). The women were forcibly searched with seven of them having to undergo cavity searches. All of the women were left in their cells in paper gowns, restraints, and leg irons (Jackson, 2002). Following the strip searches, the women were left in segregation for months.

As per CSC policy, all strip searches must be videotaped. In February 1995, the video was released and played on national television (Barrett et al., 2010). The blatant mistreatment of the female prisoners led to public outrage and a call for an inquiry into the practices at P4W. As a result of public pressure, the Canadian government appointed Madame Justice Louise Arbour (now UN Commissioner of Human Rights) to lead a Commission of Inquiry into the events that led up to the strip searches and segregation of the female prisoners while also assessing the actions that CSC took and making recommendations for improvement in the future. The final report, released in 1996, was a condemnation of the Canadian correctional system for failing to follow the rule of law or adhere to legal obligations for the sake of meeting immediate operational needs (Smit and Dunkel, 2001).

In addition to finding that the decision to bring in the IERT violated the prisoners' rights, Justice Arbour also expressed frustration at what she viewed to be an endemic problem within the correctional system as opposed to an isolated incident in what she classified as a 'culture of non-compliance'. She wrote,

Significantly in my view, when the departures from legal requirements in this case became known through this inquiry's process, their importance was downplayed and the overriding public security concern was always relied upon when lack of compliance had to be admitted. This was true to the higher ranks of the Correctional Service management, which leads me to believe that the lack of observance of individual rights is not an isolated factor applicable only to the Prison for Women, but is probably very much part of the CSC's corporate culture (Arbour, 1996, 56-57)

With regard to the conditions that the women faced, Arbour (1996) noted that the situation was "appalling" and that there was no evidence to support claims that security concerns warranted the treatment that the women received (89). She also denounced the practice of keeping prisoners in administrative segregation for long periods of time as this is not in accordance with law and policy and represented what she referred to as "a profound failure of the custodial mandate of the Correctional

Service” (141). It appeared as though prison authorities were unconcerned about the psychological well-being of the women held on the segregation unit. After months in confinement, they began to exhibit symptoms commonly associated with prolonged segregation including perceptual distortions, auditory and visual hallucinations, flashbacks, increased sensitivity and startle response, concentration difficulties, emotional distress, anxiety, fear, and an overall sense of hopelessness (Arbour, 1996; Dell et al., 2009). Despite the identification of these symptoms by prison psychologists, the women remained in segregation for an additional three months (Jackson, 2002).

The findings of the Arbour Inquiry underscore the need for and importance of accountability and transparency within corrections. Justice Arbour identified the management of segregation and the administration of the grievance process as the two main areas where CSC failed the most. It was her view that “there is nothing to suggest that the Service is either willing or able to reform without judicial guidance and control” (Arbour, 1996, 198). Moving forward, a rights-based approach is advocated that gives primary importance to adherence to the rule of law as opposed to situational needs. This approach will need to be implemented at each level of the system, from individual institutions to national headquarters (Sloan, 2004).

The Arbour report ultimately called for increased oversight within Canadian corrections and led to greater examination of correctional practices (Zinger, 2006) – specifically administrative segregation. In the years following the release of the report, a Task Force on Administrative Segregation, Working Group on Human Rights, and Cross Gender Monitoring Project were created in an effort to address the issues identified by Arbour (Sloan, 2004). P4W officially closed in 2001.

The Ashley Smith case: A spotlight on (preventable) deaths in custody)

In 2007, the news of the death of a teenage girl in a segregation cell at Grand Valley Institution brought national attention to the issue of deaths in custody. Ashley Smith was 19 at the time of her death and had a history of mental illness. She strangled herself with a piece of cloth as seven correctional officers watched doing nothing to help save her life. The Correctional Investigator, Howard Sapers, notes that Smith died as a result of individual failures that occurred in the context of much broader failures by the Canadian correctional and mental health systems (Zlomislic, 2010).

In the weeks leading up to her death, Smith complained that she was the victim of inhumane treatment at the hands of correctional officials. Smith had been in and out of the correctional system since the age of 15 serving time in seventeen institutions in four different provinces (Sapers, 2008). While

incarcerated, Smith was typically confined to administrative segregation. Although clearly suffering from mental health issues, Smith was never properly assessed nor was a treatment plan developed for her. The mental health problems led to unruly behaviour and subsequent placement in segregation as well as institutional charges that extended her prison sentence (Sapers, 2008). Smith's containment in an administrative segregation cell made it easier for correctional officers to manage her. Ironically, the long-term confinement in segregation further exacerbated Ashley's psychiatric symptoms and worsened her depression which is common among prisoners who suffer from mental illness (Cohen 2008).

Prior to her death, Ashley Smith spent weeks in isolation and routinely threatened suicide. The threats were not taken seriously and officers thought she was seeking attention. On October 19th, 2007 Ashley Smith died as a result of asphyxiation. Following the revelation that correctional officers watched Smith die, CSC was subject to a media backlash and scrutiny. While this incident was highly publicized, the reality is that deaths in custody have been an issue of contention and controversy since the establishment of the prison system. Sadly, many of these deaths are preventable and can be attributed to neglect or mistreatment.

The Correctional Service of Canada is required to conduct investigations into any incident of prisoner death under s. 19 of the *CCRA*.¹⁶ The investigations are then shared with and reviewed by the Office of the Correctional Investigator who makes a determination as to whether the death could have foreseeably been prevented. In its *2009-2010 Annual Report*, the OCI reveals that there have been 532 prisoner deaths between 1998 and 2008. Of these deaths, 20% were suicides and 6.8% were murders. The suicide rate is particularly disturbing when compared against national averages – 84/100,000 among federal prisoners vs. 11.3/100,000 among the general population (Sapers, 2010). In 2009 alone, there were 152 deaths in custody with 103 of these deaths classified as natural.

Since the time of Ashley Smith's death, the OCI has undertaken a number of studies examining the issue of deaths in custody (see: *Deaths in Custody*, 2007; *A Failure to Respond*, 2008; *A Preventable Death*, 2008; *OCI Assessments of CSC's Response to Deaths in Custody*, 2009-2010). The *Deaths in Custody* report (Gabor, 2007) provides a comprehensive list of common issues raised in the findings and recommendations of the National Board of Investigation (NBOI) and coroners. In the final OCI

¹⁶ The investigative process is different for death by natural cause vs. non-natural deaths (e.g., murder, suicide, drug overdose). For non-natural deaths, a National Board of Investigation (NBOI) is convened to examine the case and then makes a formal report to an Executive Committee which reviews the recommendations contained within the report (OCI, 2010). The Committee will then determine what actions are to be taken.

assessment, the following six areas are identified as being of primary concern relating to the prevention of deaths in custody:

- > Responses to medical emergencies that are either inappropriate or inadequate;
- > Critical information-sharing failures between clinical and front-line staff;
- > Recurring pattern of deficiencies in monitoring suicide pre-indicators;
- > Compliance issues related to the quality and frequency of security patrols, rounds and counts;
- > Management of mentally ill offenders too often driven by security responses rather than appropriate health care and treatment; and,
- > CSC investigative reports and processes require consistency and improvement (Sapers, 2008).

In the case of Ashley Smith, almost all of the above-mentioned factors played a role in her death. In his final report (*A Preventable Death*), the Correctional Investigator stated with great confidence that:

- > Ashley Smith's death was preventable;
- > **Ashley Smith's death resulted from a culmination of individual and system failures within CSC;**
- > The failures inherent within the system are not only applicable in this case; and,
- > Immediate action is required on the part of the Federal Government to address these failures in an effort to prevent deaths such as Smith's from occurring in the future (Sapers, 2008).

Correctional Investigator Howard Sapers (2008) further stated that "Ms. Smith's death was the result of individual failures that occurred in combination with much larger systemic issues within ill-functioning and under-resourced correctional and mental health systems" (5). Despite these findings, the Crown dropped charges against the four correctional officers who were implicated in Smith's death (Zlomislic, 2010). A coroner's inquest is ongoing.

In reaction to the series of reports produced by the OCI, CSC issued a response in 2009 which outlined that the agency "takes the issues of mental health and deaths in custody very seriously." The response also contained a variety of commitments and plans of action to reduce the number of deaths in custody by addressing issues related to policy, staff training, accountability, monitoring, and so forth. CSC (2009) also made it known that the goals of these new initiatives were to provide "the best possible care to offenders and strive to minimize the number of deaths in custody... [by] ensuring that our policy framework, our response protocols, our training and our hiring practices contribute to minimizing preventable deaths in federal custody."

1.5 OPCAT: Closing a gap in the oversight system through prevention

Events such as those that occurred at P4W and Grand Valley Institution may not be everyday occurrences within the Canadian correctional system, but instances of abuse are still common which suggests larger systemic issues. The psychological impact of incarceration, the use of administrative segregation, inadequate access to medical and mental healthcare, prison and jail overcrowding (and subsequent unsanitary conditions), and acts of negligence and violence must all be addressed if the system is to do a better job of preventing the violation of human rights of prisoners/detainees.

In an effort to prevent cases like those detailed in the preceding section (e.g., P4W, Ashley Smith), it is imperative to have oversight mechanisms in place to monitor conditions and to also hold officials accountable for their actions (or inaction in certain circumstances). This is where the OPCAT comes into play. Currently, correctional oversight mechanisms at the provincial and federal level are reactive in nature. In other words, an incident must first occur in order for there to be an investigation and subsequent recommendations for system improvement. This approach fails to identify and address systemic issues in the absence of a focusing event which misses opportunities to prevent deaths in custody, the commission of abuse, or the violation of human rights in places of detention.

Signature, ratification, and implementation of the OPCAT provisions would add an additional layer to existing correctional oversight. The preventive approach utilized by this instrument is meant to identify, address, and prevent the occurrence of human rights abuses through early intervention. The key to this process is not the visits by the Subcommittee on the Prevention of Torture but rather the establishment and activities of the national preventive mechanism(s). This national body would do what is currently outside of the mandate of the Office of the Correctional Investigator. Instead of requiring a complaint to initiate an institutional investigation, the NPM would routinely monitor places of detention and conduct visits unannounced without impetus from a specific incident. As a result of the regular preventive visits to all places of detention, unrestricted access to these locations, the independence of the body, and the power to submit, publish, and disseminate findings in the form of annual reports, the NPM is a powerful entity that has the ability to function in a complimentary fashion to existing oversight mechanisms.

Given that Canada has emphasized the importance of taking a preventive approach to criminal justice in an effort to reduce the occurrence of crime, it follows that a similar approach could prove beneficial within the correctional arena. In the long run, such an approach has the ability to improve the quality of

the correctional system, limit government liability, reduce expenditures, and protect the human rights of those who are incarcerated.

Chapter 2 – A Policy Analysis Framework

2.1 Purpose and Objectives

The purpose of this study is to identify and discuss factors that have led to the failure of Canada to sign and ratify the OPCAT despite obvious support for its adoption (as demonstrated by Canada's voting record in the United Nations) and adherence to the principles that this instrument embodies. Simply put, this work seeks to provide context and possible explanations to the following question:

- > Why has Canada yet to sign/ratify the Optional Protocol Against Torture?

The objectives are to identify barriers and challenges to the implementation of this instrument, to determine where in the policy cycle the OPCAT currently sits, to get a sense of the presence of this issue on both the public and systemic/political agendas, and finally, to offer suggestions on how to move forward in this process.

In order to answer the primary research question and meet the objectives of this study, a policy analysis framework was utilized to conduct stakeholder interviews, review minutes from government subcommittee meetings, and review government documents obtained through information requests. The concept of agenda-setting received special attention and content analysis of media reports and a review of government legislative activity were conducted to provide commentary on the prevalence of the human rights and torture 'agenda' in Canadian politics and press.

The following outlines the analytical framework used as well as the specific methodology for replication purposes.

2.2 Policy Analysis

Policy science was first pioneered by Harold Lasswell in the 1940s (Farr et al., 2006) and the discipline continued to develop through the 1960s as governments began to examine social problems such as education, racial issues, poverty, transportation, housing, and armed conflicts (DeLeon, 1988; Parsons, 1995). Lasswell proposed that this form of analysis was unique as a result of its multi-disciplinary and problem-solving approach, and its normative or value-oriented nature (Howlett and Ramesh, 1995; DeLeon and Vogenbeck, 2007). In his view, it was important to engage with issues of democratic choice that had the potential to affect the quality of life or the circumstances of the citizenry. Pal (2001) notes that the quality of life of citizens is often determined by the ability of government to respond to problems in a thoughtful manner with "appropriate and effective solutions" (33).

The practice of policy science or policy analysis has evolved over time. According to Greenberg et al. (1977), policy analysts have several avenues to pursue when they undertake an evaluation. Some analysts evaluate policies to determine whether they have been efficient and effective, whereas other analysts attempt to determine whether governments have been successful in their achievement of stated goals and whether they adhere to prescribed courses of action. Finally, some analysts examine the process involved in the decision to select a specific policy, policy instrument, or implementation strategy. Essentially, policy analysts want to review the entire policy process and examine how and why specific decisions were made (taking into account context such as policy regimes, determinants, instruments, and content) and how said decisions impacted outcomes (Salamon, 1981). The process is typically iterative in nature and one element has the ability to shed new light on other components of the decision-making process.

But what are public policies? Public policies result from decisions made by governments which can either be a specific action such as the passage of a law or the implementation of a program *OR* a calculated decision to do nothing and maintain the status quo (Dunn, 2004). Stated in another way, public policies are decisions made by governments which identify a problem (or interrelated set of problems), define a goal, and set a course of action to deal with it (Anderson as cited in Howlett and Ramesh, 1995). Policies are what are done, not what is said or intended.

Policies are instrumental in nature and are a tool as opposed to a solution. In order for a policy to be successful, there must be implementation and follow-up as well as evaluation of effectiveness (Sidney, 2007). On its own, a policy is merely a plan or framework for a proposed course of action in response to a societal issue. According to Pal (2001), every policy has three key elements:

1. A problem definition;
2. Stated goals; and,
3. The instrument or course of action to be utilized to address the identified problem and achieve the stated goals.

Policies are generated by those who have the legitimate authority to impose normative guidelines for action. Subsequently, the primary agent of public policy-making is the government which is comprised of a set of actors. The decisions that the government makes in relation to policy can be either deliberate or inadvertent (Tribe, 1972). An important consideration is the government's capacity to implement its decisions and how internal and external constraints will affect decision-making ability. There are numerous factors that influence government decision-making including earlier policy decisions, the

nature of the existing political system, the level of public awareness and/or pressure, and costs and benefits (Wilson, 1974 as cited in Howlett and Ramesh, 1995).

In order for a government to take some form of action, there must be impetus to do so. A government is not inclined to act unless there is a perceived problem that requires a response. This notion is discussed in greater detail in Section 2.4. A government is unlikely to act unless there is a perceived need to respond to an identified and significant problem. This call to action can be either internally motivated or brought about by external pressures from the citizenry.

Ideally, the decisions that are made by the government are done so to achieve a specific goal and the means to implement the prescribed instrument are available (Jenkins, 1978). This of course, can be a difficult process as problems are rarely singular and strategies to address different aspects of the issue could potentially be contradictory (Pal, 2001).

Once a decision is made, the government may choose not to provide justification for the course of action that was chosen. Even if an explanation is given, the “publicly avowed reason may not be the actual reason” for the decision (Howlett and Ramesh, 1995, 7). Policy analysis has the potential to delve into the motivation and reasoning behind decisions and reveal rationales other than those expressed officially.

The choice of the most appropriate instrument to implement a policy is also a challenge. With each instrument there are associated implementation requirements and barriers. As part of the decision-making process, stakeholders must determine which type of instrument is best suited to meet the existing needs in light of available resources. Instrument choice can further be limited by legal restrictions or practical constraints (e.g., division of jurisdictional responsibility between two different levels of government).

2.2.1 The Policy Cycle

The policy-making process, which involves various determinants, actors, and institutions, is best understood as a cycle. Lasswell (as cited in Howlett and Ramesh, 1995) first conceptualized this notion when he divided the policy process into seven distinct stages:

1. Intelligence – gathering relevant information and disseminating it to the actors who will actively be engaged in the decision-making process;
2. Promotion – selecting specific options or strategies and promoting their use over other potential alternatives;

3. Prescription – deciding on one course of action;
4. Innovation – invoking the prescribed course of action;
5. Application – applying the policy;
6. Termination – ceasing the use of a certain policy; and,
7. Appraisal – evaluating the policy to determine if it was successful in achieving the original goals or objectives of the decision-makers (Howlett and Ramesh, 1995).

Lasswell's model outlines how public policy *should* be developed. Over time, this model has been modified and refined. Brewer (1974) developed a similar model of the policy process that contained six stages (invention/initiation, estimation, selection, implementation, evaluation, and termination).¹⁷ Modern iterations of the policy cycle (such as that developed by Althaus et al. 2007)¹⁸ contain even more phases.

The model that is relied upon for this study is that developed by Charles Jones and James Anderson (1984). This model is limited to five stages and simplifies the policy-making process by contrasting it with phases of applied problem-solving.

While Jones and Anderson have produced a simple conceptualization of the policy cycle, it is advantageous in that it provides a clear understanding of how public policy is formulated and permits the examination of the contributions of both government and non-government actors in the policy process (Howlett and Ramesh, 1995). For the purposes of this study, such a model is ideal. The nuances of the policy process, such as the roles of various actors/institutions, structural issues, and other barriers, are discussed as part of the examination of potential reasons why Canada has not become a State Party to the OPCAT. This more detailed analysis and discussion will take place within the bounds of the following cycle. Particular emphasis is placed upon the first three phases as the OPCAT has yet to reach the implementation stage. Part of the analysis will involve a discussion of the steps involved in signature/ratification of an international treaty and at what stage of the policy cycle the OPCAT issue appears to be at present.

¹⁷ The primary difference between the Lasswell and Brewer models is the inclusion of the estimation stage which takes into account calculation of the costs, benefits, and potential risks associated with various policy options.

¹⁸ http://www.dpac.tas.gov.au/_data/assets/pdf_file/0008/121130/11_What_use_is_the_policy_life_cycle.PDF

Fig. 4 - Jones and Anderson's Policy Cycle



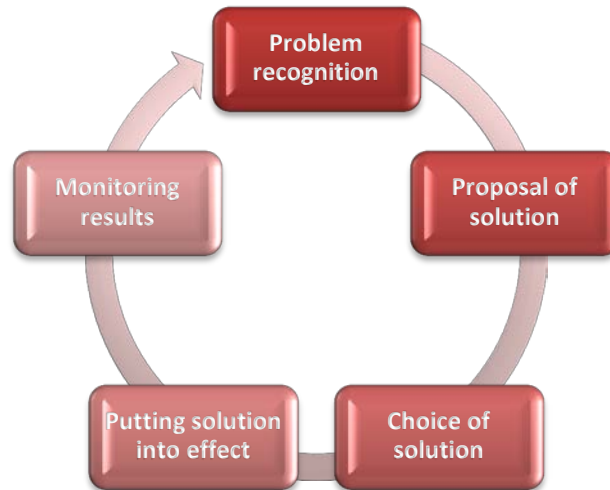
In this model of the policy cycle, each stage refers to a different process.

- > **Agenda-setting** – how problems or issues come to the attention of the government (i.e., recognition of the problem);
- > **Policy formulation** – how policy options are formulated within the government (i.e., proposal of solutions to the problem);
- > **Decision-making** – how governments adopt a particular course of action or decide to maintain the status quo (i.e., choice of one particular solution, strategy, option, etc.);
- > **Policy implementation** – how the selected policy is implemented (i.e., putting the chosen solution into effect);
- > **Policy evaluation** – how the government determines whether a policy was successful in meeting stated goals and objectives (i.e., monitoring the results and outcomes).

The evaluation stage is particularly important because it provides insight into whether the decisions that were made and the policy instruments that were chosen were appropriate and effective. The findings from an evaluation could lead to the reconceptualization of problems and subsequently, the creation of new and/or more appropriate responses – hence the analogy of a cycle.

At each of the stages of this cycle, it is important to take into consideration the actors and institutions that are actively involved at that point in the policy process (both government officials and those outside of the government) or what Howlett and Ramesh (1998) refer to as the policy subsystem.

Fig. 5 – Contrasting the policy cycle with the phases of applied problem-solving



As mentioned previously, the development of policy is, at its simplest, the identification of a problem and the creation and implementation of a proposed solution. As a result, policy-making is a form of societal problem-solving.

Jones and Anderson's model is not without limitations. Howlett and Ramesh (1995) identify three disadvantages of this conceptualization of the policy cycle. The first is that it assumes decision makers solve societal problems and develop policies in a systematic manner. This of course is not always the case. Lindblom (1959) noted that sometimes actors simply 'muddle through' the process and develop *ad hoc* solutions or temporary responses when time constraints are placed on the decision-making process. The policy process is not always linear either. The model created by Jones and Anderson is displayed as a numbered list, much like Lasswell's, which suggests that movement through the cycle is done in an incremental fashion, stage by stage. Again, this is not necessarily the reality. Actors may be forced to revisit previous stages to make adjustments or begin new discussions. In fact, an argument is presented later in this thesis that there may, in fact, be a legitimate need to return to previous stages in the cycle (e.g., from decision-making to agenda-setting) if progress stagnates. For this reason, the figures were reconceived as true cycles which allow for the transition between stages as necessary. The final limitation of this model is that it does not address the issue of causation. It does not account for or provide an explanation as to how transitions from one stage to another occur.

2.2.2 Policy actors

The policy-making process involves a host of different actors. The term ‘actors’ refers not only to government officials but also to members of society who have a vested interest in particular issues. Their viewpoints may or may not be similar. Actors can be individuals or groups of individuals and might be deeply invested in the policy process or have peripheral contributions. Most approaches to policy analysis treat actors as the key explanatory variables in the process (Pal, 2001). In effect, it is the actors who have the greatest impact in each stage of the policy cycle and their decisions are ultimately responsible for outcomes.

There are various theories and approaches to public policy analysis. While it is outside of the scope of this particular methodological framework to provide in-depth commentary on each approach, it is important to note that this work takes a statist perspective with regard to policy construction. *Statism* treats the state itself as an actor and explains public policy in terms of the state’s (government’s) objectives and capabilities (Howlett and Ramesh, 1995). For the purposes of this study, this view of the government is assumed. While this theory views the state as having pre-eminence within society and autonomous decision-making capabilities, other organizations play a role in shaping politics and policy (Skocpol, 1985 as cited in Howlett and Ramesh, 1995). The government pursues its own objectives and is not required to heed the demands of the voting public. However, the citizenry is recognized as a driving political force and can influence policy creation through pressure upon the state.

Howlett and Ramesh (1995) place actors in the policy process into five different categories: elected officials, appointed officials, interest groups, research organizations, and the mass media.

1. Elected officials

The **executive** branch of the government has the authority to make and implement policies and legislation. In Canada, the executive enjoys great power as a result of the parliamentary system, particularly if a majority government has been won. Other responsibilities include implementing and enforcing the laws created by the legislative branch (Government of Canada, 2011). Howlett and Ramesh (1995) identify other important features of the executive including the ability to control the dissemination of information and control over fiscal resources. This has important implications as the executive is in the best position to set agendas and then to fund policies that it favours. These sentiments are echoed by Bakvis and MacDonald (1993) who note that the executive also has the power to control the timing of the passage of legislation which can further dictate the political agenda.

The **legislative** branch of government is a forum for debate and is where issues on the political agenda are discussed. The legislature in Canada is comprised of the House of Commons and the Senate and it has the power to pass bills and create legislation and laws (Government of Canada, 2011). The influence of the legislature is constrained when there is a majority government as elected officials typically vote along party lines.

Within the legislature there are many committees and subcommittees that examine various issues and perform policy functions such as reviewing proposed legislation (e.g., Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development). These committees submit reports and make recommendations to the legislature on potential courses of action.

2. Appointed officials

Much of the policy-making process is performed by the public service as opposed to the executive and legislature. Officials who are appointed by the government take on the task of making policy decisions and overseeing the implementation of policy instruments (Cairns, 1990). This work is done within government departments (e.g., Department of Justice) and is often obscured from public scrutiny. Appointed officials, therefore, become the primary actors in the decision-making and policy implementation phases of the policy cycle.

3. Interest groups

The term 'interest group' is a broad category that could include corporations, rights or advocacy groups, social movements, charitable organizations, lobbyists, and associations. Members of an interest group collaborate as a result of a shared desire to create change for a specified cause (Howlett and Ramesh, 1995). All interest groups attempt to influence the political landscape by promoting their own agenda. These groups differ in their size, membership, level of organization, available resources, and credibility. Interest groups can be viewed as either government allies or adversaries and some well-established and well-funded groups have the ability to exert influence on the government through lobbying efforts. An example of an interest group is Amnesty International or the Association for the Prevention of Torture.

4. Research organizations

Academics are also actors within the policy process although they tend to be marginally involved. The research conducted at universities and think tanks¹⁹ has the ability to guide policymakers in their decisions. Think tanks in particular disseminate their findings to politicians, media, and the public with the intent of influencing policy.

5. Mass media

The mass media plays an important role in the policy process, particularly at the agenda-setting stage (Spitzer, 1993). The media has the ability to influence public opinion through its reporting on issues. In fact, the media is largely responsible for dictating the public agenda based on what problems or issues it chooses to portray as important. The media also influences public understanding of issues and has the ability to present certain solutions as more favourable than alternatives. The government and interest groups rely on the media to communicate their perspective to the general public and the information that each provides may be partial in an effort to further their own agenda (Howlett and Ramesh, 1995).

The role of the media in agenda-setting is discussed in greater detail in Section 2.4.3.

Collectively, these actors make up what Pal (2001) refers to as a ‘policy community.’ These communities are “groupings of government agencies, pressure groups, media people, and individuals, including academics, who, for various reasons, have an interest in a particular policy field and attempt to influence it” (Pross, 1995, 265 as cited in Pal, 2001). When performing policy analysis, it is important to remember that all of the actors within the policy community influence outcomes.

2.2.3 Challenges in policy-making

Howlett and Ramesh (1995) stated it best: “studying public policy is complex because the subject and object of study, government decision-making, is complex” (201). The previous section discussed the various actors involved in the policy-making process whereas this section examines other challenges and barriers that further complicate or constrain the government’s ability to develop and implement policy.

State organization and capacity

The organization or structure of the state dictates the ability of the government to establish policies. The degree to which the state has autonomy in decision-making often determines how easily a government can create and pursue its own agenda independent of external pressures (Howlett and Ramesh, 1995). In democratic nations, the government may enjoy a certain level of autonomy but because political

¹⁹ Defined by Pal (2001) as “non-governmental, sometimes for-profit and sometimes non-profit, organizations dedicated to research and discussion of policy issues with the wider public and decision makers” (317).

officials are elected, there is also a high degree of accountability to the citizenry. As such, the state must be responsive to the demands of the public otherwise support is likely to diminish.

The other element that determines the policy-making abilities of the state is its capacity to make decisions and implement strategies. The capacity of the state to carry out policy-making processes is a function of unity, agreement, and organization within the different branches of government, expertise within agencies and departments, and adequate resources (Pal, 2001). A disorganized public service that lacks resources encounters challenges when attempting to create and implement effective policy.

Federalism. State organization and capacity is determined by the system of government that is in place. A state can have either a unitary or federal system of government. The primary difference between these two systems is the number of levels of government within the nation (Elazar, 1997). A unitary system has a single level and a federal system has two autonomous levels (e.g., national level and provincial/territorial/state level). The word federalism originates from the Latin word for covenant and in today's political environment a federal political system is viewed as a contractual agreement between states or levels of government (Rodden, 2004). Inherent within this 'agreement' is the requirement that the central/federal government consults with and receives the cooperation of lower levels of government for certain decisions. Authority over various areas of governance (e.g., healthcare, education, defense, etc.) is provided to either the central or lower levels of government and in some instances, there is overlap of authority.

States that adopt a federal system of government share similar characteristics such as division of powers between levels of government enshrined in the Constitution and division of revenue sources to maintain autonomy between the various levels of government, and the inability for the central government to unilaterally amend the Constitution (Privy Council Office, 2012). A federal system of governance is best suited for nations that are diverse (with multiple language or ethnic groups) and geographically expansive as development occurs in a decentralized manner (Jackson and Jackson, 2003). In essence, in such a system many economic and social problems that are specific to regions, and not necessarily the country as a whole, are identified and addressed at a local level.

By its nature, a federal system is typically decentralized. The degree to which a state is centralized or decentralized is determined by the division of powers or the transfer of authority and responsibilities from the central government to the provincial/territorial/state governments (Rodden, 2004).

The structure of government in Canada is a federal system of parliamentary government that is highly decentralized. The responsibilities of governance are shared among the federal and provincial/territorial

governments. This has important implications for policy-making as it greatly affects state capacity. If a policy issue (e.g., correctional oversight) falls within an area where there is overlap in jurisdictional authority, both levels of government must work collaboratively to reach a decision and to implement policy. The federal government must consult with the provinces and territories to determine policy implications and cost issues which results in an inability to respond to issues in a timely fashion (Atkinson and Coleman, 1989). This often makes policy-making “a long, drawn-out and often rancorous affair as the different governments wrangle over jurisdictional issues or are involved in extensive intergovernmental negotiations or constitutional litigation” (Howlett and Ramesh, 1995, 62). Federalism is often identified as a contributing factor to weak policy capacity in many nations, including Canada (Radin and Boase, 2000; Cameron and Simeon, 2002; Jackson and Jackson, 2003).

Parliamentary system. In democratic systems, there is either a parliamentary or presidential relationship between the executive and legislative branches of government. This is the system that exists in Commonwealth nations such as Australia, Britain, New Zealand, and Canada. In the parliamentary system, the executive and legislative branches are what Jackson and Jackson (2003) refer to as ‘fused.’ This means that the authority of the executive rests on its ability to maintain the support of the members in the House of Commons as the executive is chosen by the legislature from among its members in Parliament. Permitted that an executive has a legislative majority, it enjoys control over legislative policy-making and can take action on an issue if it chooses. This system also creates a high degree of policy consistency as the government implements its agenda.

The policy-making challenge occurs when the executive no longer has a majority government. In Canada, if a party wins fewer than half of the seats in the House of Commons a minority government is formed and the government’s ability to implement policy decisions is greatly hampered. Negotiations with the opposition must occur and legislation cannot be passed without the support of opposition party members. If the government loses the support or confidence of the House of Commons or legislative assembly a vote of non-confidence has the potential to result in a new general election (Heard, 2007). The other political parties also have the ability to form a coalition government where an agreement is made to form a governing majority between two or more parties (Petry, 1995).

The international system. The creation of public policy is influenced by more than domestic institutions and actors. International institutions and agencies continue to play a greater role in the formulation of policy as the world becomes increasingly interconnected through globalization. The process of globalization is defined as “a reorientation of cultural, economic, political, and technological activities

and processes in such a way that they transcend each state or country borders” (Jackson and Jackson, 2003, 411). Specific issues that relate to economics, security, trade, and human rights are impacted by the international community through international law, treaties, or the application of political pressure. Prior to the passage of new legislation, a government might consider the larger political, economic, and societal implications of the policy and whether there are any potential international ramifications.

States are sovereign entities. The self-determination of nations is a hallmark of nationalism that has been espoused since the concept was first put forward by U.S. President Woodrow Wilson in his ‘Fourteen Points’ speech delivered to the American Congress on January 8th, 1918 (Lynch, 2002). Wilson was under the impression that self-determination (the right to sovereignty and to independently choose government free from interference of other nations), would establish a lasting peace following the end of WWI.

The notions of state sovereignty and self-determination remain important elements in the international political system. States cite these principles as justification for decisions, particularly when it comes to their willingness to open their borders to international institutions. Nationalism protects state identity, but on the other hand, it can also impinge on human rights, particularly those of minorities (Ignatieff, 2001). Any state has the right to assert sovereignty and abstain from conventions and treaties. However, there are inherent risks and consequences associated with these decisions. States must carefully balance sovereignty with the impact of globalization; this can dictate policy. It is at this juncture that human rights become a matter of politics.

2.3 Human Rights as Politics

The international response to human rights in general and torture specifically was discussed extensively in the preceding chapters. In light of the role of the international system in policy-making decisions domestically, it is prudent to think of human rights as political and global in scope. States make decisions in relation to human rights issues beyond a national context.

The literature that attempts to characterize and define the concept of human rights is broad and grounded in a multitude of different theoretical frameworks. For the purposes of this study, a simple definition will suffice. In a nutshell, the purpose of human rights is to protect the agency of individuals from oppression at the hands of the state (Gutman, 2001). These rights are enshrined within the

Canadian *Charter of Rights and Freedoms*²⁰ and in Constitutions around the world (albeit with variation in each nation).

The concept of human rights is accepted on such a large scale that it is tantamount with statehood in some instances. The guarantee and protection of human rights is viewed as part and parcel with democracy. As such, democratic nations have an innate responsibility to protect their citizens from abuse (Black, 2009).

Oft romanticized, human rights can be seen as a set of lofty and universal ideals that unite nations under the auspices of collective humanity (Sen, 2004). However, human rights do have practical and political implications and are entrenched in modern political discourse. It is important to remain cognizant of the fact that invoking human rights can be politically powerful but this is contingent on making the shift from the rhetoric of human rights to the practice of human rights – i.e., enacting policies that protect the citizenry from abuse.

Human rights instruments (as discussed in Section 1.2.1) in the form of declarations and conventions are tools put in place within the international community to protect human rights through the imposition of obligations on State Party to the instrument. The effectiveness of said instruments is enhanced through oversight and monitoring of provision compliance (through the use of committees, commissions, or special rapporteurs). Most nations accept the need to protect human rights and comply with international law. As a result, more states now recognize the need for human rights instruments and have an increased willingness to enter into these conventions.

The following is a discussion of some of the reasons why states choose to become party to international human rights instruments.

2.3.1 Arguments for commitment

There are several theories as to why a state may become party to a human rights instrument.

1. First and foremost, democratic states with good human rights records tend to view signature/ratification of these instruments as a moral duty given that the principles inherent within these declarations and conventions reflect the values of their society. This is the *norms argument* and more specifically, it is what Finnemore (1996) refers to as the ‘logic of appropriateness’. States commit to international instruments because they feel it is appropriate to do so and that such commitment reflects their standing as a member of the international community.

²⁰ <http://laws-lois.justice.gc.ca/eng/Const/page-15.html>

Norms are defined by Finnemore and Sikkink (1998) as “a standard of appropriate behaviour for actors with a given identity” (891). The commitment literature has located this identity either within the global community or within a geographical region (Goodliffe and Hawkins, 2006). Norms have a ‘cascade effect’ whereby the more states that become party to a convention, the greater the pressure on other states to follow their lead and commit (Finnemore and Sikkink, 1998; Simmons, 2000; Goodliffe and Hawkins, 2006; Wotipka and Tsutsui, 2008; Hill, 2010). This is equivalent to peer pressure on a global scale or what constructivist scholars refer to as a ‘socialization process’ (Hill, 2010). The more states commit, the more a particular norm becomes accepted as universal sentiment. Research findings support this theory as states in regions with higher levels of commitment are more likely to become party to the same treaties (Goodliffe and Hawkins, 2006; Hathaway, 2007). States that abstain from commitment appear as the ‘other’ or in opposition of what has been accepted by the majority. In essence, these states are viewed as deviants.

2. The second reason why a state may commit to an international human rights instrument is to “*pay lip service*” to the human rights rhetoric. The rationale behind the decision is to reap the benefits of being a State Party and avoid consequences such as poor standing within the international community (Hafner-Burton and Tsutsui, 2005). This is Schimmelfennig’s (2001) ‘logic of consequences.’ States adopt norms not out of a moral obligation but as a result of the rewards associated with commitment and the fear of consequences of not adhering to accepted international standards. In making this judgment call, states weigh the costs and benefits of commitment, take stock of the international political climate, and act accordingly.

The consequences for those states who fail to become a State Party to human rights instruments are real and have the potential to impact the way they are viewed by other nations. States that avoid human rights commitments, thus deviating from accepted international norms, are thought to lack credibility (Simmons, 2000). There is also the risk of condemnation from other nations as well as international non-governmental organizations (Keck and Sikkink, 1998; Hill, 2010). It is not in a nation’s best interest to have a poor human rights record exposed on the international scene and failure to sign treaties tends to bring a greater level of scrutiny from external actors and agencies. The assumption is that the state must be trying to obscure activities that are contrary to international law, such as torture. Also, if nations have a poor human rights record, they risk being subject to economic or political sanctions such as trade embargos (Hafner-Burton and Tsutsui, 2007). Again, this is not desirable and states will go to great lengths to ensure that such sanctions are not imposed.

If nations become a State Party to treaties without any actual intention of adhering to provisions, then what is the point of relying on international instruments? Critics continually acknowledge that states with established records of torture and human rights atrocities become party to conventions and then make no effort to come into compliance with guidelines or regulations (Pal, 2001; Goodliffe and Hawkins, 2006). It is commitment without compliance. Much of the literature on human rights instrument commitment has revealed that these treaties have largely been unsuccessful in altering the domestic practices of states (Hathaway, 2002;

Hafner-Burton and Tsutsui, 2005; Goodliffe and Hawkins, 2006; Hathaway, 2007). This speaks to the importance of monitoring and oversight to ensure that provisions are, in fact, upheld. In the absence of strong enforcement mechanisms, accountability is not guaranteed.

3. The '*lock-in*' argument for commitment is a more recent theory that attempts to explain human rights treaty commitment. The basic premise is that unstable democracies will seek to create human rights regimes in an attempt to protect against political upheaval and authoritarian opposition (Moravcsik, 2000). These nations face an unpredictable future which is typically the result of domestic conflict (such as civil war), economic turmoil, or a history of political corruption and lack of a democratic system of governance. If those in power ascribe to international treaties, they lock-in certain democratic principles and also distribute power to international and independent oversight authorities (Goodliffe and Hawkins, 2006). In the event that an authoritarian regime attempts to assume control, there are then measures in place to protect certain elements of the democratic system. There has been considerably less research done to substantiate this theory than the norms theory.
4. The final argument for treaty commitment is that of *varying costs*. Hathaway (2007) puts forth the notion that a state's willingness to commit to an international instrument is largely a function of the domestic enforcement requirements and the collateral consequences of becoming a signatory. The norms theory assumes that states consider the benefits of treaty commitment and some of the potential consequences of not signing. The varying costs theory takes this one step further and examines the implementation costs of the instrument (both tangible and intangible) as it relates to state sovereignty (Hathaway, 2003). Goodliffe and Hawkins (2006) define these costs as policy change, unintended consequences of ratification, and limitations placed upon state responses to unforeseen circumstances (i.e., diminished flexibility).
 - > The provisions of a treaty might require that the state change or enact new domestic policies and legislation or create new agencies to be in compliance. This process has the potential to be resource-intensive and time consuming. Certain states prefer to retain their sovereignty and will only commit to a treaty once all relevant policies have been adopted and put into place to ensure compliance, at which point commitment then becomes an option (Downs et al., 1996).
 - > The unintended consequences associated with treaty commitment is an intangible cost but states can "calculate rough probabilities that a new treaty or any new commitment will be used against them in unintended and unwanted ways" (Goodliffe and Hawkins, 2006, 363). With regard to this cost, states that are powerful and have strong judicial and law enforcement systems are likely to be better positioned to reduce the likelihood of external threats.
 - > The diminished flexibility that a state has to respond to uncertainty and threats is also an intangible cost measure. However, states are most likely to commit human rights abuses when faced with security threats (Davenport, 2000; Goodliffe and Hawkins, 2006), therefore, those states that enjoy a high level of internal political stability and a

minimal number of external conflicts with other nations, are less likely to be affected by limited response flexibility (e.g., a state that is not engaged in war has little or no use for torture techniques).

In effect, states are less likely to commit to international human rights instruments when the costs to do so are perceived as too high (Hathaway, 2003).

2.3.2 Implications for Canada and the international community

The expectation that nations now participate in the emerging 'global moral community' has resulted in not only the perceived duty and obligation to adhere to international norms and commit to international human rights instruments, but also to take a firm stand on human rights issues domestically and abroad. This has profound policy implications. Pal (2001) summarizes this notion stating that the "traditional association between public policy-making and the territorial boundaries of nation-state has been severely challenged in the last decade" (63). Borders have become permeable and globalization has resulted in shared values and a level of scrutiny that was absent in the past.

The protection of human rights is a global movement and nations are expected to uphold the rights of their people and protect them from oppressive forces. This must now thus factor into policy-making. Domestic policies in Canada are now compared with those of other nations and the potential for international embarrassment is high if human rights violations are exposed. Human rights must also play a role when formulating foreign policy. A country potentially loses international legitimacy if it espouses the protection of human rights on the one hand and, on the other, continues to have economic or political relations with nations that have dismal human rights records.

Canada has long enjoyed a reputation as a leader in the area of human rights and has been extolled and commended for its commitment to the protection and promotion of the rights of citizens at home and abroad. However, in recent years there have been a number of high profile incidents that have sullied this reputation to a degree. While one would hope that these incidents, unacceptable as they are, remain aberrations, it appears as though there are systemic failings that must be addressed. In short, more can be done and Canada can endeavor to do better so that scandals and abuse do not become the norm.

Subsequently, the issue of human rights should always be present on both the public and political policy agenda. If leadership in the area of human rights is a component of the Canadian identity, it should remain an area of serious consideration, ongoing debate, and policy.

2.4 Agenda-setting

Referring back to the policy cycle, in order for a problem to be addressed, it must first be recognized. Agenda-setting refers to “the process by which problems and alternative solutions gain or lose public and elite attention” (Birkland, 2007, 63). There are different ways that an issue can become part of the agenda as well as different forums where a call to action is generated. The question to consider when examining agendas is: why do certain issues make it on the policy agenda while others do not? (Cobb and Elder, 1972 cited in Howlett and Ramesh, 1995)

As outlined in the previous section, human rights are an inherently political issue. Concerns related to human rights are often pushed from the bottom-up and not the top-down (Black, 2009). In other words, it is the public and not the state that brings attention to abuses within society. The state is subsequently forced to respond and it is at this point that a problem is formally identified and an issue enters into the systemic/political agenda. It is important to note that the government sometimes initiates responses to problems independent of a public demand to do so. This, of course, is an oversimplification of the process and a more nuanced description is necessary to understand the impetus for an issue to become part of the policy-making agenda.

2.4.1 Policy agendas: Public and political

To begin, there are two different policy agendas: 1) the **public policy agenda**, and 2) the **systemic/institutional/political policy agenda**. The public agenda is an arena for discussion about issues and potential solutions whereas the systemic agenda is an area for action (Howlett and Ramesh, 1995; Birkland, 2007). The public agenda follows an outside initiation model for action in that the issue is brought forward by a non-government interest group and gains enough support and traction within society to eventually reach the systemic agenda. As defined by Cobb and Elder (1983), “the systemic agenda consists of all issues that are commonly perceived by members of the political community as meriting public attention and as involving matters within the legitimate jurisdiction of existing governmental authority” (85). The key to transition between the public and systemic agenda is to clearly define the problem, propose feasible solutions, and amass backing from the citizenry to an extent that the government cannot ignore the issue and is forced to respond (Cobb et al. 1976; Kingdon, 1984). Even if an issue makes it to the systemic agenda there is no guarantee that policy will be enacted as serious government consideration is given to a limited number of problems on the political agenda (Kingdon, 1984; Howlett and Ramesh, 1995).

2.4.2 Making it on the agenda

There are several elements (Howlett and Ramesh, 1995; Birkland, 1997; Birkland, 2007) that dictate the likelihood that an issue will receive attention. These include:

- > The degree to which the public is receptive to the notion that there is a problem;
 - » If the public does not identify an issue as problematic then there is likely to be little support for any policy response proposed by the government.
- > Leadership on the part of politicians in raising awareness about a particular issue;
 - » Without members of the legislature or executive expressing support for a cause, there is little political will to implement policy and the issue will not be given serious consideration on the systemic agenda.
- > Interest groups taking up a cause and focusing attention on an issue for an extended period of time;
 - » Interest groups or advocacy coalitions have the power to alert the public, politicians, and the media to issues that affect society.
- > The national or public mood in relation to a specific issue; and,
 - » The existing political and social climate influences how individuals view issues; government officials often gauge the national mood before making policy decisions.

All of these elements are important in shaping the policy agenda, but it is primarily the actors who are responsible for identifying problems and bringing them to the forefront of public and political consciousness. A large number of actors participate in the agenda-setting stage of the policy cycle (Baumgartner and Jones, 1991). These actors or groups of actors fight for their issue or cause to receive attention from the government (Cobb and Ross, 1997).

But how do these actors successfully propel their issue or cause into the limelight and onto the policy agenda? Certain interest groups are better positioned than others to influence policy debates by either manipulating the media or lobbying government officials. Kingdon (1984) referred to these individuals or groups as 'policy entrepreneurs.' These groups are willing to invest time and resources to ensure that their issues receive attention and that their proposed solutions are viewed as favourable (in essence, these individuals/groups push *their own agenda* in the hopes of altering or effecting policy at the state level). Research has shown that lobby groups are quite influential in the promotion of both policy creation and the blocking of unfavourable or competing policies. (Evans, 1996; Victor, 2007; McKay, 2012)

For an issue to be well received by the public and policymakers, it must be socially constructed in a meaningful way. This construction is linked to existing social, political, and ideological structures within society (Pal, 2001). Groups that seek to set the agenda must create and promote the most effective depiction of an issue which includes a common cause, message, and demands. In an effort to expand the reach of a particular message, groups may align and collaborate to give the appearance of a united front. Often referred to as 'advocacy coalitions,' these unified groups have the ability to capture media, public, and policy-maker attention through sustained and coordinated action (Birkland, 2007). The way in which an issue is presented to the public will dictate how well it is received. An issue might get complicated if there are multiple competing interests or messages. The more harmonious that a group is in communicating its message, the more likely it is that the public will understand the issue, identify why it is a priority, and call for a policy response.

Groups or advocacy coalitions can induce greater public sympathy and media coverage for a cause through the images or symbols that they select to convey their message. Think back to the images of Abu Ghraib detainees. These photos elicited a very strong reaction from the public and resulted in a demand that the American government be held accountable for the actions committed in their detention facilities abroad. Powerful images and concise, yet salient talking points provide these groups with a 'selling point' for their cause. Images in the media shape news, public opinion, and subsequently, politics (Anden-Papadopoulos, 2008). At a minimum, images and symbols have the potential to create dialogue and bring awareness to issues that may be far removed from the average citizen (Carrabine, 2011). In the absence of those photographs, would the Abu Ghraib abuse story have received the same level of public scrutiny? The answer to that question is probably not.

While a clear message and symbolic imagery are powerful tools for drawing attention to an issue, they may not be enough to keep the focus on a particular problem for an extended period of time. Often, issues enter the policy agenda as a result of a 'focusing event' that highlights a greater systemic problem to the point where it cannot be ignored by policymakers. A focusing event is a crisis or extraordinary event, such as a national disaster, that alerts the public and government to a problem that might otherwise go unnoticed. An example of a focusing event is the Oklahoma City bombing.²¹ Acts of domestic terrorism within the U.S. had occurred prior to 1995, but the sheer scale of the attack carried out by Timothy McVeigh and Terry Nichols (163 fatalities) immediately impacted public policy,

²¹ Not only did the bombing impact security policy in the United States, the images of the bombing received worldwide media coverage. In 1996, Charles Porter's photograph of a firefighter carrying baby Baylee Almon (who later died from her injuries) won the Pulitzer Prize for Spot News Photography.

specifically as it related to the construction of federal buildings, the security measures used at those locations, and the sale of ammonium nitrate fertilizer (Oklahoma City National Memorial, 2011). This single act of terrorism was the largest on American soil prior to 9/11 and forever changed the landscape of national security in the United States.

Focusing events open what Birkland (2004) refers to as ‘windows of opportunity.’ As a result of the crisis, there is a narrow period of time in which issues might enter the policy agenda and affect policy change. Events such as natural disasters (e.g., Hurricane Katrina), acts of violence (e.g., mass shootings or terrorist attacks), and the failure of a system (e.g., Ashley Smith; abuse at P4W) can mobilize interest groups that will either expand or attempt to contain the issue (Birkland, 1998). A window of opportunity does not, however, necessarily follow a focusing event (Howlett and Ramesh, 1995). A change in government, for example, might provide interest groups with a chance to plead their case to more receptive ears. As a result, interest groups and advocacy coalitions must be strategic in their approach to agenda-setting and gauge when the window of opportunity is greatest and the time is most advantageous to present their cause for policy consideration.

The government also relies upon windows of opportunity to push its own political policy agenda. In fact, “policymakers are involved in the same discourse as the public and in the manipulation of the signs, sets, and scenes of a political play or theatre” (Howlett and Ramesh, 1995, 109). Moreover, the government has the ability to exert a great level of control over the content of the policy agenda and can limit the information the public receive in an effort to prevent dissension or opposition (Pal, 2001). Information can be presented in a vetted, limited, or altered fashion such that it supports the ‘party line’ or the government’s chosen course of action (Besley and Pratt, 2002). Fortunately, Canadian society is structured in such a way that there is a high degree of transparency and the citizenry has the ability to access information at a rate that was previously unavailable (e.g., ATIP requests under the *Access to Information Act*).

2.4.3 The role of the media in agenda-setting

The expansion of social networking and the 24/7 news cycle contributes to a steady flow of information presented to the public which ensures that there is ongoing debate about various policy issues (Kawamoto, 2003). The media, of course, is a key actor in setting the agenda for both the public and politicians (‘the CNN effect’), particularly as it relates to issues such foreign policy and crime (Robinson, 1999). Numerous studies support the notion that the media’s reporting of crime influences public perception (see: Surette, 1990; Sacco, 1995; Chiricos et al., 1997; Fox and Van Sickel, 2001; Lowry et al.,

2003; Duffy et al., 2008). In their study on mass media effects on public attitudes Fox and Van Sickle (2001) convey how intense exposure to media-generated images of crime can alter an individual's view of reality and provide them with an inaccurate representation of the current social state. Surette (1990) adds to the literature by highlighting several qualitative studies done by Gerbner which reveal that the majority of society's exposure to crime is through the media and as a result, the media is a "significant source in forming public attitudes and perceptions concerning crime and justice" (7).

The relationship between media reporting and the creation of public policy has not been explored to the same degree as the relationship between media reporting and the shaping of public opinion. The issue of 'crime' will continue to be used as an example to illustrate this point. Surette (1990) offers two possible relationships between the media and criminal justice policy. The first is that the media influences the public who in turn puts pressure on the government to institute change – this represents an indirect relationship between the media and policy. The second is that the press influences policy because government officials react to what they are exposed to in the media or they act on the assumption that they will receive media coverage – this represents a direct relationship. As Surette (2007) points out, responses by politicians and criminal justice officials can be either reactive or proactive. The effects that the media has on policy can be broad or narrow and the difficulty for the researcher lies in determining "when these effects actually occur and what form they take" (Surette, 2007, 213). The researcher must also be aware that in some circumstances the media may appear to be the cause of policy change, but it may, in fact, be an external event that provides the impetus (Callanan, 2005).

It is clear that the agenda-setting stage of the policy cycle is perhaps the most important phase – without problem identification, there can be no solution. In summation, to properly conceptualize the agenda-setting process, it is important to understand the following:

- > Which actors in the policy system are making the demand for change?
- > Was the call to action initiated from the bottom-up or from the top-down?
- > How has the issue been framed? How has the problem been articulated? What images or symbols have been used to convey the message?
- > What are the proposed solutions?
- > What role do the media play in setting the agenda for a particular issue?
- > How receptive is the public to the issue?
- > Does the public exert pressure on the government to act?

- > Does the government act independent of public influence in making policy decisions?
- > What are the internal state characteristics and how are they affected by agenda-setting?
- > How are demands articulated in policy discourses? (Hayes and Glick, 1997).

An understanding of the public policy agenda provides insight into the motivation of actors when making decisions to implement various measures. It can also offer an explanation as to why certain policies fail to move past other stages of the policy cycle – i.e., they fall off of both the public and systemic agendas and subsequently, there is no pressure on the government to act.

2.5 A Policy Analysis Approach

The focus of this study is to identify factors that have resulted in a delay of Canada becoming a State Party to the OPCAT. Policy analysis was chosen as an appropriate methodological framework to conduct this research as it provides insight into the rationale and decision-making process of multiple actors involved in the formulation of public policy.

All of the preceding concepts are taken into consideration as part of this study – the policy cycle, policy actors, structural challenges, and the politics behind human rights (including the commitment arguments established in literature). Additional attention is given to the concept of agenda-setting to determine the presence of the issue of the OPCAT signature/ratification on the public and systemic policy agendas. It is important to identify where in the cycle the OPCAT issue currently resides, who is involved in this policy-making process, and what considerations and arguments in favour and in opposition of commitment have been proffered. The following section outlines the specific methodological approach that was utilized to analyze these topics in relation to Canada's experience with the OPCAT.

Chapter 3 – Methodology

In order to meet the objectives of this study, a qualitative approach is used to answer the primary research question. The following section outlines the methodology utilized to identify potential explanations as to why Canada has failed to sign/ratify the OPCAT.

Qualitative research is an important tool for policy analysts and it is commonly relied upon in order to interpret the actions and decisions of policymakers (Chatterji, 2005). This approach is appropriate for this particular study given the reliance on document analysis and interviews as primary data sources (Riehl, 2001; Yanow, 2007). The strengths of qualitative research are that it is useful for studying a limited number of cases in an in-depth manner, it is useful for describing complex phenomena (such as the policy cycle), it allows for the recognition of contextual factors as they relate to the phenomenon under study, and it allows the researcher to provide tentative explanatory theories about a phenomenon (Yanow, 2007). While there are limitations to qualitative research, this study relies heavily on interpretivism and social constructionism which is the basis for a qualitative approach.

The first subsection of the design discusses the research questions that are central to this project. The second subsection describes the overall approach used for this study. The third subsection discusses the process used to collect the data (subcommittee minutes, parliamentary inquiry, documents obtained through a government information request, and interviews) for analysis purposes. Also contained within this subsection is a discussion of the ethical considerations made due to the use of interviews as part of the research design. A researcher note on the importance of agenda-setting prefaces the description of the content analysis that was conducted to identify the presence of human rights issues on the political agenda and the presence of torture and abuses within corrections on the public agenda. The fourth subsection describes the rationale behind using multiple data sources and methods in qualitative research. The fifth subsection describes the structure of the analysis contained in Chapter 4. The sixth subsection identifies and discusses the validity and reliability issues inherent within this study and how the efforts that were made to control for them. The final subsection identifies some of the benefits and limitations of the study.

3.1 Research questions

Primary research questions

The focus of this thesis centres on answering three primary research questions utilizing the policy analysis framework outlined in the preceding chapter. These questions include:

- > At what stage in the policy cycle is Canada in regard to the OPCAT?
- > What specific procedures are being used to examine the OPCAT and enable the Canadian government to come to a decision regarding signature/ratification?
- > What barriers, if any, to Canada becoming a signatory have been identified by the government or stakeholders?

Secondary research questions

In order to obtain the information necessary to answer the primary research questions, a series of secondary research questions were developed after a review of the relevant issues and challenges relating to the implementation of international human rights treaties and conventions. These questions were designed to identify potential barriers to the implementation of the OPCAT in Canada while also taking into consideration the implementation of these instruments more generally in the international community. The final secondary questions relate to the issue of agenda-setting and are meant to provide insight into the level of awareness that the public has about the OPCAT and the degree to which human rights issues appear on the government agenda.

1. What considerations have been made in the decision-making process of the Canadian government with regards to becoming a signatory to the OPCAT?
2. What is taken into consideration prior to making a decision to sign/ratify an international human rights treaty such as the OPCAT?
 - » Has Canada taken these steps yet?
3. How much time and debate has the government devoted to the issue becoming a signatory of the OPCAT?
 - » Has the Canadian government fully weighed the costs and benefits of becoming a signatory?
4. What are some of the challenges that the Canadian government may be facing when making a determination of whether or not to become a signatory of the OPCAT?
 - » Is Canada being a decentralized, federal state the biggest challenge?
 - » What are the issues relating to Aboriginals?
 - » What are the cost concerns?
 - » Given that Canada has claimed to support the Protocol since the time of its introduction, what other concerns may be delaying the country in becoming a signatory?

5. Have discussions with the provinces/territories taken place regarding their role in the detention visitation process in their jurisdictions and if so, what progress has been made?
6. Does Canada already have systems in place that could serve as National Preventive Mechanisms (NPMs) at the federal and provincial/territorial level?
 - » Is Canada more likely to benefit from a multiple NPM model with a single coordinating agency or central NPM?
7. What changes would Canada have to make at both the federal and provincial/territorial levels to come into compliance with the requirements of the OPCAT?
 - » Are these changes feasible?
8. Are there specific strategies that Canada could employ that are likely to be effective in reducing the occurrence of torture, cruel, inhuman, or degrading treatment domestically?
 - » Is becoming a State Party to the OPCAT one of them?
9. Would Canada benefit from becoming a signatory of the OPCAT?
10. What actions have earned Canada the reputation of being a leader in the area of human rights on the international stage?
 - » Has this reputation suffered as a result of failing to become a signatory to the OPCAT?
11. What level of importance does the Canadian federal government ascribe to human rights issues? Are there other issues that tend to take precedence – i.e. the economy?
12. What role does Canada's relationship with allies play when it comes to the consideration of becoming a party to an international treaty?
 - » What is the American position on the OPCAT?
 - » How can the American and Canadian political relationship be characterized?
 - » Does this relationship have the potential to influence Canadian political decisions? Why or why not?
13. What are some of the reasons why there has been a delay in Canada signing and ratifying the OPCAT?
 - » Is this delay normal or excessive when it comes to international treaties?
 - » Has any timeline been proposed for the issue to be revisited or a resolution to occur?
14. Has any progress been made since the House of Commons Subcommittee on International Human Rights examined the issue in June of 2007?
15. Are more leadership, direction, and guidance needed on the political level with regards to this issue – i.e., pushing to advance the issue and make it a priority for the government?
16. What considerations might be expected to influence the decision-making process of a government with regards to becoming a signatory to the OPCAT?

- » What are some examples of nations where such considerations were an issue?
 - » How have they or might they be resolved?
17. What role do a nation's relations with other countries play when considering becoming a party to an international treaty such as the OPCAT?
- » Do these relationships have the potential to influence political decisions? Why or why not?
18. How many nations have become either signatories to or ratified the OPCAT?
19. What are some of the characteristics/traits that define nations that have become signatories to the OPCAT?
- » Are leadership, direction, and guidance needed on the political level to push for signature?
 - » Does confidence in government leadership affect the process of becoming a signatory?
 - » Does the state of democratic nations affect the process of becoming a signatory (e.g., political stability)?
20. What may be some of the reasons why a nation would delay signing or ratifying the OPCAT?
- » How long does it typically take for a nation to complete the process of consideration, signature, ratification, and compliance when it comes to international treaties such as the OPCAT?
 - » Is the Canadian delay in becoming a signatory normal or excessive?
 - » Canada typically likes to sign, ratify, and be in compliance with international treaties at the same time. Is this a common practice among other nations?
21. What are some of the challenges that nations have faced when determining whether or not to become a signatory of the OPCAT?
- » What are some of the issues facing centralized vs. non-centralized states?
 - » What are some of the issues facing federal vs. unitary states?
 - » Do issues exist relating to ethnic and racial divisions?
 - » Are there cost concerns?
 - » Are there any other common concerns?
22. Have nations who have become signatories of the OPCAT faced challenges with regard to the detention visitation process, particularly nations who have split jurisdiction over detention facilities (e.g., provincial and federal authority)?
- » How have these challenges been overcome?
23. What are some of the different models that exist for NPMs?

- » What types of models are typically used in federalized states?
24. What are some of the benefits that a nation may enjoy as a result of becoming a signatory to the OPCAT?
- » Aside from benefits, will becoming a signatory of the OPCAT be a way for nations to avoid negative consequences (e.g., judgment about lack of transparency)?
25. What are some of the potential risks that a nation may face as a result of becoming a signatory to the OPCAT (e.g., threat to national sovereignty or submitting to the judgment of an international body)?
26. What has Canada's involvement been with the UN on human rights issues since the adoption of the OPCAT in 2002 (e.g., committee involvement, promotion of human rights initiatives, agreements, etc.)?
- » Was Canada expected (or is still expected) to take a leadership role with regards to the OPCAT?
27. What human rights issues have been on the government agenda since the adoption of the OPCAT?
- » How many human rights bills have been tabled? How many have reached royal assent?
 - » What has the government agenda focused on since 2006?
 - » What has been the government's crime and corrections agenda?
28. What is the extent to which the OPCAT is on the public agenda? Has it been discussed in the print media?
- » How frequently do the issues of deaths in custody, activities of the Correctional Investigator, and human rights abuses in places of detention receive media attention?

3.2 Overall approach

The approach to satisfactorily answer the aforementioned research questions (to some degree) consists of a methodology based on the collection and synthesis of qualitative information and analysis using elements of policy analysis (described in Section 3.5). The manner in which this was achieved included the following steps and is described in more detail in this section:

- > Review minutes of the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development;
- > Review the Parliamentary Inquiry made by MP Marston (and the subsequent Parliamentary debate where the inquiry was read before the House of Commons);
- > Conduct an ATIP request to obtain government documents relating to the OPCAT;
- > Identify key stakeholders;

- > Conduct interviews;
- > Collect, synthesize, and analyze data collected from documents and interview transcripts to identify common themes;
- > Conduct content analysis of media reports relating to issues of torture, deaths in custody, the correctional investigator, UNCAT, and the OPCAT;
- > Identify the bills that have been tabled and reached royal assent since the OPCAT came into force;
- > Analyze and report findings.

First, the minutes of the proceedings from two meetings of the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development as well as the Parliamentary Inquiry made by MP Marston were obtained. These documents were then reviewed to identify any common themes and government concerns in relation to the signing/ratification of the OPCAT in Canada.

Second, an ATIP request was performed to obtain government documents from the Department of Justice (DOJ), Department of Public Safety (PS), and Department of Foreign Affairs and International Trade (DFAIT) that contained any mention of the OPCAT. These documents were collected over an extended period of time and were of varying levels of usefulness for analysis (due to redacted or omitted content). The documents were reviewed as they were obtained to identify any common themes and government concerns in relation to the signing/ratification of OPCAT in Canada.

Third, key actors (or stakeholders) in the OPCAT policy process were identified. Ivan Zinger from the Office of the Correctional Investigator served as the primary contact and provided contact information for most of the stakeholders. The targeted stakeholders were members of government departments, interest groups, and academic institutions at both the national and international level.

Fourth, the identified stakeholders were contacted and asked to participate in an on-the-record interview. These interviews relied on structured interview guides that were tailored to either Canadian subjects or international subjects. The majority of the interviews were conducted in the winter of 2010 and transcribed at a later date.

Fifth, the information collected from the Subcommittee minutes, parliamentary inquiry, and government ATIP documents as well as the information obtained from interview subjects was synthesized and reviewed. The common themes identified in the documents were combined with similar information contained with the interview transcripts. Additional themes that emerged as a result

of the interviews were also highlighted, particularly the information gathered from the international subjects.

Sixth, a brief content analysis that examined the frequency of media reporting on several issues was conducted. This analysis focused on the frequency with which the media reported on deaths in custody, the work of the Correctional Investigator, and the OPCAT. A timeframe for the content analysis was determined and the data sources (newspapers) were chosen. The results of this analysis were placed in a table.

Seventh, an examination of the Canadian political agenda since the OPCAT came into force was conducted. This involved identifying the bills that had been tabled as well as those bills that reached royal assent during the defined time period. Special attention was paid to any bills that contained human rights provisions or had a largely human rights-oriented focus.

Finally, all of the data that was collected was analyzed using a policy analysis framework to identify potential factors or reasons why Canada has yet to sign or ratify the OPCAT. The findings of this analysis are presented in Chapter 4.

3.3 Data collection

3.3.1 Government documents

The sources of information used included a parliamentary inquiry, the transcript of a House of Commons debate, and minutes from two meetings of the Subcommittee on International Human Rights (SIHR) of the Standing Committee on Foreign Affairs and International Development. These documents are as follows:

- > Parliamentary Inquiry made by MP Wayne Marston (NDP) on May 31st, 2007.
- > Transcript of House of Commons Debate from November 29th, 2007.
- > SIHR Minutes of Proceedings from the meeting of June 5th, 2007.
- > SIHR Minutes of Proceedings from the meeting of June 12th, 2007.

These sources were chosen as they are examples of the few publicly available instances when the OPCAT has been discussed by the government within the legislative branch.

3.3.2 Access to Information Request

The *Access to Information Act* gives Canadians the right to access information that is contained within federal government records (Treasury Board of Canada, 2011). According to section 2 (1) the purpose of the Act is:

to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

In order to make an ATIP request, the following steps must be completed:

- > Identify which federal government institution/department is most likely to be in possession of the desired information;
- > Complete the Access to Information Request Form;
 - » The form must include a high level of detail and describe precisely what information the applicant is seeking;
 - » If the request is not detailed enough, the process becomes lengthier as more documents will likely have to be reviewed.
- > Submit the form to the Coordinator of the identified institution/department (include a \$5.00 cheque to cover the processing fee).

For this study, ATIP requests were submitted to the Department of Public Safety, the Department of Justice, and the Department of Foreign Affairs and International Trade as these are the government departments most directly involved in OPCAT discussions.

The request was as follows:

“Any information in the form of briefing notes, memoranda, correspondence, recommendations, emails, discussion papers, option papers, issue papers, FPT documents relating to the United Nations’ Optional Protocol to the Convention Against Torture (OPCAT) as it pertains to the Department and the federal government’s position on whether Canada should sign or ratify the OPCAT, inclusive of any mention of options considered, implementation plans, costing issues, and challenges to move forward with regards to this international treaty. Timeframe: from 2002 to present [this would ultimately be extended until mid-2011 when the files were closed]. Please provide the most recent copy available, whether it is a last draft or a final copy.”

The ATIP request proved to be a useful method for the collection of data that would otherwise not have been publicly available. The rationale behind the request was to gain additional documents that may provide insight into where the OPCAT discussions currently sat within the policy cycle (e.g., at what

stage), what actors were involved, and why the process may have slowed. The other goal was to identify what barriers to signature and ratification, particularly barriers identified within individual government departments and agencies.

It should be noted that there are challenges and limitations when relying on this method for data collection. Many of the documents provided contained redacted or omitted information. Also, many pages were “under consultation” during the entire duration that the ATIP file was open. Pages that are under consultation cannot be released as they are being reviewed for classified information. Lastly, many documents were withheld pursuant to various sections of the *Access to Information Act*. The acquisition of documents through an ATIP request is also a time-consuming process. At many points during this study, notifications were received from the government departments explaining that additional time (in upwards of 175 days) was required to comply with the request because consultations could not be completed within the original time limit.

3.3.3. Interviews

Policy-related research commonly draws on interviews, especially of appointed officials, legislators, or agency executives (Yanow, 2007). Specialized interviewing was therefore, selected as a data collection method for this study. The decision to use this style of interviewing was based on a predetermined small sample size. For the purposes of this study, five interviews were conducted and one written response to the interview guide was obtained from three government departments (which took the place of interviews with three appointed officials).

While it is difficult to generalize results from a small sample, a high degree of homogeneity in the answers provided justification for this choice (McDavid and Hawthorn, 2006). Not many people encounter the OPCAT or have knowledge about it based upon their employment so the decision was made to focus on those individuals who would have the greatest expertise. As a result, there was reliance on the *politically important cases* sampling strategy by targeting individuals who are stakeholders and work in either governmental departments or interest groups (McDavid and Hawthorn, 2006). Initially, the sampling strategy was intended to be referential (or “snowball”) sampling²² but based on the contacts provided by Ivan Zinger, this proved to be unnecessary.

Ultimately, the intent of the interviews was to gain the insight of those individuals who served as actors in the policy process and to further understanding of the policy subsystem. As a result, appointed

²² This form of sampling is of the non-probability variety and involves asking each person who is interviewed if they can recommend someone else to be interviewed based upon the issue being discussed (Maxfield and Babbie, 2006).

officials, interest group members, and academics were targeted. Elected officials were also sent requests for interviews, but declined. Not only were Canadian officials contacted to participate, international officials were also targeted. The rationale for the inclusion of international figures was to gain a sense of some of the broader issues relating to the signature and ratification of human rights instruments and how other nations have overcome these barriers. Given the fact that human rights as a policy issue in general has international implications, it was important to include representatives that had a more global perspective in the interview sample.

The interviews were conducted with those subjects who agreed to participate and were available to do so in January and February of 2010. The interview subjects included:

- > Dr. Ivan Zinger, Executive Director of the Office of the Correctional Investigator (OCI);
- > Alex Neve, Secretary General of Amnesty International Canada (AI);
- > Audrey Olivier, OPCAT Coordinator for the Association for the Prevention of Torture (APT); and,
- > Dr. Elina Steinerte, Research Associate for the OPCAT Project at the Human Rights Implementation Centre, University of Bristol.

Government officials from DOJ, PS, and DFAIT were also contacted. The individual officials declined to participate in an on-the-record interview and instead elected to provide a collaborative written response to the interview guide questions. The response was prepared by DOJ's Human Rights Law Section, DFAIT's Human Rights Policy Division, and PS's International Affairs Division.

One additional interview took place in Geneva, Switzerland with a member of the United Nations' Subcommittee on Prevention of Torture. This interview could not be on-the-record as UN officials are not permitted to participate in studies such as this in an official capacity. The content from that interview provided context and furthered the researcher's understanding of some of the experiences of the SPT as well as the issues that other nations have encountered in relation to OPCAT implementation.

Of course, additional interviews with other actors involved in the policy process such as elected officials in the executive and legislative branches of government, heads of agencies (e.g., RCMP, CSIS, CBSA, etc.) that would be involved in discussions related to the creation of NPMs, and members of provincial governments and correctional oversight agencies would have been desirable. But given the exploratory nature of this study combined with the difficulties associated with scheduling and access to members of the government and the public service, this was not feasible.

Face-to-face semi-structured and on-the-record interviews were conducted with each of the subjects. These interviews lasted for approximately an hour. An interview guide was developed for the Canadian subjects and a second interview guide was developed for the international subjects (both guides can be found in [Appendix I](#)). Each subject was presented with similar, if not identical questions in the same sequential order to create consistency. While the interviews were structured, they were not rigid and in certain instances, discussion strayed from the interview guide. Contingency questions to steer focus were utilized as necessary. All of the questions asked were open-ended in an attempt to elicit the greatest amount of detail from the subjects. The interviews were recorded and transcribed and the transcripts are the source of data used for analysis. In the analysis, quotes and statements were presented in the aggregate and where appropriate, were attributed to the individual subject.

Ethical considerations

As a result of the decision to conduct interviews, ethical considerations were necessary. Ethics approval was granted by the University of Ottawa Research Ethics Board prior to the commencement of the study. Informed consent was obtained from all interview subjects as each was required to review and sign a consent form before each interview began. This form detailed the purpose of the study, as well as the voluntary nature of participation. All interview subjects were made aware of the fact that they were to be asked to answer on-the-record open-ended questions based on their knowledge and experience relating to their profession.

Other ethical considerations that were addressed included:

- > Confidentiality and anonymity – interview subjects were notified that the information they shared was considered to be on-the-record and that confidentiality and anonymity did not apply (unless otherwise noted by the researcher). Each subject did have the opportunity to review interview transcripts and make amendments or provide clarification.
- > Conservation of data – interview subjects were informed that all data collected (e.g. interview transcripts, tape-recordings, written notes) was to be kept in a secure manner.

The risks inherent in participating in this study were minimal, especially given that subjects were asked to discuss their experiences as they related to their employment as opposed to any personal opinions.

3.3.4 A note on agenda-setting commentary

Following the completion of the literature review on policy analysis and the policy cycle, it became apparent that agenda-setting is a very important stage in the process as it alerts actors to the existence of a problem and, in many instances, forces a response. While not initially part of this study's intended

design, basic content analysis of media reports and an examination of government legislative activity were added to the methodology. The purpose of this analysis is to determine to what degree human rights initiatives are on the systemic/political agenda and to what degree issues of torture, deaths in custody, OCI activity, and UNCAT/OPCAT is on the public agenda. Neither of these components are meant to be rigorous in nature, they are merely intended to provide a snapshot and point of discussion relating to the politics and visibility of torture and human rights within the government and public arenas.

3.3.5 Media reports

For the purposes of this study, the decision was made to use a very elementary form of content analysis as a method for collecting and interpreting data. Content analysis can be defined as a technique used for systematically identifying the “frequency of specific ideas, concepts, or terms in any form of communication” (Alpert and MacDonald, 2001, 193). By performing content analysis, the researcher is able to study social phenomenon and gain insight into particular events. This type of research method concentrates on the coverage of an event by a particular medium rather than on the event itself (Dantzker and Hunter, 2006). To determine the frequency with which certain issues appear in the media, content analysis was the obvious methodological choice.

Criminology has an established history of using the media, particularly newspapers, as a tool in research in order to access the public’s understanding of issues such as crime. In part, this can be attributed to the fact that members of the public typically derive their image of crime and crime-related issues based on their exposure to “mass media accounts” (Noaks and Wincup, 2004).

Newspapers were chosen as the source of data because they allow the researcher to examine written communication. Newspapers are also easily attainable with many being reproduced from their print versions on the internet. Printed news also reaches a wide segment of the population. Some academics have gone so far as to claim that crime news has become “the site of our national conscience and moral codes” (Noaks and Wincup, 2004, 127). For these reasons, through content analysis of newspapers, insight can be gained into how the media could set the agenda in relation to the OPCAT and potentially influence the public and by repercussion, the government.

Two newspapers were chosen for the analysis: the *Globe & Mail* and the *Toronto Star*. The *Globe & Mail* has been in circulation for 167 years and has a six-day readership of approximately 3.3 million (Globe and Mail, 2012). It is also the largest subscription and sales of any national Canadian newspaper and is second in circulation only to the *Toronto Star*. The *Globe & Mail* has full distribution in all parts of the

country. The *Toronto Star* is published seven days per week and is Canada's largest daily newspaper with the highest circulation rate, ahead of the *Globe*. These two publications were chosen based on their extensive readership. Given that they reach more households, the content of these newspapers is likely to have a certain amount of influence over the formulation of the public agenda.

A database (ProQuest) was used to do an advanced word search of newspaper articles for each of the chosen newspapers. The content analysis performed was not intended to examine any criteria other than the frequency with which keywords appeared within the specified time period.

The time frame selected for the newspaper content analysis was June 22nd, 2006 to June 22nd, 2012. These dates provide a six year window in which to examine the frequency that issues are mentioned in print media. June 22nd, 2006 is the date that the OPCAT came into force. While the OPCAT was first adopted in December 2002, the decision was made to focus only on the period after 2006 to make the sample size more manageable.

The search parameters are outlined in Figure 6. They were input into the database as they appear in the table. The database searched for these terms in all field and all text. The frequency with which each set of search terms appears in the given timeframe is presented in the analysis.

Fig. 6 – *Globe & Mail* and *Toronto Star* content analysis search terms

Search Terms
"Death in custody" and "Correctional Investigator" or "Office of the Correctional Investigator"
"Correctional Investigator" or "Office of the Correctional Investigator"
"Optional Protocol to the Convention Against Torture" or "OPCAT" or "Optional Protocol"

These particular terms were chosen to provide insight into how frequently the public reads about:

- > The occurrence of deaths in custody (CI and OCI had to be added to this search because many articles would reference a 'death' and then a perpetrator in 'custody' for said act. The inclusion of the CI/OCI search terms eliminated this problem);
- > The activities of or incidences prompting the involvement of the Correctional investigator or the Office of the Correctional Investigator;
- > Events or developments relating to the Convention Against Torture; and,
- > Events or developments relating to the OPCAT.

While this media content analysis only examines one criterion (frequency), it could be the basis for a more in-depth analysis. Replication is also possible.

3.3.6 Legislative activities

In an attempt to take stock of the legislative activities of the Canadian government during the six year period since the OPCAT went into force, an examination of the bills that were tabled and those that reached royal assent was conducted.

The timeframe selected for this review of legislative activity was June 22nd, 2006 to June 22nd, 2012. These dates provide a six year window in which to examine the bills that were tabled in the legislature and the bills that made it into law. While the OPCAT was first adopted in December 2002, the decision was made to focus only on the period after 2006 to make the sample size more manageable. Also, it is the same timeframe that was utilized for the media content analysis. This was done for strategic purposes to make a comparison between the political and public agendas during the same period.

The analysis of legislative activity focused on amassing a complete picture of all of the activity within a given legislative session. The LEGISInfo tool (<http://www.parl.gc.ca/LegisInfo/Home.aspx>) was utilized to identify the number of bills tabled, the originating chamber of the bills, the types of bills, the number of bills tabled by each political party, and the status of bills. All of the bills were reviewed to determine if any contained the phrase “human rights” or the provision of human rights, including those bills that were tabled but never passed or those that were still in the various stages of the legislative process. Special attention was paid to those bills which contained mention of “human rights” that received Royal Assent. The purpose of this review was to determine the frequency with which human rights issues made it on the legislative agenda during the following Parliamentary sessions:

- > 39th Parliament
 - » First session (April 3rd, 2006 – September 14th, 2007)
 - » Second session (October 16th, 2007 – September 7th, 2008)
- > 40th Parliament
 - » First session (November 18th, 2008 – December 4th, 2008)
 - » Second session (January 26th, 2009 – December 30th, 2009)
 - » Third session (March 3rd, 2010 – March 26th, 2011)
- > 41st Parliament
 - » First session (June 2nd, 2011 – present (August, 2012))

The analysis of legislative activity was meant to provide political context for this study by demonstrating the level of priority ascribed to human rights issues by the Government of Canada since the OPCAT came into force.

3.4 Why use multiple data sources and methods?

Qualitative research tends to have a lower degree of validity than quantitative research based upon the level of subjectivity and interpretation involved in data collection and analysis (Gray et al., 2007).

Triangulation is a strategy that can be used to strengthen confidence in the validity of measures that are being used (McDavid and Hawthorn, 2006). No single method can ever solve the problem of capturing all causal factors, but through the use of multiple methods more empirical information can be accumulated and analyzed to look for similarities, patterns, and common themes. By using more than one source of data or measurement process, the uncertainty involved in the interpretation of results can be reduced. As a result, the decision was made to analyze several different sources of data including publicly available documents, documents obtained through the access to information request process, and stakeholder interviews to identify barriers to OPCAT signature and ratification. The rationale was that the use of these various sources and methods of analysis would allow for better substantiation of findings.

3.5 Discussion of findings

The ‘analysis’ of the collected data was done in a discussion-based format. The decision was made early on in this process that traditional content analysis, with semantic unit codification of documents and interviews, was not an avenue that would be pursued. The limited number of document sources combined with only a handful of key actor interviews would not have allowed for an in-depth and robust exploration of specific themes if the traditional approach to content analysis was utilized. Subsequently, a more thematic description of themes that consist of the identified barriers and challenges to the implementation of OPCAT was used. Essentially, these are the issues or factors that impede or hinder signature and ratification of the OPCAT as determined through the review of government documents and interviews with key actors in the policy process.

Many of these themes/issues are common to policy-making in Canada as well as the signing of treaties internationally and have been written about extensively in literature (see: Cortell and Davis, 1996; Downs et al., 1996; Meyer et al. 1997; Finnemore and Sikkink, 1998; Abbott and Snidal, 2000; Simmons, 2000; Checkel, 2001; Ignatieff, 2001; Hathaway, 2002; Hathaway 2003; Hawkins, 2003; Goodliffe and Hawkins, 2006; Hathaway, 2007; Wotipka and Tsutsui, 2008; Hill, 2010). Referred to as ‘barriers to

commitment,' these factors are weighed by the state during the policy formulation and decision-making stages of the policy cycle as a determination is made by the state about whether to become a signatory to an international treaty, convention, or law that may limit state sovereignty. Typical causal factors include international norms, the domestic benefits associated with becoming a signatory of an international policy instrument, and the limits or threats to national sovereignty (Goodliffe and Hawkins, 2006). The discussion of the barriers specific to OPCAT signature/ratification in Canada takes into consideration the factors established in the commitment literature (refer to Section 2.3.1). This provides the basis for discussion of the specific barriers in the Canadian context.

The barrier themes that emerged from the data sources include but are not limited to: involvement of multiple stakeholders in the policy-making process; the federalist structure of Canadian government; the established/historical approach to international treaty commitment; legislative change; cooperation and collaboration with Aboriginals; privacy and the protection of personal information; cost considerations and resource allocation; ambiguity of definitions contained within the OPCAT provisions; designation of authority; creation of NPM model; influence of neighbouring jurisdictions; agenda-setting/competing priorities; and political leadership.

In the discussion, each of the aforementioned barriers to commitment was presented with an explanation as to why it is a challenge, how it is viewed by policy actors, and potential ways in which the challenge can be resolved in Canada. The discussion draws upon international examples and the commitment literature to place each barrier in a broader context but also to examine how other nations with similar government structures (e.g., federalism) have been able to resolve some of these issues and move forward with OPCAT commitment.

The other elements of the discussion - media content analysis and examination of legislative activities - were outlined in the previous section. These components follow the discussion of commitment barriers and examine the presence of the issue on the public and systemic/political agenda in Canada.

3.6 Validity and reliability issues

Given the qualitative nature of this study, it is difficult to have a high degree of either internal or external validity (Johnson and Onwuegbuzie, 2004). The results are not generalizable and a cause and effect relationship cannot be established between any individual factor and Canada's delay in OPCAT commitment. This however, is not the purpose of this research. The goal of the analysis is not to pinpoint single causal variables for a delay in OPCAT commitment in Canada but rather to highlight

ongoing issues and challenges as a basis for further discussion and recommendations. The research is exploratory as opposed to explanatory and can be ongoing.

As discussed in the first section of this chapter, the policy-making process is complex and much of the rationale for decisions is inaccessible. Subsequently, the best course of action is to look at the issue in its entirety, identify the various factors that have presented issues in decision-making previously, identify the factors specific to this particular policy, and gain the insight of those actors who are involved in the policy cycle. The political landscape is in constant flux and as a result, external events will always coincide with and influence policy decisions.

In an effort to establish some degree of validity, the most relevant information was collected (including documents that were not publicly accessible) and some of the most central actors in the policy cycle were targeted for interviews and asked to provide information based on professional rather than personal experience. The findings from each of these data sources were compared against one another and certain themes emerged. The presence of these themes in all of the interviews and many of the documents signifies a concurrence of viewpoints on the issue and identifies potential factors that currently impede Canadian commitment to the OPCAT. This triangulation (“confirmation of a proposition by two or more independent measurement processes” – Webb, 1996, p.3) reduces the uncertainty of interpretation and increases confidence in findings.

Reliability has to do with whether study results are replicable (McDavid and Hawthorn, 2006). This particular research involves a high degree of interpretation of results. However, the emergence of common themes contained within each of the data sources would be likely to lead an independent researcher to identify similar barriers as the ones discussed in the analysis.

The replication of the methodology of this study is possible. The government documents are available and the ATIP request could be performed in the same manner, although it would likely yield even more documentation if performed at a later date. The interviews followed the interview guides closely and these guides could be used with different stakeholders. Of course, the content of the interviews would not be replicable, but the process used to collect the information from policy actors could be repeated. The media content analysis is completely replicable and the results would remain the same. The legislative analysis could also be performed by an independent researcher using the methods outlined here. Ultimately, the interpretation of the data collected for this study is somewhat subjective but the methods for the obtainment of the data could be replicated by another researcher who may or may not arrive at similar findings.

Researcher bias is the final element that cannot be controlled for in the methodological design of this study. Whether intentional or not, the experiences of the researcher always have the potential to affect or influence the interpretation of findings. While a conscious effort was made to present the data as objectively as possible, the discussion of OPCAT commitment barriers in Canada is based on the researcher's interpretation of the documents and interview transcripts.

3.7 Study benefits and limitations

While there are several limitations to this research including the inability to firmly establish cause-and-effect relationships and to make entirely valid and reliable conclusions as a result of the qualitative nature of the study, there are many potential benefits to this work. First, this research will fill a gap in the literature. Much has been written about commitment barriers to human rights instruments such as the CAT, but there has been limited research specific to OPCAT commitment barriers. Second, the contribution of this work stretches across disciplines from criminology to political science and applies the policy cycle to the decision of a state to sign/ratify an international instrument. This study also involves research in an important area that has serious implications in today's world – that of human rights. Third, there is the potential that this study can be used to make recommendations to the Canadian government with regards to moving forward with commitment to the OPCAT. Lastly, there are implications for future research as the identification of barriers to commitment and potential resolutions for these specific issues can provide a starting point for discussion on how to improve the policy-making process as it relates to the ratification of international human rights instruments.

Chapter 4 – Results

When Canada makes a determination about becoming a State Party to an international human rights treaty, a complex process is involved. Thinking back to the policy analysis framework, there are several elements that come into play. First, an issue must enter the policy cycle; in other words, the issue is placed on the policy agenda and a commitment from government to consider action is made (Jones and Anderson, 1984). In this instance, the issue at hand is the prevention of torture and abuse both domestically and internationally.

Next, there is an examination of the proposed solution. This is the policy formulation stage. To prevent torture, the strategy put forward is the OPCAT with its provisions for oversight of all places of detention. After a proposed solution is identified, the decision-making process begins. Here, the policy actors decide on a course of action after making an assessment of the feasibility of available options. Implementation of the chosen policy follows.

But the decision-making process as it relates to the signature/ratification of the OPCAT, of course, is not this simple. The decision-making stage in particular involves consultation between both levels of government and among multiple government departments and agencies. There are also many considerations and technical barriers that must be overcome.

The following explores the process the government must follow when deciding whether to become a State Party to an international human rights instrument beginning with the commitment to examine the issue. The discussion then focuses on the identified obstacles, challenges, and/or barriers to ratification. These themes were identified by key stakeholders during interviews as well as in the documents that were subject to content analysis. All of these factors are taken into consideration as the government weighs the costs and benefits to treaty commitment.

Contained is also a commentary on the 'delay' of the process (it has now been nearly ten years since the OPCAT was adopted by the UN General Assembly in December of 2002) as well as the current perception of Canada's human rights standing on the international stage and the impact that the delay in ratification has had in this regard.

Finally, the chapter concludes with an examination of what political will, if any, there is to move forward with signature/ratification of the OPCAT. In an effort to move beyond stakeholder commentary on political will, which can be quite subjective, the presence of correctional oversight activities and human

rights issues on both the public agenda and political/systemic agenda is examined through media content analysis and an inventory of legislative activity between 2006 and 2012.

4. 1 The Commitment

Canada has demonstrated a long-standing commitment to the protection of human rights and the prevention of torture. Canada was among the first states to ratify the Convention Against Torture in 1987, was part of the working group that helped develop the OPCAT between 1992 and 2001, and voted for its adoption before the UN General Assembly in 2002. Prime Minister Harper, in his Speech from the Throne in 2010, announced his government's intention to "use its voice to speak on behalf of Canada's commitment to global security and human rights" (Parliament of Canada, 2010). While the OPCAT was not mentioned specifically, such a proclamation suggests that the current Canadian government seemingly views human rights as a political priority.

As part of its candidacy for a seat on the UN Human Rights Council in 2006, Canada pledged to consider ratification of the OPCAT. Canada ultimately won the seat and served on the Council until 2009 but during that time, the OPCAT was not ratified. As was noted in the Government response to the interview guide:

There has not been a change in the Government of Canada's position with respect to the OPCAT. The Government considers the principles of the OPCAT to be entirely supportable, and is currently considering whether to become a party to the instrument, as it pledged to do so when it presented its candidacy for a seat at the UN's Human Rights Council in 2006 (DOJ/DFAIT/PS, personal communication, May 4, 2010).

Further review of government documents revealed that similar language has been used to express Canada's resolve to continue to review the OPCAT and work toward becoming a State Party. In each of these instances, the notion of *commitment* is emphasized. Canada has committed to take action. This suggests that the issue is on the agenda. Moreover, this suggests that the issue is being actively considered and reviewed, and work is being done in an effort to move Canada closer to a decision with regards to ratification (Birkland, 2007).

The following are a few examples of Canada's stated *commitment* to the OPCAT:

1. Government response to a Ministerial Inquiry made by MP Wayne Marston (May 31st, 2007):
"The government of Canada is strongly committed to the prevention, the prohibition, and the elimination of torture and other forms of cruel and inhumane or degrading treatment or punishment, globally and at the national level."

“The government is committed to actively considering whether Canada should become a party to the instrument.”

2. Personal communication from Minister of Foreign Affairs Peter MacKay to MP Wayne Marston (no date):

“The Government of Canada remains committed to protecting human rights at home and abroad... Canada supports the fundamental elements of the Optional Protocol regarding the establishment of an international mechanism to conduct visits to places of detention to prevent torture.”

3. Government response to interview guide (May 4th, 2010):

“Canada, accepts in theory that any State can benefit from enhanced oversight of places of detention as one effective tool for the prevention of torture or other forms of ill-treatment” (DOJ/DFAIT/PS, personal communication, May 4, 2010).

4. Alan Kessel, Legal Advisor for DFAIT speaking before the SIHR Subcommittee on June 12th, 2007:

“We support the fundamental elements of the optional protocol. We believe the protocol can be an important tool in protecting human rights.”

5. Sixth Report of Canada on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, covering the period August 2004-December 2007 (submitted to the UN on October 4th, 2010):

“The Government of Canada is strongly committed to the prevention and elimination of torture and other forms of cruel, inhuman, or degrading treatment or punishment. Canada supports the principles of the Optional Protocol and voted in favour of its adoption... Canada is presently considering whether to become a party to the Optional Protocol” (Department of Canadian Heritage, 2011).

There is a record of Canada’s commitment to explore the issue of ratification of the OPCAT which perhaps is influenced by its perceived duty as a member of the global community to protect human rights and publicly denounce torture (Goodliffe and Hawkins, 2006). Given that human rights are a political issue, it is prudent for the government to carefully consider the issue of ratification of such an instrument and articulate a commitment to do so (Ignatieff, 2001). By making such a commitment, the issue of OPCAT ratification was placed on the political agenda and the next stage in the policy cycle was reached.

4.2 The Process

The process utilized when making a determination as to whether or not to ratify an instrument such as the OPCAT is quite complex. Particularly given the fact the instrument contains provisions that are not within the sole jurisdictional authority of a single level of government, multiple steps are involved in the consideration process.

To understand why and how some factors could be barriers to the OPCAT implementation in Canada, it is first necessary to understand the process undertaken by the public service. This is the decision-making stage of the policy cycle and the key actors are members of the public service in various government departments. This stage involves consultations, assessments, and research to determine the feasibility of moving forward with becoming a State Party to an international human rights instrument. It is in this decision-making phase of the policy cycle that the OPCAT discussions have seemingly been stalled for several years.

4.2.1 The actors (agencies)

Department of Justice (DOJ). The DOJ is primarily responsible for coordinating consultations at the federal level of government. This agency also coordinates consultations with the provinces and territories through Canadian Heritage. The purpose of these consultations is to determine whether Canada should become a signatory of an international human rights treaty or instrument such as the OPCAT (DOJ/DFAIT/PS, personal communication, May 4, 2010). An additional role of DOJ is to determine the potential domestic impact of such an instrument (SIHR, June 12, 2007).

Department of Foreign Affairs and International Development (DFAIT). The DFAIT is responsible for overseeing that Canada maintains a relationship with international human rights bodies (to which Canada is subject as a result of treaty obligations) and for overseeing foreign policy that involves human rights issues (DOJ/DFAIT/PS, personal communication, May 4, 2010). DFAIT is also responsible for leading any negotiations about whether to become party to an international human rights instrument or treaty.

Public Safety Canada (PS). PS is responsible for coordinating policy issues among its portfolio agencies (which includes the RCMP, CSC, and CBSA). Due to the nature of the OPCAT and its focus on places of detention, PS is an important agency in all Optional Protocol discussions because the agencies under its umbrella are most likely to be directly affected by any decision that is made regarding ratification (Zinger, personal communication, January 26, 2010).

Canadian Heritage. In partnership with the DOJ, Canadian Heritage takes a management role in consultations between the various levels of government on human rights issues (SIHR, June 12, 2007).

4.2.2 Steps in the process

The signature and ratification of an international human rights instrument such as the OPCAT is a process that is time-consuming and involves cooperation between both levels of government as well as

multiple government departments and agencies. As outlined in the Government's response to the interview guide (DOJ/DFAIT/PS, personal communication, May 4, 2010), the following are steps involved in the consideration of the ratification of human rights treaties and instruments:

- > There must be a review of the provisions of the OPCAT by the Department of Justice to determine Canada's domestic obligations under the instrument. This internal review is done in consultation with DFAIT.
- > All departments that could potentially be affected by the instrument must review legislation, policies, regulations, guidelines, and existing practices to determine whether the provisions and requirements of the treaty are met and what changes, if any, will be required.
- > If the provisions of the treaty or instrument cannot be met, a consultation process begins to develop solutions for satisfying the provisions. This includes the creation of new legislation, the drafting of new regulations, the development of new policies, and associated costs.
- > For treaties that have provisions that fall within the jurisdictional authority of both the federal and provincial governments, a review process similar to the one conducted at the federal level is requested of the provinces and territories. The support of the provinces and territories is needed to move forward with signature and ratification.
- > If any provisions contained within the treaty fall under the jurisdictional authority of Aboriginal governments, a consultation and review process must occur. This may be done in collaboration with Aboriginal Affairs and Northern Development Canada (AANDC).
- > Other stakeholders may be consulted to provide input and offer expertise such as NGOs and interest groups (e.g., Amnesty International, John Howard Society, Elizabeth Fry Society, etc.).
- > The final review will have taken into consideration legal, policy, jurisdictional, and resource implications associated with treaty ratification.
- > Upon completion of the federal review and the consultation process with the provinces, territories, Aboriginal governments, and other parties, the issue is presented to the Federal Cabinet. It is at this point that a decision to ratify is made.²³

The progress made in this process is discussed in Section 4.5.1. It should be noted that many of these steps take place entirely within the public service and as a result, it is difficult to determine how far along the consultation phase has progressed.

4.2.3 Issues to consider with regards to the OPCAT

A key element to successful implementation is to take into consideration potential issues prior to the adoption of policy (Howlett and Ramesh, 1995). While burdensome and time-consuming during the decision-making stage, this front-end work and attention to detail prevents policymakers from having to

²³ As of 2008, all international treaties are required to be tabled before Parliament prior to ratification or accession.

return to the formulation stage post-implementation (e.g., to make amendments to legislation or policy). The theory is that it is best to identify potential issues or impediments to implementation and develop solutions or contingency plans ahead of time.

As such, the Federal Government claims that it is doing its “due diligence” to fully explore the issues of OPCAT implementation prior to making a decision regarding ratification (Kessel, SIHR, June 12, 2007).

Some of the issues that have been identified as areas of consideration include:

- > What constitutes a place of detention in Canada?
- > Do oversight mechanisms currently exist for each level of government in Canada?
 - » Where are the gaps in detention oversight?
 - » Which mechanisms can be expanded?
 - » What mechanisms must be developed?
- > Do existing oversight mechanisms meet the requirements of the OPCAT provisions?
 - » What amendments or extensions to mandates would be needed to bring these oversight bodies into compliance with the OPCAT provisions?
 - » Do these bodies have a sufficient level of independence from the government?
 - » Do these bodies cover all places of detention?
 - » Do these bodies cover all of Canada geographically?
 - » Can the work of these existing oversight bodies be coordinated across the country?
- > How is ‘regular visit’ defined?
 - » What are the resource implications associated with monitoring places of detention?
 - » What kind of training would inspectors need to be able to carry out visits to places of detention?
- > What are the operational considerations for all affected government departments and agencies?
 - » What are the resource implications? (e.g., funding, staffing, training)
 - » What are the legislative or policy implications? (e.g., extension of mandate)
- > What are the implications for Canada’s foreign policy on human rights?

* (DOJ/DFAIT/PS, personal communication, May 4, 2010; SIHR, June 12, 2007)

Each of these issues must be addressed during consultations in order for the government to move forward by making a recommendation for or against commitment to the OPCAT. The establishment of the national preventive mechanism is perhaps the largest area of concern as it is the central component

of the OPCAT. The review of existing oversight measures that currently exist across Canada provides insight into what the full extent of implementation would be and the resource implications that would follow.

4.2.4 Existing oversight measures

Countries that already have oversight mechanisms in place are in a better position to ratify the OPCAT according to the APT (Olivier, personal communication, February 15, 2010). Canada is one such nation. Alex Neve, Secretary General of Amnesty International Canada, indicated that Canada already has a “web of bodies that exist” (Neve, personal communication, February 11, 2010). Some of these domestic oversight mechanisms were identified in Sections 1.4.1 and 1.4.2 such as the Office of the Correctional Investigator and provincial ombudsmen offices. Other agencies, like the RCMP for example, have their own mechanisms. The Commission for Public Complaints (CPC) against the RCMP and audits by Provincial and Federal Crown Attorney Offices are two oversight measures that the agency has established to address allegations of abuse and other controversial incidents (Lightfoot, 2008).

Canada is also subject to international oversight mechanisms such as the Committee Against Torture, the Human Rights Committee, the Working Group on Arbitrary Detention, and the Special Rapporteur on Torture. Under its treaty obligations, Canada is required to report to these international bodies and is subject to review and recommendations. In the spirit of complete and total transparency, Canada extended an invitation to permit visits from any UN special procedures body to visit the country (Ministerial Inquiry, May 31, 2007).

The existence of these measures demonstrates that Canada already supports oversight of places of detention and has put in place mechanisms to ensure that such oversight does occur. Given that oversight has already been established at both the federal and provincial levels, specifically with regards to corrections, Canada is in a good position to work toward the development of a workable NPM model. Neve echoes this idea by stating that “the processes and general architecture for prison monitoring are already in existence and provide the framework with which to move forward with regard to this treaty” (SIHR, June 12, 2007).

4.3 The Challenges

The primary objective of this study is to identify and discuss the factors that have resulted in a delay in OPCAT-related decision-making in Canada. As outlined in the preceding sections, the process involved in the determination of whether to become party to an international human rights instrument is quite

burdensome and involves multiple stakeholders who must address a myriad of specific issues relevant to implementation.

Through the document analysis and interviews with stakeholders, certain factors began to appear on a consistent basis that were identified as problematic to implementation. As Alex Neve stated, “some of which may be genuine but overstated, some of which are genuine but have solutions, and some of which are probably a bit more imagined than real” (personal communication, February 11, 2010).

The following section is an exploration of some of the identified challenges encountered in the OPCAT policy decision-making process. These challenges include: historical precedence, state structure and capacity (multiple agency involvement, consultation with the provinces and territories, consultations with Aboriginal governments), legislative changes, privacy and confidentiality concerns, NPM models, cost concerns, and international/bilateral relations.

4.3.1 Historical precedence – signature/ratification/compliance

Policy analysis research reveals that most policies are typically either a continuation of past practice or policy-making precedence (Pal, 2001). The first issue and perhaps the most profound with regard to the advancement of the OPCAT decision-making process was the acknowledgement that Canada, as a matter of policy, will not become party to an international treaty unless all obligations and provisions can be satisfied prior to ratification (Zinger, personal communication, January 26, 2010). Stated in another way, Canada prefers to sign, ratify, and be in compliance with a treaty all at the same time. In her statement before the SIHR Subcommittee on June 12, 2007, Elisabeth Eid (Director and Senior General Counsel, Human Rights Law Section, DOJ) confirmed that “Canada must be satisfied with all domestic laws and policies and be assured that obligations are met” prior to becoming party to a treaty.

Similarly, in a letter from then Justice Minister Irwin Cotler to Alex Neve (November 7, 2005), it was explained that “Canada does not take its international human rights obligations lightly. Accordingly, international instruments are only signed and ratified once Canada is satisfied that all aspects the obligations imposed can be met.”

What this means from a practical point of view is that agreement and cooperation from all of the provinces and territories must be obtained and all of the provisions contained within the OPCAT must be met, including the designation and operation of the NPM. This process obviously has the potential to take a considerable amount of time. While it is not unprecedented for a country to designate a NPM prior to signature and ratification (France took this approach), states typically sign or ratify and then

work towards compliance. Through Article 24 of the OPCAT, states have the option to delay implementation (the designation and set up of the NPM) for a period of up to five years if the one year allotted period following ratification is not an adequate timeframe.

To reach agreement between all of the provinces and territories and to address all the aforementioned agency considerations will take a considerable amount of time and has the potential to drag out the decision-making stage. Not to mention that changes in federal and provincial governments could force new negotiations which would further impede the consultation process. To illustrate, it took Canada approximately twenty years to adopt the *Standard Minimum Rules for Treatment of Prisoners*. OPCAT-related discussions are quickly approaching the ten year mark. Ivan Zinger, Executive Director of the Office of the Correctional Investigator suggested that “this is one exception where I think Canada should find a way to sign [as it would] demonstrate its leadership, and then ratify later, [even though] that would deviate from what Canada traditionally likes to do”. (personal communication, January 26, 2010)

4.3.2 State structure and capacity

As discussed in Chapter 5, the capacity of a state to establish and implement policy is in part a function of its structure. A federal decentralized state such as Canada faces challenges in the decision-making process due to overlap in jurisdictional authority (Jackson and Jackson, 2003). In its design, the OPCAT is a classic example of a treaty that crosses levels of government as it requires oversight of all places of detention, which can be under federal, provincial/territorial, or Aboriginal jurisdiction.

The establishment of the NPM is thus an issue of primary concern and debate among the various levels of government. The leading agencies involved in the OPCAT recognize that “the practical, legal, resource, and other considerations around establishing independent, proactive, domestic visiting mechanisms in a federal state with a vast territory must not be underestimated” (DOJ/DFAIT/PS, personal communication, May 4, 2010).

The overview of the steps involved in the decision-making process (see Section 4.2.2) highlights the extent to which consultations must occur with the provinces and territories. The consultation process is examined in greater detail in a following subsection.

The federal and decentralized nature of Canada is not a reason to avoid commitment to the OPCAT; it is merely a challenge that must be overcome in order to sign/ratify. Alex Neve pointed out that the federal nature of the country is an issue in a host of different human rights issues and cannot be isolated as a justification for inaction. He suggested that

Over time... there is a real malaise that has set in within government that just sort of accepts this notion that: 'We're a federal state, in a federal state it's really hard to move forward on ratifying and implementing international human rights treaties, that's just the way it is.' Federalism is a huge issue. Does that mean we should admit defeat? Absolutely not! Is it something that is surmountable? Absolutely! (personal communication, February 11, 2010)

The challenge is surmountable as states with federal and/or decentralized structures which become States Parties to the OPCAT include the United Kingdom, Austria, Belgium, Germany, Spain, Bosnia & Herzegovina, and Switzerland in Europe, Argentina and Brazil in South America, South Africa and Nigeria in Africa, Australia in the Pacific region, and Mexico in North America to name a few (APT, 2011). At present, NPMs have been designated in the UK, Germany, Spain, Switzerland, and Mexico (refer to [Appendix G](#)).

One cannot however, minimize the importance and necessity of conducting consultations with lower levels of government as it is through this process that uniformity in practice and implementation is established.

Consultations with the provinces/territories

The provincial and territorial consultations are coordinated through the DOJ and Canadian Heritage. International human rights treaty issues in particular are discussed through the Continuing Committee of Officials on Human Rights (CCOHR) which has both federal and provincial/territorial representation (DOJ/DFAIT/PS, personal communication, May 4, 2010). The CCOHR has monthly conference calls and meets in person once every six months (Neve, personal communication, February 11, 2010). The discussions that occur are completely confidential; meeting minutes and agendas are not available to the public. It is in this forum that concerns related to the provincial/territorial implementation provisions and financial considerations of the OPCAT are supposedly addressed as the issue has been before the CCOHR since at least 2002.

Not all of the provinces and territories currently have oversight mechanisms in place. This would mean their having to build capacity and establish independent oversight bodies (Zinger, 2007). In some instances, the capacity to do so may not exist. Implementation will ultimately require the cooperation of the provinces and territories. Cost concerns are discussed in greater detail in Section 4.3.6, but the financial implications of ratification are a legitimate concern for some provinces/territories. Who bears the financial burden for implementation of the NPM? This is an important point of consideration and likely a sticking point of debate given the current budgetary environment.

It is difficult to gauge the level of progress that has been made as a result of these consultations due to the secretive nature of the process. At the SIHR Subcommittee meeting, the DOJ relayed that there is no official position from the provinces or territories regarding their support or opposition to ratification of the OPCAT (SIHR, June 12, 2007). In email correspondence between the DOJ and PS, it was stated that “Canada is experiencing a number of challenges at the federal level and also on the FTP front” (personal communication, July 4, 2008).

At a certain juncture, complete agreement or disapproval must be obtained and this may be a matter of compromise. Given that there are a large number of entities involved in this policy subsystem, attaining a high level of consensus for a single option is unlikely (Howlett and Ramesh, 1995). The Federal government can do its best to address the concerns of the provinces/territories and provide them with the information and, more importantly, the impetus to make a decision sooner rather than later. As Kessel (June 12, 2007) explained at the SIHR meeting, collaboration with the provinces and territories is necessary because it helps avoid future problems. He also noted that “a good foundation and a good open dialogue with our colleagues makes for a much better relationship, and I think we’re putting that time in now for that purpose” (SIHR, June 12, 2007). The question that other stakeholders are now asking though, as at what point is there a transition from dialogue to decision-making and after ten years, why has this transition not occurred?

Multiple agency involvement

The provinces and territories are not the only potential cause of delay in the OPCAT decision-making process. There are a host of Federal departments and agencies that would be affected by the implementation of the OPCAT and their cooperation and collaboration is needed in order to move forward. These stakeholder agencies were identified in ‘The actors’ section of this chapter. The policy-making process becomes very complicated when so many government agencies are involved, particularly when the end goal is to have a cohesive implementation approach (Zinger, personal communication, January 26, 2010).

If agencies operate largely in silos and are reluctant to come to the discussion table, the process lags. In some instances, it may be difficult to gain the support of such agencies if it is unclear what practical implications the OPCAT will have on their operations. For example, the RCMP reviewed the OPCAT and developed a model NPM that could work within existing oversight frameworks but the agency was unable to comment on resource or staffing needs because it is unknown what the extent of detention

visits will entail (Lightfoot, 2008). If agencies do not have a clear understanding of their obligations, this is likely to be a source of frustration and confusion.

Consultation with Aboriginal self-governments

In recent years, there has been a focus on shifting authority and control to Aboriginal communities. The notion of Aboriginal self-government was contained in the findings of the Royal Commission on Aboriginal Peoples (RCAP) Report (1996) which declared that “Aboriginal people are peoples, that form collectives of unique character, and have a right to governmental autonomy” (as cited in Dickason, 2002). To date, Canada has completed 18 comprehensive self-government agreements involving 32 communities (Aboriginal Affairs and Northern Development of Canada, 2010).

Subsequently, certain Aboriginal communities have a level of autonomy and discretion in how they handle criminal justice matters. These communities often implement restorative justice measures that focus on healing and community involvement as opposed to traditional sanctions (Griffiths, 1996). There are however, places of detention on Aboriginal reserves and as a result, consultations with Aboriginal governments and First Nations police must occur in the OPCAT review process.

Again, the issue of capacity arises. While there may not be a large number of Aboriginal detention facilities, oversight mechanisms are not in place to the degree that they exist on the federal or provincial levels. There is a lot of work to be done in this negotiation process and to build the capacity (which may include legislation and the provision of financial resources) to be able to implement oversight (Zinger, 2007).

The DOJ is aware of these potential implications. In a Memorandum (June 16, 2004) prepared for then Minister of Justice Cotler, it was acknowledged that “another issue is to better identify the responsibilities with respect to detention on Aboriginal reserves and the implications in terms of consultation with Aboriginal groups.”

A final technical consideration with regard to Aboriginal detention is the existence of contractual agreements that CSC has with Aboriginal communities under section 81 of the CCRA. This section allows the Minister of Public Safety to enter into agreements with Aboriginal communities for the purpose of transferring federal prisoners into Aboriginal communities (Zinger, personal communication, January 26, 2010). Under the OPCAT, these agreements would have to be re-opened to allow for oversight.

4.3.3 Legislative changes

The decision-making process is not only complicated by the number of stakeholders and considerations involved, but also by the level of legislative work that is required to implement a treaty such as the OPCAT. In order for the implementation of any policy to be successful, clear statutes and sufficiently funded mandates are a must (Pal, 2001). Due to the fact that the OPCAT impacts such a broad number of departments and agencies at both the federal and provincial levels, it is likely that multiple legislative amendments will be required.

The legislative process is cumbersome and can take a long time to complete. The need for legislative change has the potential to drag out the decision-making process for an undefined period of time and because Canada chooses to ratify only when in compliance with provisions, these amendments would all have to be completed prior to OPCAT signature. The extent of the legislative undertaking cannot be minimized and DOJ is responsible for assessing the legislative and resource needs as well as the associated implications (Eid, SIHR, June 12, 2007). In order to allow the NPM to have access to all places of detention throughout the country, legislative amendments are unavoidable (Zinger, 2007). To effectively push legislation, there must also be political appetite or will, and in the current political environment with the focus on economic, healthcare, and crime issues, these sorts of bills may not receive top priority. Provincial/territorial legislatures and even the federal legislature could also run into challenges if minority governments are present as this could limit the government capacity to decisions with regard to the OPCAT.

Canada is not alone in this challenge. Most nations that become States Parties to the Optional Protocol must also tackle the legislative log jam. The important considerations are to look at the existing legislation of the institutions nominated for NPM designation, determine what changes are needed to be compliant with the OPCAT, and determine how to satisfy the access provisions of the Protocol (Olivier, personal communication, February 15, 2010). The government must provide these agencies with expanded mandates as preventive monitoring and oversight is very specific and with this expanded mandate there is also a need for accompanying resources. Audrey Olivier, OPCAT Program Officer at APT acknowledges that this is a common process amongst States Parties and that “most states start the process slowly” (personal communication, February 15, 2010).

4.3.4 Privacy considerations

Article 21 of the OPCAT guarantees confidentiality of information communicated to both the NPM and the SPT: “Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.”

Privacy rights are indeed a concern. DOJ has the responsibility of examining whether relevant privacy legislation in Canada permits for the sharing of personal information between the government and the SPT (Eid, SIHR, June 12, 2007). The government is obligated to provide information about all detainees to the visiting international body including information pertaining to conditions and possibly medical records. Many laws currently exist that are designed to protect the access to and sharing of personal information and amendments might be required which means more legislative work.

An email acquired through the ATIP request revealed that the privacy issue was one of the legal concerns regarding commitment to the OPCAT: “A number of legal issues have been identified, particularly pertaining to access, disclosure, sharing, and confidentiality of information” (personal communication, April 7, 2008). While identified as a potential barrier, several officials feel that the privacy concerns are a workable issue and that practical solutions are available because Canada has a breadth of experience in handling these sorts of matters (Zinger, personal communication, January 26, 2010). The APT has also offered support to identify ways in which Canada could comply with the reporting provisions of the OPCAT.

4.3.5 The designation of NPMs

Perhaps the largest and most complex element of the OPCAT is the national preventive mechanisms. Each state that becomes a party to the treaty is required to designate a NPM. The principle purpose of this mechanism is to conduct regular visits to all places of detention. A more in-depth discussion of the specific role of NPMs is contained in Section 1.2.4.

The designation and implementation of a NPM model is a lengthy and challenging process. If Canada adheres to its practice of withholding ratification until all treaty provisions are satisfied, the NPM must first be established before the OPCAT commitment can occur. Tasks related to NPM designation are at the heart of the decision-making phase in the OPCAT policy cycle. In order to determine which model best suits the state and the extent of work to be completed, policy actors must complete a number of tasks.

It is imperative that stakeholders first conduct an environmental scan to identify existing oversight mechanisms and to determine whether any are able to serve as the NPM. The assessment must also identify whether founding legislation is necessary, what changes must be made to the mandate of the agency, the extent of its jurisdiction, what powers, authority and immunities the agency has, what level of funding or resources are required, if the agency has sufficient independence from the government, and if the operations can be adjusted to meet the OPCAT provisions for visits of places of detention (APT, 2010). This process can take a considerable amount of time to complete. If no oversight mechanisms exist within a country or if the existing mechanisms cannot be altered to meet the OPCAT obligations, the state will then have to create a brand new agency which is resource-intensive and a less desirable option.

During this process, it is essential that there be continuous and open dialogue among the actors in the policy subsystem. The federal and provincial/territorial governments as well as government departments and agencies must agree on the national preventive mechanism and determine how it will operate across the country to ensure consistency in its practices.

There are four different styles of NPM that have become popular. These include new specialized bodies, national human rights institutions (either existing or new), national human rights institutions (NHRI) combined with civil society organizations, and multiple bodies that are geographically, jurisdiction (e.g., federal vs. provincial), or thematically-based (APT, 2010). Each of these models has been adopted by different nations. For example, Senegal and France designated a new specialized body, Sweden and New Zealand designated NHRIs, Slovenia has a hybrid model with the combination of NHRI and a civil society organization, and the United Kingdom and Germany have multiple bodies (Steinerte, personal communication, April 19, 2010).

Once the most appropriate model is chosen, it is recommended that the mandate of the NPM be enshrined in law and adequate resources be provided to permit the new body to function according to its new mandate. The federal government is likely to assume responsibility for the passage of NPM legislation and the allocation of the funds required to establish the mechanism.

In a federal decentralized state, such as Canada, there must be coherence amongst oversight bodies, as a model is likely to have regional offices to accommodate for the vastness of territory. While a challenge from a coordination perspective, the existence of various levels of preventive mechanisms can lead to a “richness of the actual practice of monitoring of places of deprivation of liberty” permitted that there is “coherence and synergy” (Steinerte, personal communication, April 19, 2010).

Canada already has a web of oversight mechanisms in existence (as discussed in Section 1.4). Assessment to determine whether these existing mechanism could meet the OPCAT provisions is part of the work overseen by DOJ and the other involved federal departments and their portfolio agencies. The ATIP request revealed that both the RCMP and OCI have developed NPM models. The RCMP advocated for the creation of a new specialized body called the 'Independent Office of Detention Facilities Investigations' that would coordinate with the Canadian Human Rights Commission (Lightfoot, 2008). In the proposal, the CHRC's role was described as a liaison between the SPT and the NPM. The OCI also recommended the creation of a new body called the Office of the Inspector of Federal Places of Detention that would have "jurisdiction on all persons detained in federal organizations and/or in the control of federal officials" (Zinger, 2007, 12). The plan also calls for the creation of five regional offices that coordinate with the central oversight body. At present, it is not known what level of consideration was given or is being given to these models.

4.3.6 Costs

The issue of costs or resource implications almost always factor into policy-making decisions. In the current global economic climate, there is concern about budgets and undue financial burdens placed upon the state. The costs related to the implementation of the OPCAT, and more specifically, the designation and implementation of the national preventive mechanisms is one of the main considerations that is the focus of the ongoing consultation process.

The provinces and territories are likely to raise the issue of cost as discussed in Section 4.3.2 and look to the federal government to provide financial support for implementation. Certain provinces have limited oversight capacity and these jurisdictions would require more assistance and funding (Zinger, personal communication, January 26, 2010). An agreement must be reached prior to the provinces/territories agreeing to move forward with adherence to the OPCAT provisions. While the extent to which these discussions or negotiations have occurred is unknown, it is likely that this has been a source of delay in furthering the decision-making process.

At the SIHR Subcommittee meeting on June 12, 2007, Elisabeth Eid relayed to elected officials that an evaluation of the resource implications of the establishment of NPMs must be conducted. At that point, no such evaluation had been performed.

The way in which the policy process begins to breakdown can now be seen. Using the RCMP as an example, this agency cannot determine the resource implications that Canada becoming a State Party to

the OPCAT will have on the institution because the requirements of the Protocol provisions have not been clearly delineated. Without understanding the exact structure of and the role that the NPM plays, cost considerations cannot be taken into account. In the absence of cost considerations, an agency may be less inclined to support ratification because of the unknown impact that the commitment will have on agency mandate, operations, budget, and staffing.

Concerns about the cost of implementation are not unique to Canada. APT (2010) commented that most governments want to determine the costs associated with implementation of Optional Protocol provisions, particularly with regard to the NPM. Some nations greatly underestimate the costs associated with the establishment of an oversight mechanism (Steinerte, personal communication, April 19, 2010). The financial burden extends beyond the creation of the mechanism as well. A budget must be created for the NPM that takes into account staffing, training, inspection-related costs, and so forth. However, the degree to which oversight mechanisms exist within a country has the potential to mitigate some of the implementation costs. For example, in Canada, there are several oversight mechanisms already in place which can be utilized to some degree for the NPM. This is a more cost-effective option than creating and building the capacity for a completely new entity.

4.3.7 International/bilateral relations

The ‘norms’ theory of treaty commitment posits that states are influenced by the actions and decisions of other states, most notably those within the same geographic region (Finnemore and Sikkink, 1998). Studies, such as those conducted by Goodliffe and Hawkins (2006), have lent support to this notion. In policy analysis, the role of the international system is viewed as a factor that has the ability to influence and shape decisions on both domestic and foreign policy (Howlett and Ramesh, 1995). Audrey Olivier expressed this notion, stating that “countries with regional leadership may have some political influence on other nations. When such countries are very well advanced in terms of the prevention of torture, the idea is also for them to assist other states to implement the OPCAT according to the national context” (Olivier, personal communication, February 15, 2010).

With regards to the OPCAT decision-making process in Canada, the influence of other nations on consultations and discussions appears to be minimal. The government stated that “bilateral relations generally do not play a role in the decision-making process for becoming a party to an international human rights instrument” (DOJ/DFAIT/PS, personal communication, May 4, 2010). However, Canada does pay close attention to what other nations do to meet the provisions of the OPCAT in an attempt to

learn from the challenges that these nations have faced. With 63 States Parties and 42 designated NPMs, there are many examples for Canada to draw upon.

Of particular focus are the actions of decentralized federal states. Great Britain, Spain, Mexico, Germany, Switzerland, and Argentina have ratified the Protocol, as has Brazil, which is also a federation. Other federations that are signatories to the OPCAT include Austria and South Africa (APT, 2008).

Canada's interest in NPM designation and implementation in other nations is documented.

1. Alan Kessel, Legal Advisor for DFAIT speaking before the SIHR Subcommittee on June 12th, 2007:

"In January 2005, the Canadian permanent mission in Geneva organized a meeting of decentralized states to exchange information in the hope of sharing creative approaches and problem-solving strategies in the specific context of federal and other decentralized states."

2. Emails between International Affairs Division of PS and contacts at the Federal Ministry of the Interior in Germany (November 18/19, 2009):

"We are interested in speaking with the appropriate German official about Germany's experience in becoming a Party to the OPCAT. We are particularly interested in the two NPMs that Germany has been establishing to implement the Protocol (the Federal Agency for the Prevention of Torture and the Joint Commission of the Lander).

Canada is currently looking at the experiences that other countries have had in becoming Parties. Specifically, we're interested to know how Parties set up and administer their NPMs. Germany's experience is of particular interest to us since, like Canada, Germany is a federation, and must therefore consider its NPM from both a federal and state perspective. A small group of us here in the Government of Canada is looking at the Optional Protocol. The questions would address how Germany is allotting funding and staff to its mechanisms and how the mechanisms decide or will decide on the frequency of their visits to detention facilities."

3. Email from the Department of Public Safety (December 16, 2009):

"... might speak with us about France's NPM. In a nutshell, we'd be very interested in someone very familiar with how the NPM was set up and who can therefore speak easily to questions on how financial/HR resources were allocated, how visits were determined, and lessons learned."

The extent to which these discussions have progressed or the lessons learned from these consultations however, is not known.

The aforementioned challenges are barriers that Canadian policy actors must overcome in order to move forward with a commitment decision. That decision, will ultimately involve weighing the potential costs and benefits of becoming a State Party to the OPCAT.

4.4 The Weighing of Costs and Benefits

When making a decision to commit to an international human rights treaty, a state takes into consideration all of the potential implications of becoming a State Party. The decision-making process (which in this instance, are the consultations and assessments that the government departments have performed and continue to engage in), examines both the benefits and costs of commitment. Hathaway (2007) acknowledges that human rights treaties, unlike other foreign treaties, are unique in the sense that they do not have reciprocal benefits. In other words, there is no direct benefit from becoming a party to the treaty. Trade agreements for example, have specific returns – i.e., lowered tariffs on imports and exports. Human rights treaties assume compliance to provisions on the part of all States Parties, but there is nothing tangible that committed parties receive from one another per se.

The costs associated with commitment and subsequent compliance to a human rights treaty is taken into account during the decision-making phase of the policy cycle. Policy actors anticipate the burden that compliance to treaty provisions will have on the state (Hathaway, 2007). If the enforcement of a treaty is burdensome on both the domestic and international level, states may not be inclined to commit as the costs are perceived to outweigh the benefits. These costs can take the form of domestic legal enforcement of the treaty (e.g., creation of the NPM), pressures from domestic actors and NGOs, and the collateral consequences such as the reaction and perception of transnational actors.

This goes back to the norms arguments put forth by Finnemore (1996) and Schimmelfennig (2001). A state must take into consideration their assumed 'moral obligations' in the eyes of the international community as a potential collateral cost. If a state does not ratify a treaty, the international community might view that nation as acting outside the bounds of established norms. The decision not to commit places that state in a category of countries that fail to denounce human rights violations so to speak, even if this may not be the reality. The research (Hathaway 2007) has found however, that states with strong and long established human rights records may be disinclined to commit to additional human rights treaties because there is little perceived benefit. What will ratifying one more treaty do if there are few issues related to the protection of human rights? In conjunction with this, nations that have strong records are more likely to be embarrassed by rare incidents of abuse that are brought to light as a result of treaty commitment.

Canada therefore, must determine if it is in its best interest to become a State Party to the OPCAT by carefully considering the associated benefits as well as some of the potential costs, risks, and/or challenges. These challenges are considered by the government as part of its analysis process and were outlined in the previous section (DOJ/DFAIT/PS, personal communication, May 4, 2010).

If there are many costs associated with commitment to the OPCAT, are there any identified benefits? The document analysis and interviews with key stakeholders identified a variety of benefits that Canada may enjoy as a result of becoming party to the OPCAT. These benefits include:

- > A demonstrated commitment to upholding human rights domestically and internationally as well as a clear denunciation of the practice of torture. This reinforces Canada's longstanding tradition of leadership in the area of the protection and promotion of human rights.
 - » "If it ratifies the Protocol, Canada could use the moral authority thus gained to promote this instrument with the authorities of many member states" (Tremblay, SIHR, June 5, 2007).
- > The use of OPCAT commitment as an important foreign policy tool; to provide Canada with an opportunity to have its voice heard on the international stage with regards to human rights and to influence the development of foreign policy that is shaped by a commitment to preserving the dignity and rights of all people.
- > The improvement of Canada's human rights policy record. Several high profile incidents (e.g., Maher Arar, Omar Khadr, the Afghan detainee scandal, etc.) have tarnished Canada's human rights record in recent years. By becoming party to the OPCAT, Canada renews its obligation to protect against human rights abuses and torture, specifically as it relates to places of detention.
- > The enhancement of existing oversight mechanisms. As part of the decision-making process, the government must review the role and mandate of oversight agencies to determine if, in their current capacity, they meet the OPCAT treaty obligations. This environmental scan identifies what entities and practices are currently in place and can serve to identify gaps in the web of existing mechanisms. Such an audit provides an opportunity to critically examine what exists, where there are gaps in coverage, and how they can be closed.
- > The introduction of preventive mechanisms to complement existing reactive mechanisms. The deterrent effect of the preventive mechanism can identify conditions that lead to abuse and address them before incidents occur.
- > The potential for savings due to reduction in lawsuits (e.g., deaths in custody, excessive use of force, other forms of abuse, etc.). In this capacity, commitment to the OPCAT can limit risk and liability and associated costs. It is a management strategy and as such, there is a business case for increasing correctional oversight (Zinger, 2006).
- > The introduction of best practices and standards of excellence as it relates to correctional oversight which can include better training for law enforcement and corrections officials.

- > An increase in accountability for law enforcement, correctional officials, and government officials for what transpires in ALL places of detention in Canada (Zinger, 2006).
- > A critical evaluation of justice system and audit of correctional practices.
 - » “It is a level of maturity of your democracy that you are able to step back and look at your own criminal justice system with a critical eye and have a dialogue with yourself... Is this the best way of how to do things?” (Steinerte, personal communication, April 19, 2010).

Many states view commitment to international treaties as an encroachment on national sovereignty (Goodliffe and Hawkins, 2006). Although, this traditional state sovereignty driven approach to international law is diminishing with increased globalization and the conceptualization of human rights as politics. Canada takes more of the human rights driven approach to international law. This country is party to a multitude of international treaties and declarations and has been open to scrutiny by the international community. Transparency is important and Canada has extended open invitations UN committees, international bodies, and special rapporteurs to visit (Zinger, personal communication, January 26, 2010). As such, the concerns related to ‘collateral consequences’ are minimized and unlikely to factor too greatly into the commitment decision-making process.

In short, the benefits associated with OPCAT commitment, as presented here, are to be weighed against the challenges and costs (both monetary and innate) of commitment. If Canada makes the determination that the benefits outweigh the costs, commitment will occur. After nearly ten years of consultation, assessment, and consideration however, it seems that the decision-making process has stagnated and that arrival at a final commitment determination is delayed.

4.5 The Delay

The OPCAT commitment consideration process has been underway for approximately ten years. As was noted in Section 1.2.5, Canada was intimately involved in the development of this human rights instrument and also voted in favour of its adoption. It was at this time, in 2002, that consideration of whether to become a State Party to the Optional Protocol began and it has continued ever since.

In the government’s official response to the interview guide, a number of factors were identified as having an impact on the length of time that it takes to conclude an international human rights treaty review process. The presence of any or all of these factors increases the amount of time that must be devoted to the consideration of commitment. These factors include:

- > **Treaty provisions and obligations.** Do the provisions relate to matters solely under federal jurisdiction or is there overlap? If the obligations fall within the purview of federal,

provincial/territorial, and/or Aboriginal governments, consultation with all parties is required and this is a complex and time-consuming endeavour. The federal government, provincial/territorial governments, and Aboriginal governments must be in agreement and commit to uphold the treaty provisions

- > **The number of departments and agencies effected.** The greater the number of agencies impacted by treaty provisions, the longer the consultation process as each of these entities must be brought to the discussion table. The domestic implications of the treaty must be fully explored and each department/agency will then be required to assess the scope of the operational and mandate changes required to be in compliance with treaty provisions.
- > **Legislation and resource implications.** The more extensive the legislative requirements/revisions and the more resource intensive the treaty provisions, the lengthier the consideration process. Essentially, if the treaty is difficult to implement and requires a high level of resource allocation and legislative work, then more time is devoted to determining whether commitment is desirable.
- > **Priority.** What level of priority is ascribed to commitment considerations at the federal and provincial/territorial levels? If there are competing domestic priorities that must be addressed (e.g., economy, national security, healthcare, education, etc.), then these will receive a higher level of attention than treaty consideration.
 - » What level of priority is given to commitment considerations for one particular human rights instrument over other obligations? Canada has a litany of commitments and simultaneously reviews several treaties and conventions for ratification. Also, requirements of existing commitment must be given priority such as submitting reports to UN bodies and preparing for visits from international bodies and committees.

*(DOJ/DFAIT/PS, personal communication, May 4, 2010)

Based on the above criteria, it is evident that the consideration process for commitment to the Optional Protocol could be expected to take a longer period of time than other treaty discussions. The OPCAT provisions require consultations with all levels of government, multiple departments and agencies at both the federal and provincial/territorial level, and the legislative and resource implications are extensive (due to NPM requirements). Moreover, between 2002 and 2012 other issues assumed priority status at the national as a result of the economic depression and international conflict (e.g., the War in Afghanistan). The list of requirements that a nation must meet in order to be in compliance with the OPCAT is long and multi-faceted in nature. As a result, the consideration process has taken what some view as an exorbitant amount of time.

4.5.1 Tracking progress

The following is a summary of the progress made in the OPCAT commitment decision-making process, or rather, what the government has communicated in terms of progress.

1. Memorandum to then Minister of Justice Cotler (June 16th, 2004):

“The progress slowed somewhat with the establishment and organization of the new Department of Public Safety and Emergency Preparedness and the new Canadian Border Services Agency, as well as the development of the new National Security Policy. Discussions have nonetheless taken place to examine what this new structure means with respect to the measures required to implement the Optional Protocol.”

2. Letter from then Minister of Justice Cotler to Alex Neve (November 7th, 2005):

“Officials from my department have been working with their colleagues at the federal and provincial levels... We will continue our efforts to advance the work on this issue... This work takes time, particularly when multiple departments and levels of government are involved.”

3. Government response to a Ministerial Inquiry made by MP Wayne Marston (May 31st, 2007):

“Owing to the extensive consultations required and the complexities of the issues raised by the implementation of the Optional Protocol, no timeline has been developed for Canada to become a party to the Optional Protocol.”

4. Elisabeth Eid (Director and Senior General Counsel, Human Rights Law Section, DOJ) in her statement before the SIHR Subcommittee on June 12th, 2007:

“Federal officials have begun work on the consultation process. The DOJ has analyzed the provisions of the instrument. We have held interdepartmental meetings and bilateral meetings with specific departments as well.”

“We expect this will take several months at the federal level and several more months with the provinces and territories. There is no set date.”

“We’re doing the best we can to move the process along. I can’t put a fixed time period on it.”

5. Alan Kessel (Legal Advisor for DFAIT) in his statement before the SIHR Subcommittee on June 12th, 2007:

“Consultations and analysis began after the adoption of the optional protocol and are still ongoing. After this analysis is completed, Canada will be in a position to make a decision as to signature and ratification of the optional protocol.”

“Quite clearly, if we had an international instrument that was totally within the ambit of the federal government, things would go quicker. I think we’re doing the due diligence on this particular international instrument.”

6. Government response to the interview guide (DOJ/DFAIT/PS, personal communication, May 4, 2010):

“The OPCAT review continues to move forward. A great deal of work has been completed but more remains to be done. Owing to the extensive consultations required and the complexities of the issues raised by the implementation of the OPCAT, no specific deadline has been set for a decision to be made on whether to become a party to the instrument.”

“To the best of our knowledge, no report or recommendations were issued to the Government following the Subcommittee’s consideration of the issue on June 5th and 12th, 2007. “

“Canada is still in the process of considering whether to become a party to the OPCAT. To this end, consultations with interested federal departments and the provinces and territories have continued.”

Little can be gleaned from the above statements. It is not known what exactly has been completed thus far and if any headway has been made in the consultations with the provinces/territories and portfolio agencies. It is also difficult to determine how much work must still be completed. The following are also unknowns:

- > Has any progress been made in moving toward a decision either in favour or in opposition to Optional Protocol signature/ratification?
- > Are there any provinces/territories that are hold-outs or opposed to commitment to the OPCAT?
- > What are the primary concerns or points of contention?
- > Have NPM models been proposed by government?
- > Has a review process been completed of agency proposed NPM models?
- > To what extent have discussions with other nations occurred regarding NPM designation and implementation?

- > Has the government identified what legislative changes are necessary for commitment?
- > Has an audit of the resource implications of commitment to the OPCAT been conducted?

One other important element for policy advancement that is absent in all of the government documents reviewed for this thesis is a timeline for action. Nowhere is there mention of timelines for discussions, consultations, reviews, assessments, or decisions, quite the opposite. Subsequently, there is also no deadline for when this work is expected to be completed. In the absence of timelines, this ongoing consultation process could continue indefinitely (as it has since 2002).

Members of Parliament who sat on the SIHR voiced these concerns. Kevin Sorenson, MP for Crowfoot, stated that “It seems to me it’s taking a long time. I don’t know if it’s longer than should be anticipated or if it’s longer than usual, but it seems to me it’s taking an awfully long time.” While one can appreciate the need for comprehensive consultations and the challenges associated with assuming such a multi-faceted task, there appears to be very little evidence in the way of progress. Zinger (personal communication, January 26, 2010) explained that because Canada already has many oversight mechanisms in place such as quasi-judicial control, provincial ombudsmen offices, police review boards, and the OCI at the federal level, that Canada “should be quite far ahead in terms of being in compliance” with the spirit of the OPCAT and some of the provisions. If this is true, then why has the consultation process taken ten years and for how much longer will it continue?

MP Marston echoed these frustrations when he acknowledged that:

It strikes me as very ironic as well that Canada shepherded this particular agreement through the United Nations and voted to adopt it, and now 34 nations have signed on ahead of us. It just doesn’t seem right, I’m sure, to an average person who might hear what’s going on in this place (SIHR, June 12, 2007).

There appears to be a consensus opinion that the OPCAT consultation process is taking a very long time (and this is based on documents collected and interviews conducted between two and five years ago). Perhaps the factor that compounds the situation and leads to some frustration is the inability to track progress because the decision-making process is contained completely within the public service and matters pertaining to the OPCAT are discussed behind closed doors.

4.5.2 Transparency

As detailed in Section 2.2.2, most policy-making functions are performed by the public service. The public service is not a single entity, but rather multiple departments, each of which may have conflicting interests and positions. The larger the public service, the harder it is to arrive at a single unified decision (Howlett and Ramesh, 1995; Farazmand, 2010).

Policy-making consultations and deliberations occur in a secretive environment within the public service. Due to the internal nature of such discussions, the public service struggles with balancing discretion and accountability for each of the involved parties (Pal, 2001). Civil society is not involved in this process and no information is provided to inform non-governmental stakeholders about progress or issues that arise during the course of these deliberations.

The provincial and territorial OPCAT consultations that are coordinated through the CCOHR are a prime example of the public service at work. As mentioned previously, the discussions of this committee are completely confidential and outcomes are not made available to the public. Alex Neve expressed concern about the nature of this process: “things get lost in a process that’s quite cumbersome, quite secretive, and lacking in transparency and without any real political accountability” (personal communication, February 11, 2010). Based on government statements (as seen above), all that is known is that Optional Protocol consultations continue.

If discussions have stagnated, it may be useful to engage civil society and interest groups in the process to bring new energy and creative solutions to the table. If there was a level of transparency to the process, the government would also be held accountable for inaction. Neve went on to identify several items that would be of interest to advocacy groups and other invested stakeholders:

- > How often is the issue of commitment to the OPCAT discussed?
- > What is the content of these discussions, or at a minimum, what concerns have arisen?
- > Are there any areas of consensus that could be the basis for collaborative decision-making?

Academics and international NGO representatives expressed the importance of transparency in this process. Dr. Elina Steinerte noted that “the establishment of a national preventive mechanism must happen through transparent, inclusive dialogue which would involve civil society” (personal communication, April 19, 2010). This would allow interest groups to engage in the process and to raise awareness and build public support for the initiative. Greater transparency would also facilitate coordination with international human rights groups to gain information and guidance if needed. APT has suggested that Canada develop a written proposal for a model NPM and make this process inclusive and transparent by inviting input from all policy actors (Olivier, personal communication, February 15, 2010).

To date, the only OPCAT-related discussions that have become part of the public record are the SIHR Subcommittee meetings held in June of 2007. The inability to track progress, the lack of bureaucratic transparency, and the appearance of inaction on the part of the government in moving forward with this

issue has had implications on the perception of Canada's commitment to human rights instruments and the issue of torture.

4.6 The Perception

The seemingly slow progress in moving forward with a determination on OPCAT commitment has generated several divergent perceptions of the situation. While policy actors may have similar goals as it relates to specific issues, they often have different views and interpretations of scenarios and of the policy-making process itself (Griggs, 2007). In this instance, three separate groups of actors interpret Canada's consideration of the OPCAT signature/ratification differently and as such, have formulated their own views on the potential implications of the delay. These perceptions are explored here as the government view, the Canadian stakeholder view, and the international community view.

4.6.1 In the view of the government...

The government's position on the issue of Optional Protocol commitment is that it is important to do the appropriate work to ensure that if Canada makes the decision to sign/ratify the OPCAT, no issues will arise and compliance with all treaty provisions is guaranteed. In this regard, Canada is doing the "necessary homework" to live up to its commitments (Kessel, SIHR, June 12, 2007). The rationale behind this position is that Canada is a leader in human rights and its actions are subject to the scrutiny of other nations and subsequently, it is important to serve as a role model of sorts. Implementation of international human rights instruments therefore, should occur in a seamless and effective manner so as to avoid challenges and to set a good example that others can follow.

Furthermore, the government does not believe that Canada not becoming a State Party to the OPCAT as of yet has diminished the nation's standing as a human rights leader. In the response to the interview guide, the government indicated that failing to sign one convention does not undo the breadth of human rights work, accomplishments, and accolades that are part of the country's history. It is difficult to disagree with this supposition. Canada is a party to most human rights treaties and "continues to raise and promote human rights issues at every appropriate opportunity through bilateral and multilateral channels, and through development assistance" (DOJ/DFAIT/PS, personal communication, May 4, 2010). An example cited as demonstrative of that commitment is the engagement of the RCMP and CSC in Haiti to provide human rights training among law enforcement officials and in the correctional system.

Also, during the timeframe in which the OPCAT has been under consideration, Canada became State Party to the UN Convention on the Rights of Persons with Disabilities (CRPD). In fact, it was the first time in Canadian history that the country signed a UN convention on its opening day (March 30th, 2007). Canada later ratified the CRPD on March 11, 2010 (DFAIT, 2011). It is important to point out that with this particular convention, Canada departed from its practice of simultaneous signature, ratification, and compliance. Similar to the OPCAT, Canada took a leading role in the development of this convention, but decided to forgo a lengthy consultation process and instead signed immediately. The country is working toward compliance with the CRPD's implementation provisions.

4.6.2 In the view of Canadian stakeholders and interest groups...

The Canadian stakeholder view, which is shared by interest groups, professionals, and some politicians, differs from that of the government. In fact, this group of policy actors believes that the decision to delay becoming a State Party to the OPCAT has very negative implications for the country on the international stage. These individuals express concern about Canada's image and believe that the failure to take a leadership role in signing the OPCAT diminishes the nation's standing internationally. As Alex Neve points out "We have always sought to lead, not merely follow. By virtue of that history of leadership, it is noted when Canada is absent, or silent, or tardy. Other states feel less compelled to step up if Canada has not yet done so" (SIHR, June 12, 2007).

Referring back to the norms theory of commitment, there is pressure to become party to the treaty because it is thought to be the appropriate course of action. In essence, Canada has a moral duty to commit (Finnemore, 1996). There is an expectation that Canada take a leadership role. Connected to this is the notion that Canada can influence other nations that lack oversight measures (and perhaps have a history of torture or human rights violations) to commit to the OPCAT and open their borders to inspections (Hill, 2010). But that begs the question, how can Canada call upon another nation to become party to the OPCAT while abstaining from doing so itself? In fact, many nations that are not considered to be progressive and have spotty human rights records (e.g., Chile, Mexico, Turkey, Nigeria, etc.) are all signatories to the Optional Protocol.

Agencies such as the Office of the Correctional Investigator and advocacy groups such as Amnesty International Canada and the Elizabeth Fry Society all support ratification of the OPCAT (Zinger, personal communication, January 26, 2010; Neve, personal communication, February 11, 2010; Pate, SIHR, June 5, 2007). It is the belief of these groups that Canada should take every opportunity possible to denounce

human rights abuse and the practice of torture; becoming a signatory of the OPCAT is one avenue to pursue this objective.

In her testimony before the SIHR Subcommittee (June 5, 2007), Kim Pate (Executive Director of the Canadian Association of Elizabeth Fry Societies) suggested that Canada becoming a State Party to the OPCAT was a way to demonstrate that it seriously takes into consideration the reports and recommendations of domestic inquiries (such as the Toope report and Arbour's review of P4W). It would further exhibit that Canada holds a very high standard with regard to the protection of human rights, particularly in places of detention.

4.6.3 In the view of the international community...

The international community has expressed concerns similar to those of Canadian stakeholders. Again, there is an emphasis on norms as Canada was (and still is) expected to take on a leadership role to support the use of the OPCAT. The international community feels the void of Canada not becoming a signatory because it is such a prominent force in the area of human rights treaties (Olivier, personal communication, February 15, 2010). In a sense, the international community feels as though Canada has failed to live up to an inherent obligation to commit to the OPCAT, even if one does not actually exist. APT revealed that while considered to be a leader in human rights, recent incidents such as the Maher Arar case and the Afghan detainee scandal have damaged Canada's reputation and some are left with the impression that "Canada may no longer take these highly sensitive matters as seriously as they warrant" (Tremblay, SIHR, June 5, 2007). Here the logic of consequences (Hafner-Burton and Tsutsui, 2005) is reintroduced and is further emphasized by Tremblay when he states that "I do not believe Canada has any desire to part of *that* group of countries which are dragging their feet" (SIHR, June 5, 2007).

Human rights activists have also expressed disappointment in Canada's inaction because they are trying to persuade nations where torture is routinely practiced to become Party to the OPCAT. These nations can point to the fact that Canada has not become a State Party to the OPCAT as a way to delegitimize the instrument and as an excuse not to sign. Commitment research has demonstrated that states are more likely to feel pressured to commit to international human rights treaties if nations in their geographic sphere of influence do so (Goodliffe and Hawkins, 2006). Given that Canada has yet to commit to the OPCAT, almost all of North America is completely excluded from the Protocol. In her research, Dr. Steinerte has observed the influence that powerful nations within a geographic sphere can have on their neighbours and indicated that "getting Canada to sign onto the OPCAT campaign would be

a massive boost... of such a big country and prominent human rights country, there is no question” (personal communication, April 19, 2010).

It is interesting to see the dual application of the logic of appropriateness and the logic of consequences.

1) Canada has a duty to act; 2) failure to act results in the perception of Canada not doing its due diligence with respect to human rights, and 3) Canada needs to sign in order to apply pressure to other nations to follow suit. It comes full circle.

There still however, remain the different interpretations of Canada’s current stance on the OPCAT and subsequent implications. If Canadian policy actors and interested international parties view the failure to commit in a negative light and as a poor reflection on Canada, then mobilization within civil society must occur to press the issue. However, if the government does not perceive there to be a problem and does not think that Canada’s human rights reputation has suffered as a result of not committing to the OPCAT, is there then the political will or appetite to now make a decision?

4.7 The Will

Political will is needed to move through the various stages of the policy cycle. In other words, one needs political will to translate the ideas and strategies developed in the first three phases of the cycle into action and implementation (Pal, 2001). To get beyond decision-making, leadership is required.

With regard to human rights issues, the government is firm in its resolve that “the promotion and protection of human rights is an ongoing, integral part of Canadian foreign policy” (DOJ/DFAIT/PS, personal communication, May 4, 2010). Moreover, the Canadian position on human rights remains one of great resolve as values such as freedom, democracy, and the rule of law define Canadian society and should be upheld internationally (DOJ/DFAIT/PS, personal communication, May 4, 2010). The government may take the stance that leadership is displayed in the area of human rights, but has leadership been displayed in relation to the OPCAT decision-making process?

Other policy actors claim that political leadership has been lacking in the handling of the Optional Protocol here in Canada and that the delay in making a final commitment determination can be attributed to an overall lack of direction. Perhaps more than any other issue, the absence of leadership and the political will to ‘get things done,’ so to speak, emerged as the largest impediment to the ratification of the OPCAT in Canada. All of the challenges identified in Section 4.3 can be addressed and overcome, but a void of leadership (at both the federal and provincial levels) has resulted in a stagnation of the decision-making process.

1. MP Wayne Marston (SIHR, June 12, 2007):

“So I think what we’re hearing today is boiling down to one thing: we’ve not had, and continue to not have, the political will to make this happen in Canada.”

2. Ivan Zinger (personal communication, January 26, 2010):

“I think there has been very little, limited interest on this particular file. Overall this is a non-issue on Government of Canada radar. I’m not talking about the bureaucracy, I’m talking about politicians.”

“It’s been several years where that leadership hasn’t been demonstrated in concrete terms.”

3. Alex Neve (personal communication, February 11, 2010):

“There simply has not been any significant political interest or leadership here... Once or twice we’ve managed to engage ministerial level interest but it’s generally been quite fleeting.”

“Without political leadership and someone who is really going to drive the agenda and try to push us towards the finish line, I think what has happened is the discussions around ratification have floundered around a whole variety of technical considerations.”

The rights of prisoners: An issue of political sensitivity

One factor to consider is the priority given to this particular human rights instrument in comparison to others. The CRPD, while not as complex to implement, received a tremendous amount of political support and was signed and ratified very quickly. The OPCAT considerations, however, remain in the decision-making phase of the policy cycle nearly ten years after it was open for signature. That is a stark contrast when one considers that the government signed the CRPD faster than any other human rights instrument in Canadian history.

Why the difference in priority? It is beyond the scope of this analysis to postulate as to the rationale of the government in human rights decision-making, but it is worth taking into account the fact that the OPCAT pertains to the human rights of individuals who are deprived of their liberty. Other instruments, such as the CRPD, focus more on the protection of all citizens. The current political environment supports a ‘tough on crime’ agenda and the protection of the rights of offenders would seem to run contrary to this approach. Zinger notes that “political parties are afraid of being portrayed as soft on crime” (personal communication, January 26, 2010). As a result, the government may have to be called to action by civil society on this issue.

4.7.1 The call for leadership

In order for an issue to gain traction there must be some level of perceived political capital. This goes back to the notion of costs and benefits (Hathaway, 2007). Is it in the government's best interest to support the signing of the OPCAT? Is the issue perceived as being important enough to be given any degree of priority? Are there political risks associated with promoting the OPCAT domestically? This is where one can see the issue of human rights once again being politicized (Ignatieff, 2001). Leadership, in the form of political backing, is instrumental in moving issues ahead on the agenda and in getting policy implemented. Even if there are roadblocks, if there is support and commitment to progress then these impediments can be overcome.

As Alex Neve put it, there comes a point in the process where a "champion" of sorts is required to re-energize the cause, bring focus to the issue, and develop a new course of action (personal communication, February 11, 2010). But if leadership is not present, how can it be generated? The impetus to act can come from civil society, the government, or a combination of both (Birkland, 2007). Perhaps part of the challenge is that the issue of commitment to the OPCAT is no longer present on the public and political agendas.

4.8 The Public Agenda

In Section 2.4, the concepts and theories associated with agenda-setting were introduced. This first stage of the policy cycle is arguably the most important as it is here that issues are brought to the forefront of public and, possibly, political consciousness. If an issue gains public attention, there is the potential that the citizenry or civil society will place pressure upon the government to act. If the government fails to do so, public support may be lost which is always undesirable in the world of politics.

The public agenda is defined as the forum in which discussions about issues occur and where potential solutions for problems are offered (Howlett and Ramesh, 1995). If an issue gains support on the public agenda, it stands a greater chance of reaching the systemic or political agenda where action is initiated in the form of a policy response.

As discussed in Chapter 5, there are many factors that converge to determine whether an issue becomes part of the public agenda. First and foremost, the public must identify the issue as problematic. If the public does not perceive there to be a problem or does not feel as though an issue deserves attention, then change is unlikely to occur. Second, the way in which an issue is framed, has important implications

(Pal, 2001). In order for an issue to resonate with the public, it must be framed in such a way that allows the average person to understand and relate to what is conveyed (McCombs and Ghanem, 2001; Pal, 2001). Birkland (2007) identifies other factors that influence how issues are placed on the public agenda including the actors involved in the process, institutional relationships, and social/political/economic structures and context. The actors in particular, play the most significant role in setting agendas (Cobb and Ross, 1997). Although arguably, it is the media that has the greatest influence in dictating what will or will not become part of the agenda (Kawamoto, 2003).

The best way to gauge the extent to which an issue is likely on the public agenda is to examine media reporting. Often the media's agenda sets the public's agenda (McCombs and Ghanem, 2001) as the public is made aware of issues through reading newspaper reports or viewing news stories. Human rights issues often gain attention in the media through outcries from civil interest groups – it is society that calls attention to issues, not the government (Birkland, 2007; Black, 2009).

The issue of commitment to the OPCAT has been in the consultation phase for approximately ten years now, which observers view as “taking an awfully long time” to reach a decision (Crowfoot, SIHR, June 12, 2007). As the preceding discussion revealed, there appears to be an absence of political will to push for action despite the government's repeated commitment to do so. This led to a pondering about the extent to which the issue of OPCAT commitment is present on both the public and political agendas. In the absence of political will, is there public awareness about the issue? How frequently does the public read about issues of torture as it pertains to Canada as well as issues of abuse in the Canadian correctional system? Does the public read about the Convention Against Torture or the OPCAT? If these issues are not present in media reporting, it could be argued that the public has little exposure and subsequently, has no reason to identify the lack of commitment to the OPCAT as a problem. Therefore, no external pressure is placed on the government to move forward on this issue.

In an effort to determine the presence/absence of these issues on the public agenda, a brief media content analysis was conducted. The methodology for the media content analysis is outlined in Section 3.3.5. To review: the analysis was conducted using the *Globe & Mail* and the *Toronto Star* due to their large circulation rates. The timeframe chosen was from June 22nd, 2006 (the day that the OPCAT came into force) to June 22nd, 2012 to provide a six year window into the extent that certain issues were reported upon. The search parametres were as follows:

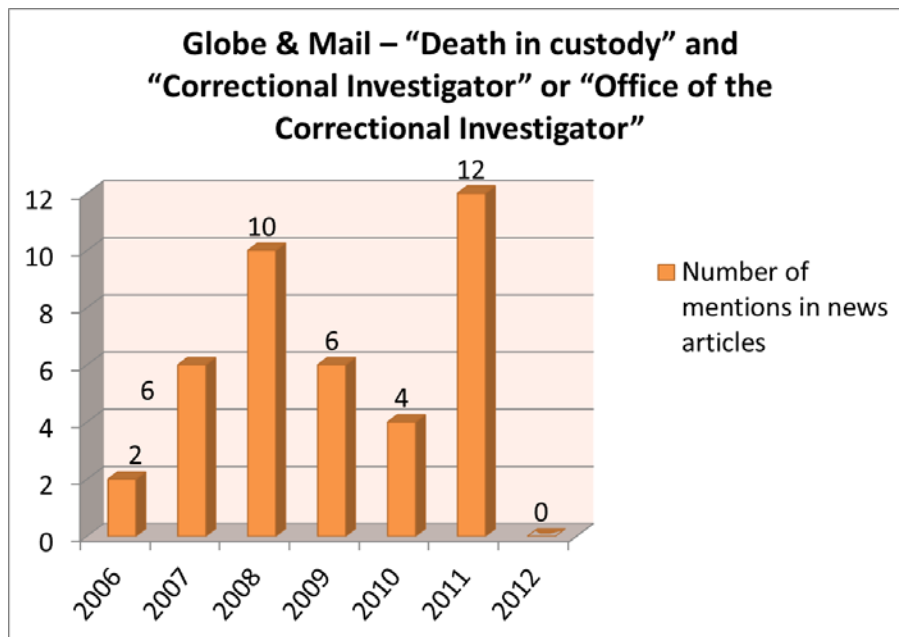
- > “Death in custody” and “Correctional Investigator” or “Office of the Correctional Investigator”;
- > “Correctional Investigator” or “Office of the Correctional Investigator”; and,

- > “Optional Protocol to the Convention Against Torture” or “OPCAT” or “Optional Protocol”.

The search terms were selected to determine the frequency with which the public reads about instances of the occurrence of deaths in custody, OCI investigations, or the activities of the OCI in general. The other focus of the content analysis was to determine how often the public reads about the UNCAT and the OPCAT in any capacity. In other words, how frequently is the public exposed to or provided knowledge about the OPCAT through the print media in Canada?

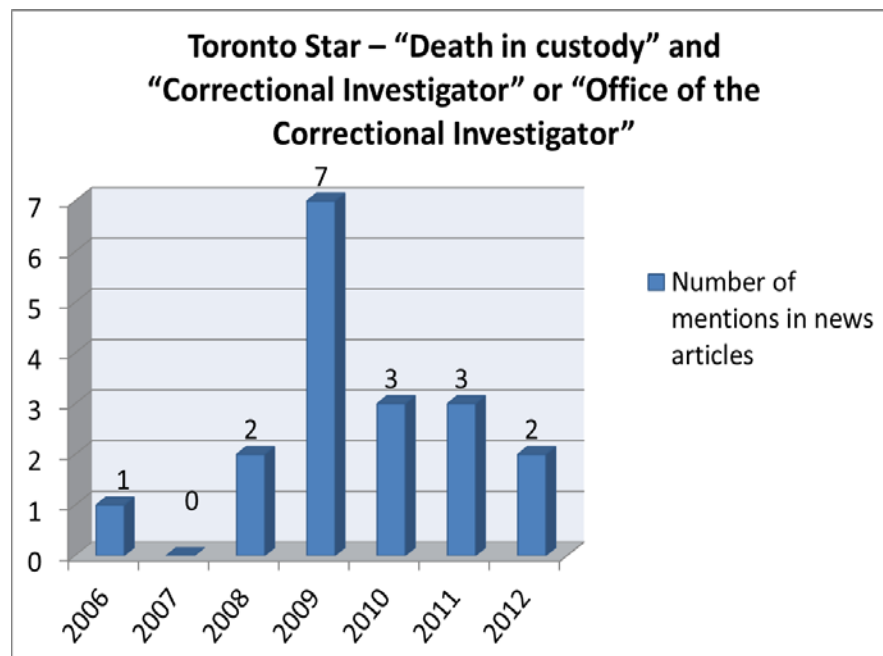
The results of this exploratory examination are as follows:

Fig. 7 – The frequency of reporting on “death in custody” and “Correctional Investigator” or “Office of the Correctional Investigator” in the *Globe & Mail*



The frequency of reporting on deaths in custody and the subsequent involvement or investigation of the OCI is minimal. Articles that focused on this issue were most frequently printed in 2011 (12) and 2008 (10). The increased reporting in 2008 can likely be attributed to the release of OCI’s findings in the Ashley Smith case. Also during the next couple of years, OCI released reports that examined CSC’s response to deaths in custody. Overall, over the course of a year, the public does not receive much information about deaths in custody in Canada via the *Globe & Mail*.

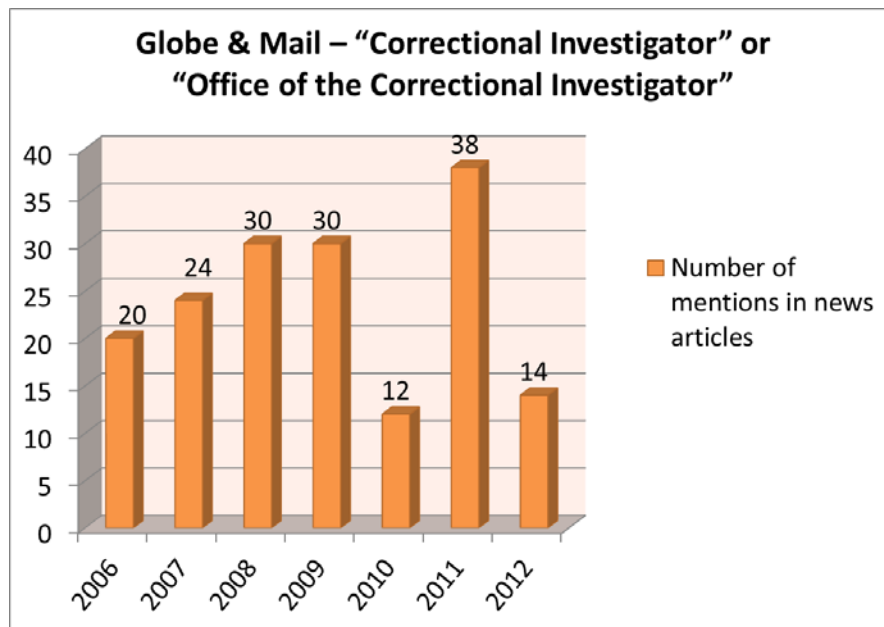
Fig. 8 – The frequency of reporting on “death in custody” and “Correctional Investigator” or “Office of the Correctional Investigator” in the *Toronto Star*



The same can be said for the *Toronto Star* although in this publication, reporting was most frequent during 2009 (7). During most years, there are only a couple of articles that make mention of deaths in custody and OCI.

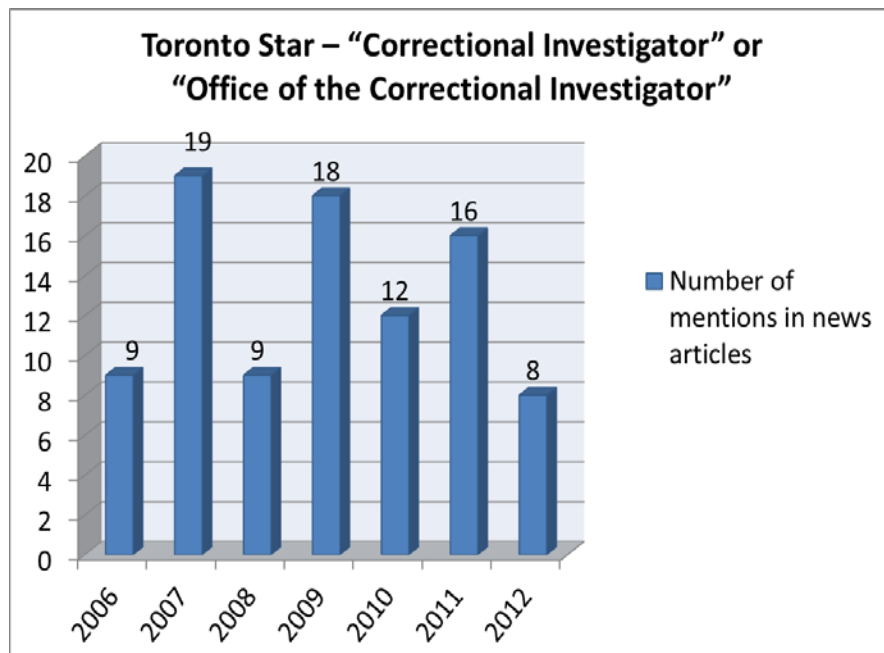
While deaths in custody are not an every day occurrence, they do warrant a certain level of attention. Between 2000 and 2009, there were 388 deaths in custody in the provinces of Ontario, Alberta, and British Columbia alone (OCI, 2011). Given that the OCI releases an Annual Report that details the issues faced in Canadian corrections (and highlights deaths in custody and recommendations for CSC improvement), the presence of between 0-12 articles annually that mention deaths in custody in Canada is somewhat disconcerting. This implies that the public does not receive much information about this particular issue through the print media.

Fig. 9 – The frequency of reporting on the “Correctional Investigator” or “Office of the Correctional Investigator” in the *Globe & Mail*



When the scope of the search is broadened to focus solely on the CI or the OCI and its activities (and not specifically deaths in custody), the frequency of reporting in the *Globe & Mail* increases. These terms appear in an average of 28 articles per year with a range of 38 to 12. The terms appeared most frequently in 2011 (38).

Fig. 10 – The frequency of reporting on the “Correctional Investigator” or “Office of the Correctional Investigator” in the *Toronto Star*



A similar phenomena occurred with *Toronto Star* reporting. The terms 'Correctional Investigator' and 'Office of the Correctional Investigator' appear in an average of 15 articles per year with a range of 8 to 19. The terms appeared most frequently in 2007 (19) which was the year of Ashley Smith's death.

By focusing solely on the occurrence of reporting as it relates to CI/OCI, one can determine that the public receives some information about the activities of the Correctional Investigator within a given year. Although this could also be attributed to the release of Annual Reports or increased attention as a result of focusing events. Without examining the content of the articles, it is difficult to determine what level of information the public receives about oversight in the Canadian correctional system via these two publications.

No figures were produced to display the frequency of reporting on the OPCAT for one specific reason – there was no reporting. In neither the *Globe & Mail* or the *Toronto Star* was there a single article that contained mention of the Optional Protocol to the Convention Against Torture between June 22nd, 2006 to June 22nd, 2012. Six years, no reporting. This result was surprising as one would expect some level of reporting in 2006 when the OPCAT came into force and the fact that the government has committed on several instances to examine the issue of ratification. As a result, the search was expanded to include the period from December 18th, 2002 when the OPCAT was formally adopted by the UN General Assembly. The result: Still nothing. No mention of the OPCAT, period. The two Canadian newspapers with the largest circulation rates have not written a single article since December of 2002 that contains mention of the OPCAT.

Based on this examination of the frequency of reporting on specific issues, one could determine that the investigation of deaths in custody and the activities of the Office of the Correctional Investigator receive some attention, although it is limited. The OPCAT is completely absent from the public agenda as there is no reporting on this human rights instrument in any capacity. If it is not on the agenda, the public is unlikely to recognize the failure to ratify in the last ten years as a problem.

A discussion about the media's ability to influence policy in this instance therefore, seems unnecessary as it does not appear as though the media, let alone the general public, has recognized that there has been a delay in OPCAT commitment decision-making. Although this is not entirely surprising given that the instrument itself has received no media attention.

The implication associated with the lack of media attention is a general unawareness on the part of the public. The citizenry has no reason to put pressure on the government to act in this instance because 1) there is no knowledge of a problem, 2) there is no knowledge about the government's lack of action,

and 3) there is little engagement from interest groups on the issue. Simply stated, this issue is not on the political agenda because it is also not on the public radar. The public is not privy to any of the information in the preceding seven subsections. No one in the media has brought attention to the issue of commitment to the OPCAT. As explained in the analytical framework, in order for an issue to transition from the public to the political agenda, the problem must be clearly defined, feasible solutions must be proposed, and civil society must back the issue to the extent that the government is no longer in a position to ignore the problem (Kingdon, 1984; Birkland 1997). Only at this point will there be a response in the form of policy.

It is clear that the issue of Canadian signature/ratification of the OPCAT has not been at the forefront of the political agenda over the last decade. Other human rights instruments such as the CRPD were quite obviously identified as a priority and, as such, the country immediately became a State Party. In order to generate the political will that was present for CRPD decision-making and apply it to the OPCAT, pressure from the citizenry is required. Lack of commitment to the OPCAT therefore, must be presented to the public as a problem, solutions as to how to overcome the identified barriers to commitment must be provided, and the public must call upon the government to sign/ratify the Optional Protocol. If the issue fails to become part of the public agenda, it will never be of primary concern on the political agenda because the impetus for action is unlikely to come from the top-down; it needs to come from the bottom-up (Black, 2009).

4.9 The Political Agenda

The political agenda consists of all issues that merit attention as determined by the political community over which the government has jurisdictional authority to act (Cobb and Elder, 1983). When an issue makes it onto the political agenda it is removed from a forum of ideas and discussion to one of decision-making and action (Birkland, 2007). While many causes are identified and advocated for within the sphere of public opinion, the citizenry is not solely responsible for bringing issues to the attention of the government. Often, the government places issues on the political agenda without outside initiation if these issues are viewed as having important political implications.

Of course, not all issues on the political agenda receive a response or are given priority in the policy-making process. Furthermore, a problem and proposed solution might be viewed as a political priority at one point in time but then be replaced on the agenda by more pressing issues. The placement of an issue on the political agenda is only the initial phase of the policy cycle; in order for a policy response to ensue, there must be a framing process (similar to what occurs in the realm of the public agenda). For

politicians to invest themselves in championing a particular cause they must see some political capital in an issue (Birkland, 2007). As such, the framing process must clearly articulate why an issue is important and what political gains are associated with taking a stance (Birkland, 1997). A realistic solution (i.e., policy) to the problem must also be proposed and the decision-making phase of the policy cycle will commence. It is at this point in the cycle that considerations about the feasibility and ability to implement said solution (policy) take place (Howlett and Ramesh, 1995).

After the decision-making phase has concluded, the issue is voted on in Parliament and the outcome will either be an abandonment of the issue, a reformulation of policy response, or the passage of laws/legislation, or in this case, treaty commitment.

The degree to which an issue is present on the political agenda is an indicator of the likelihood of a policy response. In the absence of pressure from civil society to respond to a problem, the government has little accountability to act and can choose to address or not address an issue that is present on the political agenda (Cobb and Ross, 1997). It is also important to conceptualize the political agenda as an evolving and constantly shifting entity where there are a handful of constants. Certain issues will always be on the political agenda – such as the economy – but other issues receive varying levels of priority at different times. Different governments also have different platforms and areas of focus and give precedence to the proposed policy agendas that got them elected.

In order to gauge the priority given to specific issues on the political agenda, an examination of issues on the institutional level, proposed legislation, and policy outcomes over time is the recommended approach. While outside the scope of this research, the idea for a brief examination of Canadian legislative activity was taken from the U.S. Policy Agendas Project (<http://www.policyagendas.org/>) which measures policy change in America since WWII.

The methods used for this exploration of Canadian legislative activity relied upon the records maintained by the Government of Canada. A Parliamentary database tool was used to amass information about the activities of the 39th, 40th, and 41st Parliaments from June 22nd, 2006 (when the OPCAT came into force) until June 22nd, 2012. This six year window, which was used for the media content analysis, was maintained for comparison purposes. The primary focus of this research was to determine to what extent legislation that contained the term “human rights” was proposed, how frequently “human rights” bills received Royal Assent, and the percentage of all bills that received Royal Assent that the “human rights” bills comprised. In other words, the following was an attempt to gauge

the political agenda over time to determine to what extent bills that contained human rights provisions reached royal assent (became law).

4.9.1 The political climate and its impact on government decision-making capacity

Before introducing the findings of the summary of Canadian legislative activity it is important to provide context about the political environment during this period. The information presented here should not be viewed in a vacuum and an understanding of what occurred politically during this six year timeframe is necessary to gain insight into government priorities and decision-making.

The Conservative Party of Canada under the leadership of Prime Minister Stephen Harper assumed power on April 3rd, 2006. Prior to this, the Liberals had been in power for more than a decade under Jean Chretien (November 4th, 1993 to December 12th, 2003) and Paul Martin (December 12th, 2003 to February 6th, 2006). Therefore, a Liberal government was in control of the country during the period in which the OPCAT was created and adopted by the UN General Assembly. The Liberals were also in power when the Maher Arar scandal broke. These were majority governments until the 38th Parliament when Martin had a minority. This Parliament lasted for one session and was dissolved in a vote of non-confidence following the Sponsorship Scandal and release of the Gomery Report in 2005-2006 (CBC News, 2006). When a federal election was called, the Conservatives won a minority government under Harper and have been in power since.

The Parliaments under Conservative leadership are as follows:

- > 39th Parliament (minority)
 - » First session (April 3rd, 2006 – September 14th, 2007)
 - » Second session (October 16th, 2007 – September 7th, 2008)
- > 40th Parliament (minority)
 - » First session (November 18th, 2008 – December 4th, 2008)
 - » Second session (January 26th, 2009 – December 30th, 2009)
 - » Third session (March 3rd, 2010 – March 26th, 2011)
- > 41st Parliament (majority)
 - » First session (June 2nd, 2011 – present (August, 2012))

From October of 2004 until June of 2011, Canada was led by minority governments. It can even be argued that the last year and a half under Chretien (right around the time that the OPCAT was adopted) began a period of transition where there was “a bit of paralysis because it was about waiting for Paul

Martin to take the reins” (Zinger, personal communication, January 26, 2010). This has important policy-making implications. As stated previously, the organization and capacity of a state dictates the ability of a government to establish policies. In this regard, capacity of a government to make decisions is determined by the level of agreement and unity within government structures (Pal, 2001).

When a party has a majority government, it enjoys a large degree of control over the political agenda and can implement policies as it sees fit. A majority government does not have to rely on the support of the opposition. However, a minority government is greatly constrained in its ability to implement policy because negotiations with and support of the opposition are needed (Jackson and Jackson, 2003). There is also a focus on being re-elected with a majority which factors into decision-making. A minority government will seek to implement policies that are likely to cater to the demands of the public in the hope of garnering support in an upcoming election.

The issue of minority governments emerged frequently during the stakeholder interviews and review of government documents. A number of actors pointed out that the frequent changes in government and the lack of a political majority could be a factor that has hampered the decision-making process related to the OPCAT. For example:

1. Phillippe Tremblay (Officer, Asia-Pacific Program, APT) in his testimony before the SIHR on June 5th, 2007, stated:

“We are also wondering why the Protocol has at least not been signed. Perhaps it has something to do with the change of government in early 2006, and the fact that it is a minority government may also be complicating the discussions.”

2. Ivan Zinger (personal communication, January 26, 2010):

“Many years of minority governments. It takes leadership to move that file forward and in a minority government often the priority is to get re-elected with a majority and given that there is very little political capital to be gained to deal with this issue, minority government isn’t likely to be in the driver’s seat on this issue.”

“How do you move on issues that have little political capital in a minority government setting? Canada has always demonstrated leadership but government has been self-absorbed trying to achieve policies that would be advantageous in terms of gathering support for a majority and this is not one.”

3. Alex Neve (personal communication, February 11, 2010):

“We’ve had lots of different governments, lots of different foreign ministers.”

Perhaps the lack of political will that was identified as a roadblock to commitment to the OPCAT is linked to the presence of minority governments. The lack of political capital associated with the protection of prisoners’ rights (see Section 5.7) in a minority government environment means that this particular issue was always unlikely to garner much support from politicians.

4.9.2 Competing priorities and ‘getting tough’ on crime

Certain issues always take priority on the political agenda because failure to address them means a loss of voter support. These issues include the economy, national security, healthcare, and crime. Issues such as human rights, while viewed as important, may be further down the priority list. Other urgent or pressing matters will also arise from time to time which require an immediate government response (e.g., national disaster, international conflict, etc.). During the period from the time that the OPCAT was adopted in 2002 until now, Canada has been involved in the war in Afghanistan and participated in the ‘War on Terror’, has faced a global economic crisis, and has witnessed an increasingly unstable international community in the Middle East, Europe, and Africa. These matters have been at the forefront of the political agenda and understandably so.

The government does however, still possess the ability to influence and shape the political agenda, particularly if they have a majority. As mentioned in Section 2.4.2, the government also limits the flow of information to the media which in turn controls the messages that are communicated to the public about certain issues (Pal, 2001; Besley and Pratt, 2002). In fact, sometimes the government seeks to maintain the status quo and dismantle an issue. One potential example of this type of action is the proroguing of Parliament in the midst of the Afghan detainee scandal in 2009. MPs referred to the move as an “almost despotic attempt to muzzle Parliamentarians amid controversy over the Afghan detainees affair” (CBC News, 2009). The government denied these claims and instead relayed that the decision to put Parliament on hold was done to conduct consultations about economic recovery. The true motive is not known. It is difficult to determine whether the government has made a conscious effort to control information about decisions made during the course of the OPCAT consultations but to date, all work been down behind closed doors. This limits the availability of information to both policy actors and the public (this was the reason why an ATIP request was a necessary component of this research methodology). By limiting access to information, the government has the ability to promote its own agenda at the federal level.

A majority component of the government's political agenda is addressing the issue of crime. During the minority years, the priority with regard to the crime agenda was the creation of longer mandatory sentences and combating crime. For example, Bill C-9 established minimum penalties for offences involving firearms and Bill C-2 (*Tackling Violent Crime Act*) placed a reverse onus on habitual offenders, essentially requiring them to prove that they are not worthy of a dangerous offender designation.

Upon assuming a majority government in 2011, the Conservatives continued to pursue a tougher crime agenda, passing the *Safe Streets and Communities Act* within their first 100 days in power. This omnibus bill which passed on March 12th, 2012 contained bills that reduce the use of conditional sentences and house arrest, eliminate the use of pardons in certain circumstances, and address the international transfer of Canadian citizens convicted of crimes abroad back to Canada.

These policies have the potential to increase incarceration rates and lengthen prison sentences. At the same time that this legislation has been implemented, the government has simultaneously made the decision to close Kingston Penitentiary (along with the Regional Treatment Centre) and Leclerc Institution. More than 1,000 offenders are to be moved to other institutions even though double-bunking is currently taking place. The government estimates that the closures will save an estimated \$120 million per year even though in excess of 2,700 beds must be added to other institutions to account for the overflow (Fitzpatrick, 2012).

The priority as it relates to the crime agenda appears to be the pursuit of increasingly harsher responses to criminal acts while closing institutions deemed to be too old. The rationale for the closures is to save money but other institutions will simultaneously have to be expanded. The conditions in these prisons are already crowded and the influx in population could potentially produce conditions where abuse could take place. One might argue that this is an opportune time to consider the issue of correctional oversight on the political agenda.

4.9.3 Human rights on the political agenda

The presence of certain issues such as the economy, national security, and crime on the Canadian political agenda are well established. The extent to which 'human rights' are mentioned however, is not readily known. Subsequently, the focus of the examination of legislative activities was on this particular issue.

The following figure (which appears in more depth on pages 118-119) outlines the degree to which ‘human rights’ appeared on the legislative agenda and how frequently bills with mention of the term received Royal Assent.

Fig. 11 – The presence of ‘human rights’ in the legislative activities of the 39th, 40th, and 41st Parliaments

	39-1	39-2	40-1	40-2	40-3	41-1
Total number of bills introduced	64	466	76	412	537	310
Number of bills that mentioned ‘human rights’	31	36	2	36	47	33
Number of bills that received Royal Assent	36	40	0	34	39	35
Number of bills that mentioned ‘human rights’ that received Royal Assent	6	7	0	4	12	8
Percentage of bills that mentioned ‘human rights’ that received Royal Assent	16.6%	17.5%	N/A	11.8%	30.8%	22.9%

In the first session of the 39th Parliament, 31 bills were introduced that contained mention of ‘human rights.’ Of the 36 bills that received Royal Assent, six contained the term which accounts for 16.6% of all bills that passed. There was more legislative work done in the second session as a total of 466 bills were introduced. Of that total, 36 bills were contained mention of human rights. Of the 40 bills that received Royal Assent, seven contained the term which accounts for 17.5% of all bills that passed.

In the first session of the 40th Parliament, no bills received Royal Assent. In the second session, 36 bills contained mention of ‘human rights’ and four of these received Royal Assent, accounting for 11.8% of all bills passed. The third session saw a major increase in the percentage of bills that received Royal Assent and contained mention of human rights (12). These bills accounted for 30.8% of all bills passed.

Finally, in the 41st Parliament (the first session is still ongoing at the time of writing this thesis), eight of the 35 bills that received Royal Assent contained mention of ‘human rights’ which accounts for 22.9% of all bills passed to date.

Based on these findings, it is clear that human rights are present on the political agenda to a certain degree. Human rights are mentioned in approximately 20% of all bills that received Royal Assent between April, 2006 and June, 2012. The government also moved forward with the signature and ratification of the CRPD during this timeframe.

If human rights are present and are a priority on the political agenda (as has been reaffirmed by PM Harper), then one has to consider why the OPCAT has seemingly been absent from this landscape over the last ten years.

4.10 What is known?

Based on the findings amassed through the examination of the collected data, certain things are known:

- > First, a commitment was put in place ten years ago and continues to be reiterated by the Canadian government. This is a commitment to seriously consider becoming a State Party to the OPCAT and to do the necessary work to make a determination about signature/ratification. Canada is also committed to the promotion and protection of human rights domestically and abroad.
- > Second, a process is in place to review what is necessary to fulfill the provisions and obligations of the OPCAT. This process occurs within the decision-making phase of the policy cycle and the issue of commitment to the OPCAT has been in this stage since 2002.
- > Third, there are very real and difficult challenges that must be overcome in order to be in compliance with the OPCAT provisions. However, none of these challenges are insurmountable.
- > Fourth, Canada must weigh the costs and benefits of treaty commitment in order to make a determination about becoming a State Party to the OPCAT. Stakeholders are in agreement that the benefits far outweigh any perceived costs.
- > Fifth, this process is taking a very long time to complete. There is a lack of transparency in decision-making and progress cannot be tracked; no one is aware of whether the consultation process is nearing completion or if the work has completely stagnated.
- > Sixth, the delay in commitment has altered perceptions about Canada's commitment to human rights and this is undesirable. International actors have expressed disappointment as Canada was expected and still is expected to take on a leadership role in relation to the OPCAT.
- > Seventh, there is an absence of political will and leadership on this issue which hinders progress.
- > Finally, the issue of commitment to the OPCAT is completely absent from the public agenda which means that civil society is not placing any pressure on the government to act. While human rights issues are present on the political agenda, the OPCAT has not been given priority.

If this is where the issue of commitment to the Optional Protocol stands in 2012, what are the potential implications and where does Canada go from here?

	39th Parliament - 1st Session	39th Parliament - 2nd Session	40th Parliament - 1st Session	40th Parliament - 2nd Session	40th Parliament - 3rd Session	41st Parliament - 1st Session
Dates	2006-04-03 to 2007-09-14	2007-10-16 to 2008-09-07	2008-11-18 to 2008-12-04	2009-01-26 to 2009-12-30	2010-03-03 to 2011-03-26	2011-06-02 to present
Number of Bills	64	466 Senate (47) House of Commons (419)	76 Senate (18) House of Commons (58)	412 Senate (53) House of Commons (359)	537 Senate (42) House of Commons (495)	310 Senate (25) House of Commons (285)
Originating Chamber	House of Commons (64)	Senate Government Bill (4) Senate Public Bill (43) House Government Bill (63) Private Member's Bill (356)	Senate Government Bill (1) Senate Public Bill (17) House Government Bill (5) Private Member's Bill (53)	Senate Government Bill (8) Senate Public Bill (45) House Government Bill (64) Private Member's Bill (295)	Senate Government Bill (12) Senate Private Bill (1) Senate Public Bill (29) House Government Bill (63) Private Member's Bill (432)	Senate Government Bill (11) Senate Private Bill (3) Senate Public Bill (11) House Government Bill (43) Private Member's Bill (242)
Types of Bill						
Political Affiliation	Conservative (64)	Bloc Québécois (34) Conservative (129) Independent (3) Liberal (139) NDP (158) PC (2)	Bloc Québécois (1) Conservative (9) Liberal (26) NDP (40)	Bloc Québécois (22) Conservative (99) Independent (2) Liberal (110) NDP (174) PC (4)	Bloc Québécois (27) Conservative (117) Independent Conservative (1) Liberal (136) NDP (252) PC (3)	Bloc Québécois (7) Conservative (92) Green Party (3) Independent (2) Liberal (39) NDP (166) PC (1)

Chapter 5 – Discussion

The purpose of this research was not to identify a single casual factor to explain Canada's lack of commitment to the Optional Protocol to the Convention Against Torture. On the contrary, this study was done in order to explore the practices that the government utilizes as part of its policy decision-making process and to understand how and why this process might be delayed. Part of this exploratory research involved the identification of the challenges that the government currently faces as a decision for or against signature/ratification is weighed. If anything, this research sheds light on how incredibly complex, onerous, time-consuming, and challenging the process for commitment to human rights instruments can be.

To ask why Canada has not become a State Party to the OPCAT is a very loaded question that has multiple answers. In short, there are a number of challenges that must be overcome and a high degree of coordination and collaboration amongst different levels of government and across departments and agencies is needed to tackle these barriers. These issues are all identified and discussed at length in Chapter 7. However, out of this work, one theme emerged more saliently than any other. This theme was that the real issue, the root of the problem, is the absence of political leadership. The decision-making process has stalled because there is no leadership; there is no direction and no pressure from the government to make progress and move forward.

It seems cliché to claim that there is a lack of political will and engagement on the part of the government. Interest groups often express frustration that politicians fail to act even if there is an obvious need to do so. Cliché or not, over the course of the last decade, this appears to be what has developed. Priority has not been ascribed to the issue and that is not to say that work has not been done by dedicated civil servants within the public service (documentation acquired through the ATIP request reveals that work has been completed), but there has been no sense of urgency, no drive from the top to arrive at a final determination about commitment.

All of the challenges, the barriers, the delays, at the end of the day, are surmountable. Ultimately, someone must stand up and advocate, lend support to the cause, and identify this particular issue as having importance on the political agenda. If this call to action does not come from the top-down, then the impetus for change must come from the bottom-up through engagement of civil society in the form of public interest groups or advocacy coalitions. The agenda needs to be re-set in order to make

commitment to the OPCAT a government priority. Also, re-setting the agenda can stimulate the decision-making process by bringing new ideas, new dialogue, and new direction into the fold.

As part of the bigger picture, Canada needs to be reminded of its commitment to human rights and to the prevention of abuse, particularly in light of recent allegations and events. One could argue that as a nation expected to play a leadership role in this arena, that there is an inherent or deontological need to move forward and become a State Party to this human rights instrument. If the government is interested in the promotion and protection of the rights of the citizenry then it is time to recognize that the 'homework' on this issue has been done. In May of 2012, in its report to the UN on Canada's activities, the CAT urged "the State Party to accelerate the current domestic discussions and to ratify the OPCAT as soon as possible" (CAT, June 25, 2012). The government has had ten years to make a decision and it is now time to move to the next phase of the policy cycle; it is time to implement the policy. It is time for Canada to answer the call of policy actors, civil interest groups, the United Nations, and the international community. It is time to sign and ratify the Optional Protocol.

5.1 The importance of leadership

Human rights as a concept are highly politicized. Most, if not all, politicians would agree that pursuing human rights policy is met with little resistance because there is a collective desire to be a member of good standing among the international community.

Canada has established itself as a leader and role model for other countries to follow in the area of human rights. Canada is known as a peace-keeping nation and supporter of international law as well as of the protection and promotion of human rights both domestically and abroad. This leadership has been demonstrated through Canada's commitment to UN treaties and conventions, involvement in the fight against apartheid, involvement in the establishment of war crimes tribunals, and the provision of funding to the UN Voluntary Fund for Victims of Torture (United Nations Association in Canada, 2001). Domestically, Canada has several instruments in place that protect the citizenry from abuse at the hands of the state such as the *Charter of Rights and Freedoms*. The government has also reaffirmed that it strives to promote freedom, democracy, human rights, and the rule of law (DFAIT, 2012).

At one point in time, Canadian leadership was present with regards to the OPCAT. Canada was directly involved in the drafting and adoption of the instrument as a member of the OPCAT Working Group from 1992 to 2001. Canada voted in favour of the adoption of the Optional Protocol at the Commission on Human Rights and again at the UN General Assembly. Since its formal adoption in December of 2002, Canada has continually pledged to seriously consider becoming a State Party to the OPCAT, a

commitment that was made as part of the (successful) bid for UN Human Rights Council membership in 2006. The international community was under the assumption that Canada would be one of the first nations to sign and ratify the OPCAT given the enthusiastic support that was displayed throughout the time that the instrument was conceived and developed. Ten years later, Canada is still expected to take on this leadership role (Olivier, personal communication, February 15, 2010).

At some point after 2002 however, leadership on the issue of Canadian commitment to the OPCAT evaporated, perhaps slowly over time. Initially however, the issue progressed through the policy cycle at a decent pace. There was recognition that torture is a problem and that abuses can occur within places of detention; the need for oversight became part of the policy agenda. The solution, in the form of the OPCAT, was proposed during the formulation of policy stage. The OPCAT as a policy is quite clear. The instrument aims to stop torture or abuse in all places of detention through the use of national preventive mechanisms and SPT visits. Oversight acts as a deterrent and addresses systemic issues in a non-reactive manner which is a departure from traditional oversight mechanisms.

With the issue on the agenda and a policy option selected, the next stage involved making a determination as to how to proceed and how to best implement the OPCAT. It is at this point in the policy cycle, the point at which governments adopt a particular course of action or decide to maintain the status quo (Jones and Anderson, 1984), that the leadership diminished. There are numerous factors that have contributed to the issue receiving a lower priority status including the presence of minority governments, the lack of political capital associated with protecting the rights of prisoners, the complex nature of the OPCAT provisions, the steps required to ascertain agreement from all entities involved, and so forth. The issue of OPCAT commitment essentially involves a lot of work for little perceived political gain. It is not surprising that a 'champion' of this initiative has yet to emerge from the government.

Without leadership there is a lack of accountability for indecision. No one sets timelines or assigns action items. No timeframe for a determination is established. The level of progress cannot be ascertained as the only statement provided by the public service is that work is "ongoing," consultations are "ongoing," and considerations are "ongoing." Not to overstate the point, but there is legitimate concern that the decision-making phase will continue indefinitely.

Finally, it is worth noting that Canada's lack of leadership is not only felt within the international community, but within its regional sphere of influence as well (Goodliffe and Hawkins, 2006). Canada has missed the OPCAT boat, so to speak, within the Americas. This region has the second most

ratifications of the OPCAT in the world and a total of 14 nations have become States Parties (APT, 2012). However these states are all in Latin and South America. The commitment of both Canada and the United States is conspicuously absent, which demonstrates (at least in appearance) a lack of political will on the part of these governments.

5.1.1 The difference leadership can make: The case of Australia

The presence of political will can make a huge difference in the implementation of policy. Sometimes, a change of government is necessary to invoke leadership on a particular issue. With regard to the Optional Protocol, one such example is the case of Australia. For years, the Australian government was resistant to becoming a signatory of the OPCAT as there was a belief that torture was not an issue within the country and that correctional oversight and monitoring was not necessary (Olivier, personal communication, February 15, 2010).

In 2007, an election was held and a new government (under the Australian Labour Party) assumed power. In less than three months, the issue of commitment to the OPCAT was revisited after extensive lobbying efforts at various levels of government. By September of 2008 a consultation paper (*Implementing the Optional Protocol to the Convention against Torture: Options for Australia*) was published that outlined how the OPCAT could be implemented in Australia and in May of 2009, Australia became a signatory. On February 28th, 2012, Australia took the next step and ratified the Optional Protocol. Attorney-General Nicola Roxon noted that "Ratifying OPCAT will send a strong message both within Australia and internationally that Australia takes its human rights obligations seriously" (Australian Minister for Foreign Affairs, 2012).

The Australian experience with the OPCAT demonstrates the impact that political leadership can have in the fostering of action on an issue within political forums. The Australian government had not viewed commitment to the OPCAT as a priority for five years and with a change in leadership, a more receptive ear was willing to listen to the potential benefits of Australia becoming a States Party (Steinerte, personal communication, April 19, 2010).

In Canada, the question becomes do we need a new government in order for the issue to move past the decision-making phase where it has been languishing for a decade, or do we need a groundswell of support from the opposition to force the issue onto the political agenda?

5.2 About those challenges: The illusion of insurmountability

The challenges associated with commitment to the OPCAT are not negligible; in fact they are quite burdensome. As outlined in Section 4.3, each of these issues must be addressed in order for Canada to successfully implement and be in compliance with all Optional Protocol provisions. However, through planning, leadership, support, and the allocation of adequate resources, each of the identified challenges can be overcome. What might be required is compromise among all policy actors and a collective desire to see this long process finally come to fruition by finally reaching the implementation stage of the policy cycle.

The following briefly illustrates how each of the challenges that impede Canadian commitment to the OPCAT can be surmounted:

Historical precedence of signature/ratification/compliance

- > Canada's continuation of the past policy approach of simultaneous signature/ratification/compliance is no longer necessary. There was a departure from this with the immediate signature of the CRPD. Canada became a signatory to this convention and later ratified and is still working towards compliance with the provisions. The government can no longer say that the 'simultaneous' approach is the policy that is always applied when considering whether to become a State Party to international human rights treaties.
- > Canada, at a minimum, could become a signatory and then continue to work toward the designation and implementation of a national preventive mechanism. Article 24 of the OPCAT permits the delay of implementation for several years. During this time frame, Canada could complete the work that has yet to be done.
- > Many other nations have taken longer than the prescribed amount of time to designate and implement NPMs. There is recognition of the difficulties associated with NPM implementation, few of which are unique to Canada.
- > Enough of an existing oversight framework in place in Canada to be able to work toward compliance. At this point, it is more important to move forward than it is to be in full compliance of the OPCAT provisions.

State structure and capacity

- > The federal and decentralized nature of the country is perhaps the greatest challenge that must be overcome. By no means is it impossible. Argentina was the first federal state to ratify the OPCAT back in 2005 (APT, 2011). Today, there are many examples of federal and/or decentralized nations that have ratified the OPCAT and designated NPMs.
- > Consultation and negotiation with provincial/territorial and Aboriginal governments will continue to be a challenge. Given that these consultations have been before the CCOHR for ten years, it might be time to reach compromises or a minimum level of consensus on all issues in

order to move forward. Changes in government at the provincial/territorial government must be accepted as a reality and should not continue to impede progress. The goal should be to determine what can be accomplished and while implementation moves forward, an ongoing dialogue can continue for other issues.

- > All parties must recognize that in order for there to be success, collaboration is necessary. If certain items cannot be resolved at present, it is possible to work on the ones that can be resolved. In an effort to demonstrate the Federal government's support of the OPCAT, adequate funding could be allocated to the provinces/territories as this is likely one of the primary concerns. If the Federal government allocates resources to the provinces/territories, these governments will know that support is in place to build capacity which might facilitate agreement.
- > Collaboration must also occur among all departments and agencies that will be required to carry out either the mandate of the NPM or will be affected by Canadian commitment to the OPCAT. The concerns of each agency should be identified. It might also be helpful to provide these agencies with a general scope of changes they can expect with regards to mandate, policy, operations, etc. Agencies can better prepare and are likely to be more supportive if they are provided with some direction.

Legislative changes

- > DOJ is responsible for assessing the extent of legislative work and resource needs along with any additional implications associated with commitment to the OPCAT. The file for this particular human rights instrument has been with the Department for a minimum of ten years so one could assume that this assessment has been completed. Therefore, the scope of the legislative work should already be known to some degree. The process of amending or passing legislation can be quite time consuming. As a result, the government should begin to take steps to put the proposed legislative changes before Parliament as soon as possible.
- > For the first time since 2003, Canada once again has a majority government in power. If the government elects to be supportive of commitment to the OPCAT and wishes to proceed with expediency, some of the legislative work can be done quickly if the majority votes in favour of passing the proposed amendments.

Privacy concerns

- > The respect of privacy rights and access to sensitive or confidential information is one of the lesser concerns of Canada becoming a State Party to the OPCAT. Stakeholders believe that these concerns can easily be resolved by qualified experts who can advise the government on how to proceed on this issue. The APT has also offered support to address these concerns.

Designation of the NPM

- > The designation and implementation of the national preventive mechanism is the largest undertaking of the OPCAT. Canada is fortunate in that there is already a framework of existing oversight mechanisms for places of detention across the country at the federal level (OCI) and in

many of the provinces (ombudsmen offices). An environmental scan of these existing mechanisms and identification of gaps in oversight should have already been completed to determine where additional capacity is required.

- > Due to the fact that the OPCAT now has 63 States Parties and 42 designated NPMs, Canada can look to other countries for models. These include NPMs in federal and decentralized states.
- > At least two models for a Canadian NPM have been proposed as of this date (one by the RCMP and one by OCI). The feasibility of each of these options should be determined.
- > All parties should agree on the type of model that is most appropriate and begin to determine the specifics related to implementation in an effort to move the process forward. To save time, resources, and legislative work, policy actors should consider building off of existing oversight frameworks.

Costs

- > Implementation costs are a legitimate concern. The designation and implementation of the NPM is a large expenditure and is likely to be an issue raised by the provinces/territories. The Federal government should allocate money to implement and sustain the NPM to prevent the provinces from bearing the financial burden. The current political environment is one of fiscal constraint, however, with the impending closure of Kingston Penitentiary and Leclerc Institution, the government anticipates saving approximately \$120 million per year. The transfer of offenders to other institutions has the potential to create increasingly crowded conditions. As a result, it might make sense to put some of the savings toward oversight.
- > A budget should be created. Policy actors can work within the limits of this budget to control the costs of implementation.

Ultimately, each of the identified barriers to treaty commitment can be addressed if policy actors engage collaboratively in the process. Canada needs to look to the examples set by other nations and determine what will work best to meet the country's needs with regard to the NPM and make a decision to make progress by moving toward signature and eventual implementation. The government made the decision to quickly become a State Party to the CRPD and abandoned the 'policy' of simultaneous signature/ratification/compliance. Decision-makers therefore, should no longer be bound by that precedence and instead sign and work toward ratification and eventual compliance.

Other important considerations are that the OPCAT provisions are not a great departure from what is already done in practice in Canada. Oversight of places of detention is viewed as necessary and mechanisms are in place as a result. The benefits of commitment, by all accounts, outweigh the costs and if the country believes in the provisions and the spirit of the instrument then commitment shouldn't be an issue. Finally, the barriers to commitment will always be present. No matter how long this decision-making process continues, the same challenges must be resolved; they will not evaporate over

time. Of course, all of the above recommendations are easier to state than to put into action, but if leadership is present, resolution of the challenges can be done in a collaborative fashion. Someone, whether it is the government, the public service, or a coalition of policy actors, needs to take control of the decision-making process and provide direction, a defined course of action, and a timeframe in which to accomplish tasks.

5.3 Re-setting the policy agenda

In order to foster political leadership, an issue must be viewed as a priority. The initial call to action and demand for a policy response is required once again. Section 5.1 described how such leadership was present up until the point that the OPCAT was formally adopted. What now needs to be accomplished is to get the issue back on the agenda as it was in 2002. In other words, the agenda must be re-set.

The policy cycle operates under the assumption that policy-makers solve societal problems in a systematic and linear fashion, transitioning from one step in the process to the next (Howlett and Ramesh, 1995). The reality is that policymakers do not transition seamlessly from one stage to the next. The process can stall and policy can live and die before it ever reaches the point of implementation. Upon completion of the examination of the OPCAT government documentation and stakeholder interview transcripts, as well as the review of the Canadian public and political agendas, it became obvious that the issue of commitment to the OPCAT was hopelessly mired in the decision-making stage, far removed from the political agenda.

To achieve progress and move on to the policy implementation stage of the cycle, it is necessary to go back two stages and reintroduce the issue on the agenda. In the absence of this, the question of OPCAT signature and/or ratification is likely to remain on the backburner. Therefore, it is put forward that the policy cycle is a cycle in the true sense of that word. Sometimes it does not follow the five stages. In certain instances, it may be necessary to go back a few steps if progress is not made at the rate that it should. By starting over and placing the issue back on the agenda, it will receive attention which increases the likelihood of response. Again, the impetus to act is not necessarily going to come from the top-down (i.e., the government) (Black, 2009).

In this second loop of the cycle, it is imperative to first place the issue of commitment on the public agenda. This did not occur previously. The media content analysis revealed that the issue of commitment to the OPCAT has never received any amount of media coverage which suggests that the public is not informed about the instrument. If the issue is placed on the public agenda this time around, public awareness and support can be created. If civil society identifies the lack of commitment as

problematic, the citizenry can organize and hold the government accountable for inaction by demanding a policy response (Cobb and Ross, 1997). The failure of the government to uphold its commitment to the international community in regards to the OPCAT has the potential to elicit a reaction from the public and might result in the call to action that is desperately needed.

But it is not enough for the issue to make it on the agenda; it was on the agenda previously and implementation did not ensue. The policy analysis literature states that even if an issue makes it to the political agenda there is no guarantee that policy will be enacted because the government can only give serious consideration to a limited number of problems (e.g., the economy, healthcare, etc.) at any given time (Kingdon 1984; Howlett and Ramesh, 1995). As a result, the issue of OPCAT commitment must get on what Birkland (2007) refers to as the 'decision agenda.' This is the highest level of the systemic/political agenda and it is where a decision – to act or not to act – is made. The OPCAT discussions have yet to reach this level of the agenda because an actual decision has yet to be rendered.

5.4 The impetus for action; whose responsibility is it?

For a government to engage on a particular issue there must be impetus to do so. A government is not inclined to act unless there is a perceived problem that requires a response. While it would be ideal if the government gave the issue of commitment to the OPCAT priority status independent of any external influence, the established precedent indicates that this is unlikely to happen. The current government agenda is focused on harsh crime policies and reducing the cost of corrections. A business case could be made for correctional oversight (Zinger, 2006), but this in and of itself would probably not induce political action.

The impetus and responsibility to act, therefore, falls to civil society. If organized, civil society has the potential to be a very powerful force. Interest groups or advocacy coalitions have the power to alert the public, politicians, and the media to issues that affect society (Birkland, 2007). If the OPCAT receives media attention then public interest groups and NGOs can create awareness and gain buy-in and maintain momentum (APT, 2010).

To maximize impact, an advocacy coalition of stakeholders should be formed which may include politicians, human rights institutions, interest groups, NGOs, and other actors who are involved in the policy process. All parties with a vested interest in Canadian ratification of the OPCAT should combine efforts and resources and deliver a single, consistent message to the public. This way there are no conflicting positions and the issue can be effectively communicated to the masses so they understand

what the 'ask' entails. International NGOs, such as APT, support the creation of these types of coalitions to stimulate the public agenda. Research has found that the nations with an interest in the prevention of torture and protection of human rights and where civil society is actively engaged in OPCAT promotion have higher rates of ratification and NPM implementation (Steinerte, personal communication, April 19, 2010).

5.4.1 Time to engage

In the creation of an advocacy coalition, policy actors should waste no time in engaging the public on the issue of Optional Protocol commitment. The primary task is to raise awareness through the media. The dissemination of knowledge can prove to be a powerful tool as an informed citizenry is more likely to call for action (Pal, 2001).

Before an awareness campaign can begin however, the parties that comprise the coalition must determine how the OPCAT message is to be constructed and conveyed. The goal is to communicate the message in a way that allows the public to understand the issue in a meaningful way, identify it as a priority, and call for a policy response. A common approach is to gain public sympathy and widespread media coverage by using sympathetic imagery as part of the message (Anden-Papadopoulos, 2008). The idea is to 'sell' the cause and have the public 'buy-in' to the proposed solution. With the OPCAT this becomes a challenge because the primary beneficiaries of the provisions contained within the instrument are prisoners who by in large, are not viewed in a sympathetic light.

The problem is that there tends to be great indifference outside of prison walls as the public ignores the situation of offenders serving time in the nation's prisons. The government and citizens hide behind the rhetoric that prisoners get what they deserve and therefore, any abuses that they suffer are par for the course (Cahill, 2005). It goes without saying that concern for the rights of those who have committed crimes is not the most popular case to be made. While they are marginalized members of society, it is important to not lose sight of the fact that prisoners are people and as such, they are entitled to the same rights and protections as those who are not deprived of their liberty. No matter how despicable their offence may be, prisoners should not be treated cruelly (Bernard, 1994). International law affirms these views.

An advocacy coalition would have to overcome this lack of empathy on the part of the populace. One potential solution is to personalize the message by demonstrating that humanity exists within carceral institutions. The Ashley Smith case (a focusing event), for example, incited public outrage when the details of her death were presented in the media. By highlighting cases such as this (and there are many

other examples of abuse and negligence), stakeholders can demonstrate why correctional oversight is important and how failures in the system can lead to tragic results.

Engagement with civil society is the first priority for advocacy coalitions. In this case, such engagement would serve to re-set the agenda at the public level. The second priority however, must be to engage with the other policy actors in the government and public service. These actors should not be seen as adversaries, but rather as partners in the policy-making process. Opportunities for collaboration should be taken advantage of and the issue should be presented in such a way that the government is ultimately responsible for action but can call upon interest groups to assist in the process.

In an effort to re-energize the decision-making process, the government should consider bringing more policy actors to the table to create new dialogue. These actors should include representatives from federal departments and agencies, government officials who have decision-making authority, and representatives from various NGOs or advocacy groups who have expertise in the area. Discussion should centre on the current state of the process and what/where gaps exist and how they can be addressed. This eliminates the secrecy of the process and holds the government accountable for the work that is/is not done on the OPCAT file. By making the process more transparent and inclusive, there is the potential for gains based on input from those outside of the public service.

Amnesty International (AI) Canada proposes this inclusive sort of action: “what we’ve lost is some real energy and determination to do creative thinking, to come up with innovative approaches that might push us through some of those roadblocks... if we could just get everyone to the table” (Alex Neve, personal communication, February 11, 2010). Through the engagement of civil society stakeholders like AI, the John Howard Society, the Elizabeth Fry Society and other community-based organizations, a renewed sense of vigour and dynamism as well as new vision could be injected into the policy-making process.

5.5 Canada as a leader: Is commitment deontological?

Canada is consistently held to a high regard in the international community as a leader in the promotion of human rights. Democracy, freedom, and respect for the rule of law are part of the Canadian identity.

Human rights are inherently political and influence both domestic and foreign policy. Increasingly, states view the protection of human rights as an important characteristic of democracy. An increased willingness to comply with international law and become party to human rights instruments is a trait of a functioning democracy. Acceptance of these instruments is acknowledged as a demonstration of a

nation's moral progress (Sullivan and Segers, 2007). But if human rights can be conceived as politics, is there then not a responsibility to include ethics in policy-making?

If a policy, such as a human rights instrument, is designed to protect members of society, does the government not have a moral obligation to implement it, regardless of the risks or associated costs? After all, these instruments are meant to promote the greater good in the interests of humanity. This deontological argument (the ethical/moral obligation or duty to act) adds another facet to the existing commitment arguments.

The 'logic of appropriateness' in norms theory suggests that states commit to international human rights treaties because it is the appropriate course of action as a member of the international community (Goodliffe and Hawkins, 2006). While a state may not be *obligated* to become party to a treaty, there is still an expectation that commitment will occur. For certain states, particularly those with long established records of human rights advocacy, such expectations may rise to the level of obligation.

It is true that Canada has openly stated its commitment to consideration of ratification of the OPCAT as well as support of the principles that the instrument embodies. The fact that some stakeholders believe Canada's human rights standing has suffered as a result of not committing lends credence to the notion that there is a perception of obligation on Canada's part. Does Canada have the freedom to decide that a human rights instrument, while important in principle, is simply not required or not feasible to implement without fear of judgment? Or, as a human rights leader, is there an inherent obligation to become a State Party to an instrument regardless of any challenges?

In this respect, Canada may be bound by the precedence it has set in championing other conventions and protocols. With obligation comes responsibility and Canada has an important voice within the international community. If Canada becomes a State Party to the OPCAT, it could have a cascade effect for other nations (Finnemore and Sikkink, 1998; Wotipka and Tsutsui, 2008; Hill, 2010). Due to Canada's status as a 'role model', when the nation signs an international human rights treaty, it lends a certain level of legitimacy to that instrument. The decision not to sign is perceived as a failure which may not be a fair characterization of the situation.

On the other hand, Canada does take pride in its identification as a proponent of human rights. If this issue is given such importance, there may still be an obligation to act whenever presented with an opportunity. Canada cannot call upon other nations to commit to human rights treaties if it has not done so itself. If the country wants to take a firm stance in denouncing torture, it becomes difficult to condemn the practices of other nations if Canada has failed to live up to expectations. As Ignatieff

(2001) points out, “it is inconsistent to impose international human rights constraints on other states unless we accept the jurisdiction of these instruments on our own” (36).

In light of recent developments, Canada’s human rights record is once again under scrutiny. The government has argued that not becoming party to a single instrument should not diminish the image of Canada as a protector of the rights of citizens, nor should it suggest that Canada condones the practice of torture in any way. However, when examined within the context of all of the incidents in the last few years (e.g., Arar, Khadr, Afghan detainee scandal, decision to admit evidence extracted through torture), one begins to question if Canada does need to take a more definitive stance on the issue and be critical of domestic practices. Commitment to the OPCAT has the ability to demonstrate that Canada is taking all measures possible to prevent the occurrence of abuse within places of detention nationally.

5.6 The emergence of a focusing event: The torture directives

Even with a stated commitment to promote and protect human rights and opposition to the use of torture, it was recently revealed that the Conservative government has given the RCMP and CBSA the authority to use information obtained through the use of torture techniques. Public Safety Minister Vic Toews gave the instructions to the agencies last September as was revealed through an ATIP request. These directives stated that “protection of life and property are the chief consideration when deciding on the use of information that may have been extracted through torture” (Bronskill, 2012). This seems to directly contradict the government’s position of being “strongly committed to the prevention, the prohibition, and the elimination of torture and other forms of cruel and inhumane or degrading treatment or punishment, globally and at the national level” (Ministerial Inquiry, May 31, 2007). These directives, therefore, violate the provisions of the UNCAT. Given that such policies were secretly in place, one could imagine that there is little desire to move forward in becoming a States Party to the OPCAT if Canada cannot even abide by the obligations of the original parent treaty.

Liberal leader Bob Rae is quoted as saying “I think it’s a truly disgraceful moment in Canadian public policy, and I think it sets us back a very long way” (Bronskill, 2012). The perceptions that Canadian and international stakeholders shared about Canada’s diminished reputation in the area of human rights can only further be affected by this revelation. Now more than ever, the country needs to take a firm stance on the issue of prevention of abuse within places of detention. The nation cannot have it both ways; there cannot be a condemnation of the practice but then reliance on its use for information when it is convenient and so long as the acts are not committed by Canadian operatives. A nation that is truly a leader in the area of human rights does not issue torture directives.

Toews stated that “Canada does not condone torture and we certainly do not engage in it. It is a fundamentally abhorrent practice that runs directly contrary to Canada’s reputation as a protector of human rights” (Bronskill, 2012). But in what appears to be an acceptance of the ticking time bomb scenario, Toews goes on to say that “what we also do not condone is dithering in the face of threats to the lives of Canadians.” In essence, torture is not to be ordered or perpetrated by Canadians, but if others were to torture and information proved to be of interest and/or use to the Canadian government, then there is no issue in using said information.

The emergence of the ‘torture directives’ is an example of a focusing event. All focusing events highlight a greater systemic problem and in this instance, that is the use of torture to further national security objectives (Howlett and Ramesh, 1995). It is a window of opportunity to open dialogue about torture and Canadian practices in relation to human rights in the media, within civil society, and within the government (Birkland, 2004). Not only does this focusing event bring attention to Canada’s failure to live up to UNCAT provisions, it also provides an opportunity to closely examine what Canada is and is not doing to prevent torture and acts of abuse domestically and internationally which serves to expand the issue. Civil interest groups, policy entrepreneurs, and advocacy coalitions should take advantage of the coverage of this event and use the media to bring awareness to the existence of the OPCAT and how the issue has faded from the political agenda over time. Now more than ever, the potential exists to place the Optional Protocol on the public agenda and apply pressure on the government to respond.

5.7 Something to consider: The researcher’s commentary

As a final comment on the issue of Canada’s lack of commitment to the OPCAT, I would like to take the opportunity to put forth something that I want the reader to consider after absorbing the issue in its entirety. For me, it became painfully obvious as I embarked upon this research that the issue of commitment to the OPCAT was incredibly complex and multi-faceted with various actors, structures, and contexts in play. The process of creating and implementing policy is extremely nuanced and I did my best to detail as many of those nuances as possible. My reaction to Canada’s failure to commit was initially one of surprise: Canada is a leader in human rights, how can we possibly not be party to this instrument? Upon careful examination of the issue it became apparent that while all of the challenges do hinder progress, it is the lack of leadership that has been the missing component in the equation. Policy issues are resolved when there is supportive backing.

The situation still struck me as quite ironic. Canada is a leader in human rights and yet there is no leadership on a human rights policy issue. Potential explanations for this phenomenon have been

provided throughout the body of this work, the most prominent of which is the fact that the instrument in question seeks to protect the human rights of prisoners.

Putting this aside, I think there is something to the notion that as Canadians, we enjoy a certain perception of our country and a prominent standing within the international community as a protector and promoter of human rights. For the longest time, Canada was *the* leader in human rights initiatives, to such a degree that it is engrained in our identity as Canadian citizens. But the more I examined this issue, the more I began to question how much longer that reputation will hold up. At a certain point, reliance on past accomplishments is no longer enough and it becomes a matter of 'what have you done for me lately.' Justice Louise Arbour noted that Canada appears to be resting on its laurels and that a level of complacency has set in. The perceived complacency combined with the constellation of human rights violations pertaining to torture in recent years has placed Canada in a negative light. The most recent human rights scandal (revelation of government torture directives) broke during the drafting of this chapter.

Our commitment is not as visible as it once was (Arbour, 2005). The fact that the OPCAT has not been on the public or political radar for a decade is disconcerting. It is one thing to want to be compliant with provisions and to do the necessary work to ensure this prior to commitment, it is quite another to have a process carry on for years without any identifiable progress. The lack of transparency in the decision-making process reduces policymaker accountability. There is also a degree of irony in the fact that decisions are being made about oversight mechanisms behind closed doors.

Justice Arbour advocated that Canada rise to the occasion and take a leadership role in driving the international agenda as it relates to the treatment of prisoners. This is a nice notion, but it would be difficult to helm the international agenda when such an issue cannot remain a priority on the domestic policy agenda.

I do not wish to extend the argument that Canada should have all human rights policy decisions dictated by the logic of appropriateness, as there is something to be said for taking a strategic approach to ensure compliance. Such an approach demonstrates that treaty obligations and provisions are taken seriously (as presented in this work, there is a difference between treaty commitment and treaty compliance). A consultation process is a smart approach. On the other hand, I also do not think that human rights policy decisions should be dictated by the logic of consequences either. The logic of consequences argues that states become party to an international human rights treaty as a way of paying lip service to its principles so as not to be seen as violating international norms (Hafner-Burton

and Tsutsui, 2005). Canada already adheres to the norms embodied in the OPCAT, or at least professes to. Signature at this juncture, even if full compliance could not be achieved, would not be paying lip service. On the contrary, it would finally demonstrate that Canada is willing to move forward on the issue. The last ten years of “consideration” could be interpreted as lip service. In the absence of timelines, demonstrated progress, or even action items, the perception is one of low priority status. The demonstration of due diligence and using a compliance argument as justification for a lack of progress are two different things. With regard to human rights treaty commitment there is a balance to be achieved between committing too soon and not committing soon enough and an assessment of this is largely subjective in nature.

What I ultimately want to express is that this thesis set out to examine Canada’s experience with the Optional Protocol to the Convention Against Torture and to identify possible explanations for the delay in signature and ratification. Through the course of this research however, a larger background issue began to emerge with far more significant implications. It may be time to critically question the Canadian approach to human rights in general and this is not something I would have considered at the outset of this work. The goal was to funnel down from the very broad issues of torture and human rights to the specific oversight instrument of the OPCAT. At the conclusion of this research, I find myself wondering not only about whether Canada will eventually become a State Party to the OPCAT but also the future directions the country will take in addressing torture and human rights. With the torture directive revelations this August (Bronskill, 2012) it became clear that Canada cannot rely on its past human rights record any longer. We, as a country, need to stop romanticizing and instead be critical and call upon the government to display leadership, not just in relation to the OPCAT but on the issue of human rights in general. Canada simply cannot lead when it is behind.

Ivan Zinger (2006) put forward the notion that corrections is in the business of human rights. Let’s take that one step further. Canada should be in the business of human rights.

Going back to the beginning of the analytic framework, public policy is defined: Public policy results from decisions made by governments which can either be a specific action such as the passage of a law or the implementation of a program OR a calculated decision to do nothing and maintain the status quo (Dunn, 2004). On its most basic level, policy is a government decision of either action or inaction.

If Canada takes a corporate approach to the issue of human rights, then a policy of inaction does little for revenue. Therefore, the policy approach to human rights should never be one of inaction.

Chapter 6 – Conclusions

The issues of torture and human rights remain the subject of focus in a current global environment of fear. National security concerns increasingly infringe upon the basic human rights of the citizenry; protecting the rights of many at the expense of a few. In an effort to protect human rights, international treaties, protocols, and monitoring bodies are in place to hold nations accountable for their actions. The Optional Protocol to the Convention Against Torture (OPCAT) is one such instrument. The objective of the OPCAT is to not only address systemic abuse or mistreatment but to prevent it from occurring through increased transparency and openness. The premise of the instrument is that a system of regular visits to detention facilities will combat abuse and human rights violations.

Domestically, there is need for oversight in places of detention to ensure that acts of abuse or mistreatment do not occur. Due to the closed environment of prisons, there is greater potential for acts of cruel or inhuman punishment which is why transparency is of such importance.

Canada has given support to the OPCAT since the instrument was drafted. Canada also voted in favour of its adoption at the UN General Assembly in 2002 and has continually voiced its adherence to the spirit of the instrument. Moreover, Canada already has multiple oversight mechanisms in place for monitoring places of detention which reveals that there is support for the measures advocated by the protocol. By becoming a State Party to the OPCAT, Canada could add to its existing oversight network with the establishment of a National Preventive Mechanism – an oversight body with a preventive approach in contrast to the available reactionary oversight that is currently in place. However, in the ten years following the adoption of the OPCAT, Canada is still yet to become a State Party. This research set out to determine why Canada, a nation regarded as a leader in human rights, has yet to ratify the Optional Protocol.

Through an examination of the policy-making process, stakeholder interviews, and review of government documents, common barriers emerged. These include a complicated and drawn out policy consultation process (with the provinces/territories, Aboriginal governments, and government departments/agencies) that is a function of the state's structure and capacity, historical precedence of signing and ratifying human instruments only after compliance with provisions can be ensured, legislative changes, privacy considerations, the designation of NPMs, and costs concerns. While each of these barriers is a real challenge, they are by no means insurmountable. The actual extent of progress

made on the OPCAT file is impossible to track due to the lack of transparency and secretive nature of the decision-making process. This has led to a ten year delay in making a commitment determination.

The delay has influenced perceptions on Canada's ability to be a human rights leader and this coupled with scandals (e.g., Afghan detainee scandal, torture directives revelations) has begun to diminish Canada's standing within the international community. The UN, NGOs, and other nations expect Canada to ratify the OPCAT and to do so soon.

The greatest impediment to progress in this case is an absence of political will to drive the issue on the political agenda. The likely reason why there is an absence of leadership is because the policy in question is concerned with the rights of detainees which are not an overly sympathetic group. Politicians tend to pursue policies with political capital and protecting the rights of prisoners is not viewed as a priority.

To foster accountability and elicit a government response, civil society will have to organize and call for action. But first the issue of commitment to the OPCAT must make it to the public agenda, where it has always been absent. This means that a return to the first stage of the policy cycle is necessary and the agenda must be re-set. Engagement from advocacy coalitions can push the message in the absence of government support. If pressure is applied on the government from civil society, a policy response (in the form of commitment) might follow.

But out of this, Canada must also be critical of its current practices with regards to the protection and promotion of human rights and the denouncement of torture. Canada should also consider its current human rights obligations and the expectations of other nations to serve as a role model within the international community. Ultimately, Canada cannot be complacent in its commitment to human rights, not if its leadership role is to be preserved. Through signature and ratification of the OPCAT and the establishment of a NPM, Canada would demonstrate that it is doing everything possible to prevent abuse in places of detention. The current gap in oversight would be closed and the development and implementation of preventive monitoring procedures and regular visits could lead to the identification of systemic problems inherent within the Canadian correctional system. These issues could subsequently become the focus of correctional policy in an effort to reduce their prevalence and/or occurrence in the future.

With regards to setting an example internationally, other nations (some with federal and decentralized political structures) will consider ratification of the OPCAT in the future and might benefit from learning about the Canadian experience with the instrument to date. The critical insight gained from this in-

depth examination of the policy cycle as it applies to human rights instrument implementation can be utilized by countries as they begin the process themselves. While each nation will have a different process in place, the general principles of leadership, communication, information-sharing, and engagement with civil society are important components that will make for a smooth decision-making process in any context.

While this research has practical application for nations that engage in treaty commitment processes, there is the potential for expansion of some of the methodology contained within the study. First, future research might take the form of comparative studies that examine the decision-making process for commitment to different types of treaties and the length of time said process takes to complete. Even a direct comparison of the commitment decisions related to different human rights treaties would provide further understanding of this complex yet secretive process (e.g., OPCAT vs. CRPD). The policy actors could apply any lessons learned and engage in more effective practices to streamline the policy-making process so as to eliminate unnecessary delays.

Other avenues of research could include a longitudinal investigation to measure changes in the Canadian political agenda in the areas of crime and human rights. The overview of legislative activities presented in this thesis was a mere snapshot of the political agenda over a six year period. A more robust study could identify trends and determine whether or not Canada's commitment to human rights initiatives as evidenced in a larger number of areas have remained consistent over time or whether an issue has become less of a priority. It might be interesting to contrast trends in human rights legislative activities with trends in crime and national security policies to determine if the former is less present across multiple jurisdictions when more repressive crime and/or security legislation is tabled.

Another potential area for study is exploratory research on the deontological commitment argument put forth in the discussion chapter. Human rights treaty commitment literature is a growing body of research and this theory might have validity, particularly among nations viewed as human rights leaders (the European region may be the most appropriate region to test such a theory).

Lastly, it would be interesting to study whether there is a correlation between focusing events that receive widespread media coverage and the development or passage of human rights legislation. The link between media reporting and the shaping of public opinion is well established but less is known about the relationship between media reporting and the creation of public policy so this is an opportunity to close that particular gap in the literature.

It will be interesting to see if the government takes action and eventually becomes a State Party to the Optional Protocol. In the interim, the Canadian human rights record is likely to continue to come under scrutiny which may have implications for both domestic and foreign policy. It remains to be seen whether Canada rests on its laurels or pursues a more active human rights policy agenda.

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Appendix A

International Human Rights Declarations, Conventions, Instruments, and Bodies

International Human Rights Declarations, Conventions, Instruments, and Bodies

International Human Rights Declarations

Declarations
>Universal Declaration of Human Rights (1948) >Declaration of the Rights of the Child (1959) > Declaration on the Elimination of All Forms of Racial Discrimination (1963) > Declaration on the Elimination of Discrimination Against Women (1967) > Declaration on the Rights of Mentally Retarded Persons (1971) >Declaration on the Rights of Disabled Persons (1975) >Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1975) >Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) >Declaration on the Right of Peoples to Peace (1984) > Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) > Declaration on the Protection of All Persons from Enforced Disappearance (1992) > Declaration on the Elimination of Violence Against Women (1993) > Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1998) > Declaration on the Rights of Indigenous Peoples (2007)

International Human Rights Conventions

Conventions (Treaties)
>Convention on the Prevention and the Punishment of the Crime of Genocide (1948) >Geneva Conventions (1949) > International Convention on the Elimination of All Forms of Racial Discrimination (1965) > International Covenant on Civil and Political Rights (1966) > International Covenant on Economic, Social, and Cultural Rights (1966) > Convention on the Elimination of All Forms of Racial Discrimination (1966) > Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968) > Convention on the Elimination of All Forms of Discrimination Against Women (1979) > Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984) > Convention on the Rights of the Child (1989) > Convention on the Rights of Persons with Disabilities (2006) > International Convention for the Protection of All Persons from Enforced Disappearance (2006)

Other International Human Rights Instruments

Other Instruments
>Standard Minimum Rules for the Treatment of Prisoners (1957) > Code of Conduct for Law Enforcement Officials (1979) > Principles of Medical Ethics relevant to the Role of Health Personnel in the Protection of Prisoners and Detainees Against Torture (1982) >United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985)

Other Instruments
> Body of Principles for the Protection of All Persons Under Any Form of Detention/Imprisonment (1988) > United Nations Standard Minimum Rules for Non-Custodial Measures (1990) > United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (1990) > Basic Principles of the Use of Force and Firearms by Law Enforcement Officials (1990) > Basic Principles for the Treatment of Prisoners (1990) > Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (1991) > Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (1993) > Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Istanbul Protocol) (1999)

(Harbury, 2005; Clapham, 2007; Finley, 2008; OHCHR, 2011)

UN Charter-based Bodies

- > Human Rights Council
- > Universal Periodic Review
- > Human Rights Council
- > Special Procedures of the Human Rights Council

UN Treaty-based Bodies

- > Human Rights Committee
- > Committee on Economic, Social, and Cultural Rights
- > Committee on the Elimination of Racial Discrimination
- > Committee on the Elimination of Discrimination Against Women
- > Committee Against Torture
- > Committee on the Rights of the Child
- > Committee on Migrant Workers
- > Committee on the Rights of Persons with Disabilities
- > Committee on Enforced Disappearances

*(OHCHR, 2011)

Appendix B

UN's Convention Against Torture

United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

**Adopted and opened for signature, ratification and accession by General Assembly
resolution 39/46
of 10 December 1984**

Entered into force 26 June 1987, in accordance with article 27 (1)

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

PART I

Article 1

1. 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.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

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.

Article 5

1. Each 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.

2. 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 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

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.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.
4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. 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 I, 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 of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

PART II

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Six members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.

4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article.

Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.

Article 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.

3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.

4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Commission shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

Article 21

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down

in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure;

- (a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;
- (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
- (c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;
- (d) The Committee shall hold closed meetings when examining communications under this article; (e) Subject to the provisions of subparagraph
- (e) the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;
- (f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
- (g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;
- (h) The Committee shall, within twelve months after the date of receipt of notice under

subparagraph (b), submit a report:

- (i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
- (ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party

concerned. 5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:

- (a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;
- (b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary General, unless the State Party has made a new declaration.

Article 23

The members of the Committee and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph 1 (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 24

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

PART III

Article 25

1. This Convention is open for signature by all States. 2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary General of the United Nations.

Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.
2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 29

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary General shall thereupon communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 30

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 31

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 32

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

(a) Signatures, ratifications and accessions under articles 25 and 26;

(b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;

(c) Denunciations under article 31.

Article 33

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

Appendix C

States Parties and Signatories to the UN's Convention Against Torture

*As of August 2012

Convention Against Torture (CAT) States Parties and Signatories

As of August 2012, there are 151 States Parties and 78 signatories of the CAT.

Participant	Signature	Ratification, Accession(a), Succession(d)
Afghanistan	4 Feb 1985	1 Apr 1987
Albania		11 May 1994 a
Algeria	26 Nov 1985	12 Sep 1989
Andorra	5 Aug 2002	22 Sep 2006
Antigua and Barbuda		19 Jul 1993 a
Argentina	4 Feb 1985	24 Sep 1986
Armenia		13 Sep 1993 a
Australia	10 Dec 1985	8 Aug 1989
Austria	14 Mar 1985	29 Jul 1987
Azerbaijan		16 Aug 1996 a
Bahamas	16 Dec 2008	
Bahrain		6 Mar 1998 a
Bangladesh		5 Oct 1998 a
Belarus	19 Dec 1985	13 Mar 1987
Belgium	4 Feb 1985	25 Jun 1999
Belize		17 Mar 1986 a
Benin		12 Mar 1992 a
Bolivia (Plurinational State of)	4 Feb 1985	12 Apr 1999
Bosnia and Herzegovina		1 Sep 1993 d
Botswana	8 Sep 2000	8 Sep 2000
Brazil	23 Sep 1985	28 Sep 1989
Bulgaria	10 Jun 1986	16 Dec 1986
Burkina Faso		4 Jan 1999 a
Burundi		18 Feb 1993 a
Cambodia		15 Oct 1992 a
Cameroon		19 Dec 1986 a
Canada	23 Aug 1985	24 Jun 1987
Cape Verde		4 Jun 1992 a
Chad		9 Jun 1995 a
Chile	23 Sep 1987	30 Sep 1988
China	12 Dec 1986	4 Oct 1988
Colombia	10 Apr 1985	8 Dec 1987
Comoros	22 Sep 2000	
Congo		30 Jul 2003 a
Costa Rica	4 Feb 1985	11 Nov 1993
Côte d'Ivoire		18 Dec 1995 a
Croatia		12 Oct 1992 d
Cuba	27 Jan 1986	17 May 1995
Cyprus	9 Oct 1985	18 Jul 1991

Czech Republic		22 Feb 1993 d
Democratic Republic of the Congo		18 Mar 1996 a
Denmark	4 Feb 1985	27 May 1987
Djibouti		5 Nov 2002 a
Dominican Republic	4 Feb 1985	24 Jan 2012
Ecuador	4 Feb 1985	30 Mar 1988
Egypt		25 Jun 1986 a
El Salvador		17 Jun 1996 a
Equatorial Guinea		8 Oct 2002 a
Estonia		21 Oct 1991 a
Ethiopia		14 Mar 1994 a
Finland	4 Feb 1985	30 Aug 1989
France	4 Feb 1985	18 Feb 1986
Gabon	21 Jan 1986	8 Sep 2000
Gambia	23 Oct 1985	
Georgia		26 Oct 1994 a
Germany	13 Oct 1986	1 Oct 1990
Ghana	7 Sep 2000	7 Sep 2000
Greece	4 Feb 1985	6 Oct 1988
Guatemala		5 Jan 1990 a
Guinea	30 May 1986	10 Oct 1989
Guinea-Bissau	12 Sep 2000	
Guyana	25 Jan 1988	19 May 1988
Holy See		26 Jun 2002 a
Honduras		5 Dec 1996 a
Hungary	28 Nov 1986	15 Apr 1987
Iceland	4 Feb 1985	23 Oct 1996
India	14 Oct 1997	
Indonesia	23 Oct 1985	28 Oct 1998
Iraq		7 Jul 2011 a
Ireland	28 Sep 1992	11 Apr 2002
Israel	22 Oct 1986	3 Oct 1991
Italy	4 Feb 1985	12 Jan 1989
Japan		29 Jun 1999 a
Jordan		13 Nov 1991 a
Kazakhstan		26 Aug 1998 a
Kenya		21 Feb 1997 a
Kuwait		8 Mar 1996 a
Kyrgyzstan		5 Sep 1997 a
Lao People's Democratic Republic	21 Sep 2010	
Latvia		14 Apr 1992 a
Lebanon		5 Oct 2000 a
Lesotho		12 Nov 2001 a
Liberia		22 Sep 2004 a

Libya		16 May 1989 a
Liechtenstein	27 Jun 1985	2 Nov 1990
Lithuania		1 Feb 1996 a
Luxembourg	22 Feb 1985	29 Sep 1987
Madagascar	1 Oct 2001	13 Dec 2005
Malawi		11 Jun 1996 a
Maldives		20 Apr 2004 a
Mali		26 Feb 1999 a
Malta		13 Sep 1990 a
Mauritania		17 Nov 2004 a
Mauritius		9 Dec 1992 a
Mexico	18 Mar 1985	23 Jan 1986
Monaco		6 Dec 1991 a
Mongolia		24 Jan 2002 a
Montenegro		23 Oct 2006 d
Morocco	8 Jan 1986	21 Jun 1993
Mozambique		14 Sep 1999 a
Namibia		28 Nov 1994 a
Nauru	12 Nov 2001	
Nepal		14 May 1991 a
Netherlands	4 Feb 1985	21 Dec 1988
New Zealand	14 Jan 1986	10 Dec 1989
Nicaragua	15 Apr 1985	5 Jul 2005
Niger		5 Oct 1998 a
Nigeria	28 Jul 1988	28 Jun 2001
Norway	4 Feb 1985	9 Jul 1986
Pakistan	17 Apr 2008	23 Jun 2010
Palau	20 Sep 2011	
Panama	22 Feb 1985	24 Aug 1987
Paraguay	23 Oct 1989	12 Mar 1990
Peru	29 May 1985	7 Jul 1988
Philippines		18 Jun 1986 a
Poland	13 Jan 1986	26 Jul 1989
Portugal	4 Feb 1985	9 Feb 1989
Qatar		11 Jan 2000 a
Republic of Korea		9 Jan 1995 a
Republic of Moldova		28 Nov 1995 a
Romania		18 Dec 1990 a
Russian Federation	10 Dec 1985	3 Mar 1987
Rwanda		15 Dec 2008 a
San Marino	18 Sep 2002	27 Nov 2006
Sao Tome and Principe	6 Sep 2000	
Saudi Arabia		23 Sep 1997 a
Senegal	4 Feb 1985	21 Aug 1986
Serbia		12 Mar 2001 d
Seychelles		5 May 1992 a

Sierra Leone	18 Mar 1985	25 Apr 2001
Slovakia		28 May 1993 d
Slovenia		16 Jul 1993 a
Somalia		24 Jan 1990 a
South Africa	29 Jan 1993	10 Dec 1998
Spain	4 Feb 1985	21 Oct 1987
Sri Lanka		3 Jan 1994 a
St. Vincent and the Grenadines		1 Aug 2001 a
Sudan	4 Jun 1986	
Swaziland		26 Mar 2004 a
Sweden	4 Feb 1985	8 Jan 1986
Switzerland	4 Feb 1985	2 Dec 1986
Syrian Arab Republic		19 Aug 2004 a
Tajikistan		11 Jan 1995 a
Thailand		2 Oct 2007 a
The former Yugoslav Republic of Macedonia		12 Dec 1994 d
Timor-Leste		16 Apr 2003 a
Togo	25 Mar 1987	18 Nov 1987
Tunisia	26 Aug 1987	23 Sep 1988
Turkey	25 Jan 1988	2 Aug 1988
Turkmenistan		25 Jun 1999 a
Uganda		3 Nov 1986 a
Ukraine	27 Feb 1986	24 Feb 1987
United Arab Emirates		19 Jul 2012 a
United Kingdom of Great Britain and Northern Ireland	15 Mar 1985	8 Dec 1988
United States of America	18 Apr 1988	21 Oct 1994
Uruguay	4 Feb 1985	24 Oct 1986
Uzbekistan		28 Sep 1995 a
Vanuatu		12 Jul 2011 a
Venezuela (Bolivarian Republic of)	15 Feb 1985	29 Jul 1991
Yemen		5 Nov 1991 a
Zambia		7 Oct 1998 a

*Source: United Nations Treaty Collection, 2012.

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en

Appendix D

OPCAT Working Group Session Summaries

Session by Session Account of the OPCAT Working Group (1992-2002)

Dates	Session
October 19-30 th , 1992	Some states considered that the Costa Rica draft of the protocol could be accepted but others wanted a review and discussion of the draft text. The first reading and discussion of the draft text commended.
October 25 th -November 5 th , 1993	First reading and discussion of draft text (continued).
October 17-28 th , 1994	First reading and discussion of draft text (continued).
October 30 th – November 10 th , 1995	The first reading of the draft text was completed through Articles 1-21. Consensus was not reached among the representatives. Items that were the subject of discussion included the Subcommittee (SPT) visits and objections by a state (Articles 10 and 12). Another issue was Article 14 – the possibility of UN Committee Against Torture making a recommendation public if the state refused to cooperate with the SPT.
October 14-25 th , 1996	Second reading of the draft text; consensus could not be reached on Articles 1 and 8.
October 13-24 th , 1997	Second reading of the draft text (continued); no consensus reached.
September 28 th – October 9 th , 1998	Second reading of the draft text (continued); only a few provisions were adopted and discussions about Articles 10 and 13 were delayed.
October 4-15 th , 1999	Switzerland and Sweden called on Costa Rica to create a renewed effort. Only a few provisions were adopted; issues with Articles 1, 8, 10, 12, and 13 remained unresolved.
February 12 th -31 st , 2001	Mexico brought forth a proposal that suggested the creation of national preventive mechanisms that would be established in parallel to the international preventive mechanism; Sweden submitted another proposal that promoted the original idea of an international mechanism but also allowed for the inclusion of a national preventive mechanism.
January 14-25 th , 2002	UN bodies applied pressure to the Working Group to complete a final version of the Protocol text. A lack of consensus remained among represented states. A compromise text was presented by the Chairperson. This new text included elements that were supported by the majority during the ten years the Working Group met and contained components from both the Mexican and Swedish proposals.

*Source: Optional Protocol: A Manual for Prevention, APT, 2005.

Appendix E
UN's Optional Protocol to the Convention
Against Torture

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

**Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of
the United Nations by resolution A/RES/57/199.**

Entered into force on 22 June 2006

PREAMBLE

The States Parties to the present Protocol,

Reaffirming that torture and other cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights,

Convinced that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment,

Recalling that articles 2 and 16 of the Convention 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,

Recognizing that States have the primary responsibility for implementing those articles, that strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common responsibility shared by all and that international implementing bodies complement and strengthen national measures,

Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures,

Recalling also that the World Conference on Human Rights firmly declared that efforts to eradicate torture should first and foremost be concentrated on prevention and called for the adoption of an optional protocol to the Convention, intended to establish a preventive system of regular visits to places of detention,

Convinced that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention, Have agreed as follows:

PART I

General principles

Article 1

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Article 2

1. A Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (hereinafter referred to as the Subcommittee on Prevention) shall be established and shall carry out the functions laid down in the present Protocol.
2. The Subcommittee on Prevention shall 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.
3. Equally, the Subcommittee on Prevention shall be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.
4. The Subcommittee on Prevention and the States Parties shall cooperate in the implementation of the present Protocol.

Article 3

Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).

Article 4

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where

persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.

2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting in which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

PART II

Subcommittee on Prevention

Article 5

1. The Subcommittee on Prevention shall consist of ten members. After the fiftieth ratification or accession to the present Protocol, the number of the members of the Subcommittee on Prevention shall increase to twenty-five.

2. The members of the Subcommittee on Prevention shall be chosen from among persons of high moral character, having 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.

3. In the composition of the Subcommittee on Prevention due consideration shall be given to equitable geographic distribution and to the representation of different forms of civilization and legal systems of the States Parties.

4. In this composition consideration shall also be given to balanced gender representation on the basis of the principles of equality and non-discrimination.

5. No two members of the Subcommittee on Prevention may be nationals of the same State.

6. The members of the Subcommittee on Prevention shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee on Prevention efficiently.

Article 6

1. Each State Party may nominate, in accordance with paragraph 2 of the present article, up to two candidates possessing the qualifications and meeting the requirements set out in article 5, and in doing so shall provide detailed information on the qualifications of the nominees.
2.
 - (a) The nominees shall have the nationality of a State Party to the present Protocol;
 - (b) At least one of the two candidates shall have the nationality of the nominating State Party;
 - (c) No more than two nationals of a State Party shall be nominated;
 - (d) Before a State Party nominates a national of another State Party, it shall seek and obtain the consent of that State Party.
3. At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list, in alphabetical order, of all persons thus nominated, indicating the States Parties that have nominated them.

Article 7

1. The members of the Subcommittee on Prevention shall be elected in the following manner:
 - (a) Primary consideration shall be given to the fulfilment of the requirements and criteria of article 5 of the present Protocol;
 - (b) The initial election shall be held no later than six months after the entry into force of the present Protocol;
 - (c) The States Parties shall elect the members of the Subcommittee on Prevention by secret ballot;
 - (d) Elections of the members of the Subcommittee on Prevention shall be held at biennial meetings of the States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee on Prevention shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.
2. If during the election process two nationals of a State Party have become eligible to serve as members of the Subcommittee on Prevention, the candidate receiving the higher number of votes shall serve as the member of the Subcommittee on Prevention. Where nationals have received the same number of votes, the following procedure applies:

- (a) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Subcommittee on Prevention;
- (b) Where both candidates have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall become the member;
- (c) Where neither candidate has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which candidate shall be the member.

Article 8

If a member of the Subcommittee on Prevention dies or resigns, or for any cause can no longer perform his or her duties, the State Party that nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 5, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

Article 9

The members of the Subcommittee on Prevention shall be elected for a term of four years. They shall be eligible for re-election once if renominated. The term of half the members elected at the first election shall expire at the end of two years; immediately after the first election the names of those members shall be chosen by lot by the Chairman of the meeting referred to in article 7, paragraph 1 (d).

Article 10

1. The Subcommittee on Prevention shall elect its officers for a term of two years. They may be re-elected.

2. The Subcommittee on Prevention shall establish its own rules of procedure. These rules shall provide, inter alia, that:

- (a) Half the members plus one shall constitute a quorum;
- (b) Decisions of the Subcommittee on Prevention shall be made by a majority vote of the members present;
- (c) The Subcommittee on Prevention shall meet in camera.

3. The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee on Prevention. After its initial meeting, the Subcommittee on Prevention shall meet at such times as shall be provided by its rules of procedure. The Subcommittee on Prevention and the Committee against Torture shall hold their sessions simultaneously at least once a year.

PART III

Mandate of the Subcommittee on Prevention

Article 11

1. The Subcommittee on Prevention shall:

- (a) Visit the places referred to in article 4 and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
- (b) In regard to the national preventive mechanisms:
 - (i) Advise and assist States Parties, when necessary, in their establishment;
 - (ii) Maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities;
 - (iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
 - (iv) Make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment;
- (c) Cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.

Article 12

In order to enable the Subcommittee on Prevention to comply with its mandate as laid down in article 11, the States Parties undertake:

- (a) To receive the Subcommittee on Prevention in their territory and grant it access to the places of detention as defined in article 4 of the present Protocol;
- (b) To provide all relevant information the Subcommittee on Prevention may request to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
- (c) To encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms;
- (d) To examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures.

Article 13

1. The Subcommittee on Prevention shall establish, at first by lot, a programme of regular visits to the States Parties in order to fulfil its mandate as established in article 11.
2. After consultations, the Subcommittee on Prevention shall notify the States Parties of its programme in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted.
3. The visits shall be conducted by at least two members of the Subcommittee on Prevention. These members may be accompanied, if needed, by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol who shall be selected from a roster of experts prepared on the basis of proposals made by the States Parties, the Office of the United Nations High Commissioner for Human Rights and the United Nations Centre for International Crime Prevention. In preparing the roster, the States Parties concerned shall propose no more than five national experts. The State Party concerned may oppose the inclusion of a specific expert in the visit, whereupon the Subcommittee on Prevention shall propose another expert.
4. If the Subcommittee on Prevention considers it appropriate, it may propose a short follow-up visit after a regular visit.

Article 14

1. In order to enable the Subcommittee on Prevention to fulfill its mandate, the States Parties to the present Protocol undertake to grant it:
 - (a) Unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;

- (b) Unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention;
- (c) Subject to paragraph 2 below, unrestricted access to all places of detention and their installations and facilities;
- (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the Subcommittee on Prevention believes may supply relevant information;
- (e) The liberty to choose the places it wants to visit and the persons it wants to interview.

2. 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.

Article 15

No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee on Prevention or to its delegates any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

Article 16

1. The Subcommittee on Prevention shall communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national preventive mechanism.
2. The Subcommittee on Prevention shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party. If the State Party makes part of the report public, the Subcommittee on Prevention may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned.
3. The Subcommittee on Prevention shall present a public annual report on its activities to the Committee against Torture.
4. If the State Party refuses to cooperate with the Subcommittee on Prevention according to articles 12 and 14, or to take steps to improve the situation in the light of the recommendations of the Subcommittee on Prevention, the Committee against Torture may, at the request of the Subcommittee on Prevention, decide, by a majority of its members, after the State Party has

had an opportunity to make its views known, to make a public statement on the matter or to publish the report of the Subcommittee on Prevention.

PART IV

National preventive mechanisms

Article 17

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

Article 18

1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.
2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.
3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.
4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.

Article 19

The national preventive mechanisms shall be granted at a minimum the power:

- (a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;

- (b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
- (c) To submit proposals and observations concerning existing or draft legislation.

Article 20

In order to enable the national preventive mechanisms to fulfill their mandate, the States Parties to the present Protocol undertake to grant them:

- (a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
- (b) Access to all information referring to the treatment of those persons as well as their conditions of detention;
- (c) Access to all places of detention and their installations and facilities;
- (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;
- (e) The liberty to choose the places they want to visit and the persons they want to interview;
- (f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

Article 21

1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.

Article 22

The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.

Article 23

The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.

PART V

Declaration

Article 24

1. Upon ratification, States Parties may make a declaration postponing the implementation of their obligations under either part III or part IV of the present Protocol.
2. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend that period for an additional two years.

PART VI

Financial provisions

Article 25

1. The expenditure incurred by the Subcommittee on Prevention in the implementation of the present Protocol shall be borne by the United Nations.
2. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee on Prevention under the present Protocol.

Article 26

1. A Special Fund shall be set up in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Subcommittee on Prevention after a visit to a State Party, as well as education programmes of the national preventive mechanisms.
2. The Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.

PART VII

Final provisions

Article 27

1. The present Protocol is open for signature by any State that has signed the Convention.
2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 28

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, the present Protocol shall enter into force on the thirtieth day after the date of deposit of its own instrument of ratification or accession.

Article 29

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 30

No reservations shall be made to the present Protocol.

Article 31

The provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention instituting a system of visits to places of detention. The Subcommittee on Prevention and the bodies established under such regional conventions are encouraged to

consult and cooperate with a view to avoiding duplication and promoting effectively the objectives of the present Protocol.

Article 32

The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, nor the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Article 33

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act or situation that may occur prior to the date on which the denunciation becomes effective, or to the actions that the Subcommittee on Prevention has decided or may decide to take with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter already under consideration by the Subcommittee on Prevention prior to the date on which the denunciation becomes effective.
3. Following the date on which the denunciation of the State Party becomes effective, the Subcommittee on Prevention shall not commence consideration of any new matter regarding that State.

Article 34

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment that they have accepted.

Article 35

Members of the Subcommittee on Prevention and of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. Members of the Subcommittee on Prevention shall be accorded the privileges and immunities specified in section 22 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

Article 36

When visiting a State Party, the members of the Subcommittee on Prevention shall, without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

- (a) Respect the laws and regulations of the visited State;
- (b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

Article 37

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.

Appendix F

States Parties and Signatories to the UN's Optional Protocol to the Convention Against Torture

*As of August 2012

OPCAT States Parties and Signatories

States Parties (63)	Date	Signatories (22)	Date
Albania	October 1, 2003	Australia	May 19, 2009
Argentina	November 15, 2004	Austria	September 25, 2003
Armenia	September 14, 2006	Belgium	October 24, 2005
Azerbaijan	January 28, 2009	Cameroon	December 15, 2009
Benin	September 20, 2006	Cape Verde	September 26, 2011
Bolivia	May 23, 2006	Congo	September 29, 2008
Bosnia and Herzegovina	October 24, 2008	Finland	September 23, 2003
Bulgaria	June 1, 2011	Ghana	November 6, 2006
Burkina Faso	July 7, 2010	Greece	March 3, 2011
Brazil	January 12, 2007	Guinea	September 16, 2005
Cambodia	March 30, 2007	Iceland	September 24, 2003
Chile	December 12, 2008	Ireland	October 2, 2007
Costa Rica	December 1, 2005	Italy	August 20, 2003
Croatia	April 25, 2005	Madagascar	September 24, 2003
Cyprus	April 29, 2009	Mauritania	September 27, 2011
Czech Republic	July 10, 2006	Norway	September 24, 2003
Democratic Republic of Congo	September 23, 2010	Portugal	February 15, 2006
Denmark	June 25, 2004	Sierra Leone	September 26, 2003
Ecuador	July 20, 2010	South Africa	September 20, 2006
Estonia	December 18, 2006	Timor-Leste	September 16, 2005
France	November 11, 2008	Venezuela	July 1, 2011
Gabon	September 22, 2010	Zambia	September 27, 2010
Georgia	August 9, 2005		
Germany	December 4, 2008		
Guatemala	June 9, 2008		
Honduras	May 23, 2006		
Hungary	January 12, 2012		
Kazakhstan	October 22, 2008		
Kyrgyzstan	December 29, 2008		
Lebanon	December 22, 2008		
Liberia	September 22, 2004		
Liechtenstein	November 3, 2006		
Luxembourg	May 19, 2010		
Maldives	February 15, 2006		
Mali	May 12, 2005		
Malta	September 24, 2003		
Mauritius	June 21, 2005		
Mexico	April 11, 2005		
Montenegro	March 6, 2009		
Netherlands	September 28, 2010		
New Zealand	March 14, 2007		

Nicaragua	February 25, 2009		
Nigeria	July 27, 2009		
Panama	June 2, 2011		
Paraguay	December 2, 2005		
Peru	September 14, 2006		
Philippines	April 17, 2012		
Poland	September 14, 2006		
Republic of Moldova	July 24, 2006		
Romania	July 2, 2009		
Senegal	October 18, 2006		
Serbia	September 26, 2006		
Slovenia	January 23, 2007		
Spain	April 4, 2006		
Sweden	September 14, 2005		
Switzerland	September 24, 2009		
The Former Yugoslav Republic of Macedonia	February 13, 2009		
Togo	July 20, 2010		
Tunisia	June 29, 2011		
Turkey	September 27, 2011		
Ukraine	September 19, 2006		
United Kingdom	December 10, 2003		
Uruguay	December 8, 2005		

*Source: APT, 2012.

Appendix G

Designated National Preventive Mechanisms (NPMs)

*As of August 2012

OPCAT Designated State National Preventive Mechanisms (NPMs)

Of the 63 States Parties to the OPCAT, a total of 42 states have either designated or established a NPM as of August 2012.

State Party	National Preventive Mechanism
Albania	People's Advocate (Parliamentary Ombudsman or Avokati i Popullit)
Armenia	Human Rights Defender's Office
Azerbaijan	Commissioner for Human Rights (Ombudsperson's Office)
Cambodia	Inter-governmental body
Chile	National Human Rights Institute
Costa Rica	Ombudsperson's Office (La Defensoria de los Habitantes)
Croatia	Ombudsperson's Office
Cyprus	The Office of the Commissioner for Administration (Ombudsman)
Czech Republic	Public Defender of Rights (Ombudsman)
Denmark	Parliamentary Commissioner for Civil and Military Administration (Folketingets Ombudsmand or Ombudsman)
Ecuador	Ombudsperson's Office
Estonia	Office of the Chancellor of Justice (Oiguskantsler or Ombudsman)
Former Yugoslav Republic of Macedonia	Ombudsman
France	General Inspector of Places of Deprivation of Liberty
Georgia	Public Defender
Germany	National Agency for the Prevention of Torture and the Joint Commission of the Lander - - <i>to be established</i>
Guatemala	National Preventive Mechanism (Mecanismo nacional de prevencion de la tortura y otros malos tratos) - - <i>to be established</i>
Honduras	National Committee for the Prevention of Torture
Hungary	Commissioner for Fundamental Rights
Liechtenstein	Corrections Commission
Luxembourg	Ombudsman
Maldives	Human Rights Commission of the Maldives
Mali	National Human Rights Commission (Commission nationale des droits de l'homme)
Malta	Board of Visitors for Detained Persons and Board of Visitors of the Prisons
Mauritius	National Human Rights Commission
Mexico	National Human Rights Commission (Comision Nacional de Derechos Humanos)
Montenegro	Protector on Human Rights and Freedom
Netherlands	Six bodies were designated as the NPM (three national inspectorates on public order and security, youth care and health care), a commission and a council, coordinated by the Inspectorate for Implementation of Sanctions
New Zealand	Multiple body, five different bodies coordinated by the Human Rights Commission (central NPM), and comprising the Office of the Ombudsman, the Independent Police Conduct Authority, the Office of the Children's

	Commissioner, and the Inspector of Service Penal Establishments of the Office of the Judge Advocate General of the Armed Forces
Nicaragua	Ombudsperson's Office (Procuraduria para la Defense de los Derechos Humanos)
Nigeria	National Committee on Torture
Paraguay	National Commission for the Prevention of Torture and other forms of ill-treatment - - <i>to be established</i>
Poland	Commissioner for Civil Rights Protection (Rzecznik Praw Obywatelskich)
Republic of Moldova	National Centre for Human Rights (Ombudsmen's Office) and a Consultative Council (12 civil society representatives and independent experts)
Senegal	National Observer for Places of Deprivation of Liberty (Observateur National des Lieux de Privation de Liberte)
Serbia	Ombudsperson's Office (Protector of Citizens) in cooperation with ombudsperson's offices from the autonomous provinces and human rights associations
Slovenia	Human Rights Ombudsperson's Office
Spain	Ombudsperson's Office (Defensoria del Pueblo) with a Consultative Council
Sweden	Parliamentary Ombudsman (Riksdagens Ombudsman) and the Chancellor of Justice (Justitiekanslern)
Switzerland	National Commission for the Prevention of Torture
United Kingdom	18 bodies were designated as part of the UK NPM, coordinated by Her Majesty's Inspectorate of Prisons
Uruguay	National Human Rights Institution (Institucion Nacional de Derechos Humanos) - - <i>to be established</i>

*Source: APT, 2012

Appendix H

CSC's Human Rights Milestones in Canadian Corrections

CSC - Celebrating 50 Years of Human Rights: Milestones in Federal Corrections

“The Human Rights Division of CSC considers the following milestones to be some of the most notable accomplishments in commemorating the 50th Anniversary of the *Universal Declaration of Human Rights*.”

Year	Milestone	Description
1959	<i>Parole Act</i> and National Parole Board (NPB)	The <i>Parole Act</i> came into force on February 15 th , 1959, allowing for the creation of the National Parole Board in the same year. For the first time in Canadian history, parole decisions were determined and administered by an independent, national decision-making body.
1960	<i>Canadian Bill of Rights</i>	The <i>Canadian Bill of Rights</i> , enacted by the Parliament of Canada on August 10 th , 1960, affirms the dignity and worth of the human person and recognizes and declares fundamental rights and freedoms. Although eclipsed by the <i>Charter of Rights and Freedoms</i> , the <i>Bill of Rights</i> continues to apply to acts of the federal government.
1972	Aboriginal Elders in federal penitentiaries	This year marks the first time an Aboriginal Elder entered a federal penitentiary to conduct a traditional ceremony. Just over twenty years later, two Healing Lodges for Aboriginal offenders were established with an emphasis on traditional spirituality and healing.
1972	Abolition of corporal punishment	Corporal punishment such as whipping and strapping was invoked both as a sentence of the courts and as a penalty for institutional offences until 1972.
1973	Office of the Correctional Investigator (OCI)	The Office of the Correctional Investigator was created in 1973. Its primary function is to investigate the complaints of offenders and seek resolution. In 1992, the role of this prison ombudsman was formalized in the <i>Corrections and Conditional Release Act</i> .
1975	<i>Standard Minimum Rules for the Treatment of Prisoners</i> (SMRs)	The SMRs are the most significant and comprehensive international instrument recognizing the rights of legally-incarcerated persons. In subscribing to the SMRs in 1975, Canada committed itself to ensuring full compliance and domestic implementation.
1976	Abolition of the death penalty	On July 26 th , 1976, Canada passed a law abolishing the death penalty. The last execution in our history occurred in December 1962. All death sentences between these 14 years were commuted.
1977	Independent Chairperson for adjudicating disciplinary matters	The Independent Chairperson (ICP) system was instituted in federal corrections in response to the recommendations of the <i>MacGuigan Report</i> , a Parliamentary inquiry into the Penitentiary Service of Canada. Prior to the introduction of the ICP system, all

		disciplinary decisions against offenders were made by wardens and CSC employees. This new independent process helps ensure that disciplinary hearings and decisions are fair and equitable.
1978	Women correctional officers in male institutions	Although women have always worked with female offenders at the Prison for Women, women first began working as correctional officers in federal institutions for male offenders in 1978. The first woman to hold the position of Warden in an all-male facility was appointed in 1980. As of August 1998, there were 13 women institutional heads in federal penitentiaries.
1980	<i>Martineau and the Duty to Act Fairly</i>	Prior to the landmark case of <i>Martineau v. Matsqui Institution Disciplinary Board</i> , Canadian courts were reluctant to interfere with the decisions of correctional authorities. In its decision, the Supreme Court of Canada reversed this "hands off" approach and for the first time in law articulated that correctional authorities have a duty to act fairly when making decisions concerning the rights of offenders.
1982	<i>Canadian Charter of Rights and Freedoms</i>	Proclaimed into force on April 17 th , 1982, the <i>Charter of Rights and Freedoms</i> is one of the most significant developments in the protection of human rights and is recognized internationally as a model document. The <i>Charter</i> has had a profound impact in the protection of human rights of both offenders and employees of the CSC.
1992	<i>Corrections and Conditional Release Act (CCRA)</i>	The <i>Corrections and Conditions Release Act</i> was proclaimed into force on November 1 st , 1992, replacing both the <i>Penitentiary Act</i> and the <i>Parole Act</i> . The CCRA is a progressive and comprehensive code reflecting years of human rights developments.
1995	Regional facilities for women offenders	The establishment of four regional facilities and an Aboriginal Healing Lodge for federally-sentenced women marks a significant change in philosophy for federal corrections in Canada. These new centres are designed to reflect and respond to the needs and realities of federally-sentenced women based on the principles of empowerment, meaningful and responsible choices, respect and dignity, supportive environment and shared responsibility. The new facilities began opening in the fall of 1995.

*Source: Reproduced from CSC's 50 Years of Human Rights Developments in Federal Corrections, Human Rights Division, CSC, 1998.

<http://www.csc-scc.gc.ca/text/pblct/rht-drt/index-eng.shtml>

Appendix I

Interview Guides

Interview Guide – Domestic (Canada)

1. What is your name and job title?
2. How has your profession led you to become involved with OPCAT-related discussions in Canada?
3. Are you aware of any considerations that have been made in the decision-making process of the Canadian government with regards to becoming a signatory to the OPCAT?
4. What is taken into consideration prior to making a decision to sign/ratify an international human rights instrument such as OPCAT?
 - » To your knowledge, has Canada taken these steps yet?
5. To your knowledge, how much time and debate has the government devoted to the issue of becoming a signatory of the OPCAT?
 - » Has the Canadian government fully weighed the costs and benefits of becoming a signatory?
6. Based upon your professional experience relating to the OPCAT, what are some of the challenges that the Canadian government may be facing when determining whether or not to become a signatory of the OPCAT?
 - » Is Canada being a decentralized, federal state the biggest challenge?
 - » What are the issues relating to First Nations?
 - » What are the cost concerns?
 - » Given that Canada has claimed to support the Protocol since the time of its introduction, what other concerns may be delaying the country in becoming a signatory?
7. Have discussions with the provinces/territories taken place regarding their role in the detention visitation process in their jurisdictions and if so, what progress has been made?
8. Does Canada already have systems in place that could serve as National Preventive Mechanisms (NPMs) at the federal and provincial/territorial level?
 - » Is Canada more likely to benefit from a multiple NPM model with a single coordinating agency or central NPM?

9. What changes would Canada have to make at both the federal and provincial/territorial levels to come into compliance with the requirements of the OPCAT?
 - » Are these changes feasible?
10. Based upon your professional knowledge, are there specific strategies that Canada could employ that are likely to be effective in reducing the occurrence of torture, cruel, inhuman, or degrading treatment domestically?
 - » Is becoming a State Party to the OPCAT one of them?
11. Based upon your knowledge of the OPCAT, would Canada benefit from becoming a signatory? Explain.
12. What is [insert agency/department of interview subject] official position on Canada becoming a signatory of the OPCAT?
13. Canada has long enjoyed the reputation of being a leader in the area of human rights on the international stage. What actions have earned Canada this recognition?
 - » In your experience, has this reputation suffered as a result of failing to become a signatory to the OPCAT?
14. What level of importance does the Canadian federal government ascribe to human rights issues? Are there other issues that tend to take precedence – e.g., the economy?
15. In your experience, what role does Canada's relationship with allies play when it comes to considering becoming a party to an international treaty?
 - » Are you aware of the American position on the OPCAT?
 - » How would you characterize the American and Canadian political relationship?
 - » Does this relationship have the potential to influence Canadian political decisions? Why or why not?
16. Based upon your professional experience, what are some of the reasons why there has been a delay in Canada signing and ratifying the OPCAT?
 - » Is this delay normal or excessive when it comes to international human rights instruments?
 - » Has any timeline been proposed for the issue to be revisited or a resolution to occur?

17. Are you aware of any progress that has been made since the House of Commons Subcommittee on International Human Rights (SIHR) examined the issue in June of 2007?
18. Is more leadership, direction, and guidance needed on the political level with regards to this issue – i.e., pushing to advance the issue and make it a priority for the government?

Interview Guide – International (Geneva)

1. What is your name and job title?
2. Have you become involved with OPCAT-related discussions in Canada? If so, in what capacity?
3. Are you aware of the Canadian position on OPCAT?
 - a. Are you aware of the American position on OPCAT?
4. What considerations might be expected to influence the decision-making process of a government with regards to becoming a signatory to the OPCAT? Do you have examples of nations where such considerations were at issue? How have they or might they be resolved?
5. In your experience, what role does a nation's relations with other countries play when considering becoming a party to an international human rights instrument such as the OPCAT?
 - a. Do these relationships have the potential to influence political decisions? Why or why not? Please provide examples if this type of situation has been encountered.
6. How many nations as of this date have become either signatories to or ratified the OPCAT?
7. What are some of the characteristics/traits that define nations that have become signatories to the OPCAT?
 - a. Are leadership, direction, and guidance needed on the political level to push for signature?
 - b. Does confidence in government leadership affect the process of becoming a signatory?
 - c. Does the state of democratic nations affect the process of becoming a signatory (e.g., political stability)?

8. What are the steps to making a decision to sign/ratify an international human rights instrument such as the OPCAT?
 - a. To your knowledge, what steps has Canada taken?
9. To your knowledge, how much time and debate does a government typically devote to the issue of becoming a signatory of the OPCAT? Please provide examples.
10. Based upon your professional experience, what may be some of the reasons why a nation would delay signing or ratifying the OPCAT?
 - a. How long does it typically take for a nation to complete the process of consideration, signature, ratification, and compliance when it comes to international treaties such as the OPCAT?
 - b. It has now been more than seven years since the OPCAT was adopted; in your experience, is the Canadian delay in becoming a signatory normal or excessive?
 - c. Canada typically likes to sign, ratify, and be in compliance with international treaties at the same time. Is this a common practice among other nations? If so, please provide examples.
11. Based upon your professional experience relating to the OPCAT, what are some of the challenges that nations face in determining whether or not to become a signatory of the OPCAT?
 - a. What are some of the issues facing centralized vs. non-centralized states? Please provide examples.
 - b. What are some of the issues facing federal vs. unitary states? Please provide examples.
 - c. Do issues exist relating to ethnic and racial divisions?
 - d. Are there cost concerns?
 - e. Are there any other concerns that you have encountered?
12. Have nations who have become signatories of the OPCAT faced challenges with regard to the detention visitation process, particularly nations who have split jurisdiction over detention facilities (e.g., provincial and federal authority)? How have these challenges been overcome? Please provide examples.
13. What are some of the different models that exist for National Preventive Mechanisms (NPMs)?
 - a. What types of models are typically used in federalized states? Please provide examples.
 - b. What type of model is Canada most likely to benefit from?

- c. Given your suggestion, are there any specific changes that Canada would have to make to come into compliance with the requirements of the OPCAT? Are these changes feasible?
- 14. Based upon your professional knowledge, are there specific strategies that Canada might consider that are likely to be effective in reducing the occurrence of torture, cruel, inhuman, or degrading treatment domestically?
 - a. Is becoming a State Party to the OPCAT one of them?
- 15. What are some of the benefits that a nation might enjoy as a result of becoming a signatory to the OPCAT?
 - a. Aside from benefits, will becoming a signatory of the OPCAT be a way for nations to avoid negative consequences (e.g., judgment about lack of transparency)?
- 16. What are some of the potential risks that a nation may face as a result of becoming a signatory to the OPCAT (e.g., threat to national sovereignty or submitting to the judgment of an international body)?
- 17. Canada has long enjoyed the reputation of being a leader in the area of human rights on the international stage. In your experience, has the decision not to sign OPCAT affected this reputation?
 - a. What has Canada's involvement been with the UN on human rights issues since the adoption of OPCAT in 2002 (e.g., committee involvement, promotion of human rights initiatives, agreements, etc.)?
 - b. Was Canada expected (or is still expected) to take a leadership role with regards to the OPCAT?