SCC File No. 33289

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

THE PRIME MINISTER OF CANADA,
THE MINISTER OF FOREIGN AFFAIRS, THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE, and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Appellants

- and-

OMAR AHMED KHADR

Respondent

- and -

AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH), HUMAN RIGHTS WATCH, UNIVERSITY OF TORONTO, FACULTY OF LAW – INTERNATIONAL HUMAN RIGHTS PROGRAM and DAVID ASPER CENTRE FOR CONSTITIONAL RIGHTS,
CANADIAN COALITION FOR THE RIGHTS OF CHILDREN and JUSTICE FOR CHILDREN AND YOUTH
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO),
CANADIAN BAR ASSOCIATION,
AVOCATS SANS FRONTIÈRES CANADA, BARREAU DE QUÉBEC et GROUPE D'ÉTUDE EN DROITS ET LIBERTÉS DE LA FACULTÉ DE DROIT DE L'UNIVERSITÉ LAVAL,
CANADIAN CIVIL LIBERTIES ASSOCIATION, and
NATIONAL COUNCIL FOR THE PROTECTION OF CANADIANS ABROAD

Interveners

FACTUM OF THE INTERVENERS
CANADIAN COALITION FOR THE RIGHTS OF CHILDREN and JUSTICE FOR CHILDREN AND YOUTH
Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*

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PART I – STATEMENT OF FACTS

Overview of the Intervener's Position

1. This appeal concerns the duty of the Canadian government to protect a Canadian citizen, in particular, a Canadian child, when that child's human rights have been violated in another country. The Canadian Coalition for the Rights of Children and Justice for Children and Youth ("CCRC and JFCY") submit that the interpretation of the Respondent's rights must be determined in the context of domestic and international laws vis-à-vis a child in armed conflict, and within the overarching framework of the "best interests of the child."

Facts

2. The CCRC and JFCY accept the facts as presented by the Appellants and Respondent and take no position where they might disagree.

PART II – INTERVENERS' POSITION ON THE QUESTIONS IN ISSUE

3. Did the courts below err in finding that the Respondent's rights under s.7 of the Charter were breached?

- The CCRC and JFCY agree and support the Respondent and the other Interveners with respect to their position that the Appellants' violated the Respondent's section 7 rights under the *Canadian Charter of Human Rights and Freedoms ("Charter")* to life and security of person through its participation in interviewing the Respondent when it was known that he had been tortured and through the Appellants' refusal to seek repatriation under section 10 of the *Department of Foreign Affairs and International Trade Act* ("*DFAIT Act")*.[1]

4. If such a breach occurred, was the remedy appropriate and just in the circumstances?

- The CCRC and JFCY agree that the remedy of ordering the government to seek repatriation of the Respondent is the appropriate and just remedy within the discretion of the trial court pursuant to s. 24(1) of the Charter.

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[1] *Department of Foreign Affairs and International Trade Act*, R.S., 1985, c. E-22, s. 1; 1995, c. 5, s. 2 [*DFAIT Act*].

PART III – BRIEF OF ARGUMENT

5. The submissions of the CCRC and JFCY are focused on the rights of a child in armed conflict as set out in Canada's international obligations and the *Charter*. There is a positive duty on the state to act on behalf of a child, as well as refrain from harming a child, as well as duties to protect, rehabilitate and reintegrate children involved in armed conflict. Decisions made by the Government of Canada must be consistent with and be made in the best interests of the child, a fundamental principle of law within this context. The duty to protect a child includes executive and administrative functions of the government as well as legislative functions.

6. Canadian courts accept that the values articulated in international human rights law inform the context in which the provisions of the *Canadian Charter of Human Rights and Freedoms* ("*Charter*") must be read.[2] This Court has held that Canadian laws must be interpreted to comply with Canada's international treaty obligations[3] and that "(c)hildren's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society".[4] The *United Nations Convention on the Rights of the Child* ("*Convention*")[5] is essential for the interpretation of the rights of children under the *Charter* as the *Charter* does not otherwise directly address their rights as a group who need special consideration and protection.

7. The *Convention* includes both rights to protection and rights of self-determination and participation, depending on the age and capability of the child. The right to protection, under the *Convention*, includes positive rights, with a corresponding duty of the state to take action on behalf of a child, in the best interests of a child, as well as negative rights that the state refrain from harming a child. The *Convention* requires Canada, as a State Party, to act in the best interests of the child[6] and codifies a child's right to survival and development.[7]

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[2] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at para. 70 – 71[*Baker*] and *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.),* [2004] 1 S.C.R. 76 at para. 31 [*Canadian Foundation*].
[3] *Canadian Foundation, supra* note 2 at para. 32.
[4] *Baker*, *supra* note 2 at para. 67.
[5] *Convention on the Rights of the Child,* 20 November 1989, 3 U.N.T.S. 1577, Can T.S. 1992/3 [*Convention*].
[6] *Convention*, *ibid*. Article 3.
[7] *Convention, ibid*. Article 6.2.

8. Specifically, the *Convention*'s provisions relating to children involved in armed conflict, should be taken into account by this Honourable Court in its interpretation of the Respondent's rights under s.7 of the *Charter* in this case. It is submitted that this is not a case similar to an extradition context, as argued by the Appellants in paragraph 99 of their factum in this appeal, because the Respondent was taken from Canada to Afghanistan by his father at age 11, an age when children do not make decisions to become involved in armed conflict on their own.

Articles 38 and 39 of the *Convention* and the *Optional Protocol on the Involvement of Children in Armed Conflict*

9. Articles 38 and 39 of the *Convention* specifically protect the rights of children in the context of armed conflict.[8] Article 38 prohibits the direct participation of children less than 15 years of age in hostilities and recruitment into armed forces.[9] Article 39 provides for the protection of child victims of maltreatment and requires states to take all appropriate measures to promote the recovery and social reintegration of children who have been maltreated. "Armed conflict" is specifically listed as one form of maltreatment from which a child is to be protected under Article 39.[10]

10. The minimum age for direct participation in hostilities in Article 38 of the *Convention* was raised to 18 in the *United Nations Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* ("*OP-CAC*"), which entered into force on 12 February 2002; and other provisions of Articles 38 and 39 of the *Convention* were expanded, including application to non-state armed forces. [11]

11. In July 2000, Canada was the first state to ratify the *OP-CAC*, and in June 2000, the Canadian Parliament incorporated the basic principles of the *OP-CAC* into Canadian law by amending Canada's *National Defence Act* (*"NDA").*[12] As required in Article 1 of the *OP-CAC*, section 34 of the *NDA* prohibits the deployment of persons under the age of 18 into hostilities, and as required by Article 3 of the *OP-CAC,* section

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[8] *Convention, ibid*. Articles 38 and 39.
[9] *Convention, ibid*. Article 38.
[10] *Convention, ibid*. Article 39.
[11] *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,* G.A. Res. 54/263, U.N. Doc A/RES/54/263, Annex 1 (May 25, 2000), entered into force Feb. 12, 2002 [*OP-CAC*].
[12] *National Defence Act,* R.S., c.N-4, s.1 [*NDA*].

20(3) of the *NDA* sets the minimum age of 16 for voluntary recruitment into the armed forces of Canada, and only with parental consent. [13]

12. The amendments to the *NDA* clearly demonstrate that it was the intention of Parliament to make the *OP-CAC* binding on the Government of Canada and they establish that anyone under the age of 16 is to be considered a child, to be protected from involvement in armed conflict. The Respondent falls into this category for protection because he was under age 16 when he was arrested for actions related to armed conflict and he was 11 when he was taken from Canada into a zone of active hostilities.

Central Principles

13. The central principles in Articles 38 and 39 of the *Convention,* and the *OP-CAC,* are that (a) those who recruit or use children in armed conflicts are to be prosecuted for violating the rights of children; and (b) a child involved in armed conflict, however taken or recruited, is to be treated as a child first, with a right to protection, rehabilitation, and social reintegration.[14] Paragraph 11 of the Preamble to the *OP-CAC* also applies these principles to non-state armed groups, such as those who used the Respondent, with a declaration of:

> Condemning with the gravest concern the recruitment, training, and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State, and recognizing the responsibility of those who recruit, train, and use children in this regard.[15]

14. Further, Article 4 of the *OP-CAC* specifically addresses recruitment by non-state armed groups:

> Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.[16]

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[13] *NDA, ibid*. sections 20(3) and 34, and *OP-CAC, supra* note 9, Articles 1 and 3.
[14] *Convention*, *supra* note 3, Articles 38 and 39, and *OP-CAC, supra* note 9.
[15] *OP-CAC, ibid.* at para. 11 of Preamble.
[16] *OP-CAC, ibid.* Article 4.

15. The substance of the duty to protect children who have been used in armed conflict is prescribed in paragraph 3 of Article 6 of the *OP-CAC*:

> States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties, shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration (emphasis added).[17]

16. It is submitted that the Appellants, as the State Party responsible to protect the rights of the Respondent, a Canadian child, are obligated to provide assistance for the purpose of rehabilitation and social reintegration. Social reintegration, by its nature, includes a duty for the state of which a child is citizen to do everything feasible to protect the child, return the child, and rehabilitate the child so the child can successfully function as part of society. It is submitted that this duty was not fulfilled by the Appellants', who merely sent two brief diplomatic messages to the United States of America, which is not signatory to the *Convention*, noting the Respondent's age and indicating he was a child, when alternative actions were known and available to the Appellants.

17. Throughout the *Convention* and the *OP-CAC*, the duty to protect the child includes taking administrative and "all feasible measures," as stated in the first paragraph of Article 6 of the *OP-CAC*:

> Each State party shall take all necessary legal, administration, and other measures to ensure the effective implementation and enforcement of the provisions of this Protocol within its jurisdiction (emphasis added).[18]

Administrative measures are obligatory when they involve the protection of a child who was taken into armed conflict, and when the child was not responsible for that decision. There were, and are, other measures available for Canada to take. For example, for the purposes of rehabilitation and reintegration, other States sought repatriation of their child citizens held at Guantánamo Bay and were granted their repatriation requests.

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[17] *OP-CAC, ibid.* Article 6.
[18] *OP-CAC, ibid.* Article 6.

Treatment of Children Accused of Crimes Committed During Armed Conflict

18. Further guidance for implementation of Articles 38 and 39 of the *Convention* and the *OP-CAC* is provided in the *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* (Paris Guidelines), endorsed by Canada and 76 member states of the United Nations in February 2007.[19] These principles were based on international law and knowledge and lessons learned in dealing with children involved in armed conflict.

19. The Paris Guidelines are relevant for this case because they provide a more precise definition for the category of children involved in armed conflict. The respondent clearly falls within the definition provided in Article 2.1:

> **"A child associated with an armed force or armed group"** refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies, or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities (emphasis added). [20]

20. In addition, Articles 3.6 and 3.7 of the Paris Guidelines address the particular issue of how to treat children accused of crimes during their involvement in armed conflicts. Consistent with the principle of treating them as children first and applying the universal principles of juvenile justice, these two Articles reinforce the duty of states to focus on social rehabilitation and use alternatives to judicial proceedings whenever possible:

> Article 3.6: Children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators. They must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection through numerous agreements and principles (emphasis added); and

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[19] The *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* is a declaration endorsed by 76 member states of the United Nations at an international, ministerial meeting hosted by France in February 2007: www.un.org/children/conflict/English/parisprinciples.html [Paris Guidelines].

[20] Paris Guidelines, *ibid.,* Article 2.1.

> Article 3.7: Wherever possible, alternatives to judicial proceedings must be sought, in line with the *Convention* on the Rights of the Child and other international standards for juvenile justice (emphasis added).[21]

21. The Paris Guidelines are relevant for all parties, including Canada, who have the duty to protect the rights of a child involved in armed conflict. They provide standards for good practices and grounding for an alternative course of action that was and is available to the Appellants in relation to the Respondent, a course that would be consistent with international standards and commitments Canada has made on the issue of children involved in armed conflict. The provisions in Article 3.6 and 3.7 do not say that a young person should not be held accountable for actions taken, one of the concerns raised by the Appellants in this case. Instead, they provide that alternative measures should be found to the judicial system, measures that are appropriate for the age and circumstances of the child. This is consistent with the provisions for alternative measures in Canada's *Youth Criminal Justice Act*. [22]

Consistency with Security Council Resolutions

22. The scope of the state's duty in relation to children involved in armed conflict is further reinforced by a series of Security Council resolutions, to which Canada is bound as a member state of the United Nations and which Canada actively supported from the earliest one in 1999 to the latest one in 2009.

23. There are seven Security Council Resolutions on Children and Armed Conflict, which reaffirm and elaborate the following basic principles as essential for international peace and security:

> - children who are recruited into military activity should be treated first of all as children who need protection, rehabilitation, and reintegration into society; and
> - those who recruit and/or use children for military activity should be prosecuted for violation of international laws.[23]

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[21] Paris Guidelines, i*bid.* Articles 3.6 and 3.7.
[22] *Youth Criminal Justice Act,* S.C., c.1, sections 4 - 12.
[23] United Nations Security Council Resolutions on Children and Armed Conflict [Security Council Resolutions]:
- Resolution 1261, S/RES/1261 (1999), at para. 3, 9 and 15, [Resolution 1261],
- Resolution 1314, S/RES/1314 (2000), at para. 2 and 11, [Resolution 1314],
- Resolution 1379, S/RES/1379 (2001), at para. 8(e) and 9(a), [Resolution 1379],

24. On the question of treatment for such children, these resolutions also call for states to rehabilitate and reintegrate children who become involved in armed conflicts. Paragraph 15 of the first Resolution 1261 in 1999, "urges states and the United Nations system to facilitate the disarmament, demobilization, rehabilitation and reintegration of children used as soldiers in violation of international law*."*[24]

25. Resolution 1314 in 2000, called on all states to fully respect the *OP-CAC*, which includes paragraph 3 of Article 6 on the issue of reintegration (as addressed above in our paragraph 15). [25]

26. Paragraph 13 of Resolution 1460, in 2003, emphasized reintegration and education for transition back to normal life; specifically, it "calls on Member States and international organizations to ensure that… the duration of these processes is sufficient for a successful transition to normal life, with a particular emphasis on education …"

27. The preamble of Resolution 1612, in 2005, and of Resolution 1882, in August 2009, stresses "the primary role of national Governments in providing protection and relief to all children affected by armed conflicts." [26]

28. Further, paragraph 13 of Resolution 1882 emphasizes that effective reintegration programs are "crucial for the well-being of all children who, in contravention of applicable international law, have been recruited or used by armed forces and groups, and are a critical factor for durable peace and security.[27]

29. It is submitted that the Appellants, as a member state of the United Nations and one who actively endorsed these resolutions, have a duty to comply with these Security Council Resolutions on Children and Armed Conflict. This duty includes actively taking steps to rehabilitate and reintegrate the Respondent, a child and citizen of Canada who was used in armed conflict in contravention of international law.

- Resolution 1460, S/RES/1460 (2003), at para. 5 of preamble, and 13, [Resolution 1460],
- Resolution 1539, S/RES/1539 (2004), at para. 4 of preamble, and 8, [Resolution 1539],
- Resolution 1612, S/RES/1612 (2005), at para. 4 of preamble, and 14, [Resolution 1612], and
- Resolution 1882, S/RES/1882 (2009), at para. 5 of preamble, and 13, [Resolution 1882].

[24] Resolution 1261, i*bid.* at para. 15.
[25] Resolution 1314, s*upra* note 21 at para. 3.
[26] Resolution 1612, *supra* note 21 at para 3 of preamble, and Resolution 1882, *supra* note 21, at para 3 of preamble.
[27] Resolution 1882, *supra* note 21 at para. 13.

30. The CCRC and JFCY support the position of the Respondent and the other Interveners that the appropriate remedy is for the Appellants to ask for the repatriation of the Respondent. This remedy is consistent with international laws, treaties and principles, specifically,

- Articles 38 and 39 of the *Convention*,
- the Preamble, Articles 1, 3, 4 and 6 of the *OP-CAC*,
- the seven Security Council Resolutions on Children and Armed Conflict,[28] and
- Articles 2.1, 3.6 and 3.7 of the Paris Guidelines.

Best Interests of the Child

31. Article 3 of the *Convention* provides that "in all actions concerning children … *the best interests of the child shall be a primary consideration* (emphasis added)".[29] The best interests principle is the only "primary consideration" stated in the *Convention*. It is submitted that there is no evidence that the best interest of the Respondent were even considered by the Appellants in its refusal to seek repatriation of the Respondent.

32. The reference to "all actions concerning children (emphasis added)" in Article 3 of the *Convention*, includes administrative actions.[30] It is submitted that there is no exemption for matters that fall under the executive branch of government. Such an exemption would undermine the central intent and universality of the rights of children under the *Convention* and would undermine Canada's credibility as a signatory to the *Convention* as a party to international treaties.

33. It is further submitted that the Appellants must apply the provisions of *DFAIT Act*[31] in a manner consistent with domestic and international law, in order to ensure that the best interests, special needs, stage of development and circumstances of young people remain a central focus in all decision making vis-à-vis children.[32]

34. Article 6 of the *Convention*, as well as mandating the right to life provides that "States Parties shall ensure to the maximum extent possible the survival and development of the child (emphasis added)."[33] It is submitted that the Appellants'

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[28] Security Council Resolutions, *Supra* note 21.
[29] *Convention, supra* note 3, Article 3.
[30] *Convention, supra* note 3, Article 3.
[31] *DFAIT Act, supra* note 1.
[32] *Baker, supra* note 2 at para 71 and *Canadian Foundation*, *supra* note 2 at para 31.
[33] *Convention, supra* note 3, Article 6.

dispatch of two diplomatic notes mentioning the Respondent's age does not meet this test, particularly when other alternatives are prescribed by the *Convention*, *OP-CAC*, Security Council Resolutions, and Paris Guidelines.

35. It is submitted that the Appellants' have directly violated the Respondent's rights under the *Charter*, failed to apply the best interests principle in the management of the Respondent's case, and thereby failed to fulfill its obligations to protect the Respondent, as a child involved in armed conflict. Upholding the Federal Court of Appeal's decision that requires the Appellants' to ask for the repatriation of the Respondent is the appropriate order. In seeking repatriation, it is respectfully submitted that the Appellants' must do so in a manner consistent with the Respondent's rights under the *Charter, Convention*, OP-CAC, Security Council Resolutions and the Paris Guidelines.

36. Resolution of this case has important precedence for protection of the rights of all children who are citizens of Canada and for upholding the important international laws and norms for the treatment of children involved in armed conflict, which are considered matters of international peace and security by Canada and the United Nations Security Council.

PART IV – SUBMISSIONS RELATING TO COSTS

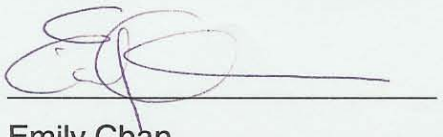
37. The CCRC and JFCY does not seek costs and asks that costs not be ordered against them.

PART V – ORDER REQUESTED

38. The CCRC and JFCY respectfully requests permission to present oral argument.

39. The CCRC and JFCY request that this Honourable Court dismiss the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14 day of October, 2009.



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International

Department of Foreign Affairs and International Trade Act
R.S., 1985, c. E-22, s. 1; 1995, c. 5, s. 2.

Powers, duties and functions of Minister

10. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to the conduct of the external affairs of Canada, including international trade and commerce and international development.

Idem

(2) In exercising his powers and carrying out his duties and functions under this Act, the Minister shall

(*a*) conduct all diplomatic and consular relations on behalf of Canada;

(*b*) conduct all official communication between the Government of Canada and the government of any other country and between the Government of Canada and any international organization;

(*c*) conduct and manage international negotiations as they relate to Canada;

(*d*) coordinate Canada's international economic relations;

(*e*) foster the expansion of Canada's international trade and commerce;

(*f*) have the control and supervision of the Canadian International Development Agency;

(*g*) coordinate the direction given by the Government of Canada to the heads of Canada's diplomatic and consular missions;

(*h*) have the management of Canada's diplomatic and consular missions;

(*i*) administer the foreign service of Canada;

(*j*) foster the development of international law and its application in Canada's external relations; and

(*k*) carry out such other duties and functions as are by law assigned to him.

Programs

(3) The Minister may develop and carry out programs related to the Minister's powers, duties and functions for the promotion of Canada's interests abroad including:

(*a*) the fostering of the expansion of Canada's international trade and commerce; and

(*b*) the provision of assistance for developing countries.

Loi sur le ministère des Affaires étrangères et du Commerce international

L.R. (1985), ch. E-22, art. 1; 1995, ch. 5, art. 2.

POUVOIRS ET FONCTIONS DU MINISTRE

Attributions

10. (1) Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés à la conduite des affaires extérieures du Canada, notamment en matière de commerce international et de développement international.

Idem

(2) Dans le cadre des pouvoirs et fonctions que lui confère la présente loi, le ministre:

a) dirige les relations diplomatiques et consulaires du Canada;

b) est chargé des communications officielles entre le gouvernement du Canada, d'une part, et les gouvernements étrangers ou les organisations internationales, d'autre part;

c) mène les négociations internationales auxquelles le Canada participe;

d) coordonne les relations économiques internationales du Canada;

e) stimule le commerce international du Canada;

f) a la tutelle de l'Agence canadienne de développement international;

g) coordonne les orientations données par le gouvernement du Canada aux chefs des missions diplomatiques et consulaires du Canada;

h) assure la gestion des missions diplomatiques et consulaires du Canada;

i) assure la gestion du service extérieur;

j) encourage le développement du droit international et son application aux relations extérieures du Canada;

k) exerce tous autres pouvoirs et fonctions qui lui sont attribués de droit.

Programmes

(3) Le ministre peut élaborer et mettre en oeuvre des programmes relevant de ses pouvoirs et fonctions en vue de favoriser les intérêts du Canada à l'étranger, notamment:

a) de stimuler le commerce international du Canada;

b) d'aider les pays en voie de développement.

National Defence Act

R.S., c. N-4, s. 1.

20. (3) A person under the age of eighteen years shall not be enrolled without the consent of one of the parents or of the guardian of that person.

34. A person who is under the age of eighteen years may not be deployed by the Canadian Forces to a theatre of hostilities.

Loi sur la défense nationale

S.R., ch. N-4, art. 1.

20. (3) L'enrôlement dans les Forces canadiennes des personnes âgées de moins de dix-huit ans est subordonné au consentement de leur père, mère ou tuteur.

34. Ne peuvent être déployées sur un théâtre d'hostilités par les Forces canadiennes les personnes de moins de dix-huit ans.

Youth Criminal Justice Act

2002, c. 1
[Assented to February 19th, 2002]

PART 1

EXTRAJUDICIAL MEASURES

Principles and Objectives

Declaration of principles

4. The following principles apply in this Part in addition to the principles set out in section 3:

(*a*) extrajudicial measures are often the most appropriate and effective way to address youth crime;

(*b*) extrajudicial measures allow for effective and timely interventions focused on correcting offending behaviour;

(*c*) extrajudicial measures are presumed to be adequate to hold a young person accountable for his or her offending behaviour if the young person has committed a non-violent offence and has not previously been found guilty of an offence; and

(*d*) extrajudicial measures should be used if they are adequate to hold a young person accountable for his or her offending behaviour and, if the use of extrajudicial measures is consistent with the principles set out in this section, nothing in this Act precludes their use in respect of a young person who

(i) has previously been dealt with by the use of extrajudicial measures, or

(ii) has previously been found guilty of an offence.

Objectives

5. Extrajudicial measures should be designed to

(*a*) provide an effective and timely response to offending behaviour outside the bounds of judicial measures;

(*b*) encourage young persons to acknowledge and repair the harm caused to the victim and the community;

(*c*) encourage families of young persons — including extended families where appropriate — and the community to become involved in the design and implementation of those measures;

(*d*) provide an opportunity for victims to participate in decisions related to the measures selected and to receive reparation; and

(*e*) respect the rights and freedoms of young persons and be proportionate to the seriousness of the offence.

Warnings, Cautions and Referrals

Warnings, cautions and referrals

6. (1) A police officer shall, before starting judicial proceedings or taking any other measures under this Act against a young person alleged to have committed an offence, consider whether it would be sufficient, having regard to the principles set out in section 4, to take no further action, warn the young person, administer a caution, if a program has been established under section 7, or, with the consent of the young person, refer the young person to a program or agency in the community that may assist the young person not to commit offences.

Saving

(2) The failure of a police officer to consider the options set out in subsection (1) does not invalidate any subsequent charges against the young person for the offence.

Police cautions

7. The Attorney General, or any other minister designated by the lieutenant governor of a province, may establish a program authorizing the police to administer cautions to young persons instead of starting judicial proceedings under this Act.

Crown cautions

8. The Attorney General may establish a program authorizing prosecutors to administer cautions to young persons instead of starting or continuing judicial proceedings under this Act.

Evidence of measures is inadmissible

9. Evidence that a young person has received a warning, caution or referral mentioned in section 6, 7 or 8 or that a police officer has taken no further action in respect of an offence, and evidence of the offence, is inadmissible for the purpose of proving prior offending behaviour in any proceedings before a youth justice court in respect of the young person.

Extrajudicial Sanctions

Extrajudicial sanctions

10. (1) An extrajudicial sanction may be used to deal with a young person alleged to have committed an offence only if the young person cannot be adequately dealt with by a warning, caution or referral mentioned in section 6, 7 or 8 because of the seriousness of the offence, the nature and number of previous offences committed by the young person or any other aggravating circumstances.

Conditions

(2) An extrajudicial sanction may be used only if

(*a*) it is part of a program of sanctions that may be authorized by the Attorney General or authorized by a person, or a member of a class of persons, designated by the lieutenant governor in council of the province;

(*b*) the person who is considering whether to use the extrajudicial sanction is satisfied that it would be appropriate, having regard to the needs of the young person and the interests of society;

(*c*) the young person, having been informed of the extrajudicial sanction, fully and freely consents to be subject to it;

(*d*) the young person has, before consenting to be subject to the extrajudicial sanction, been advised of his or her right to be represented by counsel and been given a reasonable opportunity to consult with counsel;

(*e*) the young person accepts responsibility for the act or omission that forms the basis of the offence that he or she is alleged to have committed;

(*f*) there is, in the opinion of the Attorney General, sufficient evidence to proceed with the prosecution of the offence; and

(*g*) the prosecution of the offence is not in any way barred at law.

Restriction on use

(3) An extrajudicial sanction may not be used in respect of a young person who

(*a*) denies participation or involvement in the commission of the offence; or

(*b*) expresses the wish to have the charge dealt with by a youth justice court.

Admissions not admissible in evidence

(4) Any admission, confession or statement accepting responsibility for a given act or omission that is made by a young person as a condition of being dealt with by extrajudicial measures is inadmissible in evidence against any young person in civil or criminal proceedings.

No bar to judicial proceedings

(5) The use of an extrajudicial sanction in respect of a young person alleged to have committed an offence is not a bar to judicial proceedings under this Act, but if a charge is laid against the young person in respect of the offence,

(*a*) the youth justice court shall dismiss the charge if it is satisfied on a balance of probabilities that the young person has totally complied with the terms and conditions of the extrajudicial sanction; and

(*b*) the youth justice court may dismiss the charge if it is satisfied on a balance of probabilities that the young person has partially complied with the terms and conditions of the extrajudicial sanction and if, in the opinion of the court, prosecution of the charge would be unfair having regard to the circumstances and the young person’s performance with respect to the extrajudicial sanction.

Laying of information, etc.

(6) Subject to subsection (5) and section 24 (private prosecutions only with consent of Attorney General), nothing in this section shall be construed as preventing any person from laying an information or indictment, obtaining the issue or confirmation of any process or proceeding with the prosecution of any offence in accordance with law.

Notice to parent

11. If a young person is dealt with by an extrajudicial sanction, the person who administers the program under which the sanction is used shall inform a parent of the young person of the sanction.

Victim's right to information

12. If a young person is dealt with by an extrajudicial sanction, a police officer, the Attorney General, the provincial director or any organization established by a province to provide assistance to victims shall, on request, inform the victim of the identity of the young person and how the offence has been dealt with.

Loi sur le système de justice pénale pour les adolescents

2002, ch. 1
[Sanctionnée le 19 février 2002]

PARTIE 1

MESURES EXTRAJUDICIAIRES

PRINCIPES ET OBJECTIFS

Déclaration de principes

4. Outre les principes énoncés à l'article 3, les principes suivants s'appliquent à la présente partie :

a) le recours aux mesures extrajudiciaires est souvent la meilleure façon de s'attaquer à la délinquance juvénile;

b) le recours à ces mesures permet d'intervenir rapidement et efficacement pour corriger le comportement délictueux des adolescents;

c) il est présumé que la prise de mesures extrajudiciaires suffit pour faire répondre les adolescents de leurs actes délictueux dans le cas où ceux-ci ont commis des infractions sans violence et n'ont jamais été déclarés coupables d'une infraction auparavant;

d) il convient de recourir aux mesures extrajudiciaires lorsqu'elles suffisent pour faire répondre les adolescents de leurs actes délictueux et, dans le cas où la prise de celles-ci est compatible avec les principes énoncés au présent article, la présente

loi n'a pas pour effet d'empêcher qu'on y ait recours à l'égard d'adolescents qui en ont déjà fait l'objet ou qui ont déjà été déclarés coupables d'une infraction.

Objectifs

5. Le recours à des mesures extrajudiciaires vise les objectifs suivants :

a) sanctionner rapidement et efficacement le comportement délictueux de l'adolescent sans avoir recours aux tribunaux;

b) l'inciter à reconnaître et à réparer les dommages causés à la victime et à la collectivité;

c) favoriser la participation des familles, y compris les familles étendues dans les cas indiqués, et de la collectivité en général à leur détermination et mise en oeuvre;

d) donner la possibilité à la victime de participer au traitement du cas de l'adolescent et d'obtenir réparation;

e) respecter les droits et libertés de l'adolescent et tenir compte de la gravité de l'infraction.

AVERTISSEMENTS, MISES EN GARDE ET RENVOIS

Avertissements, mises en garde et renvois

6. (1) L'agent de police détermine s'il est préférable, compte tenu des principes énoncés à l'article 4, plutôt que d'engager des poursuites contre l'adolescent à qui est imputée une infraction ou de prendre d'autres mesures sous le régime de la présente loi, de ne prendre aucune mesure, de lui donner soit un avertissement, soit une mise en garde dans le cadre de l'article 7 ou de le renvoyer, si l'adolescent y consent, à un programme ou organisme communautaire susceptible de l'aider à ne pas commettre d'infractions.

Validité des accusations

(2) Le fait pour l'agent de police de ne pas se conformer au paragraphe (1) n'a pas pour effet d'invalider les accusations portées ultérieurement contre l'adolescent pour l'infraction en cause.

Mise en garde par la police

7. Le procureur général ou tout autre ministre désigné par le lieutenant-gouverneur en conseil de la province peut établir un programme autorisant les corps policiers à mettre en garde un adolescent plutôt que d'entamer contre lui des procédures judiciaires sous le régime de la présente loi.

Mise en garde par le procureur général

8. Le procureur général peut établir un programme autorisant le poursuivant à mettre en garde un adolescent plutôt que d'entamer ou de continuer des poursuites contre lui sous le régime de la présente loi.

Inadmissibilité des renseignements relatifs aux mesures

9. Les renseignements relatifs à la prise des mesures d'avertissement, de mise en garde ou de renvoi visées aux articles 6, 7 et 8, au fait que l'agent de police n'a pris aucune mesure et à la perpétration de l'infraction en cause ne peuvent être mis en preuve dans les procédures judiciaires devant le tribunal pour adolescents pour établir le comportement délictueux de l'adolescent.

SANCTIONS EXTRAJUDICIAIRES

Sanctions extrajudiciaires

10. (1) Le recours à une sanction extrajudiciaire n'est possible que dans les cas où la nature et le nombre des infractions antérieures commises par l'adolescent, la gravité de celle qui lui est reprochée ou toute autre circonstance aggravante ne permettent pas le recours à l'avertissement, à la mise en garde ou au renvoi visés aux articles 6, 7 ou 8.

Conditions

(2) En outre, il est assujetti aux conditions suivantes :

a) la sanction est prévue dans le cadre d'un programme autorisé soit par le procureur général, soit par une personne désignée par le lieutenant-gouverneur en conseil de la province ou faisant partie d'une catégorie de personnes désignée par lui;

b) la personne qui envisage de recourir à cette sanction est convaincue qu'elle est appropriée, compte tenu des besoins de l'adolescent et de l'intérêt de la société;

c) l'adolescent, informé de la sanction, a librement accepté d'en faire l'objet;

d) l'adolescent, avant d'accepter de faire l'objet de la sanction, a été avisé de son droit aux services d'un avocat et s'est vu donner la possibilité d'en consulter un;

e) l'adolescent se reconnaît responsable du fait constitutif de l'infraction qui lui est imputée;

f) le procureur général estime qu'il y a des preuves suffisantes justifiant la poursuite de l'infraction;

g) aucune règle de droit n'y fait par ailleurs obstacle.

Restriction à la mise en oeuvre de la sanction

(3) Il n'est toutefois pas possible de recourir à une sanction extrajudiciaire lorsque l'adolescent a soit dénié toute participation à la perpétration de l'infraction, soit manifesté le désir d'être jugé par le tribunal pour adolescents.

Non-admissibilité des aveux

(4) Les aveux de culpabilité ou déclarations par lesquels l'adolescent reconnaît sa responsabilité pour un fait précis ne sont pas, lorsqu'il les a faits pour pouvoir bénéficier d'une mesure extrajudiciaire, admissibles en preuve contre un adolescent dans toutes poursuites civiles ou pénales.

Possibilité d'une sanction extrajudiciaire et de poursuites

(5) Le recours à une sanction extrajudiciaire ne fait pas obstacle à l'introduction de poursuites dans le cadre de la présente loi. Toutefois, lorsqu'il est convaincu, selon la prépondérance des probabilités, que l'adolescent s'est totalement conformé aux modalités de la sanction, le tribunal doit rejeter les accusations portées contre lui; lorsqu'il est convaincu, selon la prépondérance des probabilités, que l'adolescent s'y est conformé seulement en partie, il peut les rejeter s'il estime par ailleurs que les poursuites sont injustes eu égard aux circonstances et compte tenu du comportement de l'adolescent dans l'exécution de la sanction.

Dépôt d'une dénonciation ou d'un acte d'accusation

(6) Sous réserve du paragraphe (5) et de l'article 24 (poursuites privées seulement sur consentement du procureur général), le présent article n'a pas pour effet d'empêcher quiconque de déposer une dénonciation ou un acte d'accusation, d'obtenir un acte judiciaire ou la confirmation d'un tel acte, ou d'entamer ou de continuer des poursuites, conformément aux règles de droit.

Avis au père ou à la mère

11. La personne chargée de la mise en oeuvre du programme dans le cadre duquel il est fait recours à la sanction extrajudiciaire doit informer de la sanction le père ou la mère de l'adolescent qui en fait l'objet.

Droit des victimes à l'information

12. L'agent de police, le procureur général, le directeur provincial ou tout organisme d'aide aux victimes mis sur pied dans la province dévoile à la victime, si elle lui en fait la demande, l'identité de l'adolescent qui fait l'objet d'une sanction extrajudiciaire et la nature de celle-ci.

Convention on the Rights of the Child

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 6

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Convention relative aux droits de l'enfant

Adoptée et ouverte à la signature, ratification et adhésion par l'Assemblée générale dans sa résolution 44/25 du 20 novembre 1989

Article 3

1. Dans toutes les décisions qui concernent les enfants, qu'elles soient le fait des institutions publiques ou privées de protection sociale, des tribunaux, des autorités administratives ou des organes législatifs, l'intérêt supérieur de l'enfant doit être une considération primordiale.

2. Les Etats parties s'engagent à assurer à l'enfant la protection et les soins nécessaires à son bien-être, compte tenu des droits et des devoirs de ses parents, de ses tuteurs ou des autres personnes légalement responsables de lui, et ils prennent à cette fin toutes les mesures législatives et administratives appropriées.

3. Les Etats parties veillent à ce que le fonctionnement des institutions, services et établissements qui ont la charge des enfants et assurent leur protection soit conforme aux normes fixées par les autorités compétentes, particulièrement dans le domaine de la sécurité et de la santé et en ce qui concerne le nombre et la compétence de leur personnel ainsi que l'existence d'un contrôle approprié.

Article 6

1. Les Etats parties reconnaissent que tout enfant a un droit inhérent à la vie.

2. Les Etats parties assurent dans toute la mesure possible la survie et le développement de l'enfant.

Article 38

1. Les Etats parties s'engagent à respecter et à faire respecter les règles du droit humanitaire international qui leur sont applicables en cas de conflit armé et dont la protection s'étend aux enfants.
2. Les Etats parties prennent toutes les mesures possibles dans la pratique pour veiller à ce que les personnes n'ayant pas atteint l'âge de quinze ans ne participent pas directement aux hostilités.

3. Les Etats parties s'abstiennent d'enrôler dans leurs forces armées toute personne n'ayant pas atteint l'âge de quinze ans. Lorsqu'ils incorporent des personnes de plus de quinze ans mais de moins de dix-huit ans, les Etats parties s'efforcent d'enrôler en priorité les plus âgées.

4. Conformément à l'obligation qui leur incombe en vertu du droit humanitaire international de protéger la population civile en cas de conflit armé, les Etats parties prennent toutes les mesures possibles dans la pratique pour que les enfants qui sont touchés par un conflit armé bénéficient d'une protection et de soins.

Article 39

Les Etats parties prennent toutes les mesures appropriées pour faciliter la réadaptation physique et psychologique et la réinsertion sociale de tout enfant victime de toute forme de négligence, d'exploitation ou de sévices, de torture ou de toute autre forme de peines ou traitements cruels, inhumains ou dégradants, ou de conflit armé. Cette réadaptation et cette réinsertion se déroulent dans des conditions qui favorisent la santé, le respect de soi et la dignité de l'enfant.

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

G.A. Res. 54/263, U.N. Doc A/RES/54/263, Annex 1(May 25, 2000), entered into force Feb. 12, 2002

Preamble

The States Parties to the present Protocol, … Condemning with the gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State, and recognizing the responsibility of those who recruit, train and use children in this regard, …

Article 1

States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

Article 3

States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child,1 taking account of the principles contained in that article and recognizing that under the Convention persons under 18 are entitled to special protection.

Each State Party shall deposit a binding declaration upon ratification of or accession to this Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.

States Parties that permit voluntary recruitment into their national armed forces under the age of 18 shall maintain safeguards to ensure, as a minimum, that:

Such recruitment is genuinely voluntary;

Such recruitment is done with the informed consent of the person legal guardians;

Such persons are fully informed of the duties involved in such military service;

Such persons provide reliable proof of age prior to acceptance into national military service.

Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.

The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.

Article 4

Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

The application of the present article under this Protocol shall not affect the legal status of any party to an armed conflict.

Article 6

Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of this Protocol within its jurisdiction.

States Parties undertake to make the principles and provisions of the present Protocol widely known and promoted by appropriate means, to adults and children alike.

States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to this Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery and their social reintegration.

Projet de Protocole facultatif à la Convention relative aux droits de l'enfant, concernant l'implication d'enfants dans les conflits armés

<G.A. Res. 54/263, U.N. Doc A/RES/54/263, Annex 1(May 25, 2000), entered into force Feb. 12, 2002>

Preamble

, … Condamnant avec une profonde inquiétude l'enrôlement, l'entraînement et d'enfants dans en deçà et au delà des frontières nationales l'utilisation les hostilités par des groupes armés distincts des forces armées d'un État, et reconnaissant la responsabilité des personnes qui recrutent, forment et utilisent des enfants à cet égard, …

Article premier

Les États Parties prennent toutes les mesures possibles dans la pratique pour veiller à ce que les membres de leurs forces armées qui n'ont pas atteint l'âge de 18 ans ne participent pas directement aux hostilités.

Article 3

Les États Parties relèvent en années l'âge minimum de l'engagement volontaire dans leurs forces armées nationales par rapport à celui fixé au paragraphe 3 de l'article 38 de la Convention relative aux droits de l'enfant1, en tenant compte des principes inscrits dans ledit article et en reconnaissant qu'en vertu de la Convention, les personnes âgées de moins de 18 ans ont droit à une protection spéciale.

Chaque État Partie dépose, lors de la ratification du présent Protocole ou de l'adhésion à cet instrument, une déclaration contraignante indiquant l'âge minimum à partir duquel il autorise l'engagement volontaire dans ses forces armées nationales et décrivant les garanties qu'il a prévues pour veiller à ce que cet engagement ne soit pas contracté de force ou sous la contrainte.

Les États Parties qui autorisent l'engagement volontaire dans leurs forces armées nationales avant l'âge de 18 ans mettent en place des garanties assurant, au minimum, que:

Cet engagement soit effectivement volontaire;

Cet engagement ait lieu avec le consentement, en connaissance de cause, des parents ou gardiens légaux de l'intéressé;

Les personnes engagées soient pleinement informées des devoirs qui s'attachent au service militaire national;

Ces personnes fournissent une preuve fiable de leur âge avant d'être admises audit service.

Tout État Partie peut, à tout moment, renforcer sa déclaration par voie de notification à cet effet adressée au Secrétaire général de l'Organisation des Nations Unies, qui en informe tous les autres États Parties. Cette notification prend effet à la date à laquelle elle est reçue par le Secrétaire général.

L'obligation de relever l'âge minimum de l'engagement volontaire visée au paragraphe 1 du présent article ne s'applique pas aux établissements scolaires placés sous l'administration ou le

contrôle des forces armées des États Parties, conformément aux articles 28 et 29 de la Convention relative aux droits de l'enfant.

Article 4

Les groupes armés qui sont distincts des forces armées d'un État ne devraient en aucune circonstance enrôler ni utiliser dans les hostilités des personnes âgées de moins de 18 ans.

Les États Parties prennent toutes les mesures possibles dans la pratique pour empêcher l'enrôlement et l'utilisation de ces personnes, notamment les mesures d'ordre juridique voulues pour interdire et sanctionner pénalement ces pratiques.

L'application du présent article du Protocole est sans effet sur le statut juridique de toute partie à un conflit armé.

Article 6

d'ordre juridique,BChaque État Partie prend toutes les mesures voulues pour assurer l'application et le respectBadministratif et autre effectifs des dispositions du présent Protocole dans les limites de sa compétence.

Les États Parties s'engagent à faire largement connaître les principes et dispositions du présent Protocole, aux adultes comme aux enfants, à l'aide de moyens appropriés.

Les États Parties prennent toutes les mesures possibles dans la pratique pour veiller à ce que les personnes relevant de leur compétence qui sont enrôlées ou utilisées dans des hostilités en violation du présent Protocole soient démobilisées ou de quelque autre manière libérées des obligations militaires. Si nécessaire, les États Parties accordent à ces personnes toute l'assistance appropriée en vue de leur réadaptation physique et psychologique et de leur réinsertion sociale.