

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

K.M., J.B., and D.R.

[Young persons within the meaning of the *Youth Criminal Justice Act*]

Respondents

- and -

**THE ATTORNEY GENERAL OF CANADA, CANADIAN CIVIL LIBERTIES
ASSOCIATION, CRIMINAL LAWYERS ASSOCIATION OF ONTARIO AND
JUSTICE FOR CHILDREN AND YOUTH**

Interveners

**FACTUM OF THE INTERVENER
JUSTICE FOR CHILDREN AND YOUTH
Volume 1 of 2**

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PART I - STATEMENT OF THE CASE

1. This a Crown appeal of Justice Cohen's March 30 and July 16, 2009 decisions wherein she found that s. 487.051 of the *Criminal Code* violated ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*").
2. Justice for Children and Youth ("JFCY") submits that the *Youth Criminal Justice Act* ("YCJA") is the governing code with respect to youth criminal justice, and takes the position that the balancing of the principles of the *YCJA*, including public safety, is best done by judges who are alive to all the aspects of the young person and the offence.
3. JFCY submits that mandatory collection of DNA samples under s. 487.051(1) of the *Criminal Code* should not apply to young persons as it violates the principles of the *YCJA* and s.7 and 8 of the *Charter*.
4. JFCY submits that the reverse onus provisions regarding DNA orders in s. 487.051(2), are unconstitutional, violate the principles of the *YCJA*, and therefore do not apply to young persons. The burden should be on the Crown to prove the need for collection of a DNA sample from a young person.
5. The DNA order provisions of the *Criminal Code* contravene international law, including the *United Nations Convention on the Rights of the Child* ("the *UNCRC*") which is incorporated by reference into the *YCJA*.
6. Where the *Criminal Code* is inconsistent with the *YCJA*, the *YCJA* must prevail. Where the *Code* can be interpreted in more than one way, the interpretation most consistent with the principles of the *YCJA* is the correct interpretation.
7. JFCY submits that a DNA order against a young person must be discretionary, and that the discretion given to judges must be exercised differently than when applied to adults. Factors

and considerations specific to young persons and the principles of the *YCJA* must be taken into account.

PART II – SUMMARY OF THE FACTS

8. JFCY relies on the Facts as outlined in the Applicant's and Respondents' Facts.

PART III - ISSUES AND THE LAW

9. Sub-sections 487.051(1) and (2) were found by Justice Cohen of the Ontario Court of Justice to violate ss. 7 and 8 of the *Charter*.

IMPACT OF DNA ORDERS ON YOUNG PERSONS

Labelling, Stigma and Psychological Harm

10. A DNA order permanently or semi-permanently labels young people as “delinquent” or “criminal” at a stage in their life when they are developing identity. The result is stigmatization which affects a “young person’s psyche, his developing self-image and his sense of self-worth”.¹ Researchers note that “A young person’s self-concept changes to be consistent with the label.... Being labelled as an offender makes behaviour that is consistent with that label more likely”.²

11. In *F.N. (Re)* the Supreme Court described the deleterious effects of stigmatization:

Stigmatization or premature “labelling” of a young offender still in his or her formative years is well understood as a problem in the juvenile justice system. A young person once stigmatized as a lawbreaker may, unless given help and redirection, render the stigma a self-fulfilling prophecy. In the long run, society is best protected by preventing recurrence.³

12. Inclusion in the DNA Data Bank is essentially a strong label as a criminal. The prospect of a DNA order has a very real effect on a young person’s psychological well-being. A DNA

¹ *R. v. D.B.* [2006] O.J. No. 1112 (C.A.) at para 6.

² Anthony N. Doob & Carla Cesaroni, *Responding to Youth Crime in Canada*, (Toronto: University of Toronto Press, 2004) at 41-42.

³ *F.N. (Re)*, [2000] 1 S.C.R. 880 at para 14.

order, because of its stigmatizing effects, undermines factors important to the successful navigation of adolescence, such as positive personal and social identity, and positive association with social networks.

13. A DNA order's effect, because it lasts longer than the sentence, embeds young people into the criminal justice system when it is better for them to begin dissociating themselves from that system. Research demonstrates that "criminal justice processing (e.g., charging, fingerprinting, taking the young person to court) does not reduce the likelihood of re-offending."⁴ A recent Canadian study found that official delinquency (processing in the YCJA system) correlated with a delinquent self-concept.⁵ It is in the interest of the administration of justice to minimize exposure of young persons to the police and the justice system. Another researcher notes that

"[r]estorative practices...make a positive difference while the extent of embeddedness in the criminal justice system, severe and retributive outcomes and stigmatic shaming have negative effects."⁶

14. Privacy rights under the *YCJA* are engaged in order to protect the young person from the effects of labeling and stigma and to facilitate rehabilitation and re-integration. International law provides that "the juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity *or by the process of labelling*."⁷
- [emphasis added]

⁴ Doob & Cesaroni, *supra* note 2 at 42.

⁵ Brownfield, D. and Thompson, K. "Correlates of Delinquent Identity: Testing Interactionist, Labeling, and Control Theory" (2008) 3(1) *International Journal of Criminal Justice Sciences* 44–53, available at: <http://cjsjournal.brinkster.net/davidandkevin.html>

⁶ Gabrielle Maxwell, "Achieving Effective Outcomes in Youth Justice: Implications of new research for Principles, Police and Practice". (2003) 6th International Conference on Restorative Justice. Retrieved October 4, 2010, from <http://www.sfu.ca/cfrj/fulltext/maxwell.pdf> at p.1

⁷ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, GA Res. 40/33, 29 November 1985, article 8.1 [*The Beijing Rules*].

15. Labeling theory is reflected in the U.N. Guidelines (1990) for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), Annex Article I(5)⁸:

I. Fundamental principles

5. The need for and importance of progressive delinquency prevention policies and the systematic study and the elaboration of measures should be recognized. These should avoid criminalizing and penalizing a child for behaviour that does not cause serious damage to the development of the child or harm to others. Such policies and measures should involve:

(f) Awareness that, in the predominant opinion of experts, labelling a young person as "deviant", "delinquent" or "pre-delinquent" often contributes to the development of a consistent pattern of undesirable behaviour by young persons.

16. A sense of closure and finality is necessary to subdue the effects of stigma and labelling on young persons. Like a designation as a violent offender, or a custody order, the retention of DNA creates an additional stigma: self-identification as a criminal and the inculcation of the perception that the world still views them as a criminal.

Rehabilitation

17. The *YCJA* emphasises the importance of rehabilitation and reintegration of young people as objectives of youth criminal justice. Mandatory DNA collection, on the other hand, essentially presumes recidivism and may increase the likelihood of this undermining these long-term safety principles.

18. Research shows that a diversity of factors and circumstances affect the likelihood of recidivism⁹. An assessment of these relevant factors can assist in distinguishing lower risk and higher risk offenders.¹⁰ Even among the 'high risk of reoffending' group, recidivism by

⁸ *United Nations Guidelines (1990) for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*, GA Res. 45/112, 14 December 1990, Annex, I 5 (f) [*The Riyadh Guidelines*].

⁹ Eyitayo Onifade, William Davidson, Christina Campbell, Garrett Turke, Jill Malinowski, and Kimberly Turner, "Predicting Recidivism in Probationers with the Youth Level of Service Case Management Inventory (YLS/CMI)", (2008) 35(4) *Criminal Justice and Behaviour* 474-483.

¹⁰ Onifade et al, *ibid.*

young persons remains relatively low.¹¹ The majority of youth desist from criminal activity by age 19 or 20, even for those who have committed violent offences.¹² This is supported in the *Riyadh Guidelines*, which requires that state policies and measures should involve:

“Consideration that youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood.”¹³

19. Evidence-based studies have shown, and the Canadian government has acknowledged, that young people “may not fully understand the nature and consequences of their acts for themselves and others.”¹⁴ One study found that when the young offenders were asked to state what influenced their involvement in committing their crime, not one of these youths mentioned that they thought about the penalty of the crime committed.¹⁵ One reason for this lack of foresight in young people is a result of the fact that the last area of the brain to develop is the frontal cortex, which involves self-control and reasoning.¹⁶

20. The Supreme Court stated:

“Parliament has sought preferably to promote the long-term protection of the public by addressing the circumstances underlying the offending behaviour, by rehabilitating and reintegrating young persons into society.”¹⁷

21. Even “severe” offences do not justify mandatory DNA orders. Studies show that restorative and reintegrative approaches are effective for serious crimes as well as minor ones.¹⁸ Further,

¹¹ Onifade et al, *ibid*.

¹² Penney, S.R. and Moretti, M.M. (2005). The transfer of juveniles to adult court in Canada and the United States: confused agendas and compromised assessment procedures. *International Journal of Forensic Mental Health*, 4(1): 19-37 at 28.

¹³ The *Riyadh Guidelines*, supra, note 8, at I.5.e.

¹⁴ Department of Justice Canada (2006). Why did the Government introduce New Youth Justice Legislation? <Retrieved online on October 7, 2010: <http://www.justice.gc.ca/eng/pi/yj-jj/ycja-lsipa/why-pourq.html> >.

¹⁵ Martin Ruck, Christopher Koegl, & M. Peterson-Badali, “Youth Court Dispositions: Perceptions of Canadian Juvenile Offenders” (2001), *International Journal of Offender Therapy and Comparative Criminology*, 45(5), 593-605.

¹⁶ Report of the Nunn Commission of Inquiry, at p. 155, Retrieved online October 4, 2010 at: http://gov.ns.ca/just/nunn_commission/docs/Report_Nunn_Final.pdf

¹⁷ *R. v. B.W.P.; R. v. B.V.N.*, [2006] 1 S.C.R. 941 at para 4.

the range of conduct that can constitute a specific designated offence is very broad, especially for youthful offences. A mandatory order may well be disproportionate to the actual circumstances of the offence.¹⁹

22. The judge hearing a case is in the best position to judge the seriousness of the offence, the circumstances, the age of the young person, maturity and character, the absence of a record and previous convictions, the likelihood of re-offending and any other relevant elements that can guide the court in determining whether or not there should be a DNA order.
23. The principle of diminished moral blameworthiness, should be applied when determining whether a DNA order should be made. If the circumstances of the young person and their offence are such that a DNA order would undermine rehabilitation and long-term protection then they amount to stigmatizing punishment. Generally, the sentence imposed on the youth will adequately address the similar objectives of DNA orders, namely protection of the public.

Disproportionate Effects on Young People

24. The kind of incidents that may result in charges often differs between young persons and adults. Many young people are charged with very serious offences, and plead guilty to the same, for relatively minor circumstances. As was seen in *R v. M.H.* and *R v. S.M.*, cited above²⁰, the circumstances of primary designated offences can often be on the low end of facts that support the serious charge. Prior to the legislative amendments, the Supreme Court

¹⁸ Tanya A. Ruge & Robert B. Cormier, "Restorative Justice in Cases of Serious Crime: An Evaluation." (2003) 6th International Conference on Restorative Justice. Retrieved online October 4, 2010 at:

<http://www.sfu.ca/cfij/fulltext/rugge.pdf>

¹⁹ Consider two actual cases of primary designated offences: a) "assault with a weapon" where a 14 year-old threw a telephone at his sister during an argument: *R v. S.M.* [2004] A.J. No. 534 (Alta. Q.B.), and b) "assault causing bodily harm" where during a consensual schoolyard fight between *junior* high school students the youthful offender injured a classmate *R v. M.H.* [2001] N.S.J No. 557 (N.S. Youth Court).

²⁰ *Ibid.*

upheld a decision not to make a DNA order for a young offender who pled guilty to “assault with a weapon” for stabbing his mother in the foot with a pen.²¹ “Assault with weapon” charges for youth often involve school bags or supplies (and don’t lead to injury), while “robbery” charges often involve minimally aggressive demands for an iPod or cell phone from their peers. Under the impugned provisions, DNA orders in all of these cases would be mandatory.

25. Also noted is the fact that some offences, including robbery, attract even harsher consequences because they are “scheduled offences” under the *Code* that attract an additional five year retention period.²² Thus, a 16 year-old youth found guilty of robbery of a classmate’s iPod, could typically have the DNA sample held by the state for twelve years²³. Other Scheduled offences that could stem from facts that are less serious include youthful trafficking and sexual assault. A teen sharing the costs of a small quantity of marijuana with a friend, and a youth pinching a classmate’s bottom can both lead to mandatory DNA orders that have a 10 year retention period.

CHARTER ANALYSIS

Section 7 of the Charter

26. Section 8 is not the sole focal point of the *Charter* analysis. While the court in *Rodgers* noted that s.7 is affected modestly with respect to DNA orders²⁴, it is submitted that a s. 7 analysis is different in the context of the youth and the *YCJA*.

27. The constitutional questions is: has the government action violated one or more of life, liberty and security of the person, and if so is the violation inconsistent with the principles of

²¹ *R. v. R.C.*, [2005] S.C.J. No 62.

²² From para 6(b), citing Exhibit D, of the Affidavit of Robert Murray, filed by the Department of Justice: June 2010 Final Report on Statutory Review of the DNA Identification Act showed that 2,619 of the 20,865 DNA samples retained by RCMP were for Scheduled Offences and thus held for an additional 5 years.

²³ 2 year sentence of probation + 5 years *YCJA* retention + 5 additional years as a “scheduled offence”

²⁴ *R v. Rodgers* [2006] 1 S.C.R. 554 at para 23.

fundamental justice? In other words, if there is a life, liberty or security of the person violation, did Parliament strike the right balance between competing values of the young person and the interests of society?

28. In *New Brunswick v. G.(J.)* the Supreme Court held that a serious interference with one's psychological integrity is a violation of security of the person.²⁵ In the concurring opinion, Justice L'Heureux-Dube held that "serious stigma and psychological stress" can lead to security of the person violations.²⁶ In *Blencoe*, the Supreme Court held that serious state-induced psychological stress could lead to a breach of security of the person.²⁷
29. A DNA order triggers s.7 protections of "life, liberty and security of the person"²⁸ and is physically invasive, with the state keeping a piece of the individual's most psychologically valued information. The stigma²⁹ attached to the obtaining and retention of a youth DNA sample engages security of the person because it labels the young person as a criminal and thus affects their psychological security. In *F.N. (Re)*, the Supreme Court stated, "A young person once stigmatized as a lawbreaker may, unless given help and redirection, render the stigma a self-fulfilling prophecy."³⁰
30. The Supreme Court has held that the "making of a DNA order clearly engages two aspects of privacy protected by the *Canadian Charter of Rights and Freedoms*. The first relates to the person, and the second arises in what has been called the "informational context"³¹ The

²⁵ *New Brunswick v. G.(J.)* [1999] 3 S.C.R. 46 at para 61.

²⁶ *New Brunswick v. G.(J.)*, *ibid* at para 116.

²⁷ *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 S.C.R. 307 at para 57.

²⁸ *The Canadian Charter of Rights and Freedoms*, section 7, *The Constitution Act*, 1982, c.11.

²⁹ Levitt, Mairi & Tomasini, Floris, "Bar-coded children: an exploration around the inclusion of children on the England and Wales National DNA database" (2006) *Genomics, Society and Policy*, 2(1), 41-56.

³⁰ *F.N. (Re)*, *supra* note 3, at para. 14

³¹ *R. v. R.C.*, *supra* note 21 at para 25.

Supreme Court has also stated that “with regards to privacy related to the person, the taking of bodily samples... clearly interferes with bodily integrity”³².

Separate Treatment of Young Persons as a Principle of Fundamental Justice

31. It is a firmly held principle of Canadian law that young people are treated separately from and differently than adults. This principle is well established in the Preamble to the *YCJA*, which emphasizes society’s “responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood”. In particular, it seeks to address the underlying causes of youth crime, respond to the needs of youth, and provide support to youth at risk of reoffending in order to enhance the long-term protection of the public.

32. In *R v. D.B.*, the Supreme Court held that special treatment of young people in recognition of their reduced maturity and presumption of reduced culpability is a principle of fundamental justice.³³ According to the Supreme Court

“a broad consensus reflecting society’s values and interests exists, namely that the principle of a presumption of diminished moral culpability in young persons is fundamental to our notions of how a fair legal system ought to operate.”³⁴

33. The Supreme Court also stated that “[b]ecause of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgement.”³⁵ These factors militate for privacy, rehabilitation and re-integration, and against stigmatization, long-term consequences and violations of young people’s privacy. Both mandatory orders and reverse onus provisions regarding DNA collection from young people are contradictory to the presumption of diminished moral culpability.

34. Social science research informs that youth often experience

³² *R. v. R.C.*, *supra* note 21, at para 44.

³³ *R. v. D.B.* [2008] S.C.J. No. 25, at para. 39-69 for discussion.

³⁴ *R. v. D.B.*, [2008] *ibid.*, at para 68.

³⁵ *R. v. D.B.*, [2008] *ibid.*, at para 41.

“an abrupt increase in reward-seeking behaviors, and a more gradual increase in the capacity for self-regulation. This leaves a time gap in which adolescence are more vulnerable to reckless behaviour.”³⁶

35. Further, both Canadian legislation and common law consistently make distinctions in the treatment and culpability of children versus adults based on capacity and responsibility. Accordingly, age and developmental stage have always been determining factors when judging the degree to which young people are held responsible for their actions. This is reflected in the *YCJA*, where the objectives and treatment of young people are entirely distinct from those of the ordinary criminal justice system for adults. Young persons are to be “decidedly but differently accountable”³⁷. The separate treatment of young people includes enhanced privacy rights, procedural protections, and different objectives from the ordinary criminal justice system, including a focus on rehabilitation and reintegration and the absence of deterrence as a sentencing principle.

36. The *YCJA* provides that young persons have “special guarantees of their rights and freedoms”³⁸ in addition to those guaranteed to the rest of the population by the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*. The *YCJA* assures young persons “a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that affect them.”³⁹

37. By removing the discretionary authority of the judge regarding DNA orders, s. 487.051(1) eliminates young persons’ participation in a proceeding with profound effects on their freedom and perception of self, and is inconsistent with the principles of the *YCJA*.

³⁶ Praveen Kambam & Christopher Thompson, “The development of decision-making capacities in children and adolescents: psychological and neurological perspectives and their implications for juvenile defendants” (2009). *Behavioral Sciences & the Law*, 27(2): 173-190 at 176.

³⁷ *R. v. D.B.*, [2008] *supra* note 33, at para. 1.

³⁸ *Youth Criminal Justice Act*, S.C., 2002 c.1 (*YCJA*), Preamble.

³⁹ *Ibid.*, at s. 3(d)(i).

38. Section 487.051(2), by placing the legal burden on the young person deprives them of the benefit of the presumption of diminished moral blameworthiness based on age and offends the presumed treatment of the young person as separate from the adult system. Similar to the analysis in *R v. D.B.* regarding reverse onus sentencing provisions⁴⁰, a reverse onus DNA provision is inconsistent with the stated intent of the *YCJA* to treat young people differently than adults in the criminal justice system and offends the principle of fundamental justice.⁴¹
39. Furthermore, in *R v. Malmo-Levine* the Supreme Court applied the doctrine of disproportionality: it is a breach of the principles of fundamental justice when a law is grossly disproportionate to the state interest.⁴² It is submitted that such is the case with the impugned DNA provisions. Making DNA orders mandatory for all young people found guilty of primary designated offences, regardless of their personal factors or the unique circumstances of the offence is too extreme a response to the objectives of the DNA provisions. The simple designation of an offence is not enough to justify a DNA order. Judges are in a better position than Parliament to account for the circumstances of a particular offence, and to determine whether a DNA order is required.⁴³

Different Treatment Under International Law

40. The Preamble⁴⁴ of the *YCJA* incorporates into the *Act* by reference⁴⁵ the *UN Convention on the Rights of the Child* (“the *UNCRC*”) ⁴⁶. The *UNCRC* is the most widely ratified and accepted human rights treaty. The Supreme Court has held that Canadian law must be

⁴⁰ *R v. D.B.*, [2008] *supra* note 33, at para. 93.

⁴¹ The Senate Report (Exhibit D of Affidavit of Robert Murray) (*supra* note 22, at p. 44) made a recommendation to remove the reverse onus provision.

⁴² *R v. Malmo-Levine* [2003] 3 S.C.R. 571 para 143.

⁴³ Prior to the relevant amendments, the Supreme Court held that the “court must consider the impact of a DNA order... to determine whether privacy and security of the person are affected in a grossly disproportionate manner. This inquiry is highly contextual, *taking into account not only that the offence is a primary designated offence, but also the particular circumstances of the offence and the character and profile of the offender.*” *R. v. R.C.*, *supra* note 21, at para 29 [emphasis added].

⁴⁴ *YCJA*, *supra* note 38, Preamble.

⁴⁵ *R. v. R. C.*, *supra* note 21, at para. 41.

⁴⁶ *United Nations Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Preamble [*UNCRC*].

interpreted in compliance with Canada's international Treaty obligations⁴⁷. The *UNCRC* recognizes "the need to extend particular care to the child"⁴⁸ [defined as anyone under the age of 18⁴⁹] and endorses the separate treatment of young persons.

41. As signatory to the *UNCRC*, Canada has undertaken to provide special protective treatment to children based on their vulnerability. The Preamble to the *UNCRC* states that under the *Declaration of the Rights of the Child*, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection..."⁵⁰ Article 3 provides that in all actions concerning children by courts of law, the "best interests of the child shall be a primary consideration." Similarly, the *Ridayh Guidelines* hold that: "a child-centred orientation should be pursued" in the context of youth justice issues.⁵¹
42. The youth justice principles of privacy are strengthened by incorporated international law as they are in Canadian domestic law. The *UNCRC* requires Canada to guarantee the child's right to have his or her privacy guaranteed at *all* stages of the proceedings.⁵² Further privacy safeguards ensure that "no child shall be subjected to arbitrary or unlawful interference with his or her privacy",⁵³ and that "the child has the right to the protection of the law against such interference..."⁵⁴
43. State Parties must treat children who have infringed the law in a manner consistent with the child's age and the desirability of promoting the child's reintegration and assumption of a constructive role in society.⁵⁵ In other words, rehabilitation is at the heart of the legislative

⁴⁷ *Canadian Foundation for Children Youth and the Law v. Canada (Attorney General)* [2004] S.C.J. No 6 at para 31.

⁴⁸ *UNCRC*, *supra* note 46, Preamble.

⁴⁹ *UNCRC*, *supra* note 46, Article 1.

⁵⁰ *UNCRC*, *supra* note 46, Preamble.

⁵¹ *Ridayh Guidelines*, *supra* note 8, at I.3

⁵² *UNCRC*, *supra* note 46, Article 16, 40.

⁵³ *UNCRC*, *supra* note 46, Article 16.

⁵⁴ *UNCRC*, *supra* note 46, Article 16.

⁵⁵ *UNCRC*, *supra* note 46, Article 40

and judicial intervention with young persons, and privacy ensures this protection. Mandatory DNA Orders, and reverse onus provisions violate this principle.⁵⁶

44. The *UNCRC* further requires that

“the child shall in particular be provided the opportunity to be heard in *any judicial and administrative proceedings affecting the child*, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”⁵⁷ [emphasis added]

45. The opportunity to be heard and to participate is made hollow by the mandatory nature of the DNA provisions in the *Criminal Code*.

Privacy Rights and Procedural Protections

46. The *YCJA* provides that young persons are entitled to “enhanced procedural protection to ensure that [they] are treated fairly and that their rights, including their right to privacy, are protected” under domestic law.⁵⁸ The taking and retention of DNA invades privacy; to do so without discretion or consideration of the individual young person denies young people any procedural protection.

47. Courts have emphasized the privacy issues regarding DNA. In *R v. S.A.B* the Supreme Court stated,

“The informational aspect of privacy... is the central concern involved in the collection of DNA information by the state. Privacy in relation to information derives from the assumption that all information about a person is in a fundamental way his or her own, to be communicated or retained by the individual in question as he or she sees fit... There is undoubtedly the highest level of personal and private information contained in an individual’s DNA.”⁵⁹

48. In *R v. D.B.* the Supreme Court held that principles of fundamental justice hold that the burden must remain on the Crown to justify the imposition of consequences under the

⁵⁶ For example, if *R v. S.M.* [2004] A.J. No. 534 was heard under the current 487.051(1), this 14 year-old boy with no criminal record would be subject to a mandatory DNA order for tossing a telephone at his sister.

⁵⁷ *UNCRC*, *supra* note 46, at Article 12 [emphasis added].

⁵⁸ *YCJA*, *supra* note 38 at s. 3(1)(b)(iii).

⁵⁹ *R v. S.A.B.*, [2003] S.C.J. No. 61, at para. 48.

YCJA.⁶⁰ Because of the heightened privacy rights of young people, the Crown bears the burden of proof if it seeks to deprive a young person of a publication ban.⁶¹ In order to ensure consistency, as well as constitutional compliance, this principle must apply to DNA orders as well. While DNA orders are not “punishment” in the context of a Charter s.11(h) and (i) analysis⁶², the effect of a DNA order is a significant negative consequence for young people.

Overbreadth

49. ‘Overbreadth’ of legislation is a breach of the principles of fundamental justice.⁶³ This breach was established in *R. v. Heywood*, a case involving a broad and mandatory restriction of liberty upon conviction for certain offences, in which the Court held the impugned provisions’ lack of judicial discretion and avenue for review constituted overbreadth.⁶⁴ A law that restricts more than necessary to accomplish its purpose breaches of the principles of fundamental justice.

50. Despite reduced blameworthiness, s.487.051(1) is such that young people found guilty of the most minor baseball cap robbery are subject to the same DNA order as adult armed bank robberies. The *UNCRC* prohibits such uniform mandatory orders when it requires dispositions affecting young people to be “appropriate to their well-being and proportionate both to their circumstances and the offence”⁶⁵.

Section 8

51. It is submitted that ss. 487.051(1) and (2) also violate s. 8 of the *Charter*, which provides that everyone has the right to be free from unreasonable search and seizure. The taking of a DNA

⁶⁰ *R. v. D.B.* [2008] *supra* note 33, at para 94.

⁶¹ *R. v. D.B.*, [2008] *supra* note 33, at para 95.

⁶² *R v. Rodgers*, *supra* note 24.

⁶³ *R. v. Heywood*, [1994] 3 S.C.R. 761.

⁶⁴ *R. v. Heywood*, *ibid.*

⁶⁵ *UNCRC supra* note 46, Article 40(3)(b).

sample is a seizure. Section 8 protects one's reasonable expectation of privacy. The analysis, as set out in *Hunter v. Southam* is "whether the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement."⁶⁶ When one has a heightened sense of privacy it will raise the standard of reasonableness.⁶⁷

52. In the context of a *Charter* analysis, DNA orders impact one's personal and informational privacy⁶⁸, with the informational privacy being of central concern⁶⁹. DNA contains the "highest level of personal and private information"⁷⁰. "[A]bsent a compelling public interest" the taking and retention of DNA "would inherently constitute a grave intrusion on the subject's right to informational privacy."⁷¹

State Objective

53. The state objectives (namely law enforcement and detection) in maintaining a Convicted Offenders Index (COI) in the DNA databank do not apply in the same way to young people because deterrence is not a principle of the *YCJA*.⁷² In its decision in *R. v. B.W.P.; R. v. B.V.N.*⁷³ the Supreme Court of Canada held: "...by policy choice, I conclude that Parliament has not included deterrence as a basis for imposing a sanction under the *YCJA*."⁷⁴ The primary objective of the *YCJA* is the rehabilitation of youthful offenders in order to ensure the long-term protection of the public. There is a focus on the principles of rehabilitation and reintegration as the mechanisms which best serves the needs of young people as well as

⁶⁶ *Hunter v. Southam* [1984] 2 S.C.R. 145, at pp 159-60.

⁶⁷ Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. suppl. (Toronto: Carswell, 2007) Vol. 2 at 48-36.

⁶⁸ *R v. R.C.* *supra* note 21, at para 25.

⁶⁹ *R v. S.A.B.*, *supra* note 59, at para 48.

⁷⁰ *R v. S.A.B.*, *supra* note 59, at para. 48

⁷¹ *R v. R.C.*, *supra* note 21, at para 39.

⁷² *YCJA*, *supra* note 38, s. 3; *R v. D.B.* [2008] *supra* note 33.

⁷³ *R. v. B.W.P.; R.v. B.V.N.* *supra* note 17, at para 4.

⁷⁴ *Ibid.*

providing for the long-term safety of the public. That deterrence is not an appropriate youth justice principle is supported by both social science and medical research.⁷⁵

54. Social science research shows that criminal justice processing does not reduce the likelihood of youth reoffending.⁷⁶ Finally, because young people have a low rate of recidivism⁷⁷ the objective of deterrence is neither rational nor reasonable. This is made even more unreasonable by the breadth of offences/offenders that may be captured under this mandatory provision.

55. A 20-year study of 1053 boys in Montreal found that boys processed in the justice system were much more likely to engage in adult criminality than boys who self-reported delinquency but were not given formal sanctions. These results are independent of other possible contributing variables, such as hyperactivity, poor parental supervision, etc.

“With regard to the effect of the specific type of judicial intervention, it was found that the more restrictive and more intense the justice system intervention was, the greater was its negative impact.”⁷⁸

56. Imposing mandatory DNA orders runs counter to the state interests.

Impact of DNA Order on Privacy Interests of Young People

57. Young people have a legislated higher expectation of privacy and this is clear from various provisions in the *YCJA*, including the Statement of Principles (namely s. 3(b)(iii), 3(d)(ii)) and Part 6, which prohibits publishing and disseminating information about young people. The purpose of these protections is to prevent labelling and stigmatization. This prohibition continues after proceedings are complete under the *Act*; young people do not lose this protection if they are found guilty.

⁷⁵ See Daniel P. Keating, PH.D. (2010), *Developmental Science and Youth Justice*, Prepared for the Department of Justice Canada and presented at the Roundtable on Youth Developmental Science and Youth Justice.

⁷⁶ Doob & Cesaroni, *supra* note 2, at 42.

⁷⁷ Onifade et al, *supra* note 9.

⁷⁸ U. Gatti, R.E. Tremblay & F. Vitaro, “Iatrogenic effect of juvenile justice” (2009) *Journal of Child Psychology and Psychiatry*, 50(8): 991–998, at 996.

58. The DNA provisions create a serious intrusion on the young person's privacy interests. The appellant states that "convicted offenders have diminished expectations of privacy in relation to many aspects of their lives."⁷⁹ This ignores the fact that young people found guilty actually have a higher legislative expectation of privacy than adult offenders.
59. While the physical process for obtaining both is similar, DNA is more intrusive with respect to the informational context than finger-printing and carries with it a greater stigma. Stigmatization impairs the objectives of the *YCJA*. Unlike for finger-prints, which all people arrested must provide, DNA orders are reserved for convicted offenders, thus increasing the stigma.⁸⁰
60. The mandatory nature of the DNA provisions ensures that in individual circumstances there may not be an appropriate balance between public and individual interests. The sections require offenders who have a history of violence and who are found guilty of a violent offence to be treated the same as a young person with no criminal record who has been found guilty of an offence for which the circumstances are not serious. Discretion is totally removed from the judge who has made a finding of guilt. The principles of the *YCJA* cannot inform a decision about a DNA order. The result is that for these young people the interference with their privacy interests is grossly disproportionate to the state interest.
61. Furthermore, if DNA information that is disclosed to foreign states Canada has no power to enforce its own privacy and destruction principles.⁸¹
62. The principles of the *YCJA* must inform the way young people are dealt with at every stage of the youth justice process, including after a finding of guilt. The mandatory nature of s. 487.051 makes it an unreasonable law and a s. 8 violation. Section 140 of the *YCJA* gives

⁷⁹ Appellant's factum at p. 30

⁸⁰ Levitt & Floris, *supra* note 29.

⁸¹ Exhibit E of the Affidavit of R. Murray, *supra* note 22, Article 1(e) of Memorandum of Cooperation.

courts express power to modify other legislation that is inconsistent with the YCJA. For the reasons explained above, s. 487.051 is a provision that requires modification to ensure that it does not violate the *UNCRC* and Charter rights of young persons.

Section 1

63. It is submitted that subsections 487.051(1) and (2) violate ss. 7 and 8 of the *Charter* and should not be upheld under s. 1 of the *Charter* because the infringement is not a reasonable impairment of the rights of young people.
64. The onus is on the government to establish that the legislation is a reasonable limit, rationally connected to the government objective, proportional and constitutes only a minimal impairment of young people's rights.⁸² In fact, the "reasonable limits" standard of s.1 is a very difficult standard to meet regarding rights to life, liberty and security of the person. The Supreme Court has never upheld a s.7 violation by justification under s.1⁸³:

Doubts exist as to whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified.... Overbroad legislation infringing s. 7 of the *Charter* is even more difficult to justify and would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis.⁸⁴

65. While the collection of DNA is rationally collected to crime solving, it is not rationally connected to the principles of youth rehabilitation and reintegration nor of public safety, which, in the long-term, depends on rehabilitation.
66. Evidence shows that "much youthful offending is transitory in nature".⁸⁵ This has important implications for youth provisions:

⁸² *R v. Oakes* [1986] 1 S.C.R. 103.

⁸³ Hogg, P, *supra* note 67, at 38-46.

⁸⁴ *Heywood*, *supra* note 63, at page 3.

⁸⁵ *Doob & Cesaroni*, *supra* note 2 at 40.

Given the transitory nature of most youthful offending, policies should avoid 'treatments' that carry with them significant risks. Negative effects of being brought into the justice system, is likely to be one such 'risk'.⁸⁶

67. Not only do the impugned provisions have the effect of reminding young people of their mistakes, even after their record has been sealed, but DNA orders can be imposed retroactively, when the young person has already made a fresh start.

68. No mandatory order based on a category of offence only, can be proportional to the circumstances of a particular offence and offender.

Conclusions

69. Sections 487.051(1) and (2) of the *Code* violate ss. 7 and 8 of the *Charter* and are not saved by s. 1.

70. Section 487.051(3) of the *Code* allows for DNA orders to be made at the discretion of the court, where the burden of proof has been met by the Prosecution. Balancing of the factors listed in that section and factors relevant to young persons in particular would serve the objectives of the DNA legislation, while minimizing the impairment of s.7 and 8 rights. Restoring discretion to the youth court judge would allow all the relevant factors regarding the offender and the offence to be taken into account in determining whether an order should be made; this is necessary for *Charter* compliance.

71. As stated by the Department of Justice:

"Interference with an individual's bodily integrity in order to obtain bodily substances for law enforcement purposes potentially raises several issues under the *Canadian Charter of Rights and Freedoms*. Most importantly, therefore, under both the DNA warrant and the DNA data bank schemes an independent judicial arbiter determines whether it is appropriate, in the circumstances, to authorize an agent of the state to take samples of bodily substances from the individual for limited law enforcement purposes. In doing so the judge balances the rights of

⁸⁶ Doob & Cesaroni, *supra* note 2 at 41.

the individual and the law enforcement interest of the state. *Judicial discretion is required to ensure the constitutionality of the scheme as a whole.*⁸⁷ (Emphasis added.)

PART IV – ORDER REQUESTED

72. For the long-term protection of the public, to ensure a fair, proportionate response to an individual young offender, and to uphold Canada's international obligations, JFCY respectfully submits that the appeal must be dismissed.

ALL OF WHICH is respectfully submitted this 13th day of October, 2010.



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⁸⁷ Department of Justice Canada, Communications Branch, "DNA Data Bank Legislation: Consultation Paper." Retrieved online October 7, 2010 at: <http://www.justice.gc.ca/eng/cons/dna-adn/dna-adn.pdf>

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LEGISLATION AND INTERNATIONAL LAW

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), GA Res. 40/33, 29 November 1985, article 8.1 [*The Beijing Rules*]

United Nations Guidelines (1990) for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), GA Res. 45/112, 14 December 1990, Annex, I 3, 5 (f) [*The Riyadh Guidelines*]

Youth Criminal Justice Act, S.C., 2002 c.1, Preamble, ss. 3, 38(1)

The Canadian Charter of Rights and Freedoms, section 7 and 8, *The Constitution Act*, 1982, c.11

United Nations Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Preamble, Article 12, 40(4) [*UNCRC*]

SCHEDULE B: RELEVANT LEGISLATIVE PROVISIONS

LEGISLATION AND INTERNATIONAL LAW

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), GA Res. 40/33, 29 November 1985, Annex article 8.1 [*The Beijing Rules*]



United Nations

A/RES/40/33

General Assembly

Distr. GENERAL

29 November 1985

ORIGINAL:
ENGLISH

A/RES/40/33
29 November 1985
96th plenary meeting

40/33. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")

The General Assembly,

Bearing in mind the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as other international human rights instruments pertaining to the rights of young persons,

Also bearing in mind that 1985 was designated the International Youth Year: Participation, Development, Peace and that the international community has placed importance on the protection and promotion of the rights of the

young, as witnessed by the significance attached to the Declaration of the Rights of the Child,

Recalling resolution 4 adopted by the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Caracas from 25 August to 5 September 1980, which called for the development of standard minimum rules for the administration of juvenile justice and the care of juveniles, which could serve as a model for Member States,

Recalling also Economic and Social Council decision 1984/153 of 25 May 1984, by which the draft rules were forwarded to the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, through the Interregional Preparatory Meeting, held at Beijing from 14 to 18 May 1984,

Recognizing that the young, owing to their early stage of human development, require particular care and assistance with regard to physical, mental and social development, and require legal protection in conditions of peace, freedom, dignity and security,

Considering that existing national legislation, policies and practices may well require review and amendment in view of the standards contained in the rules,

Considering further that, although such standards may seem difficult to achieve at present in view of existing social, economic, cultural, political and legal conditions, they are nevertheless intended to be attainable as a policy minimum,

ANNEX

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)

Part one. General principles

1. Fundamental perspectives

8. Protection of privacy

- 8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.

Commentary

Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal".

Rule 8 also stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interest of the individual should be protected and upheld, at least in principle. (The general contents of rule 8 are further specified in rule 21.)

United Nations Guidelines (1990) for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), GA Res. 45/112, 14 December 1990, Annex, I 3, 5 (f) [*The Riyadh Guidelines*]



United Nations

A/RES/45/112

General Assembly

Distr. GENERAL

14 December 1990

ORIGINAL:
ENGLISH

A/RES/45/112
68th plenary meeting
14 December 1990

45/112. United Nations Guidelines for the Prevention of Juvenile
Delinquency (The Riyadh Guidelines)

The General Assembly,

Bearing in mind the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as other international instruments pertaining to the rights and well-being of young persons, including relevant standards established by the International Labour Organisation,

Bearing in mind also the Declaration of the Rights of the Child, the Convention on the Rights of the Child, and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules),

Recalling General Assembly resolution 40/33 of 29 November 1985, by which the Assembly adopted the Beijing Rules recommended by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Recalling that the General Assembly, in its resolution 40/35 of 29 November 1985, called for the development of standards for the prevention of juvenile delinquency which would assist Member States in formulating and implementing specialized programmes and policies, emphasizing assistance, care and community involvement, and called upon the Economic and Social Council to report to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders on the progress achieved with respect to these standards, for review and action,

Recalling also that the Economic and Social Council, in section II of its resolution 1986/10 of 21 May 1986, requested the Eighth Congress to consider the draft standards for the prevention of juvenile delinquency, with a view to their adoption,

Recognizing the need to develop national, regional and international approaches and strategies for the prevention of juvenile delinquency,

Affirming that every child has basic human rights, including, in particular, access to free education,

Mindful of the large number of young persons who may or may not be in

conflict with the law but who are abandoned, neglected, abused, exposed to drug abuse, and are in marginal circumstances and in general at social risk,

Taking into account the benefits of progressive policies for the prevention of delinquency and for the welfare of the community,

ANNEX

United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)

I. FUNDAMENTAL PRINCIPLES

3. For the purposes of the interpretation of the present Guidelines, a child-centred orientation should be pursued. Young persons should have an active role and partnership within society and should not be considered as mere objects of socialization or control.

5. The need for and importance of progressive delinquency prevention policies and the systematic study and the elaboration of measures should be recognized. These should avoid criminalizing and penalizing a child for behaviour that does not cause serious damage to the development of the child or harm to others. Such policies and measures should involve:

(f) Awareness that, in the predominant opinion of experts, labelling a young person as "deviant", "delinquent" or "pre-delinquent" often contributes to the development of a consistent pattern of undesirable behaviour by young persons.

Youth Criminal Justice Act, S.C., 2002 c.1, Preamble, ss. 3, 38(1)

Preamble

WHEREAS members of society share a responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood;

WHEREAS communities, families, parents and others concerned with the development of young persons should, through multi-disciplinary approaches, take reasonable steps to prevent youth crime by addressing its underlying causes, to respond to the needs of young persons, and to provide guidance and support to those at risk of committing crimes;

WHEREAS information about youth justice, youth crime and the effectiveness of measures taken to address youth crime should be publicly available;

WHEREAS Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, and have special guarantees of their rights and freedoms;

AND WHEREAS Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons;

DECLARATION OF PRINCIPLE

Policy for Canada with respect to young persons

3. (1) The following principles apply in this Act:

(a) the youth criminal justice system is intended to

(i) prevent crime by addressing the circumstances underlying a young person's offending behaviour,

(ii) rehabilitate young persons who commit offences and reintegrate them into society, and

(iii) ensure that a young person is subject to meaningful consequences for his or her offence

in order to promote the long-term protection of the public;

(b) the criminal justice system for young persons must be separate from that of adults and emphasize the following:

(i) rehabilitation and reintegration,

(ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,

(iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,

(iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and

(v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

(c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should

(i) reinforce respect for societal values,

(ii) encourage the repair of harm done to victims and the community,

(iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and

(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and

(d) special considerations apply in respect of proceedings against young persons and, in particular,

(i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,

(ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,

(iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and

(iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

Act to be liberally construed

(2) This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).

PART 4

SENTENCING

Purpose and Principles

Purpose

38. (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

The Canadian Charter of Rights and Freedoms, section 7 and 8, The Constitution Act, 1982, c.11

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Legal Rights

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

United Nations Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Preamble, Article 1, 12, 16, 40 [UNCRC]

Convention on the Rights of the Child

[Text in PDF Format](#)

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

Entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

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

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.