Court File No. 36081

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

DAVID PELHAM, WARDEN OF THE BOWDEN INSTITUTE, ATTORNEY GENERAL OF CANADA, and HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

APPELLANTS

- and -

OMAR AHMED KHADR

RESPONDENT

- and -

AMNESTY INTERNATIONAL CANADA, CANADIAN CIVIL LIBERTIES ASSOCIATION

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PART I – OVERVIEW

1. This appeal raises important issues regarding the interpretation of ss 18 and 20 of the *International Transfer of Offenders Act*[1] (*ITOA*) and the appropriate principles of international law that should be applied when interpreting these provisions. The appeal also raises critical issues of youth justice: a Receiving State's treatment following transfer (pursuant to treaty) of young offenders and former child soldiers, and their rehabilitation and reintegration into society.

2. Sections 18 and 20 of the *ITOA* should be interpreted and applied consistently with Canada's international legal obligations. The *ITOA* should be interpreted and applied in conformity with the treaties it implements and with Canada's other international human rights obligations and commitments. These sources of international law all emphasize humanitarianism and protection of young persons and child soldiers. Accordingly, ss 18 and 20 of the *ITOA* must be interpreted so as to extend special protection to young offenders and former child soldiers, and reflect the application of the best interests of the child principle. The meaning accorded to ss 18 and 20 must foster the overarching goals of rehabilitation and reintegration. Any interpretation of ss 18 and 20 that fosters retribution rather than protection (e.g. by aggravating the nature of the foreign sentence) runs contrary to Canada's international obligations.

3. The contention that Mr. Khadr's sentence should be deemed an adult sentence under s 18 of the *ITOA*, resulting in his placement in a federal penitentiary under s 20, should be rejected, as it is incompatible with the principle of the best interests of the child, the duty to extend special protection to youth and child soldiers, and the goal of rehabilitation and reintegration. It is also incompatible with the prohibition on aggravating the foreign sentence set out in the *Treaty between Canada and the United States of America on the Execution of Penal Sentences*[2] (*Canada-USA Treaty*) and with the presumption of diminished moral responsibility of young persons. Such an interpretation of ss 18 and 20 is neither reasonable nor correct.[3]

PART II – ISSUES

4. How should ss 18 and 20 of the *ITOA* be interpreted in light of Canada's international obligations and commitments?

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[1] SC 2004, c 21.
[2] Can TS 1978 No 12 [*Canada-USA Treaty*].
[3] AI does not take a position on the standard of review to be applied in this appeal; In AI's submission, the interpretation of the relevant provisions was incompatible with international law and as a result does not satisfy either of the administrative standards of review available.

PART III – LAW AND ARGUMENT

A. The ITOA must be interpreted in conformity with the treaties it implements and with international human rights law.

5. As recognized by this Court in *R v Hape,* "[i]t is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law."[4] As the Appellants acknowledge in this appeal,[5] when courts interpret domestic statutes engaging Canada's international obligations, they "will avoid a construction that would place Canada in breach of [those] obligations."[6] The principles and rules of international law have long been recognized as relevant and persuasive sources for interpreting domestic statutes.[7] These rules and principles "form part of the context in which statutes are enacted, and read" and therefore "[i]n so far as possible […] interpretations that reflect these values and principles are preferred."[8]

6. The presumption of conformity applies to Canada's international obligations as set out in binding treaties, including the *Convention on the Rights of the Child*[9] ("*CRC*") – the most widely ratified human rights treaty in history[10] – its *Optional Protocol on the involvement of children in armed conflict*[11] ("*Optional Protocol*"), and the *Canada-USA Treaty* and other treaties on the transfer of offenders.[12] The presumption of conformity also applies to customary international law, which, absent express and unequivocal contrary legislative intent, forms part of the Canadian common law.[13]

7. Declaratory instruments, such as international guidelines, declarations, and resolutions, are also relevant and persuasive,[14] as they often encapsulate and reflect elements of existing or evolving customary international law.[15] For the purposes of this appeal, such instruments include the *UN*

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[4] *R v Hape*, 2007 SCC 26 at para 53, [2007] 2 SCR 292 [*Hape*].
[5] Appellants' Factum at para 58.
[6] *Hape, supra* note 4 at para 53.
[7] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at 348, Dickson CJ, dissenting on other grounds; *Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 22-28 [*Divito*]; *R v Sharpe*, 2001 SCC 2 at paras 175, 178 [*Sharpe*]; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at paras 30-32.
[8] *Ibid* at para 30; See also *Hape, supra* note 4 at para 53. See also, for instance, *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para 70.
[9] 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 [*CRC*]
[10] *Sharpe*, *supra* note 7 at para 177.
[11] 25 May 2000, 2173 UNTS 222 (adopted by resolution by the United Nations General Assembly, 54th Sess, UN Doc A/RES/54/263) [*Optional Protocol*].
[12] For a full list of bilateral and multilateral treaties on the international transfer of offenders Canada has ratified, see footnote 15 at page 4 of the Appellants' factum [International Transfer of Offenders].
[13] *Hape*, *supra* note 4 at para 39, 54.
[14] *Reference Re Public Service, supra* note 7 at 348; *Sharpe, supra* note 7 at para 178.
[15] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, Judgment of 27 June 1986, [1986] ICJ Rep 14 at para 188.

Standard Minimum Rules for the Administration of Juvenile Justice[16] ("*Beijing Rules*"), the *UN Rules for the Protection of Juveniles Deprived of their Liberty*[17] ("*Havana Rules*"), the *Guidelines for Action on Children in the Criminal Justice System*[18] ("*Vienna Guidelines*"), and the *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*[19] ("*Paris Principles*"). Canadian courts regularly rely upon such instruments to guide the interpretation of domestic statutes.[20]

8. The Appellants acknowledge that the "*ITOA* flows from Canada's international obligations and therefore its provisions require interpretation in light of their international context."[21] This context includes the transfer treaties' core objective of reintegration and rehabilitation of offenders and the vital principles on the treatment of young persons and former child soldiers set out in international human rights law.

9. Parliament intended the *ITOA* to conform to the requirements of the *Youth Criminal Justice Act*[22] ("*YCJA*").[23] References to the *YCJA* permeate the *ITOA*.[24] The *YCJA* incorporates the human rights principles enshrined in the *CRC*[25] and courts have recognized that in the event of any doubts or ambiguities between the *YCJA* and international law, "it can be presumed that Parliament legislates in a manner that respects Canada's international commitments."[26] Further, this Court has found that the principles of the *YCJA*, and consequently the international obligations it incorporates, must be respected in applying legislation that is engaged when young persons come into contact with Canada's criminal justice system.[27] Therefore, in enacting the *ITOA* to conform to the

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[16] United Nations General Assembly, UN Doc A/RES/40/33 (29 November 1985) [*Beijing Rules*].
[17] United Nations General Assembly, 68th Plenary Mtg, UN Doc A/RES/45/113 (14 December 1990) [*Havana Rules*].
[18] United Nations Economic and Social Council, UN Doc 1997/30 (21 July 1997) [*Vienna Guidelines*].
[19] Adopted at the international conference "Free children from war" in Paris (February 2007) online: < http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf> [*Paris Principles*]. Canada was one of the 59 States that drafted and endorsed the *Paris Principles* in 2007: See UNICEF, "Paris Conference – 'Free Children from War': List of 59 Participating Countries" (5-6 February 2007) online: < http://www.unicef.org/protection/files/Attendees.pdf>; 105 States have now endorsed the *Paris Principles*: See Office of the Representative of the Secretary General for Children and Armed Conflict, "Five new countries endorse the Paris Commitments to end the use of children in conflict" (3 December 2012) online: <https://childrenandarmedconflict.un.org/press-release/five-new-countries-endorse-the-paris-commitments-to-end-the-use-of-children-in-conflict/>.
[20] E.g. *Quebec (Minister of Justice) v Canada (Minister of Justice)*, (2003) 228 DLR (4th) 63 at paras 124-127(QCCA) [*Quebec v Canada*]; *FN (Re)*, 2000 SCC 35 at para 16; *R v DB*, 2008 SCC 25 at para 85 [*DB*].
[21] Appellants' Factum at para 58.
[22] SC 2002, c 1 [*YCJA*].
[23] Robin MacKay, *Bill C-15: International Transfer of Offenders Act* (Legislative Summary, Law and Government Division, 16 February 2004), p. 7, online: < http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/37/3/c15-e.pdf>.
[24] *ITOA, supra* note 1, ss 4(3), 8(5), 9(1), 10(3), 10(4), 16, 17, 18, 19, 20, 29(1), 34(1).
[25] *YCJA, supra* note 22, preamble. See also *R v RC*, 2005 SCC 61 at para 41[*RC*]; *R v CD*; *R v CDK*, 2005 SCC 78 at para 35; *DB*, *supra* note 20 at para 60.
[26] *Quebec v Canada, supra* note 20 at para 93.
[27] *RC*, *supra* note 25 at para 36.

requirements set out in the *YCJA*, Parliament also signalled its intention that the *ITOA* be interpreted consistently with Canada's international human rights obligations towards children and youth. This is consistent with how Canada has presented its approach to implementing its international human rights obligations domestically before UN treaty bodies.[28]

B. Sections 18 and 20 of the ITOA must be interpreted (i) so as to extend special protection to young offenders; and (ii) consistently with the "best interests of the child" principle.

10. The *CRC* provides that in all actions concerning children, including those undertaken by courts of law, "the best interests of the child shall be a primary consideration."[29] Parties to the *CRC* must take into account children's "evolving capacities"[30], age, and level of maturity[31] when implementing the *CRC*. Due to the physical and mental immaturity of children, States Parties to the *CRC* must provide them with "special safeguards and care, including appropriate legal protection".[32] The *Beijing Rules* add that "[t]he well-being of the juvenile shall be the guiding factor in the consideration of her or his case."[33] Indeed, Mr. Khadr's status as a young offender, and the enhanced protections it necessitates, was recently recognized by the Court of Queen's Bench of Alberta as a factor weighing in favour of his release on bail pending the appeal of his conviction in the United States.[34] In light of Mr. Khadr's status as a young offender, the special protections this status entails should guide this Court in deciding the issues in this appeal.

11. The necessity for such safeguards, care, and protection, is increased for children involved in armed conflict.[35] The *Paris Principles* emphasize that "[c]hildren accused of crimes […] allegedly committed while associated with armed forces or armed groups are entitled to be treated in accordance with international standards for juvenile justice."[36] In ratifying the *Optional Protocol*, Canada adopted as its law and practice the view that children under the age of 18 cannot be voluntarily recruited into armed groups."[37] In doing so, Canada re-affirmed that children are often

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[28] UN Committee on the Rights of the Child, *Canada's response to the list of issues adopted by the Committee on the Rights of the Child in advance of the examination of Canada's combined Third and Fourth Report on the* Convention on the Rights of the Child (*CRC*), UN Doc CRC/C/CAN/3-4 (September 2012) at para 7; *Core document forming part of the reports of States parties:* Canada, UN Doc HRI/CORE/CAN/2013 (30 May 2013) at para 122.
[29] *CRC*, *supra* note 9, art 3.
[30] *Ibid* art 5.
[31] *Ibid* art 12.
[32] *Ibid*, preamble.
[33] *Beijing Rules*, *supra* note 16, r 17.1(d).
[34] *Omar Ahmed Khadr v Dave Pelham, Warden of Bowden Institution and Her Majesty the Queen*, 2015 ABQB 261 at para 100 [*Khadr v Pelham*].
[35] *Optional Protocol*, *supra* note 11, preamble.
[36] *Paris Principles*, *supra* note 19, principle 8.8.
[37] *Optional Protocol*, *supra* note 11, art 4(1)-(2).

targeted in situations of armed conflict, and that their rights "require special protection."[38] The *Paris Principles* emphasize that "[c]hildren 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."[39] As noted by the court below, Mr. Khadr had been brought to Afghanistan by his father in order to support Al Qaeda.[40] Accordingly, the need for enhanced safeguards, care, and protection of child soldiers also applies in the present case.

12. Sections 18 and 20 of the *ITOA* must be interpreted to extend the maximum possible safeguards, care, and protection to young offenders and former child soldiers. These provisions must be interpreted consistently with the international human rights principles of the best interests of the child and the recognition of the diminished moral blameworthiness of children who come into conflict with the law, particularly in situations of armed conflict. This approach is inherent to the *ITOA*, which requires the Minister to consider the best interests of the child when considering whether to consent to the transfer of a young person.[41] It is also consistent with this Court's jurisprudence, which has found the best interests of the child to be a legal principle that "carries great power"[42], and that the presumption of diminished moral blameworthiness for young offenders is a principle of fundamental justice.[43]

13. The deeming provision at s 18 of the *ITOA* is an extraordinary legislative measure that rescinds, in the context of international transfers, the burden normally resting on the government to rebut the presumption of diminished moral blameworthiness by demonstrating that an adult sentence is justified for a particular young offender.[44] This legislative scheme can have dramatic consequences for young offenders. Without judging the appropriateness of the deeming provisions or of adult sentences on young offenders or child soldiers as a general matter, in a case such as this one, where the foreign sentence cannot be clearly construed as an adult sentence, the deeming provision at s 18 of the *ITOA* ought not operate to rebut the presumption of diminished moral blameworthiness for young offenders – particularly children involved in armed conflict. A contrary interpretation would

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[38] *Ibid*, preamble.
[39] *Paris Principles*, *supra* note 19, principle 3.6.
[40] *Khadr v Edmonton Institution*, 2014 ABCA 225 at para 7 [*Khadr*].
[41] *Supra,* note 1: Section 10(3) provides that "In determining whether to consent to the transfer of a Canadian offender who is a young person within the meaning of the Youth Criminal Justice Act, the Minister and the relevant provincial authority *shall* consider the best interests of the young person" [emphasis added].
[42] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at paras 9, 12.
[43] *DB, supra* note 20 at para 60.
[44] *YCJA*, *supra* note 22 s. 72(1)(*a*).

violate fundamental principles of youth justice established in both Canadian and international law. Accordingly, the foreign unitary sentence to which Mr. Khadr plead guilty must be interpreted as a youth sentence.

C. Sections 18 and 20 of the ITOA must be interpreted to best achieve the overarching goals of rehabilitation and societal reintegration of young offenders or former child soldiers.

14. Sections 18 and 20 of the *ITOA* must be interpreted consistently with the over-arching objectives of youth justice set out in international human rights instruments: rehabilitation and "promoting the child's reintegration and the child's assuming a constructive role in society."[45] Consistent with these rehabilitative and protective goals, Article 37(b) of the *CRC* provides that the "imprisonment of a child shall […] be used only as a measure of last resort and for the shortest appropriate period of time."[46] In keeping with this principle, the *YCJA* provides that a youth sentence must "be the least restrictive sentence that is capable of achieving the purpose" of rehabilitation and reintegration.[47] When custodial sentences are imposed under the *YCJA*, the least restrictive environment possible must be favoured.[48]

15. Protective measures favouring rehabilitation are especially important when applied to former child soldiers. The *CRC* requires:

> "States Parties [to] take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of […] armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."[49]

The *Paris Principles* specify that "[t]he release, protection and reintegration of children unlawfully recruited or used must be sought at all times, without condition".[50]

16. Unlike the extradition treaties upon which the Appellants rely to argue that Canada must recognize foreign, harsher approaches to penal policy in order to obtain the requisite consent for the transfer of a prisoner,[51] the treaties that are implemented through the *ITOA* are *all* founded on the core objective of facilitating transfers of offenders to favour rehabilitation and successful

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[45] *CRC, supra* note 9, art 40(1).
[46] *Ibid*, art 37(b). The same principle lies at the core of the *YCJA*, see *supra* note 22 ss 38-39.
[47] *YCJA, supra* note 22, s 38(2)(e)(i).
[48] The *YCJA* sets out a hierarchy of places of detention for young persons, from youth custody facilities to provincial correctional facilities for adults to federal penitentiaries, see *YCJA* ss 85, 89, 92 as regards youth sentences, with decisions to transfer to more restrictive environments taken in the child's best interests (e.g. s 92(2)).
[49] *CRC*, *supra* note 9, art 39.
[50] *Paris Principles, supra* note 19, principle 3.11. See also principle 7.6.4: "All appropriate measures to promote physical and psychological recovery and social reintegration must be taken."
[51] *United States v Burns*, 2001 SCC 7, cited in paragraph 62 of the Appellants' factum.

reintegration into society, and as such have a distinctly humanitarian purpose.[52] This humanitarian orientation is evident in the requirement that, in addition to the foreign state's consent, the prisoner must also consent to the transfer[53] in order to be given a choice "to rehabilitate himself in an environment which he assumes to be more conducive to such a goal."[54] Rehabilitation and reintegration are the primary objectives of all of the bilateral and multilateral treaties on the transfer of offenders and the *ITOA* is consequently also founded on such core principles.[55] Prisoner transfer agreements are "established for humanitarian ends rather than government convenience".[56]

17. The Receiving State has the most interest regarding rehabilitation, as it is likely where the offender, being a national, will establish himself or herself upon completion of their sentence.[57] Consequently, "the completion of a transferred Offender's sentence shall be carried out according to the laws and procedures of the Receiving State".[58] Where young persons are concerned, treaties such as the *Canada-USA* treaty logically provide that the Receiving State's youth justice laws will apply to the administration of their sentence, to maximize the young person's opportunities for rehabilitation and reintegration in that State. [59] It is precisely because the main objective of these treaties is to promote rehabilitation and reintegration that they favour transfers of young persons and allow States to grant special protections to young offenders by enforcing their sentences within specialized youth justice systems, in full respect of the sovereignty of both states involved. An interpretation of ss 18 and 20 of the *ITOA* that is consistent with Canada's international obligations favours rehabilitation and reintegration. A finding that Mr. Khadr's sentence is a youth sentence according to the *ITOA* is respectful of the treaties it implements and the state sovereignty of both

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[52] *Canada-USA Treaty*, *supra* note 2, preamble. See also, in International Transfer of Offenders, *supra* note 12, the preambles of Canada's prisoner transfer treaties with Argentina, Bolivia, Brazil, Cuba, The Dominican Republic, Egypt, France, Mexico, Mongolia, Morocco, Peru, Thailand, Venezuela. See also *Convention on the Transfer of Sentenced Persons*, 21 March 1983, Strasbourg, 21.III.1983, preamble; *Inter-American Convention on Serving Criminal Sentences Abroad*, preamble, online: < http://www.oas.org/juridico/english/treaties/a-57.html> [*Inter-American Convention*].

[53] *Canada-USA Treaty, supra* note 2, preamble, Art III(10).

[54] Michael Plachta, "Human Rights Aspects of the Prisoner Transfer in a Comparative Perspective" (1992) 53 Louisiana L Rev 1043 at 1050 [Plachta].

[55] *ITOA*, *supra* note 1, s 3.

[56] Plachta, *supra* note 54 at 1052.

[57] *Ibid* at 1043.

[58] *Canada-USA Treaty, supra* note 2, art IV(1), aff'd in *Divito*, *supra* note 7 at para 33 and incorporated by section 13 of the *ITOA*, *supra* note 1.

[59] For instance, the *Canada-USA Treaty*, *supra* note 2, at art IV(2), provides: "The Receiving State may treat under its laws relating to youthful offenders any Offender so categorized under its laws regardless of his status under the laws of the Sending State". Canada's treaties with Brazil, Argentina, Barbados, Cuba, the Dominican Republic, Egypt, Mexico, Mongolia, and Thailand also provide for agreement between States to facilitate such transfers in accordance with principles underlying youth justice: See International Transfer of Offenders, *supra,* note 12. See also *Inter-American Convention*, *supra* note 52, art IX.

Canada and the United States, which have agreed that the Receiving State's laws would apply to this determination.

D. An interpretation of ss 18 and 20 of the ITOA that respects the principles of international law regarding young offenders cannot have the effect of aggravating the foreign sentence.

18. As a corollary to the focus on rehabilitation, reintegration, and protection set out in international law, as well as in the *ITOA*,[60] Receiving States are prohibited from aggravating the foreign sentence[61], and are allowed to adapt the sentence in certain circumstances.[62] As specified by the UN Office on Drugs and Crime, Receiving States like Canada "must not aggravate, by its nature or duration, the sanction imposed in the sentencing State".[63] This principle is repeated throughout the bilateral and multilateral prisoner transfer treaties Canada has entered into.[64]

19. Assuming, but not conceding that the *ITOA* is ambiguous regarding the treatment of foreign sentences of young persons that do not assign a specific duration for each offence where multiple offences are concerned, it is "the overriding principle governing the interpretation of penal provisions […] that [such] ambiguity should be resolved in a manner most favourable to accused persons."[65] Canada's international human rights obligations must be considered when resolving such ambiguities in the manner most favourable to the young offender.

20. In this appeal, the Canadian authorities decided, under s 18 of the *ITOA*, to deem Mr. Khadr's eight-year unitary sentence an adult sentence by enforcing it as five concurrent eight-year sentences. This choice was incompatible with Canada's obligation to refrain from aggravating the sentence, to provide special protections, and treat Mr. Khadr in accordance with the best interests of the child and to maximize his opportunities for rehabilitation and reintegration. As recognized by the Court of Appeal for Alberta, "[t]here is a colossal divide between a global sentence of eight years that could have been a youth sentence within the meaning of the *YCJA* and a sentence that is

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[60] *ITOA*, *supra* note 1, s 5(1).
[61] *Canada-USA Treaty*, *supra* note 2, preamble, art IV(3). The prohibition against aggravation is also included in Canada's International Prisoner Transfer treaties with Argentina, Barbados, Bolivia, Brazil, Cuba, the Dominican Republic, Egypt, France, Mexico, Mongolia, Morocco, Peru, Thailand, and Venezuela: see International Transfer of Offenders, *supra* note 12. The prohibition is also specified in the *Commonwealth Scheme for the Transfer of Offenders* (1990), art 12, online: < http://travel.gc.ca/assistance/emergency-info/consular/framework/commonwealth>; and the *Inter-American Convention*, *supra* note 52, preamble, arts V, VII.
[62] *ITOA*, *supra* note 1, s 14.
[63] United Nations Office on Drugs and Crime, *Handbook on the International Transfer of Sentenced Persons* (New York: United Nations, 2012) at 7.
[64] See International Transfer of Offenders, *supra* note 12.
[65] *R v McIntosh*, [1995] 1 SCR 686 at para 38 ; See also *R v SAC*, 2008 SCC 47 at para 30-33.

converted into one youth sentence of eight years and four concurrent adult sentences of eight years."[66]

21. The characterization of Mr. Khadr's sentence also has direct and practical consequences on its nature by determining the place of detention under s 20. This consequence is important; as acknowledged by the Court of Appeal, the difference between being placed in a provincial correctional facility and a federal penitentiary constitutes "a sufficiently material difference so as to affect [Khadr's] residual liberty."[67] In light of these consequences, an interpretation of ss 18 and 20 that is compatible with Canada's international obligations would recognize Mr. Khadr's sentence as a youth sentence and provide for the least restrictive place of detention available. By altering and aggravating the nature of the sentence handed down by US authorities, Canada breached a fundamental rule of the *Canada-USA Treaty*.

22. Interpreting the unitary sentence as five concurrent 8-year sentences leads to a conclusion that runs contrary to the principles of Canadian and international law regarding sentencing of young persons. Concluding that the sentence given for the most serious offence – first degree murder – is a youth sentence, and that the four less serious offences are adult sentences, is incompatible with underlying youth justice principles. As established in the *Beijing Rules,* the *ITOA* and the *YCJA* must "emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence."[68] Finding that the foreign unitary sentence – lower than the maximum combined duration permitted by the *YCJA* where first degree murder is involved (10 years[69]) – must be a youth sentence under s 18 and for the determination of the place of detention under s 20 of the *ITOA*, is compatible both with Canadian law and with international law.

23. The reasonable and correct interpretation of ss 18 and 20 of the *ITOA* is one that fosters the protective aspirations of international human rights standards and principles regarding the treatment of young offenders and former child soldiers. The *ITOA* must be "liberally construed so as to ensure that young persons are dealt with in accordance with the principles"[70] of youth justice in Canadian and international law. As stated by the Committee on the Rights of the Child, "the protection of the

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[66] *Khadr supra* note 40 at para 79.
[67] *Ibid* at para 51.
[68] *Beijing Rules*, *supra* note 16, r 5.1
[69] *YCJA*, *supra* note 22, s 42 (15).
[70] *Ibid*, s 3(2).

best interests of the child means […] that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders."[71] This principle is re-affirmed in the *Beijing Rules*,[72] *Vienna Guidelines*,[73] and the *Havana Rules*.[74] Selecting an interpretation that aggravates the sentence by deeming a youth and former child soldier to be serving an adult sentence, and by ordering the sentence to be served in an environment which further limits that young offender's residual liberty, fosters retribution rather than protection, and runs contrary to the very humanitarian object and protective purpose of Canada's prisoner transfer treaties, the *CRC*, the *YCJA*, and the *ITOA* which incorporates all of these instruments.

PART IV – SUBMISSIONS ON COSTS

24. AI does not seek costs and asks that no costs be ordered against it.

PART V – ORDER SOUGHT

25. AI respectfully requests the appeal be dismissed and the issues determined in light of the foregoing principles. AI also requests to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30th DAY OF APRIL 2015 BY:

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Fannie Lafontaine
François Larocque
David P. Taylor

Counsel for Amnesty International

[71] United Nations Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 25 April 2007, UN Doc CRC/C/GC/10 (25 April 2007) at para 10.
[72] *Beijing Rules, supra* note 16, rr 17.1(b), 19.1, 28.1.
[73] *Vienna Guidelines*, *supra* note 18, guideline 18.
[74] *Havana Rules, supra* note 17, rr 1-2.

PART VI – AUTHORITIES

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2.	*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.	5
3.	*Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4.	12
4.	*Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, Judgment of 27 June 1986, [1986] ICJ Rep 14.	7
5.	*Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47.	5, 17
6.	*FN (Re)*, 2000 SCC 35.	7
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7.	*Quebec (Minister of Justice) v Canada (Minister of Justice)*, (2003) 228 DLR (4th) 63 (QCCA).	7, 9
8.	*Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313.	5, 7
9.	*R v CD*; *R v CDK*, 2005 SCC 78.	9
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16.	Michael Plachta, "Human Rights Aspects of the Prisoner Transfer in a Comparative Perspective" (1992) 53 Louisiana L Rev 1043 at 1043, 1050, 1052.	16, 17
17.	Robin MacKay, *Bill C-15: International Transfer of Offenders Act* (Legislative Summary, Law and Government Division, 16 February 2004), p. 7, online: < http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/37/3/c15-e.pdf>)	9
18.	United Nations Office on Drugs and Crime, *Handbook on the International Transfer of Sentenced Persons* (New York: United Nations, 2012) at 7.	18
Treaties, Rules, Guidelines		
19.	*Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 [*CRC*].	6, 9, 10, 14, 15
20.	*Convention on the Transfer of Sentenced Persons*, 21 March 1983, Strasbourg, 21.III.1983, preamble.	16
21.	*Core document forming part of the reports of States parties:* Canada, UN Doc HRI/CORE/CAN/2013 (30 May 2013) at para 122.	9
22.	*Guidelines for Action on Children in the Criminal Justice System*, United Nations Economic and Social Council, UN Doc 1997/30 (21 July 1997).	7, 23
	Inter-American Convention on Serving Criminal Sentences Abroad, preamble, online: < http://www.oas.org/juridico/english/treaties/a-57.html>.. **Canada's Authorities, Tab 36.**	9
23.	Office of the Representative of the Secretary General for Children and Armed Conflict, "Five new countries endorse the Paris Commitments to end the use of children in conflict" (3 December 2012) online: <https://childrenandarmedconflict.un.org/press-release/five-new-countries-endorse-the-paris-commitments-to-end-the-use-of-children-in-conflict/>	7
24.	*Optional Protocol on the involvement of children in armed conflict* , 25 May 2000, 2173 UNTS 222 (adopted by resolution by the United Nations General Assembly, 54th Sess, UN Doc A/RES/54/263) [*Optional Protocol*].	6, 11
25.	*Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups,* Adopted at the international conference "Free children from war" in Paris (February 2007) online: < http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>.	7, 11, 15

	Treaty between Canada and the United States of America on the Execution of Penal Sentences (*Canada-USA Treaty*) Can TS 1978 No 12 [*Canada-USA Treaty*]. **Canada's Authorities, Tab 40.**	3, 16, 17, 18
26.	UN Committee on the Rights of the Child, *Canada's response to the list of issues adopted by the Committee on the Rights of the Child in advance of the examination of Canada's combined Third and Fourth Report on the* Convention on the Rights of the Child (*CRC*), UN Doc CRC/C/CAN/3-4 (September 2012) at para 7.	9
27.	United Nations Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 25 April 2007, UN Doc CRC/C/GC/10 (25 April 2007) at para 10.	23
28.	UNICEF, "Paris Conference – 'Free Children from War': List of 59 Participating Countries" (5-6 February 2007) online: < http://www.unicef.org/protection/files/Attendees.pdf>	7
29.	*UN Standard Minimum Rules for the Administration of Juvenile Justice* , United Nations General Assembly, UN Doc A/RES/40/33 (29 November 1985) [*Beijing Rules*].	7, 10, 22, 23
30.	*UN Rules for the Protection of Juveniles Deprived of their Liberty* , United Nations General Assembly, 68th Plenary Mtg, UN Doc A/RES/45/113 (14 December 1990) [*Havana Rules*].	7, 23

PART VII – LIST OF STATUTES

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31.	*Youth Criminal Justice Act* ("*YCJA*"), SC 2002, c 1.. ss. 3(2), 72(1)(a) 38-39, 42, 85, 89, 92.	