2009-2010

NIAGARA INTERNATIONAL MOOT COURT COMPETITION

A Dispute Arising Under the
Statute of the International Court of Justice

February, 2010

THE GOVERNMENT OF CANADA
(Applicant)

v.

THE GOVERNMENT OF THE UNITED STATES
(Respondent)

MEMORIAL OF THE APPLICANT

TEAM#: 2010-01A

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JURISDICTIONAL STATEMENT

The governments of Canada and the United States appear before the International Court of Justice pursuant to Article 36(1) of the Statute of the International Court of Justice.[1] The Parties have complied with all requirements of Article 36(1), and in the Compromis the Parties agree to submit their dispute to the jurisdiction of this Court.[2]

[1] Statute of the International Court of Justice, art. 36(1), 26 June, 1945, 59 Stat. 1055.

QUESTIONS PRESENTED

I. Whether the United States violated Canada's sovereignty and international agreements when it improperly lured Mr. Rutagonda from Canada without co-operating, and then violated Mr. Rutagonda's internationally protected rights guaranteed by the International Covenant on Civil and Political Rights, and under customary international law by not following extradition protocol.

II. Whether the rendition Mr. Rutagonda to Rwanda violates international law when no treaty or agreement exists with Rwanda; when Mr. Rutagonda was recruited at the age of 14 as a child soldier and lacked criminal culpability; and when the Rwandan judiciary cannot provide even basic procedural guarantees for Mr. Rutagonda to receive a fair trial.

STATEMENT OF FACTS

Emanual Rutagonda is a victim of the genocide crimes committed in Rwanda. Mr. Rutagonda was recruited involuntarily by the *Interhamwe*, a paramilitary group during a five month period in which acts of genocide were perpetrated in Rwandan territories.[1] Mr. Rutagonda was recruited by the *Interhamwe* at the age of 14, and was exposed to armed conflict at the age of 15.[2] In August 1994, Mr. Rutagonda was released from service and fled the war torn country back to his place of birth in Quebec, Canada.[3]

In 2001, the Tutsi-dominated government of Rwanda sought retribution and issued an indictment for Mr. Rutagonda alleged involvement with six other identified members of the *Interhamwe* militia.[4] The Rwandan government requested the surrender of Mr. Rutagonda from Canada to Rwanda for prosecution.[5] Canada has consistently refused to surrender Mr. Rutagonda recognizing that he is the victim of war crimes.[6] In January 2002, INTERPOL issued a Red Notice, authorizing universal jurisdiction for the arrest of Mr. Rutagonda from any country in the world.[7]

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[1] Compromis Between Canada (Applicant) and the United States of America (Respondent) to Submit to the International Court of Justice Their Differences Regarding Emmanuel Rutaganda ¶ 1 (jointly notified to the Court on 24 October 2009) [hereinafter Compromis].

[2] 2010 Niagara Moot Court Competition Corrections/Clarifications to the Compromis (Jan 18, 2010) ¶ "Correction".

[3] *Id*. ¶ 3.

[4] *Id*. ¶ 4.

[5] *Id*. ¶ 5.

[6] *Id*.

[7] *Id*.

On July 7, 2009, the new NBC television series, "The Wanted," publicized to the American public the alleged crimes of genocide by Mr. Rutagonda.[8] The segment portrayed Mr. Rutagonda as an indicated Rwandan genocide perpetrator living freely in Canada.[9] Shortly thereafter, American newspapers seized hold of the situation and launched a media attack against Mr. Rutagonda.[10] Due to these pressures, the Inter-Agency Working Group was established by several United States federal agencies.[11] The purpose of this task force was to implement the Genocide Accountability Act of 2007 and arrest Mr. Rutagonda.[12]

On July 21, 2009, the U.S. Immigration and Customs Enforcement ("ICE") notified the Inter-Agency Working Group that Mr. Rutagonda's mother was in Detroit for a specialized medical procedure at the Detroit Clinic.[13] The day thereafter, President Obama signed off on a plan to "lure" and apprehend Mr. Rutagonda with the cooperation of the Detroit Clinic.[14] Putting the plan into action, at 12:30 PM on July 22, 2009 ICE agents sent a false email addressed from the Detroit Clinic to Mr. Rutagonda's cell phone.[15] The email stated that Mr. Rutagonda's mother was in deteriorating health and that she needed to see her son before she

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[8] *Id.* ¶ 7.

[9] *Id.*

[10] *Id.*

[11] *Id* ¶ 6.

[12] *Id.*

[13] *Id.* ¶ 8.

[14] *Id.* ¶ 9.

[15] *Id.*

died.[16] To the contrary, Rutagonda's mother had no life threatening condition or injury and her surgery was a success.[17]

On July 22, 2009, Mr. Rutagonda entered the United States through the Windsor-Detroit tunnel and went to the Detroit Clinic.[18] When Mr. Rutagonda arrived at the Clinic and requested to see his mother he was arrested.[19] An order of removal was ordered to extradite Mr. Rutagonda to Rwanda based on his illegal entry.[20] Canada was notified of Mr. Rutagonda's arrest via the Canada-US Consular Notification Agreement.[21] Mr. Rutagonda received no relief from United States courts and Mr. Rutaganda was ordered to be extradited to Rwanda.[22]

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[16] *Id.*

[17] *Id.*

[18] *Id.* ¶ 10.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

SUMMARY OF ARGUMENT

Mr. Rutagonda should be repatriated to Canada for two reasons: (1) the United States violated international agreements with Canada when it lured Mr. Rutagonda from Canadian territory and circumvented established protocol to co-operate with Canada on matters of extradition; and (2) the rendition of Mr. Rutagonda to Rwanda violates international law when no legal agreement exists between Rwanda and United States or Canada; when Mr. Rutagonda lacks criminal culpability; and when he would be denied a fair trial.

First, the United States violated international agreements with Canada by luring Mr. Rutagonda, a Canadian citizen into its jurisdiction. The United States is required to co-operate on matters of extradition. By failing to follow the established protocol, the United States violated Canada's ability to control extradition of its nationals. When ignoring the established protocols between the countries, the United States violated the internationally protected rights of Mr. Rutagonda from arbitrary arrest and detention.

Second, the rendition of Mr. Rutagonda to Rwanda violates international law. The United States has no legal authority to surrender Mr. Rutagonda to Rwanda. The United States completely ignores that Mr. Rutagonda was recruited as a child solider at the age of 14 and that he lacks culpability. Rather, Mr. Rutagonda is a victim of war crimes and needs rehabilitation and reintegration back into Canadian society. Finally, surrendering Mr. Rutagonda to Rwanda violates his right to a fair trial when Rwanda fails to offer basic internationally required procedural safe guards.

ARGUMENT

I. THE UNITED STATES VIOLATED CANADIAN SOVERIGNTY AND MR. RUTAGONDA'S INTERNATIONALLY PROTECTED RIGHTS.

The United States violated Canadian sovereignty and Mr. Rutagonda's internationally protected rights for three reasons. First, the United States violated treaties with Canada that define the procedure to extradite nationals. Second, the United States violated the International Covenant on Civil and Political Rights ("ICCPR") and the Universal Declaration of Human Rights ("UDHR") prohibiting arbitrary arrest and detention. Lastly, under customary international law the United States has no legal authority to detain Mr. Rutagonda.

Article 38 of the Statute of the International Court of Justice applies three binding sources of international law with prominence.[1] First, international agreements comprised mainly of treaties, but include conventions, protocols and declarations. Whether a State has violated a treaty agreement is a matter of interpretation governed by the Vienna Convention on the Law of Treaties ("VCLT").[2] Article 26 of the VCLT provides that "[a] treaty in force is binding upon the parties to it and must be performed by them in good faith."[3] Second, customary international law is a standard that has been followed as a "general practice," and has been "accepted as law."[4] Lastly, general principles of law are internationally binding when recognized by the world's municipal legal bodies.[5]

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[1] Gary Botting, *Canadian Extradition Law Practice* (Markham: Butterworths LexisNexis, 2009) at 25.

[2] UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969).

[3] *Id.* at art. 26.

[4] *F.R.G. v. Den*; *F.R.G. v. Neth.*, 1969 I.C.J. 3 (Feb 20).

[5] *Supra* note 1.

A. The United States violated Canadian sovereignty under international agreements.

Canadian sovereignty was violated because the United States failed to request extradition of Mr. Rutagonda under the bilateral treaties in force between the United States and Canada ("the Parties"). Territorial sovereignty has been defined as "states having exclusive sovereignty over their territory and this sovereignty is unfettered by the interests of any other State."[6] The United States impinged upon Canadian sovereignty by violating the Treaty on Extradition and the Parties' agreement in regard to the Mutual Assistance of Criminal Matters. Article 18 of the Vienna Convention on the Law of Treaties prohibits a State from participating in acts that violate the spirit and purpose of the executed treaty.[7] In this case, international agreements were violated because the United States did not request co-operation from Canada to extradite Mr. Rutagonda for trial in Rwanda. Therefore, the United States violated Canadian sovereignty by not asking for assistance in this matter.

1. The United States had no legal authority to apprehend Mr. Rutagonda under the Treaty on Extradition.

The United States Constitution provides that Treaties are the supreme law of the United States.[8] In addition, U.S. Treaties with foreign States trump federal and state law.[9] A domestic law that is an obstacle to the accomplishment and execution of Congress's purposes and objectives in a treaty is unconstitutional.[10] The overriding purpose of the Treaty on Extradition

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[6] Stephen C. McCaffrey, *The Law of International Watercourses*, 77 (Oxford Univ. Press 2007).

[7] UN Doc. A/Conf.39/27; 1155 U.N.T.S 331; 8 ILM 679 (1969); 63 AJIL 875 (1969).

[8] U.S. Const. art VI, cl. 2.

[9] *See McCulloch v. Maryland*, 17 U.S. 316 (1819); *see also Missouri v. Holland*, 252 U.S. 416 (1920).

[10] *See Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

is for the Parties to request extradition of persons found within such territories.[11] The Second Protocol is binding as the most recent legislative act by the parties to amend the original Treaty of Extradition.[12]

The Treaty on Extradition requires nations to communicate prior to extradition. Article 14 in the Treaty on Extradition requires "a warrant or order for the extradition of a person sought."[13] The Second Protocol affirms Article 14 of the Treaty on Extradition while reinforcing the need for co-operation when seeking to obtain custody of fugitives from each other. When the Second Protocol was signed by President Bush, the purpose was to "enhance co-operation between the law enforcement communities of both nations."[14] Further, under Article 14(1) of the Treaty on Extradition, the requested State, in this case Canada, shall make a prompt decision on the request for extradition.[15] In a U.S. Supreme Court ruling on Transborder abduction, the Court found that forcible abduction is acceptable under the terms of the U.S. Mexico Extradition Treaty because the treaty was silent on Transborder abduction.[16] However, the international community has condemned this decision and conversely accepts the international principle that abduction of any sort is in violation of international law.[17]

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[11] Treaty of Extradition on Dec. 3, 1971, 27 U.S.T. 985, T.I.A.S. No. 8237 [hereafter "Treaty"].

[12] Second Protocol Amending the Treaty on Extradition, U.S. Treaty Doc 107-11 July 11, 2002.

[13] Treaty, *supra* note, 34 at art.14.

[14] Second Protocol at Letter of Transmission

[15] Treaty, *supra* note, 34 at art. 14(1).

[16] *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992).

[17] Inter-American Juridical Committee Legal Opinion in United States v. Alvarez-Machain, 32 I.L.M 277, (1993).

In the present case, the United States failed to follow the protocol as outlined by the Treaty on Extradition and the Second Protocol amending it. The United States cannot abrogate its obligations under the Treaties. The United States never requested the surrender of Mr. Rutaganda. If the United States requested Mr. Rutagonda's extradition, then under Article 14 both Parties had an obligation to communicate and co-operate. However, the United States did not request extradition of Mr. Rutagonda from Canada and violated the Treaty on Extradition. Moreover, even if the Treaty is silent on luring, it does not mean that the U.S. has an implied power to lure and apprehend. This reasoning is in line with the accepted norms of the international community and is in stark contrast to the ruling in *U.S. v. Alvarez-Machain*.

2. The luring of Mr. Rutagonda is in violation of the Treaty on the Mutual Assistance of Criminal Matters.

The purpose of the treaty is to "improve the effectiveness of both countries in the investigation, prosecution and suppression of crime through cooperation and mutual assistance in law enforcement matters." [18] The Parties are obligated to provide legal assistance in all matters relating to the investigation, prosecution and suppression of such offenses, including locating or identifying persons and transferring persons in custody. [19]

In this case, the United States made no effort to co-operate with Canada. The United States did not request extradition because it sought to circumvent the procedure established in the protocol. Canada's ability to control matters within its jurisdiction is essential in maintaining its sovereignty. Further, luring and apprehension is in stark contrast to the accepted norms between the countries relating to mutual assistance in criminal matters as evidenced in this Treaty.

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[18] R.S.C, 1985, c. 30 (4th Supp.) Article II (1).

[19] *Id.* at art. 2(2)(3).

Therefore, the United States violated Canadian sovereignty when it prevented Canada from controlling extradition procedures within its jurisdiction.

B. The United States violated Mr. Rutagonda's internationally protected rights.

The luring and criminal apprehension of Mr. Rutagonda violated the ICCPR and the UDHR. These international agreements prohibit arbitrary arrest and detention while guaranteeing an accused the right to a fair trial. In this case, the United States violated these international agreements by luring and apprehending Mr. Rutagonda through electronic communication into Canada's territory.

1. The United States violated the International Covenant on Civil and Political rights because Mr. Rutagonda was arbitrarily arrested.

Two articles of the covenant have application in this case. First, under ICCPR Article 9 "no one shall be subjected to arbitrary arrest or detention."[20] Arbitrary has been defined by Black's Law Dictionary as "depending on individual discretion . . . rather than by fixed rules, procedures, or law."[21] Second, Article 14(1) emphasizes the principle that all persons "shall be entitled to a fair and public hearing by . . . [an] impartial tribunal established by law."[22] In addition, Article 14(2) states that any person charged with a crime shall have the right to be presumed innocent until proven guilty.[23]

In this case, Mr. Rutagonda's international civil and political rights were violated because the United States had no authority to arrest and detain him. The United States lured Mr.

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[20] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), Dec. 16, 1966, entered into force March 23, 1976 at art. 9 [hereinafter ICCPR].

[21] Black's Law Dictionary 9th Edition, 2009 at 119.

[22] ICCPR, *supra* note, 20 at art. 14(1).

[23] *Id.* at art. 14(2).

Rutagonda from Canada with the intention of arresting and detaining him without an arrest warrant or agreement with Canada. The ICCPR expressly prohibits arbitrary arrest under Article 9 when established procedures are not followed.[24] Mr. Rutagonda's arrest in Detroit, Michigan was the headstone in a series of criminal procedures determined to punish Mr. Rutagonda. The United States meant to serve no other purpose than to take any means necessary to arrest and extradite Mr. Rutagonda. Therefore, the luring and apprehension of Mr. Rutagonda has violated his civil and political rights under the ICCPR.

2. The United States violated the Universal Declaration of Human Rights because Mr. Rutagonda was arbitrarily arrested.

Article 9(1) of the ICCPR supports Article 9 of the UDHR. UDHR Article 9 states that no person shall be subjected to arbitrary arrest, detention or exile.[25] According to the U.S. State Department's website, the United States is responsible for holding governments accountable for their actions under universal norms of international human rights.[26] Secretary of State Clinton has commented that the Obama Administration is dedicated to "upholding the tenets of the Universal Declaration at home and championing them abroad through a policy of principled engagement."[27]

In this case, the United States violated Mr. Rutagonda's internationally protected rights by subjecting him to arbitrary arrest and detention. Considering the breadth of the bilateral treaties between the Parties, the United States act of luring Mr. Rutagonda contravenes the

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[24] *Id.* at art. 9.

[25] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) at art. 9 [hereafter UDHR].

[26] *Id.*

[27] Bureau of Democracy Labor and Human Rights, 2009, *available at* http://www.state.gov/g/drl/hr/index.htm.

purpose of the UDHR. Particularly, the circumstances of Mr. Rutagonda's case are extraordinary and deserve special diplomatic treatment. If the United States would have further participated in diplomatic relations between the two countries, then this issue could have been avoided entirely. By luring Mr. Rutaganda, the United Stated exploited Rutagonda's most intimate relationship with his mother. Acting in this manner, the United States has ignored its own foreign policy. These violations defeat the purpose of the UDHR and have further strained relations between the Parties.

C. The luring and criminal apprehension of Mr. Rutagonda violates customary international law.

The United States violated customary international law because it failed to communicate with Canada to surrender Mr. Rutagonda. The United States has no duty to apprehend and extradite Mr. Rutagonda under customary norms of international law without first communicating with Canada. The surrender of another State's national, must be commenced by complying with established protocol.[28]

Moreover, the Montevideo Convention on the Rights and Duties of States also establishes that the United States had no duty to detain and extradite Mr. Rutagonda without the consent and co-operation of Canada. Article 4 of the Convention says that States are equal, enjoy the same rights as other States, and are equally capable of regulating their affairs.[29] Further, the Canadian Supreme Court has ruled as a matter of public policy that Canada does not promote harboring international fugitives of any kind.[30]

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[28] Robert Cryer, *Prosecuting International Crimes*, 101-02, Cambridge University Press (2005); *see also* M. Cherif Bassiouni, *The History of Universal Jursidiction and Its Place in International Law*, Universal Jurisdiction, University of Pennsylvania Press 39-46 (2004).

[29] Montevideo Convention on the Rights and Duties of States, 165 L.N.T.S 19 (1933).

[30] *United States of America v. Burns*, [2001] 1 S.C.R. 283, 195 D.L.R. (4th) at ¶ 58.

In this case, the United States government had no authority to obtain justice by any means necessary. The United States cannot lure Mr. Rutagonda back to Rwanda for trial without extraditing pursuant to customary protocol. Canada has the sovereign decision to determine Mr. Rutagonda's extradition. In light of the abuses of such sovereignty, Canada does not promote harboring war criminals or supporting genocide acts.[31] Inversely, Canada asserts its sovereignty over Mr. Rutagonda because Canada is serving to protect Mr. Rutagonda from any further abuse.

Every situation pertaining to war criminals must be evaluated based on the facts and circumstances of the alleged crime. In this case, the facts and circumstances surrounding Mr. Rutagonda's participation in acts of genocide do not give the United States the right act freely in criminal matters. Moreover, it is not appropriate that the United States used electronic communication to violate Canada's territorial sovereignty. Both physical abduction and luring by electronic means is in direct violation of Canada's territorial sovereignty.

Further, the line between physical abduction and luring by electronic means is becoming more and more blurred. For instance, if the United States actions are not denounced by the ICJ, then bounty hunters and governing states are allowed to use any means necessary to apprehend criminal fugitives. With the rapid emergence of technology, such means for luring are becoming more and more prevalent, placing the sovereignty of recognized States in peril. That is why extradition treaties and international agreements are in force, so foreign nations can co-operate in these types of criminal matters. Clear violations of sovereignty will not help promote relations between States and defeats the purpose of bilateral treaties and international agreements. Therefore, the United States has no duty to punish Mr. Rutagonda. The duty to pursue justice is placed on the sovereign state of the accused national, in this case Canada.

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[31] *Id.*

II. THE RENDITION OF MR. RUTAGONDA FROM THE UNITED STATES TO RWANDA VIOLATES INTERNATIONAL LAW.

The rendition of Mr. Rutagonda from the United States to Rwanda violates international law for three reasons. First, the United States has no treaty or agreement with the Rwandan government. Second, Mr. Rutagonda was recruited illegally and compelled to serve involuntarily by the *Interhamwe* as a child solider.[32] Finally, the Rwandan judiciary cannot provide even basic procedural guarantees for Mr. Rutagonda to receive a fair trial.

A. The rendition of Mr. Rutagonda violates international law because no treaty or agreement exists between Rwanda and the United States or Canada.

International law recognizes that a State's executive has no duty or authority to extradite, absent a treaty or agreement.[33] This principle requires democratic states to enter into treaties or agreements as a prerequisite to extradition.[34] Forming a treaty signifies that each state recognizes trust in the judicial system of the other and will extradite an accused upon request.[35] Even with the existence of an otherwise valid treaty or agreement, a request for extradition should be refused if the international human rights of the accused would be violated.[36]

When the extradition or rendition of an accused is requested, international law requires that either a treaty or agreement exists between the States.[37] The United States and Canada do

[32] Clarification to the Compromis ¶ "Correction"

[33] D.W. Greig, *International Law*, 2nd ed. (Buttersworths, London), 1976, p. 408.

[34] *Supra* note 1, at 25.

[35] *Id.*

[36] Office of the United Nations High Commissioner for Human Rights, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res.39/46 [hereafter "CAT"].

[37] *Supra* note 1, at 26.

not have an extradition treaty or agreement with the Rwandan government.[38] In the United States, there is no inherent right to extradite an accused without a treaty or agreement.[39] As one prominent American legal scholar has described extradition, "in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power."[40]

Similarly, United States federal law requires that a person can only be extradited where an extradition treaty or convention exists. Under federal law, the United States can only extradite an accused to the ICTR.[41] For example, in the *Ntakirutimana* case, the ICTR indicted the defendant for crimes of genocide in Rwanda and requested his surrender to the ICTR.[42] The defendant argued that the United States could only extradite pursuant to a treaty, and not by statute.[43] The court disagreed, holding that the defendant could be extradited pursuant to the executive agreement with the ICTR.[44] The U.S. federal court extradited the defendant pursuant to its authority under federal law to the ICTR.[45]

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[38] Information Exchange Network For Mutual Assistance in Criminal Matters and Extradition, Organization of American States, *available at* http://www.oas.org/juridico/mla/en/usa/index.html

[39] John Moore, *Moore on Extradition*, (International Law Digest vol. I, 2009) (1891) at 22-3.

[40] *Id.*

[41] *Ntakirutimana v. Reno*, 184 F.3d 419, 421 (Cir. 5th 1999).

[42] *Id.* at 422.

[43] *Id.* at 423.

[44] National Defense Authorization Act for Fiscal Year 1996, Pub.L. 104-106, § 1342, 110 Stat. 486 (1996).

[45] *Supra* note 41.

In the present case, the United States has no authority under a treaty or agreement to extradite Mr. Rutagonda to the Rwandan district court. In *Ntakirutimana*, the defendant was indicted by the ICTR.[46] In contrast, Mr. Rutagonda has been indicted by the District Court of Rwanda, not by the ICTR.[47] Under U.S federal law, the United States can only extradite to the ICTR. The ICTR is a separate and distinct international tribunal apart from the local Rwandan district court. Only the ICTR can indict and request the surrender of Mr. Rutagonda pursuant to United States federal law. The United States does not have jurisdiction to extradite Mr. Rutagonda to the local Rwandan court. Therefore, absent a treaty or agreement, Mr. Rutagonda cannot be surrendered to the Rwandan district court.

B. The rendition of Mr. Rutagonda violates international law because child soldiers are presumed to have served involuntarily and should be treated as victims.

The international community recognizes that "[t]here can be no excuse for arming children to fight adult wars."[48] Under international agreements, children recruited as soldiers are presumed to have served involuntarily.[49] International law recognizes children involved in armed conflict under the age of 18 should be provided legal protection because of their physical and mental inability to protest recruitment.[50] Moreover, international agreements prohibit the recruitment and participation of children under the age of 15 from ever being involved in armed

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[46] *Id.* at 422.

[47] Compromis ¶ 5.

[48] Statement by Mary Robinson, United Nations High Commissioner for Human Rights on February 12, 2002, *available at* http://www.unhchr.ch/.../4BFEBE8DA116E9EEC1256CF00031CE80/.../G0311990.doc.

[49] Office of the United Nations High Commissioner for Human Rights, Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25.

[50] Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. Doc. A/4354 (Nov. 20, 1959).

conflict.[51] Because child soldiers lack culpability, they should be viewed by the international community as victims from the atrocities of war.

1. International law presumes child soldiers similar to Mr. Rutagonda were recruited illegally and served involuntarily.

Under international agreements, the recruitment and use of children under the age of 15 in armed conflict is illegal. For instance, Article 77(2) of the Geneva Conventions states that children under 15 cannot be recruited or participate in armed conflict.[52] Similarly, the United Nations Convention on the Rights of the Child Article 38 proclaims: "State parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities."[53] Globally, 194 nations have signed Article 38 prohibiting children under the age of 15 from participating in armed conflict.[54] Only the United States and Somali have declined to sign this agreement.[55] Further, the Rome Statute of the International Criminal Court ("ICC") treats the recruitment or the use of children in armed conflict under the age of 15 in any circumstance as a war crime.[56]

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[51] Additional Protocol to the 1949 Geneva Conventions and Relating to The Protection of Victims of International Armed Conflicts, (1979) 1125 U.N.T.S. 3, at art. 77.

[52] *Id.*

[53] *Supra* note 79, at art. 38.

[54] *Id.*

[55] *Id.*

[56] I.C.C. Rome. Statute of the International Criminal Court Art. 8(2)(b)(xxvi), U.N. Doc. A/Conf. 183/9, July 17, 1998, 2187 U.N.T.S. 90.

The age of criminal culpability is not affirmatively established by international law, however, 18 is a recognized legal standard.[57] Under the ICC, children who commit crimes under 18 are *doli incapax* (incapable of forming criminal intent) for international crimes.[58] Although the United States declined to sign the ICC, other international agreements affirm this principle. For instance, the ICC Preparatory Committee of the ICCPR, the European Convention on Human Rights, the Inter-American Convention on Human Rights, and the Convention on the Rights of the Child, establish that children under the age of 18 are not criminally responsible for international crimes.[59] International prosecutors also apply the ICC standard for all international criminal tribunals including the ICTR, and have refused to prosecute children under age of 18.[60] From the ICC's drafting history, no international criminal tribunal dating back to the Nuremberg Court has prosecuted a former child solider for violating the laws of war.[61]

This legal standard is also affirmed under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ("Optional Protocol").[62]

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[57] UN General Assembly, *Rome Statute of the International Criminal Court (last amended January 2002)*, 17 July 1998, A/CONF. 183/9, *available at:* http://www.unhcr.org/refworld/docid/3ae6b3a84.html.

[58] *Id.*

[59] Roger S. Clark and Otto Triffterer, Article 26: Exclusion of jurisdiction over persons under eighteen, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, 493, 495-96 (Triffterer, ed., Nomos, 1999).

[60] SCSL Chief Prosecutor, David Crane: Special Court for Sierra Leone, Press and Public Affairs Office, 2002.

[61] *Supra* note 59, at 494.

[62] UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2005, *available at:* http://www.unhcr.org/refworld/docid/47fdfb180.html.

The Optional Protocol establishes 18 as the minimum age for direct participation in armed conflict and prohibits compulsory recruitment of children under the age of 18 by government forces.[63] While non-government armed groups cannot recruit or use children in armed conflicts under the age of 18 under any circumstance.[64] The United States is a signatory to the Optional Protocol and has an obligation to uphold its principles.[65]

In the present case, Mr. Rutagonda was recruited illegally by the *Interhamwe* at the age of 14.[66] The *Interhamwe* can only be properly characterized as a non-governmental paramilitary group.[67] Under international law, the *Interhamwe*, as a non-governmental paramilitary group cannot legally recruit children under the age of 15 under any circumstance. At the age of 15, Mr. Rutagonda was placed into armed conflict by the *Interhamwe*.[68] Under the ICC and the Optional Protocol, the *Interhamwe's* recruitment and use of Mr. Rutagonda was illegal and constitutes a war crime.[69]

Additionally, Mr. Rutagonda did not act voluntarily as a child solider under the control of the *Interhamwe*. The international community recognizes 18 as the age at which children become criminally culpable. This legal standard is reflected under the ICC and the Optional

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[63] *Id.*

[64] CA Res./54/263, U.N. Doc. A/RES/54/49, Annex I (May 25, 2000).

[65] The United States Signature to Protocol, July 5, 2000, ratified on Dec. 23, 2002, *available at:* http://www.ohchr.org/english/countries/ratification/11-b.htm (last updated July 13, 2007).

[66] Clarification to the Compromis ¶ "Correction."

[67] Compromis ¶ 2.

[68] *Id.*

[69] *Supra* note 59.

Protocol because children simply do not possess culpability when they are recruited and directed by armed groups. The International community recognizes that armed groups can exercise considerable duress on a child by exploiting their physical and mental inabilities. Even the ICTR will not prosecute former child soldiers that were under the age of 18 at the time of the offence.[70] Thus, surrendering Mr. Rutagonda to Rwanda would be in contravention of the most recognized legal standard for establishing criminal culpability at the age of 18 when the *Interhamwe* recruited him at the age of 14 and exposed him to armed conflict at the age of 15.

2. Mr. Rutagonda should be treated as a victim under international law because children are exploited in armed conflict.

International human rights law recognizes that children recruited into armed conflict are the victims of war crimes. ICC prosecutor Luis Moreno Ocampo in the Court's first case said that "[c]hild conscription destroys the lives and futures of thousands of children around the world."[71] Children in armed conflict are the subjects of abduction, forced recruitment, sexual exploitation, compelled drug use, physical and mental abuse.[72] The International Labor Organization Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor ("ILO") recognizes that forced recruitment of children under the age of 18 into armed conflict is one of the worst forms of child labor.[73] During the Rwanda

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[70] *Id.*

[71] International Criminal Court Press Release, ICC Prosecutor Luis Moreno Ocampo, Feb. 1991, *available at* http://www.iccppi.int/menus/ICC/Structure+of+court+/Office+of +Prosecutor/Bibliographies/The+Prosecutor.

[72] Graga Machel, Report, Promotion and Protection of the Rights of Children: Impact of armed conflict on children, a shocking revelation of horrific abduction and recruitment of child soldiers, sexual exploitation and other appalling crimes against children. U.N. Doc. A/51/306 (Aug. 26, 1996).

[73] The International Labor Organization Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, I.L.O 182, June 17, 1999, 38 I.L.M. 1207.

genocide, the *Interhamwe* had a notorious practice of abducting and forcing service of children as young as ten years old into armed conflict.[74] Further, Article 3 of the ILO defines this practice as a form of slavery and the United States was one of the first countries to ratify the ILO.[75]

In 1993, Mr. Rutaganda, at the age of 14, was recruited by the *Interhamwe*.[76] The recruitment practices by the *Interhamwe* make it apparent that Mr. Rutaganda, as a 14 year old child, had no ability to protest. Under the ILO, Mr. Rutagonda recruitment by the *Interhamwe* contravenes international human rights law.[77] It is only proper that Mr. Rutagonda be viewed by international law as a victim of the *Interhamwe's* campaign of genocide. As a former child soldier, the rendition of Mr. Rutagonda from the United States to Rwanda is misplaced. The remedy for child solider victims should be to provide assistance in the form of rehabilitation and reintegration. Therefore, Mr. Rutagonda should be recognized as a victim of genocide crimes and be returned to Canada to continue his rehabilitation and reintegration into society.

C. The rendition of Mr. Rutagonda violates international law because the Rwanda judiciary cannot provide a fair trial.

It is a general principle of law that the right to a fair trial is one of the most fundamental recognized by civilized nations. The right to a fair trial is guaranteed under Article 14 of the ICCPR, which provides that "everyone shall be entitled to a fair and public hearing by a

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[74] Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2004 - Rwanda*, 2004, at 2. *available at*: http://www.unhcr.org/refworld/docid/4988062928.html United Nations: Child Soldiers Global Report 2004 at 2.

[75] International Labour Organization (ILO), *"A Global Alliance Against Forced Labour". Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights At Work*, May 2005, *available at:* http://www.unhcr.org/refworld/docid/4289f7254.html.

[76] Compromis ¶ 2.

[77] 38 I.L.M.120, at art. 3.

competent, independent and impartial tribunal established by law."[78] The treaty is signed by 154 nations, is binding on the United States, Canada and the international community.[79] In addition, the right to a fair trial is also required by the United States and Canada as a matter of customary international law. This principle is evident from Article 10 of the Universal Declaration of Human Rights, the Sixth Amendment to the United States Constitution, Section 7 of The Canadian Charter of Rights and Freedoms, and other provisions throughout the world.[80]

It is a logical extension of the law that an accused who is extradited be guaranteed the right to a fair trial. For instance, Article 3 of the UN Model Treaty on Extradition lists "mandatory grounds for refusal of extradition . . . if that person has not or would not receive the minimum guarantees in criminal proceedings as contained in Article 14 of the ICCPR."[81] This international custom has also gained support from the European Court of Human Rights ("ECHR"). For example, in *Soering v. United Kingdom*, the ECHR established that extradition might be refused when the right to a fair trial is denied by the extraditing country stating:

> The right to a fair trial in criminal proceedings, as embodied in Article 6 [of the European Convention on Human Rights,] holds a prominent place in a democratic society. . . . The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a *flagrant denial of a fair trial in the requesting country.*[82]

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[78] ICCPR, *supra* note 20, at art. 14.

[79] *See* Ratification Table, Office of the U.N. High Commissioner for Human Rights, *available at* http:// www.ohchr.org/english/countries/ratification/index.htm

[80] UDHR, *supra* note 25; U.S. Const. IIV. amend.; *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[81] United Nations Model Treaty on Extradition, 1990, at art. 3(f).

[82] 11 Eur. Ct. H.R. (ser. A) (1989) ¶113, (emphasis added).

Refusing to extradite an accused absent a fair trial is also consistent with United States domestic law. The American Law Institute's 3rd Restatement of the Foreign Relations Law of the United States recognizes that extradition "is generally refused if the requested state has reason to believe that extradition is requested for purposes of persecution . . . or if there is substantial ground for believing that the person sought will not receive a fair trial in the requesting state."[83]

The international community recognizes that the judicial system in Rwanda is incapable of providing a fair trial. For instance, in *Bajinya et al v. Government of Rwanda/UK Secretary of State*, the extradition of 4 men from the U.K to Rwanda was refused.[84] On appeal, the court held that that there was "a real risk they would suffer a flagrant denial of justice" if returned to Rwanda to face trial.[85] Similarly, the ICTR and national authorities in France, Finland, Switzerland and the United Kingdom have all decided not to transfer cases to Rwanda on the basis that a fair trial could not be guaranteed.[86] The Courts identified a lack in the independence of the Rwandan judiciary, obstructions of defense lawyers and an ineffective witness protection system.[87] Under the Rwanda judicial process, reports of faulty procedure, judicial corruption and false accusations have significantly undermined the trial process.[88]

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[83] § 476 comment (h)(1987).

[84] [2009] EWHC 770 (Admin) at ¶ 543.

[85] *Id.*

[86] Amnesty International 2009 Report *available at* http://web.amnesty.org/library/index/engafr.

[87] *Id.*

[88] Human Rights Watch: World Report 2009 at 100.

In the present case, the rendition of Mr. Rutagonda to Rwanda would undermine his right to a fair trial. International law requires that an accused be given the right to a fair trial.[89] The practice of civilized nations both domestically and internationally has further established international custom that extradition to countries should be refused when an accused would be denied their right to a fair trial.[90] The Rwandan judicial system has committed significant international human rights violations. These include, but are not limited to an unfair judicial proceeding, the inability to secure defense witnesses, and corruption of the Rwandan judiciary.[91] Therefore, rendition to Rwanda to face these abuses would prevent Mr. Rutagonda from receiving a fair trial guaranteed under international law.

CONCLUSION

The United States violated international agreements and international law. First, the luring of Mr. Rutagonda by the United States violated international agreements with Canada to co-operate on matters of extradition. Secondly, the rendition of Mr. Rutagonda to Rwanda violates international law when no legal agreement exists to extradite with Rwanda, when Mr. Rutagonda lacks criminal culpability and when he would be denied a fair trial. Therefore, this Court should order that Mr. Rutagonda be repatriated back to Canada.

Dated: January 26, 2010

Respectfully submitted,

TEAM#: 2010-01A

Counsel for the Applicant,
the Government of Canada

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[89] ICCPR, *supra* note 20.

[90] *See id.; see also supra* note 83.

[91] *Supra* note 88.