

**2009-2010  
NIAGARA INTERNATIONAL MOOT COURT COMPETITION**

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

**February 2009**

**THE GOVERNMENT OF CANADA  
(Applicant)**

**v.**

**THE GOVERNMENT OF THE UNITED STATES  
(Respondent)**

**MEMORIAL OF THE RESPONDENT**

**TEAM#: 2010-01R**

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## STATEMENT OF FACTS

In June 1994, Emanuel Rutagonda (hereinafter “the Accused”) and twelve other members of the *Interhamwe* militia locked 275 Tutsi children inside of Boudaire High School.<sup>1</sup> The school was set ablaze and the Accused, along with the other twelve assailants stood at the exits of the school and shot any child attempting to escape the fire.<sup>2</sup> These horrid acts came to be known as the Boudaire High School massacre, considered one of the worst atrocities committed during the 1994 genocide of Rwanda.<sup>3</sup>

The Accused was born on September 10, 1978 in Montreal, Québec.<sup>4</sup> The Accused is also a citizen of Rwanda. In 1979, the Accused’s parents moved back to Rwanda, whereby his father, a Colonel in the Rwandan army, was killed in a helicopter accident in 1993.<sup>5</sup> Subsequently, at the age of fourteen, the Accused was recruited into the *Interhamwe* militia group, a paramilitary organization affiliated with the Hutu army.<sup>6</sup> After his participation in the murder and execution of 275 Tutsi children, the Accused and his mother moved back to Canada in August 1994.<sup>7</sup>

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<sup>1</sup> *Compromis*, ¶ 4.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at ¶ 1; *Compromis Clarifications*

<sup>5</sup> *Compromis*, at ¶ 2.

<sup>6</sup> *Compromis Clarifications*.

<sup>7</sup> *Compromis*, at ¶ 3.

In 2001, Rwanda issued an indictment for the Accused and six other members of the *Interhamwe* militia who were involved in the Boutaire High School Massacre.<sup>8</sup> Since 2001, the Rwandan government has consistently requested the surrender of the Accused for prosecution for his participation in the heinous crimes against 275 Tutsi children.<sup>9</sup> The Canadian government (hereinafter “Appellants” or “Canada”) denied the request.<sup>10</sup> Subsequently, in January 2002, INTERPOL issued a worldwide Red Notice calling for the Accused’s arrest if found in any country’s territory.<sup>11</sup>

In an effort to bring justice to the families of the 275 murdered Tutsi children, on July 22, 2009, President Barack Obama, the President of the United States of America (hereinafter “U.S.”) signed off on “Operation Motown Express.”<sup>12</sup> “Operation Motown Express” called for the luring and apprehension of the Accused at a health clinic in Detroit, Michigan, where his mother was undergoing a surgical procedure.<sup>13</sup> On that day, ICE agents sent an e-mail to the Accused stating that his mother’s health was rapidly deteriorating and that she was asking for her son.<sup>14</sup> The Accused then obtained a false passport and entered the U.S. *illegally*.<sup>15</sup> The Canadian

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<sup>8</sup> *Id.* at ¶ 4.

<sup>9</sup> *Id.* at ¶ 4-5.

<sup>10</sup> *Id.* at ¶ 5.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at ¶ 9.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at ¶ 10.

government was then immediately notified of the Accused’s detention pursuant to the 2004 Canada-U.S. Consular Notification Agreement.<sup>16</sup>

The U.S., through a series of immigration and judicial decisions, affirmed that the Accused could be rendered to Rwanda.<sup>17</sup> The Appellants protested, arguing that such a rendition would violate its territorial sovereignty, the U.S.-Canada Extradition Treaty (hereinafter “the Extradition Treaty”) and the 1988 Exchange of Letters, and rights guaranteed to the Accused by both the International Covenant on Civil and Political Rights and Customary International Law.<sup>18</sup> The U.S., respecting the Appellant’s contentions, thereby agreed to submit this case to the International Court of Justice (hereinafter “ICJ”) for a binding and final resolution.

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at ¶ 10.

<sup>18</sup> *Id.* at ¶ 11.

## **QUESTIONS PRESENTED**

- A. Whether the U.S.'s act of luring, as a peaceful alternative to trans-border abduction, violated the Appellant's territorial sovereignty or the Accused's international human rights?
  
- B. Whether the U.S. has the proper authority to render the Accused to an international tribunal for a fair trial?
  
- C. Whether the Accused possessed the requisite criminal culpability for his crimes?

## **JURISDICTIONAL STATEMENT**

The parties to this dispute, the U.S. and Canada, have submitted their differences regarding the detainment and rendition of the Accused to the International Court of Justice in accordance with Articles 40(1) and 36(1) of the Statute of the International Court of Justice.<sup>19</sup>

The parties have agreed to the contents of the *Compromis* and any clarifications. The respective parties shall respect the judgment of this Court as final and binding.

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<sup>19</sup> Statute of International Court of Justice arts. 36, 40, June 26, 1945, 59 Stat. 1055.

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## **SUMMARY OF THE ARGUMENT**

The luring of the Accused did not violate the terms of the U.S.-Canada Extradition Treaty because the treaty itself was silent in regards to the prohibition of luring. Furthermore, the luring of the Accused did not infringe upon Canada's territorial sovereignty because no representative of the U.S. set foot upon Canadian soil. On an international scale, luring is viewed as an acceptable alternative to abduction. Once successfully detained within the jurisdictional power of the U.S., the U.S. government has sole authority pursuant to a statute to exercise the rendition of the Accused to the ICTR even in the absence of a formal treaty. The rendition of the Accused does not violate any international norms because the Accused possessed the requisite culpable mind-set at the time of his crimes, and will stand to receive a fair trial at the ICTR or at any Rwandan court.

## **ARGUMENT**

### **I. THE LURING OF THE ACCUSED DID NOT VIOLATE THE U.S-CANADA EXTRADITION TREATY, ANY INTERNATIONAL COVENANTS, OR STANDARDS OF CUSTOMARY INTERNATIONAL LAW.**

The U.S. acted lawfully in the luring and detention of the Accused because it did not violate the terms of any treaty or U.S. domestic law, nor infringe upon the protected principles and standards of sovereignty and customary international law. First, the act of luring did not violate the Extradition Treaty because both the plain meaning of the treaty's text and its supporting historical context were silent in regards to luring. Second, the act did not violate Canada's territorial sovereignty because the U.S. did not physically invade or enter into the territorial province of Canada and abduct the Accused. Luring is a separate and distinct concept from abduction because an abduction would clearly violate both the Extradition Treaty and the protected standard of territorial sovereignty. Furthermore, luring is often used as an alternative

and acceptable method to abduction whereby justice may be brought against criminals who committed or assisted in universal crimes. Third, the luring and detention of the Accused did not violate any of his protected and guaranteed rights pursuant to the International Covenant on Civil and Political Rights because his detainment was conducted in a humane and lawful manner. Therefore, the U.S. did not violate any treaty or domestic law, Canada's territorial sovereignty and customary international law, or the Accused's human rights.

**A. The Luring Of The Accused Was Lawful Because The Plain Meaning And Historical Context Of The Extradition Treaty Did Not Prohibit Luring.**

There is a distinct line that must be examined between the concepts of abduction and luring. Although abduction has been long recognized as a violation of customary international law because of the encroachment into a sovereign's territory,<sup>20</sup> luring has been viewed as an acceptable alternative.<sup>21</sup> The act of luring, as an extraterritorial law enforcement practice, is common and far less objectionable because it does not involve the use of any force or violence.<sup>22</sup> It can be accomplished by the means of telephone, fax, or e-mail and does not involve the unlawful entrance of one state into another.<sup>23</sup>

Alternatively, the act of abduction may be characterized as the unlawful physical invasion or entrance by one state into another where the use of force and weapons is often used to perpetrate an arrest.<sup>24</sup> In the international realm states must respect the territorial sovereignty

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<sup>20</sup> U.N. Charter art. 2, para. 4.

<sup>21</sup> *See* United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991).

<sup>22</sup> Michael P. Scharf, *The Tools For Enforcing International Criminal Justice In The New Millenium* 49 DEPAUL L. REV. 925, 970 (2000).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

and integrity of other states and must refrain from the use of force or threat.<sup>25</sup> However, in the situation at hand, the U.S. did not abduct the Accused, instead, detained him by means of luring, an issue that was silent under the Extradition Treaty.

The Extradition Treaty is not applicable to the situation at hand because the luring of the Accused was not subject to the formal provisions of the extradition treaty, nor a violation thereof. An extradition treaty is typically only used as a procedural means of obtaining individuals in other states who are subject to prosecution.<sup>26</sup> They are also used as a means of respecting other state's territorial sovereignty and refer only to the methods by which an individual may be obtained.<sup>27</sup> However, the U.S. never formally initiated the extradition process pursuant to the Extradition Treaty.

Furthermore, even through an interpretation of the treaty, the U.S.'s actions are still justified because both the plain meaning and historical background of the treaty are silent in regards to the prohibition of luring. Under both the Vienna Convention on the Law of Treaties (hereinafter "Vienna Convention") and U.S. domestic law, it is necessary to first interpret a treaty through a plain meaning reading of the text.<sup>28</sup> After a plain meaning of the text has been

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<sup>25</sup> U.N. Charter art. 2, para. 4.

<sup>26</sup> M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE (Oxford Univ. Press 2007)

<sup>27</sup> *Id.* at 17

<sup>28</sup> Vienna Convention on the Law of Treaties, 22 May 1969, 155 U.N.T.S. 331, art. 31; United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992).\

ascertained, courts subsequently look to the historical background, including negotiations between the contracting parties as support for their interpretation.<sup>29</sup>

In one such case, *U.S. v. Alvarez-Machain*, a Mexican national was forcibly abducted (Alvarez-Machain was abducted while the Accused was merely *lured*) and brought to the U.S. for the torture and murder of a U.S. DEA agent. Alvarez argued that the U.S. lacked jurisdiction over him because his abduction violated the extradition treaty between the U.S. and Mexico. The court first interpreted the U.S.-Mexico extradition treaty through a plain reading of the text as required under U.S. law.<sup>30</sup> The court found that the treaty was silent in regards to the concept of trans-border abduction. Furthermore, as a means of reassurance, the court looked to the legislative history between the parties and still found that the treaty was silent.<sup>31</sup> The court inevitably ruled that the abduction of Alvarez was lawful and justified only because the U.S.-Mexico treaty's plain language and historical context remained silent in regards to the issue of trans-border abductions.<sup>32</sup>

According to the reasoning established in *Alvarez-Machain* and the Vienna Convention, the U.S.-Canada Extradition Treaty must first be examined by construing its terms to determine its meaning.<sup>33</sup> The treaty is absolutely silent and makes no mention about the affirmative obligation of either country to refrain from luring. If the countries were fearful of such actions,

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<sup>29</sup> *Id.* at 665; Vienna Convention on the Law of Treaties, 22 May 1969, 1155 U.N.T.S. 331, art. 31.

<sup>30</sup> *Alvarez-Machain*, 504 U.S. at 663.

<sup>31</sup> *Id.* at 663-65.

<sup>32</sup> *Id.* at 668-69.

<sup>33</sup> *Id.* at 663; *See Air France v. Saks*, 470 U.S. 392, 397 (1985); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 11 (1936).

the treaty would have mentioned the restrictions on luring. Furthermore, the Extradition Treaty, when read as a whole is merely a mechanism, “requiring, under certain circumstances, that the [signatory states] extradite individuals to the other country through an established procedure.”<sup>34</sup> The Extradition Treaty, as a formal mechanism, was created to discourage trans-border abductions and maintain the globally recognized right to territorial sovereignty.

The second step in interpreting a treaty is to look at the history of amendments made to the treaty, along with any correspondence, history of negotiations, or other supporting documents.<sup>35</sup> The negotiations between the U.S. and Canada, as shown through the January 11, 1988 Letters Concerning Trans-border Abduction (hereinafter “Letters”) did not mention the subject of luring.<sup>36</sup> Rather, the Letters concerned matters of trans-border *abduction* and strictly prohibited the use of bounty-hunters.<sup>37</sup> The objective of the Letters was to amend the Extradition treaty in order to further appreciate and respect each country’s territorial sovereignty.

Furthermore, another important concept to treaty interpretation, as evidenced by *Alvarez-Machain*, is that it would be unreasonable to merely imply terms into the treaty that were not originally stated. More specifically, the court stated that “to imply from the terms of this [t]reaty that it prohibits obtaining the presence of an individual by means outside of the procedures the [t]reaty establishes requires a much larger inferential leap...”<sup>38</sup> If the prohibition of abduction

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<sup>34</sup> *Alvarez-Machain*, 504 U.S. at 664.

<sup>35</sup> *Id.* at 663; Vienna Convention on the Law of Treaties, 22 May 1969, 155 U.N.T.S. 331, art. 31.

<sup>36</sup> Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 82 AM. J. INT’L L. 337, 337-38 (1988).

<sup>37</sup> *Id.*

<sup>38</sup> *Alvarez-Machain*, 504 U.S. at 669.

cannot be implied into a treaty, it would be irrational to merely imply the prohibition of luring into the Extradition Treaty.<sup>39</sup>

Under the process of treaty interpretation, as recognized by the Vienna Convention and *Alvarez-Machain*, the Extradition Treaty never prohibited the act of luring. Subsequent amendments to the treaty, as evidenced through the Letters, only prohibited the act of abduction, but remained silent in regards to luring. Therefore, the U.S. did not violate the Extradition Treaty because the treaty's terms and historical background did not prohibit the act of luring.

**B. The Luring Of The Accused Did Not Infringe Upon Canada's Territorial Sovereignty.**

Customary International Law recognizes territorial sovereignty as a mandatory right of all nations.<sup>40</sup> Territorial sovereignty "provides that [s]tates have exclusive sovereignty over their territory and that this sovereignty is unfettered by the interests of any other State."<sup>41</sup> Although abduction has long been recognized as a violation of territorial sovereignty,<sup>42</sup> luring has been viewed as an acceptable alternative.<sup>43</sup> Luring is not considered a violation of a state's sovereignty because it respects the territorial boundaries of states and works as an effective means of apprehending criminals.<sup>44</sup>

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<sup>39</sup> Prosecutor v. Dokmanovic, Case No. ICTY IT-95-13a-PT, T., Ch. II (Nov. 28, 1997).

<sup>40</sup> U.N. Charter art.2, para. 4.

<sup>41</sup> STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 77 (Oxford Univ. Press 2007).

<sup>42</sup> U.N. Charter art. 2, para. 4.

<sup>43</sup> *Yunis*, 924 F.2d at 1086.

<sup>44</sup> *Id.*

In the situation at hand, the U.S. did not violate Canada's territorial sovereignty because it did not enter Canadian territory through the commission of its own authorized personnel or bounty-hunters. In fact, the U.S. went to great lengths to ensure that the territorial sovereignty of its neighbor was respected. Rather than forcibly abducting the Accused from Canadian soil, the U.S. resorted to luring as a means respecting Canadian sovereignty. Furthermore, the U.S. notified Canada of the Accused's detainment pursuant to the 2004 Canada-U.S. Consular Notification Agreement.<sup>45</sup>

**C. The Luring Of The Accused Did Not Violate Any Principle Of Customary International Law.**

Luring does not violate principles of customary international law. On an international scale, the act of luring is typically viewed as an acceptable means of apprehending criminals from non-cooperating states. In one such case, *Prosecutor v. Dokmanovic*,<sup>46</sup> the ICTY,<sup>47</sup> an international criminal tribunal created and authorized by the United Nations to try individuals responsible for acts of genocide committed in the former Yugoslavia, held that "the [act of luring] used to accomplish the arrest of Mr. Dokmanovic neither violated principles of international law nor the sovereignty of the FRY."<sup>48</sup> In *Dokmanovic*, Mr. Dokmanovic was lured from the Federal Republic of Yugoslavia ("FRY") into Eastern Slovenia by means of deception in order to complete his arrest and bring him in front of the ICTY. The ICTY subsequently ruled that the luring of Dokmanovic did not violate the sovereignty of the FRY nor customs of

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<sup>45</sup> *Compromis*, ¶10.

<sup>46</sup> *Dokmanovic*, Case No. ICTY IT-95-13a-PT, T., Ch. II.

<sup>47</sup> S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993)

<sup>48</sup> *Dokmanovic*, Case No. ICTY IT-95-13a-PT, T., Ch. II.

international law. This decision underscores the fundamental truth that a party “may directly or through third parties resort to luring as a method of obtaining custody over offenders present in *non-cooperating states*.”<sup>49</sup> (emphasis added).

It is precisely the Canadian indecisiveness and non-cooperation that prompted the luring of the Accused. The Convention on the Prevention and Punishment of the Crime of Genocide defines Genocide as acts "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."<sup>50</sup> Due to the nature of the crime, the U.S. sanctioned immediate action under the universality principle. The universality principle gives the international community jurisdiction over serious and globally recognized offenses, such as genocide.<sup>51</sup>

Statutory laws of both the U.S. and Canada reflect their acceptance of the universality principle and the importance to prosecute individuals responsible for genocide. The U.S.’s luring of the Accused was consistent with the Genocide Accountability Act of 2007.<sup>52</sup> Furthermore, Canadian law also calls for the prosecution of those responsible for acts of genocide.<sup>53</sup> It is necessary to try those individuals responsible for such acts because holding them accountable is

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<sup>49</sup> Michael P. Scharf, *The Tools For Enforcing International Criminal Justice In The New Millenium* 49 DEPAUL L. REV. 925, 971 (2000).

<sup>50</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Jan. 12, 1951, 78 U.N.T.S. 277.

<sup>51</sup> *See generally* Demjanjuk v. Petrovsky, 776 F.2d 571 (6<sup>th</sup> Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *See generally* Filartiga v. Peña-Irala, 630 F.2d 876 (2<sup>nd</sup> Cir. 1980).

<sup>52</sup> 18 U.S.C.A. § 1091 (2009).

<sup>53</sup> Crimes Against Humanity and War Crimes Act, (2000, c.24) August 31, 2001.

a proper means of deterring such future actions.<sup>54</sup> By luring the Accused, the U.S. effectuated and gave substance to the weight of both international custom and its own domestic laws by bringing an individual who committed an internationally recognized crime to justice.

**D. The Luring And Detainment Of The Accused Did Not Violate Any Of The Rights Guaranteed By The International Covenant On Civil And Political Rights.**

The luring of the Accused did not violate the International Covenant on Civil and Political Rights (hereinafter “ICCPR”) because he was not subject to torture, aggressive or arbitrary arrest, or forcible abduction. Article 9(1) of the ICCPR states that “no one shall be subjected to arbitrary arrest or detention.”<sup>55</sup> The Accused was lured under no guarantee as to whether he would actually enter U.S. territory. He *willingly* entered into the U.S. by no means of force, abduction, torture, or inhumane treatment. Furthermore, his use of a false passport to enter the U.S. violated U.S. domestic law,<sup>56</sup> subjecting him to lawful U.S. detainment.

Additionally, Article 9(2) of the ICCPR states that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”<sup>57</sup> The luring of the Accused did not violate Article 9(2) of the ICCPR because under U.S. domestic law, or the *Ker*-doctrine, the means by which an individual is arrested or

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<sup>54</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91 (Feb. 26).

<sup>55</sup> International Covenant on Civil and Political Rights art. 9 para. 1, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* March 23, 1976; *entered into force for the United States* September 8, 1992), 138 Cong. Rec. S4781-84 (1992).

<sup>56</sup> 8 U.S.C.A. § 1325 (2009).

<sup>57</sup> International Covenant on Civil and Political Rights art. 9 para. 2, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* March 23, 1976; *entered into force for the United States* September 8, 1992), 138 Cong. Rec. S4781-84 (1992).

obtained does not bar prosecution so long as it is done in a humane manner.<sup>58</sup> The Accused was lured in a humane manner because he was not harmed, physically assaulted, nor physically abducted. Therefore, the luring and detainment of the Accused did not violate any of the rights guaranteed by the ICCPR.

## **II. THE RENDITION OF THE ACCUSED WOULD NOT VIOLATE INTERNATIONAL LAW.**

The rendition of the Accused would not violate international law because the U.S. has the express statutory authority to surrender individuals who took part in the 1994 Rwandan genocide to the International Criminal Tribunal for Rwanda (hereinafter “ICTR”). Under both U.S. and international law, it is recognized that children sometimes act under duress; however, this defense does not negate the fact that they still may have possessed the requisite criminal culpability. Furthermore, once established that there is a probable cause for prosecution, the surrendering party must ensure that the venue of the requesting state will offer a fair trial. The ICTR, or the courts of Rwanda, through their recent progression, meet the requirements of a proper venue, and would offer the Accused a fair trial.

### **A. The U.S. Has Proper Statutory Authority To Surrender The Accused To The ICTR.**

According to U.S. law, the surrender of a criminal to a foreign nation is not illegal in the absence of treaty so long as a domestic statute authorizes the surrender.<sup>59</sup> The U.S. Constitution does *not* invalidate executive agreements that are ratified by Congress which provide for extradition.<sup>60</sup> In fact, the U.S. Supreme Court has consistently ruled that Article II of the

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<sup>58</sup> Ker v. People of State of Illinois, 119 U.S. 436 (1886).

<sup>59</sup> Ntakirutimana v. Reno, 184 F.3d 419, 425 (5<sup>th</sup> Cir. 1999).

<sup>60</sup> *Id.*

Constitution does not expressly state that extradition is only proper through the use of a treaty alone.<sup>61</sup> However, extradition may be proper pursuant to a congressional statute.<sup>62</sup> Furthermore, the executive branch of the U.S. has broad authority to enter into international agreements and conduct foreign relations.<sup>63</sup>

In one such case, *Ntakirutimana v. Reno*, the U.S. Supreme Court reinforced the notion that in the absence of a treaty, statutes may confer the authority to extradite. In *Ntakirutimana*, the defendant, a Rwandan national living in Texas, was Accused of genocide by the ICTR and subsequently requested to be extradited to the ICTR. Defendant argued that the U.S. had no treaty with Rwanda and therefore no right to extradite him. However, the Supreme Court ruled that although no formal treaty existed, an executive agreement codified into domestic law authorized the extradition.<sup>64</sup>

In the situation at hand, although the courts of Rwanda rather than the ICTR have requested the extradition of the Accused, the U.S. still has proper authority to render him to the ICTR. In 1995, President Bill Clinton entered into an executive agreement with the ICTR<sup>65</sup> where criminals who took part in the 1994 genocide of Hutu nationals found within U.S. territory

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 424.

<sup>63</sup> *Id.* at 426.

<sup>64</sup> Pub. L. 104-106, § 1342, 110 Stat. 486 (1996) *amending* 18 U.S.C. § 3181.

<sup>65</sup> State Dept. No. 96-48 (Agreement On Surrender of Persons Between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States)

would be extradited to the ICTR for criminal prosecution.<sup>66</sup> Subsequently, this executive agreement was codified as Pub. L. 104-106, S1342, 110 Stat. 486 (1996), *amending* 18 U.S.C. § 3181. Prior to the amendment, Title 18 U.S.C. § 3181 provided that the extradition of individuals would be permitted so long as a formal extradition treaty existed between the U.S. and the requesting nation. However, the formal amendment specifically provided that criminals could also be extradited to the ICTR in the absence of an extradition treaty between the U.S. and ICTR. In this situation, the Accused took part in the acts of genocide during 1994, and is clearly within the jurisdictional realm of the ICTR. Therefore, the rendition of the Accused to the ICTR would not violate international law because even in the absence of a treaty, the U.S. still has the proper statutory authority to do so, and he is also subject to the ICTR's jurisdiction.

**B. The Rendition Of The Accused To The ICTR Or Rwandan Courts Would Not Violate International Law Because Both Courts Would Guarantee The Right To A Fair Trial.**

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 competent, independent and impartial tribunal established by law.”<sup>67</sup> Furthermore, Additional Protocol 2 of the Geneva Convention is also extremely vital in regards to maintaining the globally recognized right to a fair trial. Protocol 2 states that the death penalty shall not be available as a form of punishment to those people who were under the age of 18 at the time they committed the offense, and also guarantees many of the same rights guaranteed by both the U.S. Constitution and the ICTR

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<sup>66</sup> *Id.* at art. 1, para. 1.

<sup>67</sup> International Covenant on Civil and Political Rights art. 14, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* March 23, 1976; *entered into force for the United States* September 8, 1992), 138 Cong. Rec. S4781-84 (1992).

statute.<sup>68</sup> The ICTR statute guarantees that no death penalty shall be sentenced to *any* individual and that in the case of individuals under 18, it will refer to the way Rwanda would punish the individual.<sup>69</sup> The Rwandan Penal Code recognizes that although children are generally less culpable than adults, they are still culpable and therefore deserving of some form of punishment.<sup>70</sup> The fact that the ICTR guarantees no death penalty indicates that it is dedicated to providing a fair trial.

The ICTR not only expresses its recognition of the importance of the right to a fair trial, but guarantees it pursuant to its statute.<sup>71</sup> The statute provides the rules, procedures, and rights guaranteed to those accused of crimes. Furthermore, the ICTR's rules and procedures conform with the Protocol II and most importantly, the guaranteed and necessary right to a fair trial.<sup>72</sup> Article 20 of the ICTR statute outlines the rights guaranteed by the court. The ICTR states that all individuals are equal before the court, that they are entitled to a fair and public hearing, and most importantly, that the accused are always innocent until proven guilty.<sup>73</sup> The ICTR also guarantees that individuals will be informed of the charges against them, that they will have adequate time and preparation to defend themselves with the counsel of their choice, and to be

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<sup>68</sup> Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 6, para. 2, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

<sup>69</sup> Art. 23 ICTRSt

<sup>70</sup> Rwandan Penal Code art. 77, J.O., 1978.

<sup>71</sup> ICTRSt.

<sup>72</sup> Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 6, para. 2, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

<sup>73</sup> Art. 20 ICTRSt

tried without undue delay.<sup>74</sup> Furthermore, the ICTR guarantees the accused the right to self-privilege and the right to examine the witnesses against them which coincides with the Confrontation Clause of the U.S. Constitution and the right to a fair trial under international law. Article 19(1) of the ICTR statute also ensures that a trial will be both fair and expeditious and conducted in accordance with the Rules of Procedure and Evidence.<sup>75</sup> The rendition of the Accused to the ICTR would not violate international law because not only does the ICTR look to the Rwandan Penal Code as a means of determining punishment for individuals under 18, but the ICTR statute actually guarantees a fair trial. As evidenced through its statute, rules, and procedures, the ICTR would offer a proper venue to the Accused for a fair trial.

Even if tried outside of the ICTR in a Rwandan court, there is no justified reason to assume that a Rwandan court would provide an unfair trial to the Accused because both courts have abolished the death penalty and progressed towards guaranteeing individuals the right to a fair and speedy trial. The governing laws of both courts are very similar in nature.<sup>76</sup>

Both the ICTR enabling statute and the new Rwandan Organic Law, developed after the 1994 genocide, deal with the crimes of genocide and are guided by extremely similar procedural rules.<sup>77</sup> One of the few differences is that the ICTR only prosecutes those individuals who specifically took part in the 1994 genocide while Rwandan courts may prosecute all cases of genocide. Moreover, the Rwandan Penal Code supports the notion that the Rwandan court

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Organizations of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990, Organic Law No. 08/96 (Aug. 30, 1996), Compare with ICTRSt.

<sup>77</sup> *Id.*

system will provide a fair trial. The Rwandan Penal Code guarantees that punishment for an individual that committed a crime while under the age of 18 will be less harsh than that of an adult.<sup>78</sup> Additionally, the ICTR looks to these provisions when trying individuals under 18.<sup>79</sup> Therefore, both the ICTR and Rwandan courts' recent progression are evidence that the potential of bias or a conflict of interests has been remedied, and the Accused will therefore receive a fair trial.

**C. The Accused May Be Properly Rendered Because He Possessed Sufficient Culpability For His Crimes.**

There can be no *set* age at which a dividing line may be established between an individual's culpability or their lack of. A criminal's age does not alter the outcome or amount of harm incurred because the actions of a 15-year-old may inflict the same harm and injuries as an adult. Therefore, it becomes important to analyze each individual's situation on a case-by-case basis in order to determine their culpability and corresponding punishment. Although age is a relevant factor in the overall analysis of culpability, it does not shield an individual from facing any punishment simply because he or she may have been of a certain age. It would do no justice to simply imply that child-soldiers lack *any* culpability simply because they fall within a certain age bracket of 15 to 17-years-old. Children may be "*less* culpable for their misconduct than adults [but that] does not necessarily mean that a 17-year-old murderer cannot be *sufficiently* culpable..." and suffer a corresponding punishment.<sup>80</sup>

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<sup>78</sup> Rwandan Penal Code art. 77, J.O., 1978.

<sup>79</sup> ICTRSt.

<sup>80</sup> *Roper v. Simmons*, 543 U.S. 551, 599-600 (2005) (O'Connor, J., dissenting).

Child-soldiers should not be completely barred from punishment simply due to their age of recruitment. Although the punishment for a child may be less severe than an adult, they are at least deserving of *some* punishment. The Accused took part in one of the worst atrocities, and as a 15-year-old, was capable of possessing at least *some* moral blameworthiness or general culpable state of mind. The deaths, injuries and seriousness of the Accused's crimes should not go unpunished. The victims of these atrocities deserve at least some type of justice.

Although customary international law typically acknowledges that children are generally less culpable than adults, this notion does not bar individuals from facing at least *some* form of punishment.<sup>81</sup> On a global scale, pursuant to the Convention on the Rights of a Child (hereinafter "CRC"), children under the age of 18 are consistently given at least some form of punishment for violating their respective nation's domestic laws.<sup>82</sup> The CRC has left the minimum age at which one may be held accountable for international war crimes to be determined by domestic law.<sup>83</sup> The CRC proclaims that at some point, children possess the requisite mental capacity and ability to form their own views and therefore, be held accountable for their actions.<sup>84</sup> Article 40.3 of the CRC states that:

States Parties shall seek to promote the establishment of laws . . . 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[.]

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<sup>81</sup> MODEL PENAL CODE § 4.10 (1985), Criminal Code of Canada, R.S.C. 1985, c. C-46, Section 13; Rwandan Penal Code art. 77, J.O., 1978; Children and Young Persons Act, 1933 § 50 as amended by CYPA 1963 § 16(1).

<sup>82</sup> Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/Res/44/25, art. 40.3(a) (1989) [hereinafter "CRC"]

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at art.12.

Both U.S. and Rwandan law recognize that although children under the age of 18 are generally less culpable than adults, they still must face *some* kind of punishment.<sup>85</sup> The prevailing view of U.S. domestic law on the punishment of children under 18 is supported by the fact that the U.S. has juvenile courts in place, and if the crime or violation committed is considered serious, the child may be transferred to an adult court.<sup>86</sup> For example, the court in *Harris v. Wright*, 93 F.3d 581 (9th Cir. 1996) upheld a mandatory life-imprisonment sentence for a 15-year-old who was convicted of murder and found that "mandatory life imprisonment without parole is, for young and old alike." Appellants have mistakenly placed their reliance on the fact that the Accused was recruited at the age of 14 and therefore not criminally culpable; however, both U.S. and Rwandan law see otherwise.<sup>87</sup> The age of recruitment is irrelevant so long as when the crime or act took place, the child possessed sufficient culpability. International law typically prohibits military recruitment of children under the age of 15,<sup>88</sup> and although the Accused was *recruited* at the age of 14, it does not shield him from facing punishment because at the time of his actions, he still possessed the requisite culpability.

Rwanda's extradition request and penal code evidence the notion that Rwanda recognizes at least *some* form of punishment for crimes committed by children under 18. The Rwandan Penal Code recognizes that children are generally less culpable than adults, but still imposes

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<sup>85</sup> MODEL PENAL CODE § 4.10 (1985); Rwandan Penal Code art. 77, J.O., 1978

<sup>86</sup> 18 U.S.C. §5032 (2006).

<sup>87</sup> MODEL PENAL CODE § 4.10 (1985); Rwandan Penal Code art. 77, J.O., 1978

<sup>88</sup> Convention on the Rights of the Child, Sept. 2, 1990, art. 1, 1577 U.N.T.S. 44, 46

penalties and punishments for children between the ages of 14 and 18.<sup>89</sup> Although the punishments are not as severe as it would be had they been 18 or older, they still do recognize *some* form of punishment.<sup>90</sup>

In addition to U.S. and Rwandan penal law, both Canada and the United Kingdom have similar penal law recognizing at least some form of punishment for criminally culpable children. Although they may not necessarily face the strictest of punishment, the law still reflects the view that a person is not completely absolved and free of punishment simply because they fit within a certain age range.

The Criminal Code of Canada holds children between the ages of 12 and 18 accountable for their actions.<sup>91</sup> Canada's penal law recognizes that children under the age of 18 do possess the requisite culpability to commit crimes and should be punished accordingly.<sup>92</sup> Section 13 of the Criminal Code of Canada specifically states that, "[n]o person shall be convicted of an offence in respect of an act or omission on his or her part while that person was under the age of twelve years."<sup>93</sup> The Appellant's view that the Accused should not be tried for his conduct under customary international law completely conflicts with its own domestic law. Throughout this proceeding, the U.S. has held a consistent view that children who possess criminal culpability should be punished.

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<sup>89</sup> Rwandan Penal Code art. 77, J.O., 1978.

<sup>90</sup> *Id.*

<sup>91</sup> Criminal Code of Canada, R.S.C. 1985, c. C-46, Section 13.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

In relating U.S., Canadian, and Rwandan law to the situation at hand, the Accused should be prosecuted for his actions because his age at the time of his crimes clearly meets the standards required by all three respective nations. Moreover, the U.S., Rwandan, and Canadian penal law are not alone in their view that children 16 and under may possess the requisite culpability to be tried for their crimes. The United Kingdom's penal law also reflects this view. Under the Children and Young Persons Act of 1963, the United Kingdom holds those between the ages of 10 and 18 accountable for their crimes.<sup>94</sup>

Furthermore, even if rendered to the ICTR, the court has the right to try the Accused pursuant to Article I of its statute. Article I states that the ICTR "shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States between 1 January 1994 and 31 December 1994."<sup>95</sup> Article 6(4) of the ICTR also states that the Accused shall not be relieved of criminal responsibility simply because they were acting pursuant to an order of a superior or government official, but they may face a less severe penalty.<sup>96</sup> The Accused took part in the genocide of over 275 individuals, and although Appellants may argue he was acting on behalf of a superior, this does not completely shield him from any punishment. The idea that the Accused should not face any prosecution simply because of his age at the time of his conduct is unmerited and inexcusable. The Accused may arguably have been *less* culpable than an adult soldier, but he was still

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<sup>94</sup> Children and Young Persons Act, 1933 § 50 as amended by CYPA 1963 § 16(1).

<sup>95</sup> Art. 1 ICTRSt.

<sup>96</sup> Art. 6(4) ICTRSt.

*sufficiently* culpable because he was aware of what he was doing, and although a juvenile, ultimately, his *conduct* is still indistinguishable than that of an adult.<sup>97</sup>

International efforts to deter war atrocities requires a clear and credible message to be sent to all: that *anyone* involved in war crimes will face justice at some point in the future. The U.S. is in no way disregarding the need to protect those children who are so young that they do not possess the requisite mind-state, maturity, or culpability to be held accountable for their actions. The recruitment of the Accused does not change the fact that he possessed the requisite culpable mindset for his crimes. The notion that there is no set or defined age at which a child is or is not criminally culpable is evidenced through the various penal laws amongst the world powers. However, most are in agreement that children under the age of 16 are not completely barred from facing at least some kind of punishment.

### **Conclusion**

The luring and detainment of the Accused did not violate Canada's territorial sovereignty, the U.S.-Canada Extradition Treaty, the January 11, 1988 Exchange of Letters Between Canada and the United States on Trans-border Abduction, and the rights guaranteed to the Accused by both the International Covenant on Civil and Political Rights and Customary International law. Furthermore, the rendition of the Accused from the U.S. to the ICTR or a Rwandan court would not violate international law because the U.S. has the statutory authority to render individuals to the ICTR, the Accused possessed the requisite criminal culpability, and both the ICTR and Rwandan courts are capable of providing a fair trial.

Respectfully Submitted,  
Agents for United States, 2010-01R

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<sup>97</sup> Joshua A. Romero, *The Special Court For Sierra Leone And The Juvenile Soldier Dilemma*, 2 NW. U. J. INT'L HUM. RTS. 8, 25 (2004).