

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#: 2010-09A

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QUESTIONS PRESENTED

- I. Whether the alleged “luring” of a genocide suspect, Emanuel Rutaganda, from Canada to the United States violated Canada’s territorial sovereignty, the U.S.-Canada Extradition Treaty, the January 11, 1988 Exchange Letters Between Canada and the United States on Transborder Abduction, and/or the human rights of Emanuel Rutaganda under the International Covenant on Civil and Political Rights and customary international law.

- II. Whether the rendition of Emanuel Rutaganda from the United States to Rwanda for trial of genocidal acts would violate international law when neither the United States nor Canada is party to an extradition treaty with Rwanda, a soldier of fifteen years is not criminally culpable for war crimes, and the Rwandan court system is not capable of providing a fair trial.

JURISDICTIONAL STATEMENT

The Republic of Canada (“the Applicant” or “Canada”) and the United States of America (“the Respondent” or “United States”), have submitted their differences regarding Emanuel Rutaganda to the International Court of Justice in accordance with Articles 40(1) and 36(1) of the Statute of the International Court of Justice.¹ The parties have agreed to the contents of the Compromis and any clarifications. Each party will accept the judgment of this Court as final and binding.

¹ Statute of the International Court of Justice arts. 36, 40, June 26, 1945, 59 Stat. 1055.

STATEMENT OF FACTS

On July 22, 2009, Emanuel Rutaganda, a citizen of both Canada and Rwanda, was lured and apprehended into the United States.² Mr. Rutaganda left his wife and three children in Canada to enter the U.S. under the false belief that his mother was dying.³

Since the implementation of the Genocide Accountability Act of 2007, the U.S. government has become increasingly concerned about human rights issues.⁴ The U.S. government began focusing on Mr. Rutaganda's case after a July 7, 2009 television show discussing him as an internationally wanted individual.⁵ In this context, he was the target of a U.S. government operation called "Operation Motown Express," through which he would be brought to America and apprehended.⁶ With the approval of President Obama and the cooperation of the Detroit Clinic in the U.S., the operation began.⁷

On July 21, 2009 government officials obtained information that Mr. Rutaganda's mother had entered U.S. territory to receive a specialized cardiac treatment.⁸ Taking advantage of this information, U.S. officials planned to entice Mr. Rutaganda to enter America.⁹ The next day,

² Compromis between Canada (Applicant) and the United States of America (Respondent) to submit to the International Court of Justice their differences regarding Emanuel Rutaganda, ¶ 2, 10 (jointly notified to the Court on October 29, 2009) [hereinafter, "Compromis"].

³ Compromis, *supra* note 2, ¶ 9.

⁴ *Id.* ¶ 6.

⁵ *Id.* ¶ 7.

⁶ *Id.* ¶ 9.

⁷ *Id.*

⁸ *Id.* ¶ 8.

⁹ *Id.* ¶ 9.

U.S. officials sent an email to Mr. Rutaganda’s personal phone stating that his mother’s health was deteriorating after the surgery and that she was in imminent danger of death.¹⁰ Upon receipt of this information, Mr. Rutaganda entered the U.S. on a friend’s passport to visit his supposedly dying mother.¹¹ When he entered the clinic and asked to see his mother, Immigration and Customs Enforcement immediately apprehended Mr. Rutaganda.¹² The U.S. notified Canada of Mr. Rutaganda’s apprehension, to which the Canadian government vigorously objected.¹³

After a series of judicial decisions, including the Federal Court of Appeals, an order of removal of Mr. Rutaganda to Rwanda was granted.¹⁴ The order was approved following Rwanda’s request for prosecution, alleging that Mr. Rutaganda participated in the Boutaire High School Massacre during the Rwandan genocide of 1994.

In 1993, fourteen year old Mr. Rutaganda was recruited into the *Interhamwe* militia group after losing his father in a helicopter accident.¹⁵ This paramilitary group participated in the Boutaire High School Massacre and Rwandan authorities have charged Mr. Rutaganda as being one of the perpetrators.¹⁶ After these events, Mr. Rutaganda and his mother returned to Canada in August 1994.¹⁷ Ever since, Mr. Rutaganda has lived a peaceful life owning and

¹⁰ *Id.*

¹¹ *Id.* ¶ 10.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 2010 Niagara Moot Court Competition Clarifications, Correction (Jan. 19, 2010).

¹⁶ *Compromis*, *supra* note 2, ¶ 4.

¹⁷ *Id.* ¶ 3.

operating a successful African curio shop in Ontario, Canada.¹⁸ He has never been the subject of any criminal proceedings, not even a traffic citation.¹⁹

Mr. Rutaganda is now being detained by the American government, awaiting the decision regarding whether he will be extradited back to Rwanda, a nation with which neither Canada nor the United States has an extradition treaty, or be returned to his home in Canada.²⁰

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* ¶ 11.

SUMMARY OF THE ARGUMENT

The U.S. violated customary international law and its treaty obligations during the luring and apprehension of Mr. Emanuel Rutaganda. The U.S. violated Canada's territorial sovereignty and integrity by enticing Mr. Rutaganda, a Canadian citizen, into U.S. territory under false pretenses. The luring of a Canadian citizen by authorities of the U.S. without the consent of Canada violates the established Extradition Treaty and Exchange Letters between the countries. Customary international law was also violated because the U.S. interfered with Canada's internal affairs, an action that is prohibited. Additionally, the tactics used by the U.S. resulted in an arbitrary arrest, which is unlawful under international human rights laws and covenants.

Following the arbitrary arrest, the U.S. is now seeking to extradite Mr. Rutaganda to Rwanda for a trial. Rendition of Mr. Rutaganda is in violation of international law because there is no extradition treaty between either the U.S. or Canada and Rwanda. Further, reliance on international conventions as a legal basis for extradition is inappropriate because extradition is improper if Mr. Rutaganda will be faced with violations of his human rights, as would be the case in Rwanda.

The alleged genocide acts occurred when Mr. Rutaganada was merely fifteen years old, which under international standards is not a criminally culpable age. International bodies will not prosecute an individual who was under eighteen at the commission of the crime. Therefore, prosecuting Mr. Rutaganda in Rwanda for a crime he allegedly committed as a minor violates international law and custom. Furthermore, rendition of Mr. Rutaganda will result in an unfair trial because the Rwandan judicial system lacks due process rights guaranteed under international law. Therefore, Canada respectfully requests the Court to determine that the luring, apprehension and arrest of Mr. Rutaganda, as well as any potential rendition to Rwanda, is in complete violation of international custom, laws, and treaties.

ARGUMENT

I. THE UNITED STATES IMPROPERLY APPREHENDED EMANUAL RUTAGANDA UNDER INTERNATIONAL LAW.

The apprehension of Emanuel Rutaganda [hereinafter, “Mr. Rutaganda”] violated international humanitarian and extradition laws. The luring of Mr. Rutaganda by the United States of America [hereinafter, “U.S.” or “America”] was improper because it violated the Republic of Canada’s [hereinafter, “Canada”] territorial sovereignty and integrity and breached the US-Canada Extradition Treaty of 1971 [hereinafter, “Extradition Treaty”] and the 1988 Exchange Letters on Transborder Abductions [hereinafter, “Exchange Letters”]. Moreover, the U.S. violated customary international law and humanitarian law when it used luring tactics to affect the arbitrary arrest of Mr. Rutaganda.

A. The arrest of Emmanuel Rutaganda constitutes a violation of the territorial integrity and sovereignty of Canada.

Under international law, the principle of territorial sovereignty involves the power of a state to exercise supreme authority over all persons and things within its territory, without intervention of other states in its affairs.²¹ One of the limitations that the territorial sovereignty principle imposes upon states is that, absent the existence of a permissive rule to the contrary, one state may not exercise its power in any form in the territory of another state.²² A state that authorizes the abduction of a person from the territory of another sovereign state is guilty violating of international law.²³ Furthermore, “it is universally recognized, as a corollary of state

²¹ See Charter of the United Nation art. 2(1), June 26, 1945, 1 U.N.T.S. XVI [hereinafter, U.N. Charter].

²² S.S. Lotus (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 14 (Sept. 9, 1927).

²³ Rosalyn Higgs, *Problems & Process, International Law and How We Use It* 70 (Oxford Univ. Press, 2004) (1994).

sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent.”²⁴

Moreover, a violation of territorial sovereignty can arguably occur when a state does not abduct a suspect by force, but instead induces a person to leave one country to be apprehended in another.²⁵ Even without physical entry by the apprehending state, these tactics violate territorial sovereignty because of the direct affect on the internal affairs of the sovereign state.²⁶

Even though Mr. Rutaganda did not enter the territory of the U.S. by force of American authority, the fraudulent means employed in “Operation Motown Express” enticed Mr. Rutaganda into America.²⁷ This was a violation of the territorial sovereignty of Canada because the enticement tactics had their effect upon the territory of that sovereign state and the liberty of an individual citizen. The use of subterfuge to gain custody of a Canadian citizen is not justified under international law.

Further, the luring of a Canadian citizen by U.S. authorities constituted an internationally wrongful act. A state responsible for a wrongful act is under an obligation to make restitution by re-establishing the situation as it existed before the wrongful act.²⁸ Canada never authorized the luring of Mr. Rutaganda. Indeed, the government of Canada vigorously protested the luring and apprehension of Rutaganda and the violation of customary international law by America.

²⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 432, comment b (1987).

²⁵ F.A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law at a Time of Perplexity* 407 (Dinstein, Ed. 1989).

²⁶ *Id.* at 409.

²⁷ Compromis, *supra* note 2, ¶ 10.

²⁸ Draft Articles on Responsibility of States for Internationally Wrongful Acts Art. 31, 2001, Doc A/CN.4/L.602/Rev 1.

government.²⁹ Therefore, the luring and enticement of Mr. Rutaganda by American authorities violated Canada's territorial sovereignty under international law.

B. The United States violated its obligations under the U.S.–Canada Extradition Treaty of 1971 by circumventing established procedures for the interstate surrender of criminal suspects.

Under Article 38 of the International Court of Justice disputes among states are to be decided according to “international conventions, whether general or particular, establishing rules expressly recognized by contracting states.”³⁰ The U.S. has bilateral treaties with numerous nations to regulate extradition proceedings, including Canada. Those treaties define the process for the surrender of persons that have committed a crime in a country party to the treaty, establish lists of extraditable offenses, and assure reciprocity.³¹ When there is an extradition treaty in place, it delineates the expected procedure to bring a criminal to the jurisdiction of a foreign court.³² However, in absence of extradition treaty, nations are under no obligation to surrender those in their country to foreign authorities for prosecution.³³

The extradition treaty between the U.S. and Canada is meant to be the only procedure designated by the two nations to transfer a person from one country to the other for prosecution.³⁴ In the present case, the U.S. undermined the treaty's purpose of interstate cooperation and the trust of both countries by using subterfuge to lure Mr. Rutaganda to enter the

²⁹ Compromis, *supra* note 2, ¶ 11.

³⁰ Statute of the International Court of Justice, *supra* note 1, art. 38(a).

³¹ See John Bassett Moore, *A Treaty on Extradition and Interstate Rendition* § 72 (1891).

³² *Id.*

³³ See Ivan Anthony Shearer, *Extradition in International Law* 22 (1971).

³⁴ *Id.*

U.S. by lying about the condition of his mother's health.³⁵ The Extradition Treaty is designed to assure both interstate cooperation and respect for national sovereignty in the surrender of persons between the signatory nations.³⁶ Moreover, the protection of the contracting states is a foundational element of the treaty, which contemplates that the treaty parties will not seek to evade its terms by sponsoring abductions of the other's citizens.³⁷ In "Operation Motown Express," U.S. authorities bypassed the established provisions for transferring criminal suspects when it lured Mr. Rutaganda into Detroit, Michigan for apprehension. The actions by the U.S. constitute a violation of the Extradition Treaty, both in its provisions and fundamental purpose.

C. The United States and Canada expressed its intent to be legally bound by the 1988 Exchange Letters on Transborder Abduction.

The luring of Mr. Rutaganda violated the Exchange Letters because it breached the commitment of good faith cooperation between the U.S. and Canada. The Vienna Convention on the Law of Treaties (hereinafter, "VCT") establishes that states' consent to be bound by a treaty, constituted by instruments exchanged between them, is expressed when the instruments provide, or when the states recognize, that their exchange shall have that effect.³⁸ The Extradition Treaty between the U.S. and Canada and the Exchange Letters are recognized as binding both states under the VCT, since the instrument provides that their exchange shall have that effect and that

³⁵ Compromis, *supra* note 2, ¶ 9.

³⁶ Michael J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746, 747 (Oct. 1992).

³⁷ *Id.*

³⁸ Vienna Convention on the Law of Treaties art. 13, Jan. 27, 1980, 1155 U.N.T.S 331 [hereinafter, "VCT"].

the letter constituted an understanding between the two governments.³⁹

The Exchange Letters that amended the Extradition Treaty between both countries recognized the concerns of Canada regarding transborder abductions of Canadian citizens wanted in America.⁴⁰ Both countries agreed by an exchange of letters to cooperate with each other to deter transborder abductions by civilians.⁴¹ The condemnation of transborder abduction established by the Exchange Letters also applies to U.S. officials through customary international law. Indeed, every state has a duty to abstain from and prevent its agents from any act which constitutes a violation of another State's independence or territorial sovereignty.⁴² Also, the lack of express limitations prohibiting transborder abduction or luring by U.S. officials in the Extradition Treaty or the Exchange Letters does not make either tactic valid.⁴³

The international community would condemn the luring and apprehension of Mr. Rutaganda by U.S. officials because it used methods not contemplated by the Extradition Treaty to get jurisdiction over a Canadian citizen. Here, the U.S. used an e-mail from a medical institution containing false information regarding Mr. Rutaganda's mother's health. This method used by U.S. officials shows bad faith on behalf of the U.S. government and its disregard for the terms and purpose of the Extradition Treaty and the Exchange Letters. Indeed, there is no reason to make treaties that establish specific mechanisms of cooperation on inter-state surrenders if a state party to that treaty could simply ignore those mechanisms and get jurisdiction by fraud. It is

³⁹ Protocol Amending the Extradition Treaty, Exchange Letters on Transborder Abduction, Jan. 11, 1988, U.S.-Can., S. Treaty Doc. No. 101-17 [hereinafter, "Exchange Letters"].

⁴⁰ *See id.*

⁴¹ *Id.*

⁴² L. Oppenheim, INTERNATIONAL LAW: A TREATISE § 125 (1912).

⁴³ *U.S. v. Rauscher*, 119 U.S. 407 (1886).

startling that the U.S. government is trying to justify “Operation Motown Express” as a way to circumvent its obligations under the Extradition Treaty and the Exchange Letters.

D. The United States breached its obligations under the International Covenant on Civil and Political Rights.

The U.S. is party to the International Covenant on Civil and Political Rights [hereinafter, “ICCPR”], which recognizes that everyone has the right to liberty and sets up the international standards for appropriate arrest and detention.⁴⁴ Article 9 of the ICCPR guarantees a person protection against arbitrary arrest or detention.⁴⁵ The inclusion of this protection recognizes that all citizens of states share an interest to be free from arbitrary arrest without a proper legal basis. As such, using fraudulent means to remove a person from his homeland erodes the standards of international law. In this case, the enticing of Mr. Rutaganda by U.S. officials was arbitrary because it was planned and executed in total disregard for the established legal procedures. Therefore, “Operation Motown Express” was a violation of the ICCPR protections against the deprivation of liberty without a legitimate legal basis.

E. The arrest of Mr. Rutaganda was a violation of customary international law.

Customary international law is defined as the practices and obligations that determine the conduct of states in their dealings with other states.⁴⁶ Regarding interstate surrenders, customary practice indicates that the international community condemns things like transborder abduction because these tactics are considered a violation of state sovereignty and an interference with its

⁴⁴ See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter, “ICCPR”].

⁴⁵ *Id.* at art. 9.

⁴⁶ Thomas Joseph Lawrence, *Definitions and Nature of International Law*, A Handbook of Public International Law (5th Ed. 1901).

domestic affairs.⁴⁷ As such, the enticing and luring of another state's citizen by contrivance or fraud would be considered a like violation of a state territorial sovereignty.

When there is an extradition treaty in place, a state promises to surrender fugitives under certain specified conditions, the treaty parties have plainly agreed that fugitives need not be surrendered when those conditions are not met.⁴⁸ As the United States Supreme Court has recognized, the principles of international law recognize no right to extradition apart from a treaty.⁴⁹ In this case, Mr. Rutaganda was not surrendered by the government of Canada to the U.S. according to the established treaty procedures. Instead, a Canadian citizen was fraudulently enticed into the U.S. using fear tactics and subterfuge. Indeed, U.S. officials used their power to get cooperation from a specialized medical institution to trick Mr. Rutaganda to come to the U.S., pressured by false information regarding his mother delicate health. Further, even though U.S. officials apprehended Mr. Rutaganda in Detroit, Michigan "Operation Motown Express" was designed to evade the surrender mechanism established under the Extradition Treaty and constituted a wrongful act by the U.S against a friendly country.

II. RENDITION OF EMANUAL RUTAGANDA VIOLATES INTERNATIONAL LAW BECAUSE EXTRADITION IS IMPROPER, HE WAS NOT CRIMINALLY CULPABLE AS A CHILD SOLDIER, AND WILL NOT RECEIVE A FAIR TRIAL IN RWANDA.

Rendition of Mr. Rutaganda will violate international law because extradition is improper when there is no extradition treaty between two countries. Moreover, the U.S. cannot attempt to use an international convention as a basis for extradition, because of the human rights conditions in Rwanda. Additionally, prosecution of Mr. Rutaganda is a violation of international law

⁴⁷ *Harvard Research in International Law*, 29 J. INT'L L. I (Supp. 1935).

⁴⁸ *Factor v. Laubenheimerl*, 290 U.S. 276, 287 (1933).

⁴⁹ *Id.*

because, as a fifteen year old at the commission of the crime, he was not criminally culpable for his actions. Furthermore, rendition breaches international law because he will not receive a fair trial in Rwanda.

A. Extraditing Mr. Rutaganda to Rwanda violates international law because neither the United States nor Canada has an extradition treaty with Rwanda.

Under the national laws of both Canada and the U.S., an extradition treaty must be in place between the requesting and granting countries in order for extradition to be proper. Under Canadian law, a person may only be extradited if Canada has an extradition agreement with the requesting country.⁵⁰ Canada currently has an extradition agreement with the U.N. International Criminal Tribunal of Rwanda.⁵¹ However, neither Canada nor the U.S. has a specific treaty or agreement with Rwanda for extradition.⁵² In the absence of a legitimate treaty to regulate the process of extradition, Mr. Rutaganda cannot be surrendered to Rwanda.

In the alternative, even in the absence of a treaty, reliance on other conventions or agreements as a basis for extradition would be improper because of serious human rights concerns relating to the Rwandan judicial system. Customary international law dictates that a country shall not extradite an accused if there is a potential for an abuse of rights.⁵³ Further, a state granting extradition is responsible for a violation of the human rights of the accused.⁵⁴

⁵⁰ Extradition Act, S.C. 1999, c. 18, s. 3.

⁵¹ *Id.* at Schedule.

⁵² Compromis, *supra* note 2, ¶ 5.

⁵³ *Extraditing Genocide Suspects from Europe to Rwanda: Issues and Challenges*, Report of a Conference Organized by REDRESS and African Rights at Belgian Parliament 12 (July 1, 2008) [hereinafter, “Extraditing Genocide Suspects”]

⁵⁴ *Id.* at 13.

There are grave concerns regarding extradition of any accused to Rwanda because of prison conditions. The overcrowded, unsafe, and utterly inadequate state of the Rwandan prison system results in cruel and inhumane treatment.⁵⁵ Prisoners die from preventable diseases, suffer from poor sanitary facilities, and shortages of food.⁵⁶ Under international law, a country is required to guarantee that an accused will receive humane and fair treatment before extraditing.⁵⁷

Because of these conditions, many countries now refuse to extradite to Rwanda. For example, the United Kingdom has overturned extradition orders because of deficient legal standards.⁵⁸ Finland has also refused to extradite for the same reasons.⁵⁹ Amnesty International has issued alerts encouraging all countries to refrain from extraditing to Rwanda until all rights can be guaranteed to all accused. A report regarding Sweden's decision to extradite declares that under customary law countries should not extradite to Rwanda. The report stated the following:

The International Criminal Tribunal for Rwanda 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 [because of] the lack of independence of the Rwandan judiciary, obstructions of defen[s]e lawyers and lack of effective witness protection systems.⁶⁰

⁵⁵ Human Rights Watch. *Law and Reality: Challenges to Fair Trial Standards*, Human Rights Watch (July 24, 2008), <http://www.hrw.org/en/node/62097/section/10> [hereinafter, "Human Rights Watch, Fair Trial"].

⁵⁶ *Id.*

⁵⁷ *See* Extraditing Genocide Suspects, *supra* note 53.

⁵⁸ Collin Haba, *Rwanda, Universal Jurisdiction and International Justice, Will Genocide Fugitives Face a Day in Court?* The New Times (June 4, 2009).

⁵⁹ *Id.*

⁶⁰ Press Release, Amnesty International, *Sweden: Extradition of Rwandan Genocide Suspect Jeopardizes Right to Fair Trial* (July 10, 2009), <http://www.amnesty.org/en/for-media/press-releases/sweden-extradition-rwandan-genocide-suspect-jeopardizes-right-fair-trial> [hereinafter, "Amnesty Press Release: Sweden"].

The actions taken by the international community demonstrate international customary standards indicating that extradition to Rwanda, even when an international convention might provide some legal basis, is inappropriate because of the deficient human rights standards.

Here, the rendition of Mr. Rutaganda will violate international law because neither Canada nor the U.S. has an extradition treaty with Rwanda. Furthermore, customary international law has established that an extradition to Rwanda under alternative conventions would violate international standards because the rights of the accused are not sufficiently upheld. Therefore, extradition of Mr. Rutaganda under any circumstance will violate international law.

B. Rendition of Mr. Rutaganda will violate international law because he was minor during the commission of his alleged crime.

1. International law and custom dictates that prosecution of an individual for war crimes committed under the age of eighteen is improper.

Rendition of Mr. Rutaganda will violate international law because he will be tried for crimes he allegedly committed while under the age of eighteen. International organizations have created standards that do not allow individuals to be convicted of crimes committed while the accused was under the age of eighteen.⁶¹ The Rome Statute of the International Criminal Court [hereinafter, “ICC”] states that “the Court shall have no jurisdiction over any person who was under the age of [eighteen] at the time of the alleged commission of a crime.”⁶² The ICC has made a determination that no person who commits a crime under the age of eighteen shall be criminally punished.⁶³ The decision made by the international community contributes to the concept that minors who commit crimes lack criminal culpability and control over their

⁶¹ Rome Statute of the International Criminal Court, art. 26, July 17, 1998, 2187 U.N.T.S. 90.

⁶² *Id.*

⁶³ *Id.*

actions.⁶⁴

While some international jurisdictions have chosen to set no age limits, or a lesser age limit of fifteen, for recognition of criminal culpability, this is not the custom. In the practice, prosecutors refuse to pursue any acts committed by individuals under the age of eighteen.⁶⁵ Additionally, in the Special Court of Sierra Leone, the prosecutor publically announced that he would not prosecute anyone under the age of eighteen, despite the ability to prosecute individuals as young as fifteen.⁶⁶ These examples demonstrate that, in practice, international courts are not willing to prosecute anyone under the age of eighteen for war crimes.

In this case, it would be a violation of international customary law to prosecute Mr. Rutaganda for his acts. He was a child soldier fighting for the *Interhamwe* militia, a paramilitary group associated with the Hutu army.⁶⁷ Mr. Rutaganda was only fifteen at the time of the alleged commission of the war crime.⁶⁸ Because he was under the age of eighteen when the crimes were allegedly committed, international law standards and practice state that he should not be prosecuted. Thus, a rendition of Mr. Rutaganda, which will result in a trial, is a violation of international custom.

⁶⁴ 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, Article by Article*, 493, 495-496 (Triffterer, ed., Nomos, 1999).

⁶⁵ See e.g. Press Release, Special Court of Sierra Leone, Public Affairs Office, *Special Court Prosecutor Says he Will Not Prosecute Children* (Nov. 2, 2002); Mark Osiel, *The End of Reciprocity: Terror, Torture and the Law of War* (2009).

⁶⁶ Press Release, Special Court of Sierra Leone, Public Affairs Office, *supra* note 65.

⁶⁷ Compromis, *supra* note 2, ¶ 2.

⁶⁸ *Id.*

2. *Child soldiers are the victims of war, not perpetrators.*

Mr. Rutaganda is a victim of the internal conflict that occurred in Rwanda, and under international law should not be prosecuted for the alleged crimes. Under the Paris Principles, children are to be viewed as victims of the war and should be rehabilitated rather than prosecuted.⁶⁹ As quoted in the Paris Principles:

Children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offen[s]es against international law; not only as perpetrators. They must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection through numerous agreements and principles.⁷⁰

A child becomes a victim as soon as he is recruited into a military group.⁷¹ The child is given explicit orders from adults on actions to take, and furthermore, the child is often given drugs to help increase aggression.⁷² Children often “voluntarily” join because they have lost family members in the conflict and need support, protection, and a family.⁷³ The children become dependent on the military group and have little understanding of the moral consequences.⁷⁴ The child soldier is a victim that needs to be rehabilitated, not punished.

⁶⁹ U.N. Children’s Fund (UNICEF), *The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, 3.6. (Feb 2007).

⁷⁰ *Id.*

⁷¹ Rose Grogan, *Child Soldiers, Prosecution* (Sept. 5, 2009), http://www.idebate.org/debatabase/topic_details.php?topicID=924.

⁷² Chen Reis, *Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict*, 28 COLUM. HUM. RTS. L. REV. 629, 644 (1997).

⁷³ Elizabeth Braunstein, *Are Gang Members, Like Other Child Soldiers, Entitled to Protection from Prosecution Under International Law?*, 3 U.C. DAVIS J. JUV. L. & POL’Y 75, 79 (1999).

⁷⁴ Chen Reis, *supra* note 72.

In this case, Mr. Rutaganda was a victim of the internal conflict in Rwanda and should not be tried for his alleged crimes. Mr. Rutaganda was recruited into the *Interhamwe* after his father, a Colonel in the Rwandan army, died in a helicopter accident.⁷⁵ He had just lost his father and was looking for support. Rutaganda was a victim in the civil war in Rwanda and was unfortunately in a situation that resulted in grave consequences. After he left the militia group, he began a successful business, married, and became a father.⁷⁶ While living in Canada, he has not been involved in any criminal behavior, not even a traffic violation.⁷⁷ To extradite Mr. Rutaganda to Rwanda to be tried for a crime he allegedly committed at the age of fifteen vitiates the principles of international law protecting children from being victims of child soldiering.

C. The Rwandan court system is incapable of providing a fair trial to Mr. Rutaganda as guaranteed by the International Covenant on Civil Political Rights.

Rutaganda will not receive a fair trial under international standards if he is extradited to Rwanda. Under the International Covenant on Civil and Political Rights [hereinafter, “ICCPR”], an accused shall be entitled to a fair trial with the following minimum guarantees: to be informed of the charges against him, to have adequate time to form a defense, to be tried without delay, to defend himself or have legal counsel of his choosing, to have witnesses present testimony, to remain silent, and to appeal a ruling.⁷⁸ Rwanda cannot guarantee the right to a fair trial because both the Rwandan conventional court and the traditional gacaca courts lack the essential elements of a fair trial. In the alternative that Rutaganda’s case is not discharged because of his

⁷⁵ Compromis, *supra* note 2, ¶ 2.

⁷⁶ *Id.* at ¶ 3.

⁷⁷ *Id.*

⁷⁸ ICCPR, *supra* note 25.

lack of culpability due to his age at the commission of the crime, he should be tried under universal jurisdiction so that he can receive all the protections of a fair trial.

1. Conventional Rwandan courts do not offer the essential protections to a fair trial guaranteed in international law.

Mr. Rutaganda will not receive a fair trial under international legal standards if he is transferred to a conventional Rwandan court. Organic Law N° 11/2007 provides that all accused transferred from other countries to Rwanda will face trials in the conventional court system.⁷⁹ While the conventional courts have more of the essential qualities of a fair trial, it is still not sufficient under international fair trial standards, which must be applied to the entire Rwandan justice system before cases can properly be tried.⁸⁰

While the country is taking steps to ensure fair trials for all accused, defendants are not receiving the benefit of an impartial justice system, the right to a speedy trial, right to have witnesses testify, or the right to defense counsel. First, Rwanda is not trying cases in an impartial justice system. Rwanda has historically failed to punish members of the Rwandese Patriotic Army, the army associated with the current political power, who committed crimes during the genocide. The failure to address these crimes shows an inability to have a just, fair, and impartial system and until the country can prove that it will be prosecuting all crimes resulting from the genocide, no individual can be guaranteed a fair trial in the Rwandan courts.⁸¹

Second, all accused have the right a trial without undue delay. The heavy burden on the

⁷⁹ *Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States*, Organic Law N° 11/2007 (Mar. 16, 2007) [hereinafter, “Organic Law”].

⁸⁰ Amnesty Press Release: Sweden, *supra* note 42.

⁸¹ *Id.*

courts due to the number of accused has caused major delays in the trial process, sometimes up to ten years.⁸² There is concern that persons transferred to Rwanda for trial will be held in prison for an unreasonable amount of time, especially since there is no remedy available to correct fair trial issues once an accused has been transferred to Rwanda.⁸³

Third, witnesses are not as readily available to testify because of the fear of death.⁸⁴ There have been reports of prosecution witnesses being murdered in order to silence their testimony.⁸⁵ Also, agents of the state have interfered with defendants' right to present a defense by threatening or intimidating a witness so he or she will not testify.⁸⁶ Because the accused has the right to question witnesses for and against him, witnesses must have proper protection before Rwanda can reach international fair trial standards.⁸⁷

Last, the accused that are transferred to Rwanda are not provided with appropriate counsel. The conventional court system guarantees the right to legal counsel under Rwandan law.⁸⁸ However, Rwanda has no obligation to assist an accused who cannot afford counsel, resulting in most defendants not having sufficient representation because they have inadequate

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Human Rights Watch, Fair Trial, *supra* note 55.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ ICCPR, *supra* note 25.

⁸⁸ Human Rights Watch, Fair Trial, *supra* note 55; Organic Law, *supra* note 79.

financial means.⁸⁹ Furthermore, Rwanda is lacking a sufficient number of attorneys for all accused to be represented even without financial problems. In 2008, the Rwandan Bar Association had only eighty-four lawyers practicing in Rwanda, most in Kigali.⁹⁰

Mr. Rutaganda should not be transferred to Rwanda because he will not receive the internationally protected rights to a trial in an impartial justice system, a speedy trial, the benefit of legal counsel, or access to a full defense because of the lack of witness protection. Without receiving these due process guarantees, Mr. Rutaganda's rendition violates international law.

2. *In the alternative, if Mr. Rutaganda is transferred to a traditional Rwandan gacaca court, he will still not receive a fair trial under international law.*

While Rwandan law states that Mr. Rutaganda would be tried in a conventional court as a transferee from another country, there is no guarantee that he will not be transferred to a gacaca court. Gacaca jurisdictions were established to handle the overwhelming amount cases of genocide perpetrators.⁹¹ In October of 2009, over 10,000 cases were transferred from conventional courts to gacaca courts, resulting in more than ninety-nine percent of all genocide cases appearing in gacaca courts, thus, making it likely that Rutaganda will be transferred to one once reaching Rwanda.⁹² However, the gacaca courts are deficient under international fair trial standards because of judicial corruption, lack of witnesses, and no right to counsel.

⁸⁹ U.S. Department of State, *2008 Human Rights Report: Rwanda* (Feb. 25, 2009), <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119019.htm> [hereinafter, "2008 Human Rights Report"].

⁹⁰ *Id.*

⁹¹ Christopher J. Le Mon, *Rwanda's Troubled Gacaca Courts*, 14 NO. 2 HUM. RTS. BRIEF 16 (2007).

⁹² Amnesty International, *Rwanda: Human Rights in Republic of Rwanda* (2009); 2008 Human Rights Report, *supra* note 71.

There have been significant reports of judicial corruption within gacaca proceedings. The judges are members of the community who are supposedly viewed to be persons of “high integrity,” yet have not received more than a few weeks of training.⁹³ Some gacaca judges cannot even read or write.⁹⁴ Yet, more than the lack of education and training, the gacaca judges deny accused the right to witnesses and imprison people who question their impartiality.⁹⁵ Thus, there is no assurance that a defendant’s case will be heard by an impartial judge truly seeking justice.

In addition to the impartiality of the judges, like the conventional courts, witnesses are also hesitant to testify in the gacaca courts because of threats. The witnesses are afraid of incarceration and being accused of genocide ideologies for testifying.⁹⁶ Also, officials use intimidation tactics so witnesses will not testify for the accused. Further, witness protection programs are ineffective because the state threatens witnesses rather than providing assistance.⁹⁷

Lastly, and most importantly, there are absolutely no lawyers present in gacaca trials. An accused cannot have counsel, which is in direct contrast to international fair trial standards.⁹⁸ The accused is only allowed to speak on his own behalf and typically is dependent on witnesses in the community speaking on his behalf, very few of which will come forward due to the

⁹³ Linda E. Carter, *Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda*, 14 NEW ENG. J. INT’L & COMP. L. 41, 47 (2007).

⁹⁴ Human Rights Watch, *Law and Reality: Justice for the Genocide*, Human Rights Watch (July 24, 2008), <http://www.hrw.org/en/node/62097/section/6> [hereinafter, “Human Rights Watch, Genocide”].

⁹⁵ 2008 Human Rights Report, *supra* note 89.

⁹⁶ Human Rights Watch, Fair Trial, *supra* note 55.

⁹⁷ *Id.*

⁹⁸ 2008 Human Rights Report, *supra* note 89.

threats.⁹⁹ Therefore, any accused sitting before the gacaca court is denied a fundamental right to trial found in ICCPR.

In this case, Mr. Rutaganda cannot be assured a fair trial if he is extradited to Rwanda. There is no guarantee his rights will be met in the conventional court. Further, if he is transferred to a gacaca court, his rights will be blatantly ignored. Without the right to counsel, the ability to have witnesses, and an impartial judiciary, Mr. Rutaganda's rendition violates international law.

3. *If Mr. Rutaganda's case is not discharged due to his age at the commission of the crime, the only way to receive a fair trial would be in a foreign court under the principle of universal jurisdiction.*

If Mr. Rutaganda's case is not dismissed due to his age at the commission of the crime, he should be provided the chance to receive a fair trial in another country under universal jurisdiction. Many countries are refusing to extradite accused individuals to Rwanda because of the unfair trial practices.¹⁰⁰ In response, Amnesty International requests states to bring domestic proceedings against defendants in Rwandan genocide cases under universal jurisdiction, instead of extraditing them to the Rwandan courts.¹⁰¹

The Geneva Convention and the Convention on Genocide place a legally binding obligation on signatories to exercise universal jurisdiction over individuals accused of grave

⁹⁹ Human Rights Watch, Fair Trial, *supra* note 55.

¹⁰⁰ Human Rights Watch, *Rwanda: End Lifetime of Solitary Confinement* (Jan. 29, 2009), <http://www.hrw.org/en/news/2009/01/29/rwanda-end-lifetime-solitary-confinement>; Amnesty Press Release: Sweden, *supra* note 42.

¹⁰¹ Press Release, Amnesty International, *Rwanda: Suspects Must Not be Transferred to Rwandan Courts for Trial Until it is Demonstrated that Trials Will Comply With International Standards of Justice* (Nov. 2, 2007), <http://www.amnesty.org/en/library/asset/AFR47/014/2007/en/7d4a5c1d-d35c-11dd-a329-2f46302a8cc6/afr470142007en.html>.

breaches of international law.¹⁰² For instance, under universal jurisdiction, Canada sentenced Desirè Munyaneza for crimes he committed during the Rwandan genocide.¹⁰³ Canada was able to provide the accused with a fair trial and the defendant was held accountable for his actions. Universal jurisdiction can provide a fair trial for the accused without letting the crime go unpunished. Genocide crimes are not ignored, yet states do not have to violate international law by extraditing accused back to Rwanda, where there is no guarantee for a fair trial.

In this case, Mr. Rutaganda has a right to a fair trial under international law. If it is determined that Mr. Rutaganda should be tried for the alleged acts, then the only fair trial possible is one that exercises universal jurisdiction. Any other choice would subject him to grave violations of his basic rights to due process and human dignity.

CONCLUSION

THEREFORE, Canada respectfully submits that this Honourable Court adjudge and declare that:

(1) The luring of Mr. Rutaganda violated established treaties between the U.S. and Canada because the U.S. took action without Canada's consent; (2) the tactics employed by the U.S. violated Mr. Rutaganda's human rights under the ICCPR and customary international law; (3) the rendition of Mr. Rutaganda is improper because there is no legal basis for extradition; and (4) a trial in Rwanda violates international law because Mr. Rutaganda cannot be held criminally culpable of the alleged crimes and, under the Rwandan court system, he will not receive all his fundamental due process rights.

Respectfully submitted,

Agents for the Applicant, Canada, Team #2010-09A

¹⁰²Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) 1993 I.C.J. 325 (Sept. 13).

¹⁰³R.C. Munyaneza, [2009] CarswellQue 4973.