

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#: 2010-15A

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STATEMENT OF FACTS

Emanuel Rutaganda (“Rutaganda”) was born on September 10, 1978 in Canada.¹ His parents, both Rwandan nationals of Hutu ethnicity, returned to Rwanda after his birth.² In 1993, when Rutaganda was fourteen, his father died in a helicopter accident.³ Soon after his father’s death, the *Interhamwe* militia group – a paramilitary organization associated with the Hutu army – recruited Rutaganda.⁴ He served in the *Interhamwe* during the Rwandan genocide.⁵ When the Hutu government fell in August 1994, he fled to Canada with his mother, Marie.⁶

Rutaganda has not been involved in any criminal proceeding in the 15 years since he returned to Canada.⁷ Rutaganda and his mother Marie operate an extremely successful African curio shop in Windsor, Ontario.⁸ Rutaganda married a Canadian woman in 2000 and has three children with her, ages seven, five, and three.⁹

In 2001, the Tutsi-dominated government of Rwanda issued an indictment for

¹ See *Compromis*, ¶ 2; *Clarification*.

² *Compromis*, ¶ 2.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Compromis*, ¶ 3.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

Rutaganda.¹⁰ According to the indictment, Rutaganda allegedly was involved in a June 1994 incident during the genocide.¹¹ *Interhamwe* militia members burned down Boutaire High School, killing 275 Tutsi children trapped inside.¹² The District Court of South Province Rwanda charged Rutaganda and six other identified *Interhamwe* militia members with 275 counts of murder.¹³ Since Rwanda does not have an extradition treaty with Canada, Canada has repeatedly denied Rwanda’s request for Rutaganda’s surrender.¹⁴ In January 2002, at the request of the Rwandan government, INTERPOL circulated a Red Notice worldwide seeking Rutaganda’s arrest.¹⁵

To implement the Genocide Accountability Act of 2007, the United States (“U.S.”) government established the Inter-Agency Working Group for Human Rights Violators (“IAWG”) in February 2009.¹⁶ The IAWG comprises the Deputy Counsel of the National Security Council, the State Department Ambassador at Large for War Crimes Issues, the Section Chief of the Department of Homeland Security Immigration and Customs Enforcement’s Human Rights Violators and War Crimes Unit, the Director of the Department of Justice Office of Special Investigations, and the Director of the Department of Justice Office of International

¹⁰ *Compromis*, ¶ 4.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*; *Clarification*.

¹⁴ *Compromis*, ¶ 5.

¹⁵ *Id.*

¹⁶ *Compromis*, ¶ 6.

Affairs.¹⁷

The IAWG began focusing on Rutaganda after the NBC television series, “The Wanted”, aired an episode on Rutaganda on July 7, 2009.¹⁸ The episode triggered a number of American newspapers to publish editorials expressing disapproval of Rutaganda’s freedom in Canada.¹⁹ Fourteen days after the episode was aired, on July 21, 2009, U.S. Immigration and Customs Enforcement (“ICE”) notified IAWG that Rutaganda’s mother was undergoing a specialized medical procedure in the Detroit Clinic in Michigan.²⁰ In order to apprehend and transfer Rutaganda to Rwanda, IAWG then developed “Operation Motown Express” (the “Operation”) and submitted the plan to President Obama for approval.²¹

The next morning, on July 22, 2009, President Obama approved the Operation.²² IAWG quickly obtained the cooperation of the Detroit Clinic and, at 12:30 p.m. that same day, ICE agents sent an email from the Detroit Clinic to Rutaganda, urgently requesting his presence.²³ The email stated that Marie’s health was quickly deteriorating, she requested Rutaganda’s presence, and that he should visit immediately if he wanted to see her before she died.²⁴ Compelled by the email, Rutaganda entered the U.S. later that same afternoon by using a

¹⁷ *Id.*

¹⁸ *Compromis*, ¶ 7.

¹⁹ *Id.*

²⁰ *Compromis*, ¶ 8.

²¹ *Id.*

²² *Compromis*, ¶ 9.

²³ *Id.*

²⁴ *Id.*

borrowed passport and proceeded directly to the Detroit Clinic.²⁵ When Rutaganda asked clinic staff to bring him to his mother, ICE agents immediately arrested him and took him into custody.²⁶

The U.S. subsequently issued an order of removal for Rutaganda based on his illegal entry into the U.S. In a series of immigration and judicial decisions, the U.S. Supreme Court affirmed Rutaganda's removal to Rwanda.²⁷ After a contentious exchange, the U.S. rebuffed Canada's protests over the fraudulent luring and the impending rendition to Rwanda, but eventually both parties agreed to submit the dispute to the International Court of Justice.²⁸

²⁵ *Compromis*, ¶ 10.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Compromis*, ¶ 11-12.

QUESTIONS PRESENTED

- I. Did the fraudulent luring of Rutaganda from Canada (A) contravene the U.S.-Canada Extradition Treaty (“Treaty”) and the January 11, 1988 Exchange of Letters Between Canada and the U.S. on Transborder Abduction (“Letters”); (B) constitute an arbitrary arrest in violation of Rutaganda’s internationally protected human rights guaranteed by the International Covenant on Civil and Political Rights (“ICCPR”) and customary international law; and (c) infringe Canada’s territorial sovereignty?

- II. Will the pending rendition of Rutaganda from the U.S. to Rwanda for his alleged role in the Boutaire High School incident violate international law on grounds that (A) Rutaganda lacked criminal culpability because he was a child soldier during the incident; (B) the Rwandan courts are incapable of providing Rutaganda a fair trial; and (C) there is no extradition treaty between Rwanda and either Canada or the U.S.?

JURISDICTIONAL STATEMENT

Canada and the U.S. (“the Parties”) respectfully submit this dispute to the International Court of Justice. Pursuant to Article 36(1) of the Statute of the International Court of Justice,²⁹ this Court has jurisdiction to hear and adjudicate this dispute. The Parties agree to accept the judgment of the Court as final and binding, and shall fully conform to the Court’s decision in good faith.

²⁹ Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 993.

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SUMMARY OF THE ARGUMENT

The fraudulent luring of Rutaganda violates the Treaty and the Letters because it amounts to a unilateral act contrary to the purposes of the instruments and it denies Canada rights secured under the Treaty. The U.S. also violated Rutaganda's personal rights against arbitrary arrest guaranteed by Article 9(1) of the International Covenant on Civil and Political Rights ("ICCPR") and customary international law. The luring violated the ICCPR and customary international law because it illegally deprived him of liberty without due process of law and it offended fundamental principles of human dignity. Finally, the luring also infringed upon Canada's territorial sovereignty because it directly affected Canadian citizens.

A U.S. rendition of Rutaganda to Rwanda will violate international law.

First, Rutaganda's illegal recruitment and retention as a child soldier makes him a war crime victim, so he cannot be held criminally culpable. Second, rendition to Rwanda for prosecution in their court system violates his fundamental right to a fair trial guaranteed by the ICCPR and customary international law. Finally, international law requires the U.S. to protect Rutaganda's right to a fair trial; this obligation cannot yield without an extradition treaty between Rwanda and Canada or the U.S.

ARGUMENT

I. THE U.S. VIOLATED THE RIGHTS OF CANADA AND RUTAGANDA WHEN IT FRAUDULENTLY LURED RUTAGANDA FROM CANADA INTO THE U.S.

A. The fraudulent luring of Rutaganda is a unilateral act in contravention of the Treaty and the Letters

The Vienna Convention on the Law of Treaties ("VCLT") constitutes customary international law³⁰ governing the interpretation and application of international agreements

³⁰ MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 27 (Thomson/West 3d ed. 2006).

between states.³¹ Article 18 of the VLCT prohibits states from defeating the purpose of an international agreement prior to its entry into force. Under Article 26 of the VLCT, states must perform an international agreement in good faith. In the same vein, Article 31 requires states to interpret an international agreement “in good faith ... and in the light of its object and purpose.” Taken together, these provisions impose on states an obligation to uphold the spirit, as well as the letter, of their bilateral and multilateral international agreements.

1. *The fraudulent luring violates the Treaty and the Letters because it is a unilateral act contrary to the purposes of the instruments*

The Sixth Committee of the United Nations General Assembly recognizes that when a state unilaterally obtains the presence of criminal offenders from another state to make them accountable for their crimes, the state undermines extradition treaties and other international cooperative efforts to apprehend and prosecute criminal offenders.³² This position also represents a general consensus among nations.³³ Accordingly, a unilateral act such as fraudulent luring violates bilateral extradition treaties and their ancillary instruments.

The Treaty’s purpose is to “make more effective the cooperation of the two countries in the repression of crime by making provision for the reciprocal extradition of offenders.”³⁴ The desire to have a reciprocal relationship is also reflected in the Treaty’s provisions mandating the

³¹ Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331.

³² Virginia Morris & M. Christiane Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Forty-Eighth Session of the U.N. General Assembly*, 88 Am. J. Int’l L. 343, 357 (1994).

³³ *Id.*

³⁴ Treaty on Extradition Between the United States of America and Canada, U.S.-Can., July 9, 1974, 27 U.S.T. 983, T.I.A.S. 8237 (hereinafter, Treaty).

use of diplomatic channels and prompt communications.³⁵ The Letters contain the same commitment to mutuality of purpose. The purpose of the Letters is to enhance cooperation between the Parties in deterring transborder abductions.³⁶ Instead of using bail bondsmen or bounty hunters to obtain the presence of a fugitive to stand trial, the Parties' agree to utilize the extradition process.³⁷ The U.S. also promises to use best efforts to discourage bail bondsmen or bounty hunters from this practice.³⁸

Contrary to the goals of the Treaty and the Letters, the fraudulent luring of Rutaganda was a unilateral act lacking mutuality of purpose. The U.S. acted without Canada's consent or cooperation but only through IAWG and its ICE agents, which respectively conceived of and carried out the plan to lure Rutaganda into U.S. territory.³⁹ By acting outside diplomatic channels, the U.S. undermined future cooperative efforts between the Parties to deter crime. The collusion with the Detroit Clinic, a private party,⁴⁰ also undercuts ongoing U.S. efforts to discourage bounty hunters and bail bondsmen from using illegal methods to extraterritorially obtain the presence of a fugitive offender. While the U.S. once denied that the Treaty is the exclusive means of obtaining an offender's presence, it also conceded that the transfer of offenders pursuant to the Treaty epitomized the "mutually beneficial law enforcement

³⁵ Treaty, *supra* note 32, arts. 9, 14.

³⁶ Exchange of Letters Constituting an Understanding between the Government of Canada and the Government of the United States of America Concerning the Protocol Amending the Treaty on Extradition, U.S.-Can., Jan. 11, 1988, 27 I.L.M. 422, 427 (1988) (hereinafter Letters).

³⁷ Letters, *supra* note 34, at 427-28.

³⁸ *Id.*, at 427.

³⁹ *Compromis*, ¶¶ 8-9.

⁴⁰ *Compromis*, ¶ 9.

cooperation relationship” between the Parties.⁴¹ By its own admission, the U.S. then cannot argue that fraudulently luring Rutaganda does not undermine the Treaty and the Letters.

2. *The U.S. violated the Treaty because the fraudulent luring was an evasion of Canada’s Treaty rights*

Fraudulent luring, according to the jurisprudence of Swiss courts, falls within the spectrum of unilateral acts that violate an extradition treaty.⁴² In a 1982 case, a Swiss court characterized fraudulent luring as an evasion of rights constituting an international wrong.⁴³ There, German authorities had attempted to bypass the German-Belgium extradition treaty, which prohibits extradition of its own citizens, by deceiving the fugitive into entering Switzerland.⁴⁴ The Swiss court declined the extradition on grounds that extradition law prohibits an arrest by fraud or ruse.⁴⁵

In the Treaty, the Parties committed themselves to a comprehensive framework of procedures that strictly defines their obligations and rights in all matters relating to an extradition request. Under the Treaty, Canada may recommend that Rutaganda not be extradited on grounds

⁴¹ Note No. 133 of the U.S. Embassy in Ottawa to Canada’s Department of External Affairs (May 23, 1991), Dept. of State File No. P91 0149-1187/1189, *as reprinted in* Marian Nash, *Territorial Jurisdiction: Irregular Apprehension*, 86 Am. J. Int’l L. 109, 109-10 (1992).

⁴² Stephen Wilske & Teresa Schiller, *Jurisdiction Over Persons Abducted in Violation of International Law in the Aftermath of United States v. Alvarez-Machain*, 5 U. Chi. L. Sch. Roundtable 205, 228 (1998) (hereinafter Wilske & Schiller).

⁴³ X v. Ministère public de la Confédération de Département fédéral de justice et police, *excerpted in* 39 Annuaire Suisse de droit international 228 (1983), *as summarized and translated in* John Quigley, *Our Men In Guadalajara and the Abduction Of Suspects Abroad: A Comment of United States v. Alvarez-Machain*, 68 Notre Dane L. Rev. 723, 733 (1993).

⁴⁴ *Id.*

⁴⁵ Wilske & Schiller, *supra* note 40, at 228.

that he allegedly committed the offense when he was 15 years old and has since rehabilitated.⁴⁶ Canada's recommendation would be well supported by the following evidence of social readjustment and rehabilitation: (1) Rutaganda's 15 years in Canada has been crime-free; (2) with his business acumen, he has proven to be a productive member of society; and (3) he has been raising three children with his wife of ten years.⁴⁷ By circumventing the Treaty, the U.S. denied Canada its discretionary right to deny the extradition on supportable grounds.

Acting unilaterally also allowed the U.S. to evade an evidentiary burden. The Treaty requires the U.S. to provide a warrant of arrest and evidentiary proof in compliance with its own legal standards.⁴⁸ This means that an extradition request must be justified by a showing of probable cause and a warrant issued by a neutral and detached magistrate.⁴⁹ However, the INTERPOL Red Notice is not an international arrest warrant.⁵⁰ Even if this Court construes the Red Notice to suffice as an arrest warrant, Canada is entitled to request evidence proving that Rutaganda is the "Emanuel Rutagonda"⁵¹ referred in Red Notice.⁵² By getting President Obama to authorize the Operation,⁵³ the U.S. bypassed these procedural safeguards against unjustifiable

⁴⁶ See Treaty, *supra* note 32, at art. 5.

⁴⁷ *Compromis*, ¶ 3.

⁴⁸ Treaty, *supra* note 32, at art. 9.

⁴⁹ U.S. CONST. amend. IV; see also e.g. *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975); *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Draper v. United States*, 358 U.S. 307, 310 (1959).

⁵⁰ INTERPOL, *Wanted*, <http://www.interpol.int/Public/Wanted/Default.asp>

⁵¹ *Clarification*.

⁵² See Treaty, *supra* note 32, at art. 9(3).

⁵³ *Compromis*, ¶ 9.

prosecution of fugitives. In fact, IAWG's decision to detain Rutaganda was precipitated by media outcry⁵⁴ stemming from a television series that has been criticized for sensationally mixing investigative journalism and criminal justice.⁵⁵

By denying Canada its rights and undermining the purposes of the Treaty and the Letters, the U.S. made irrelevant these carefully drafted instruments. In order to uphold the spirit of these instruments, this Court should hold that the fraudulent luring violated the Treaty and the Letters.

B. The fraudulent luring constitutes an arbitrary arrest and thus is a violation of Rutaganda's internationally protected human rights under the ICCPR and customary international law

Article 9(1) of the ICCPR guarantees that everyone has the right to be protected against arbitrary arrest.⁵⁶ An arrest is arbitrary if it is not in strict accordance with procedures that are established by law.⁵⁷ This protection against an arbitrary loss of liberty is also universally recognized as customary international law,⁵⁸ and codified in three regional human rights treaties: the European Convention of Human Rights ("ECHR"), the African Charter on Human and Peoples' Rights ("African Charter"), and the American Convention on Human Rights.⁵⁹

⁵⁴ *Id.*, at ¶ 6.

⁵⁵ Rwanda Development Gateway, *New TV Show Dedicated to Tracking Genocide Suspects*, http://www.rwandagateway.org/article.php3?id_article=11643 (last visited Jan. 24, 2010).

⁵⁶ International Covenant on Civil and Political Rights art. 9, 16 Dec. 1966, 999 U.N.T.S. 171 (hereinafter ICCPR).

⁵⁷ ALEX CONTE & RICHARD BURCHILL, *DEFINING CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE* 113 (Ashgate 2d. 2009) (hereinafter Conte & Burchill).

⁵⁸ Universal Declaration of Human Rights art. 3, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).

⁵⁹ European Convention on the Protection of Human Rights and Fundamental Freedoms art. 5(1), Nov. 4, 1950, 213 U.N.T.S. 222; The African Charter on Human and Peoples' Rights art. 6, June

An arrest may be arbitrary even when it occurs within legal strictures. According to the “constant jurisprudence” of the United Nations Human Rights Committee (“UNHRC”), arbitrariness “must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.”⁶⁰ Compliance with other rights within the ICCPR is also relevant to whether the arrest meets the standards of ICCPR’s Article 9.⁶¹

1. *The fraudulent luring did not follow lawful procedures*

Fraudulent luring is not a procedure prescribed by law. UNHRC jurisprudence recognizes that the use of false pretenses to conduct an arrest is an apprehension that violates Article 9(1) of the ICCPR.⁶² As discussed *supra*, the Swiss courts also have held that apprehension by fraud or ruse violates extradition law.⁶³ Moreover, the U.S. Supreme Court recognizes an exculpatory defense to criminal conduct that is premised on the government’s action in luring the offender into committing the crime.⁶⁴ This luring, or entrapment, is generally considered to be

27, 1981, O.A.U. Doc. CAB/LEG/67/3/ rev. 5, reprinted in 21 I.L.M. 58, 60 (1982); American Convention on Human Rights art. 7(3), July 18, 1978, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123.

⁶⁰ *de Morais v. Angola*, Comm’n No. 1128/2002, para. 6.1, U.N. Human Rights Comm., 83rd Sess., U.N. Doc. CCPR/C/83/D/1128/2002 (March 29, 2005).

⁶¹ Conte & Burchill, *supra* note 55, at 113.

⁶² *Mulezi v. Democratic Republic of Congo*, Comm’n No. 962/2001, para. 2.2, U.N. Human Rights Comm’n., 81st Sess., U.N. Doc. CCPR/C/81/D/962/2001 (July 8, 2004) (hereinafter, *Mulezi*).

⁶³ Wilske & Schiller, *supra* note 40, at 228.

⁶⁴ See e.g. *Jacobson v. United States*, 503 U.S. 540 (1992); *Mathews v. United States*, 485 U.S. 58 (1988); *Sherman v. United States*, 356 U.S. 369 (1958).

impermissible police conduct.⁶⁵

The fraudulent luring of Rutaganda was not pursuant to procedures established by law. In *Mulezi v. Democratic Republic of the Congo*, a businessman was lured from the safety of his home into a detention camp when members of a military intelligence service falsely informed him that his services were required by a commander.⁶⁶ Similarly, Rutaganda was lured from the safety of Canada when U.S. ICE agents, with the cooperation of the Detroit Clinic, falsely informed him that his mother was dying.⁶⁷ This use of false pretenses was no different from the arbitrary arrest in *Mulezi*. Not only was this fraudulent luring in violation of international law, specifically ICCPR's Article 9(1) and customary international law on extradition, it also constituted impermissible police conduct that would grant Rutaganda the use of the exculpatory defense for the immigration offense. Accordingly, Rutaganda's luring was not pursuant to any lawful procedure and was an arbitrary deprivation of liberty.

2. *The fraudulent luring lacked due process*

Customary international law recognizes due process rights to include the right to a hearing before an adverse state action is taken, and the right to an effective remedy when an individual asserts a state violation of his or her rights.⁶⁸ The Treaty allows Rutaganda the right to

⁶⁵ John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 Vand. L. Rev. 1869, 1878 (1999).

⁶⁶ *Mulezi*, *supra* note 60, at ¶ 5.2.

⁶⁷ *Compromis*, ¶ 9.

⁶⁸ Bardo Fassbender, *Targeted Sanctions and Due Process: Study Commissioned by the United Nations Office of Legal Affairs* 6, available at http://untreaty.un.org/ola/media/info_from_lc/Fassbender_study.pdf.

use all remedies and recourses provided by Canadian law to contest a request for extradition.⁶⁹ This means that Rutaganda is entitled to an extradition hearing, the right to proffer submissions explaining why he should not be removed to the U.S., and the right of judicial appeal.⁷⁰

However, by obtaining Rutaganda's presence through fraud, the U.S. denied Rutaganda the opportunity to utilize the procedural protections that were available to him. The fraudulent luring accordingly deprived Rutaganda of his due process right and thus was an arbitrary arrest.

3. *The fraudulent luring was unreasonable and unjust*

The U.S. has once described an arbitrary arrest to be one that is "incompatible with principles of justice or with the dignity of the human person."⁷¹ Unlawful and arbitrary interference with privacy, family, or correspondence, as Article 17 of the ICCPR reflects, debases the dignity of the human person.⁷²

The luring of Rutaganda involved an arbitrary and unlawful interference with his private correspondence concerning his family. The U.S. interjected itself into his private correspondence with his mother when ICE agents impersonated the Detroit Clinic to send the false email to Rutaganda's personal Blackberry.⁷³ The interference was exceptionally outrageous because it concerned the alleged impending death of his mother and pleaded for his immediate presence. In cases where national courts justified the use of fraudulent luring in order to assert jurisdiction,

⁶⁹ Treaty, *supra* note 32, at art. 8.

⁷⁰ Canada Extradition Act, S.C. 1999., c.18, arts. 24, 43, 55 (1999).

⁷¹ Statement of U.S. Delegation, 13 G.A.O.R., U.N. Doc. A/C.3/SR.863 at 137 (1958), *as reproduced in* Restat. 3d U.S. Foreign Law § 702 cmt. h.

⁷² ICCPR, *supra* note 54, art. 17; pmbi.

⁷³ *Compromis*, ¶ 9.

government agents had lured the offender by appealing to the offender's greed or selfish motives.⁷⁴ In contrast, ICE agents successfully lured Rutaganda into the U.S. because they took advantage of a vulnerability, that is, Rutaganda's love and affection for his mother. This interference is contrary to the principles protecting the family unit and is inherently incompatible with the dignity of the human person.

As the fraudulent luring was illegal, lacking in due process, and incompatible with principles of human dignity, this Court should hold that it is an arbitrary deprivation of Rutaganda's liberty in violation of the ICCPR and customary international law.

C. The U.S. infringed upon Canada's territorial sovereignty because the fraudulent luring created effects in Canada.

Under international law, a state violates the territorial sovereignty of the other state when its law enforcement officers exercise their functions in the other state without the other state's consent.⁷⁵ Commentators have argued that the concept of territorial sovereignty should be expanded to include fraudulent luring.⁷⁶ The state acts extraterritorially because the illegal means have their effects in the other state.⁷⁷ Accordingly, a fraudulent luring constitutes a wrong committed by law enforcement officers in that foreign state, and is an infringement of the other

⁷⁴ See e.g. *United States v. Yunis*, 924 F.2d 1086 (9th Cir. 1991); *Liangsiriprasert v. United States*, [1991] 1 App. Cas. 225 (P.C. 1990) (appeal taken from H.K.); *Schmidt II*, [1995] 1 App. Cas. 339 (Eng. H.L. 1994).

⁷⁵ Morris & Bourloyannis-Vrailas, *supra* note 3, at 357; 1 L. OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW § 119 (Robert Jennings & Arthur Watts eds., 9th ed. Longman 1992); Restat. 3d of the Foreign Relations Law of the U.S., § 432.

⁷⁶ F.A. MANN, FURTHER STUDIES IN INTERNATIONAL LAW 340-41 (Oxford University Press 1990) (hereinafter Mann); Paul Michell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 Cornell Int'l L. J. 383, 490 (1996).

⁷⁷ Mann, *supra* note 74, at 341.

state's territorial sovereignty.

The U.S. perpetrated a fraudulent act on Rutaganda while he was in Canada. Rutaganda received the false email in Canada on his personal Blackberry.⁷⁸ As a result of the fraud, he was induced to borrow a passport from a Canadian friend and made plans to leave the safety of Canadian soil and enter U.S. territory.⁷⁹ The false email by the U.S. agents constituted a wrong perpetrated on Rutaganda while in Canada because its effects – Rutaganda's reliance – occurred in Canada. As this constituted an extraterritorial exercise of official functions on Canadian soil without Canada's consent, the fraudulent luring also violated Canada's territorial sovereignty.

II. THE U.S. WILL VIOLATE INTERTIONAL LAW IF IT PROCEEDS WITH THE RENDITION OF RUTAGANDA TO RWANDA

A. Rutaganda was not criminally culpable because he was a child soldier

According to Article 1 of the Convention on the Rights of the Child (the "CRC"), a child is defined as "every human being below the age of 18 years." The 1924 Geneva Convention explained that "the child must be the first to receive relief in times of distress" and "must be protected against every form of exploitation."⁸⁰ Moreover, the Declaration of the Rights of the Child states that children have a "physical and mental immaturity, and need safeguards and care, including appropriate legal protection."⁸¹

⁷⁸ *Compromis*, ¶ 9.

⁷⁹ *Id.*, at ¶ 10.

⁸⁰ Geneva Declaration of the Rights of the Child, Sept. 26, 1924, League of Nations, O.J. Spec. Supp. 21 at 43 (1924).

⁸¹ Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. Doc. A/4354 (Nov. 20, 1959).

1. *Rutaganda deserves special protection because the incident occurred when he was 15 and during a period of armed conflict*

Under international humanitarian law, we must do our utmost to protect children from the horrors and reality of war. Article 24 of the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War outlines specific protections for children under the age of 15 during times of conflict.⁸² Under Article 4(3) of Additional Protocol to the Geneva Conventions of 12 August 1949, children combatants are entitled by virtue of their age to far greater protections than any similarly situated adult.⁸³ The 2005 World Summit Outcome Document calls states to prevent armed forces from recruiting and using children during armed conflict, and to “ensure that children in armed conflicts receive timely and effective humanitarian assistance ... for their rehabilitation and reintegration into society.”⁸⁴

Rutaganda was under the age of 18 during his recruitment and at the time of the commission of the Boutaire High School incident. Accordingly, he has a right to special protections under international law. First, Rutaganda was considered a child under the CRC when he was recruited into the *Interhamwe* militia at age fourteen and during the commission of the Boutaire High School massacre.⁸⁵ Not only was he physically and mentally immature, the recruitment occurred at an exceptionally vulnerable time, that is, soon after the death of his father. Second, he allegedly participated in the Boutaire High School incident during the

⁸² Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War art. 24, Aug. 12, 1949, 75 U.N.T.S. 287 (hereinafter, GCRPCP).

⁸³ Additional Protocol to the Geneva Conventions of 12 August 1949, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 7, 1978, 1125 U.N.T.S. 3 (hereinafter, Protocol II).

⁸⁴ 2005 World Summit Outcome Document, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

⁸⁵ *Compromis*, ¶ 2; *Clarification*.

Rwandan genocide,⁸⁶ which was a period of armed conflict. As Rutaganda deserved the right to receive timely and effective humanitarian assistance for his rehabilitation and reintegration into society, he should not lose that right now that he is an adult.

2. *Rutaganda's recruitment into the Interhamwe was illegal*

Customary international law and treaty law prohibit the recruitment and use of child soldiers. Article 4(3)(c) of Protocol II forbids the recruitment of children under the age of 15 into armed forces or groups or their participation in hostilities in non-international armed conflicts.⁸⁷ Article 38(3) of the CRC requires states to “refrain from recruiting any person who has not attained the age of 15 years into their armed forces.”⁸⁸ Further, Article 4 of the Child Soldier Protocol prohibits non-State armed groups from recruiting or using in hostilities persons under the age of 18 years under any circumstances.⁸⁹ The 1990 African Charter on the Rights and Welfare of the Child (ACRWC), to which 39 African States including Rwanda are parties, require parties to “ensure no child takes a direct part in hostilities and refrain in particular, from recruiting a child,” and defines a child as “being below the age of 18 years.”⁹⁰ Rutaganda was recruited into the *Interhamwe* militia group when he was 14.⁹¹ Accordingly, his recruitment as a child soldier was illegal and he should not be made accountable for any alleged incidents taking

⁸⁶ Compromis, ¶ 4.

⁸⁷ Protocol II, *supra* note 84, at art. 4(3)(c).

⁸⁸ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989).

⁸⁹ Protocol II, *supra* note 84, art. 4.

⁹⁰ African Charter on the Rights and Welfare of the Child, arts. 2 & 24(2), OAU Doc. CAB/LEG/24.9/49, Nov. 29, 1999.

⁹¹ *Clarification*.

place while he was a child soldier.

3. *Rutaganda should be treated as a victim of a war crime*

Children who are recruited into and retained in armed conflict, both voluntarily or involuntarily, should be treated as victims of a war crime. Article 3 of the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour defines the compulsory recruitment of children for use in armed conflict as a form of slavery.⁹² A child's rights are further violated by his or her retention in an armed force in which he has been illegally recruited.⁹³ In *Prosecutor v. Lubanga*, the defendant was charged with "enlisting children under the age of 15" and "using children under the age of 15 to participate actively in hostilities."⁹⁴ Notably, neither the International Criminal Court ("ICC") nor other international criminal tribunals have sought to hold child soldiers responsible for any crimes they may have committed during an armed conflict.⁹⁵

Rutaganda's rights were violated because he was 14 when he was recruited, and was 15 when he was retained by the *Interhamwe* to take part in the Boutaire High School incident. His alleged commission of the offense accordingly took place under conditions akin to slavery. Instead of treating Rutaganda as a war criminal, this Court should acknowledge Rutaganda's status as a victim of a war crime.

⁹² Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO C182), June 17, 1999, 38 I.L.M. 1207 at art. 3.

⁹³ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, Pre-Trial Chamber 1, International Criminal Court, 29 January 2007, ICC-01/05-0106-803, para . 248.

⁹⁴ *Prosecutor v. Lubanga*, Warrant Arrest of 10 February 2006.

⁹⁵ Appellate Brief for Respondent, *Odah v. U.S.A.*, 128 S. Ct. 2229 (2007)(No. 06-1196).

4. *Under international law, adults should not be prosecuted for crimes committed as child soldiers*

Rutaganda should not be tried before a court of law even though he is no longer a child soldier. Under international law, child soldiers cannot be prosecuted because a person cannot be held fully accountable for a crime if he was not fully responsible at the time he committed it. According to the U.S. Supreme Court, “the susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally responsible as that of an adult.”⁹⁶ Such prosecutions are disfavored, and there is no precedent for an international law tribunal trying a person for an offense committed under the age of 18 years old.⁹⁷ Similarly, the ICC treats minors as absolutely exempt from criminal responsibility. Article 26 of the Rome Statute plainly states that “[t]he Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.”⁹⁸ According to the drafting history of Article 6, under international law, criminal responsibility begins at the age of 18.⁹⁹ Therefore, international precedent and policy does not support prosecuting Rutaganda for a crime allegedly committed when he was a child soldier.

B. The Rwandan courts are not capable of providing Rutaganda with a fair trial

International law demands that courts guarantee Rutaganda certain rights, such as due process and the right to a fair and impartial trial. Article 14(1) of the ICCPR provides that

⁹⁶ *Roper v. Simmons*, 543 U.S. 551, 770 (2005).

⁹⁷ Appellate Brief for Respondent, *Odah v. U.S.A.*, 128 S. Ct. 2229 (2007)(No. 06-1196).

⁹⁸ Article 26, Rome Statute of the International Criminal Court; U.N. Doc. A/CONF.183/9 (July 17, 1998).

⁹⁹ COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 494 (Otto Triffterer, ed., 1999).

everyone is entitled to a fair and public hearing by a competent, independent, and impartial tribunal.¹⁰⁰ Moreover, Article 7(1) of the African Charter provides that every individual shall have the right to be tried within a *reasonable* time by an impartial court or tribunal, and Article 26 requires State Parties to "guarantee the independence of the Courts."¹⁰¹ In 1992, the African Commission on Human and Peoples' Rights ("African Commission") adopted the Resolution on the Right to Recourse Procedure and Fair Trial, guaranteeing, *inter alia*, the right to adequate preparation of the defense and the right to examine witnesses.¹⁰²

1. *Rwanda is plagued by an unfair trial process and corruption*

In 2008, Rwandan senators raised concern over the issue of Rwanda's illegally detaining people for egregious amounts of time without a trial.¹⁰³ Dominique Makeli, a former journalist for Radio Rwanda, remained in detention without trial after almost 13 years and Tatiana Mukakibibi, a former presenter and producer with Radio Rwanda, was acquitted of genocide charges after 11 years in detention without trial.¹⁰⁴ Both of these detentions violated Article 7(1) of the African Charter because a 10-year detention without being tried is unreasonable.

Extradition requests made in 2009 by the Rwandan Prosecutor General for three cases to be transferred from the International Criminal Tribunal of Rwanda ("ICTR") were refused on the

¹⁰⁰ ICCPR, *supra* note 54, art. 14(1).

¹⁰¹ African Charter, art. 7(1); 26.

¹⁰² http://www.achpr.org/english/resolutions/resolution105_en.htm

¹⁰³ <http://thereport.amnesty.org/en/regions/africa/rwanda>.

¹⁰⁴ *Id.*

grounds that the accused would then be subjected to an unfair trial in Rwandan courts.¹⁰⁵ In rejecting the request, the ICTR pointed to reports that defense witnesses inside and outside Rwanda risked being rejected by their community, mistreated, arrested, detained, beaten, tortured and, in some cases, killed.¹⁰⁶ The ICTR judges determined that the accused would not have a realistic ability to call defense witnesses to trial.¹⁰⁷ According to the Amnesty International's deputy director for Africa, there is "overwhelming evidence" that one's right to a fair trial would be violated if extradited to Rwanda.¹⁰⁸ This lack of access to witnesses violates the African Commission because it would not allow Rutaganda, for example, to adequately prepare for trial. The director suggested that the ICTR and other national authorities around the world, have the responsibility to prosecute these crimes before their national courts, rather than Rwandan tribunals.¹⁰⁹ Therefore, extradition of accused persons should only take place where it can be guaranteed that the rights will be respected.¹¹⁰

2. *The Rwandan courts lack the framework of restorative justice and social rehabilitation programs required for Rutaganda, who was a child soldier*

International law requires that minimum safeguards and procedures be established to ensure that if child soldiers are being prosecuted, the process is one that ensures retribution and

¹⁰⁵ *Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11bis; *Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis; *Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-11bis, 19 June 2008.

¹⁰⁶ *Id.*

¹⁰⁷ <http://thereport.amnesty.org/en/regions/africa/rwanda>.

¹⁰⁸ <http://www.amnesty.org/en/for-media/press-releases/sweden-extradition-rwandan-genocide-suspect-jeopardizes-right-fair-trial>

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

reintegration, not retribution. Article 7 of the Special Court of Sierra Leone (“SCSL”) states that should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he shall be “treated with dignity and a sense of worth, taking into account his young age and desirability of promoting his rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular his rights.”¹¹¹ Further, Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.¹¹² This statute suggests that the prosecution of a child soldier should not result in life imprisonment, or other types of retributive forms of punishment.

The potential prosecution of Rutaganda by a Rwandan court will not provide an outcome that focuses on retribution and reintegration. First, Rwanda is a State party to the ICCPR and obliged to obey its Article 7.¹¹³ Although Rwandan lawmakers passed the “transfer law” in 2007, which abolished capital punishment for prisoners and replaced it with life imprisonment in solitary confinement, this punishment still violates international law.¹¹⁴

C. Neither the U.S. or Canada has an extradition treaty with Rwanda

Under international law, the rendition of Rutaganda is not proper in the absence of an extradition treaty between the U.S. and Rwanda. Extradition is the official surrender of an alleged criminal from one State or authority where the criminal has taken refuge to another

¹¹¹ Appellate Brief for Respondent, *Odah v. U.S.A.*, 128 S. Ct. 2229 (2007)(No. 06-1196).

¹¹² ICCPR, art. 7.

¹¹³ <http://www.hrweb.org/legal/cprsigs.html>

¹¹⁴ <http://www.hrweb.org/legal/cprsigs.html>

jurisdiction to prosecute for the alleged crime.¹¹⁵ While there are several legal bases for which a country can grant extradition, the U.S. essentially relies on bilateral treaties.¹¹⁶ No international legal duty to surrender a fugitive exists without a treaty.¹¹⁷ As there is no extradition treaty between Canada or the U.S. and Rwanda, the U.S. cannot extradite Rutaganda to Rwanda.

1. *There is no legal basis for the extradition of Rutaganda under comity*

U.S. extraditions are governed by 18 U.S.C.S. § 3181, which prohibits the extradition of individuals from the U.S. in the absence of a treaty.¹¹⁸ Though extradition sometimes may be based on comity, this narrow circumstance is limited to defendants who are U.S. citizens.¹¹⁹ Here, Rutaganda as a dual citizen of Rwanda and Canada and does not qualify under the provisions of 18 U.S.C.S. § 3181(b). Therefore, the U.S. cannot extradite Rutaganda on the basis of comity.

2. *The U.S. is required to deny the extradition because Rwandan courts cannot provide the right to a fair trial*

Under Articles 3 and 6 of the ECHR, all state parties are obliged to respect the rights of the accused, including the absolute right not be subjected to torture or to cruel, inhuman or degrading treatment or punishment in the requesting country and the right to a fair trial. The right to a fair trial requires various fair trial rights to be respected, including *inter alia*, equality of

¹¹⁵ M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 1 (5th ed. 2007).

¹¹⁶ *Id* at 69.

¹¹⁷ *Id.* at 462; *Factor v. Laubenheimer*, 290 U.S. 276, 286–87 (1933).

¹¹⁸ 18 U.S.C.S. § 3181.

¹¹⁹ 18 U.S.C.S. § 3181(b).

arms.¹²⁰ State parties are obliged to reject an extradition request if it emerges that there is a risk of a “flagrant denial of justice” in the requesting state.¹²¹ Lastly, where an extradition request by the relevant authorities handling the request prior to the judicial assessment has been approved, courts need to carry out an assessment of their obligations under the ECHR.¹²² These obligations include an examination of the prison conditions in the requesting state, and the legislative and practical arrangements set in place to guarantee a fair trial by the requesting state.¹²³

The U.S. violated the ECHR by agreeing to extradite Rutaganda to Rwanda for prosecution. The Rwandan courts cannot guarantee a right to a fair trial, as established above. Namely, the lack of independence of the judiciary constitutes a flagrant denial of justice. Therefore, under Article 6, the U.S. was under an obligation to deny the extradition request from Rwanda. Lastly, the record is void of any indication that the U.S. courts examined their obligation under the ECHR to ensure that the prison conditions and arrangements in Rwanda guaranteed Rutaganda the right to a fair trial. In sum, the U.S. was under an obligation to deny Rwanda’s request and therefore, violated Article 6 of the ECHR.

CONCLUSION

Therefore, the Republic of Canada respectfully requests that the Court find 1) that the luring of Rutaganda violated Canada’s rights under the Treaty and Letters as well as its territorial sovereignty; and 2) the proposed rendition of Rutaganda to Rwanda will violate his human rights as Rutaganda deserves recognition as a victim of a war crime and the right to a fair trial.

¹²⁰ <http://www.redress.org/documents/08-07-01%20BackgroundNote%20Extradition%20Conference.pdf>

¹²¹ *Soering v. the United Kingdom*, 11 EHRR 439. (1989).

¹²² *Id.*

¹²³ *Id.*