

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#: 2010-16A

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Rome Statute of the International Criminal Court art. 26, July 17, 1998, 2187 U.N.T.S. 90..13, 15	
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<i>In Re Jolis</i> , (1933-1934) 7 Ann. Dig. 191 (1933) (Trib. Correctionnel d'Avesnes) (Fr.)	6
<i>Prosecutor v. Dokmanovic</i> , Case No. IT-95-13a-PT, Decision on the Motion for Release (Oct. 22, 1997), in <i>2 Substantive and Procedural Aspects of International Criminal Law (Documents and Cases)</i> (Gabrielle Kirk McDonald & Olivia Swaak-Goldman, eds. 2000)	3, 4
<i>State v. Ebrahim</i> (SC) (1988) 1 SALR 991, 31 ILM 88 (1991) (S. Afr.)	6
<i>Stocke v. Germany</i> , BverfG, Nov. 5, 2003, docket no. 2 BvR 1506/03, at http://www.bverfg.de/entscheidungen/rs20031105_2bvr150603en.html (2003)	3, 5

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Extradition Treaty Between the United States of America and Canada, U.S.-Can., Dec. 3, 1971, 27 U.S.T. 983	8, 9, 10, 13
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<i>Lotus case</i> , PCIJ, Ser. A., No. 10, 1927	2
<i>Nuclear Tests Cases (Australia v France; New Zealand v France)</i> [1974] ICJ Reports 253	8
Office of the Legal Adviser to the Secretary of State, Guidance on Non-Binding Documents, http://www.state.gov/s/l/treaty/guidance/index.htm (last visited January 22, 2010)	12
Protocol Amending the Extradition Treaty Between the United State of America and Canada, Jan. 11, 1988, 1853 U.N.T.S. 407	8, 9, 10

Articles, Books, and Treatises

Amelia S. Canter, “ <i>For These Reasons, the Chamber Denies the Prosecutor's Request for Referral</i> ”: <i>The False Hope of Rule 11 Bis</i> , 32 Fordham Int'l L.J., 1614, (2009)	17, 18
Christine Van Den Wyngaert, <i>Reconciling Extradition with Human Rights</i> , 92 Am. J. Int'l L., 187 (1998)	17
Christopher Greenwood, <i>Protection of Peacekeepers: The Legal Regime</i> , 7 Duke J. Comp. & Int'l L. 185, 203-04 (1996)	7
J.L. BRIERLY, THE LAW OF NATIONS (Sir Humphrey Waldock ed. Oxford Univ. Press 6th ed. 1963) (5th prtng. 1970).	2
Lassa Oppenheim International Law: A Treatise sec 554(1) (1919)	10
Michael Scharf, “The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal.” 49 DePaul L. Rev. 925.....	2, 6, 7
RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER Yugoslavia (Oxford Univ. Press 2004)	4
Thomas G. Snow, <i>Investigation and Prosecution of White Collar Crime: International Criminal Challenges</i> 11 Wm. & Mary Bill Rts. J. 209 (2002)	2, 4

Secondary Materials

Amnesty Int'l, <i>Gacaca: A Question of Justice</i> , AI Index AFR 47/007/2002, Dec. 17, 2002..	17, 18, 19
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Amnesty Int'l, <i>Rwanda: Genocide Suspects Must Not Be Transferred Until Fair Trial Conditions Met</i> , AI Index AFR 47/014/2007, Nov. 2, 2007	18
Brief for the Government of Canada as Amicus Curiae in Support of Respondent in <i>U.S. v. Alvarez-Machain</i> , 31 LL.M 919 (1992)	6
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Criminal Code of Canada, 1985, R.S.C. c. C-46	9
Human Rights Watch [HRW], <i>Law and Reality: Progress in Judicial Reform in Rwanda</i> , HRW Doc. 1-56432-366-8, July 24, 2008	17, 18
Interpol – Wanted, http://www.interpol.int/Public/Wanted/Default.asp (last visited January 13, 2010)	6
Press Release, Special Court for Sierra Leone Public Affairs Office, Special Court Prosecutor Says He Will Not Prosecute Children (Nov. 2, 2002) <i>available at</i> http://www.scsl.org/LinkClick.aspx?fileticket=XRwCUe%2baVhw%3d&tabid=196)	13, 14
RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(1)	2
<i>Rwanda Accused Win UK Court Case</i> , BBC News, Apr. 8, 2009, <i>available at</i> http://news.bbc.co.uk/2/hi/uk_news/7989534.stm (last visited January 20, 2010)	18
U.N. Children’s Fund [UNICEF], <i>The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups</i> (Consolidated Version), (February 2007) <i>available at</i> http://www.un.org/children/conflict/documents/pariscommitments/ParisCommitments_EN.pdf	14
U.N. Children’s Fund [UNICEF], <i>The Paris Principles. Principles and Guidelines on Children Associated With Armed Forces or Armed Groups</i> , (2007), <i>available at</i> http://www.unhcr.org/refworld/docid/465198442.html	14
U.N. Sec. Council, <i>Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General</i> , U.N. Doc. S/2000/1234 (Dec. 22, 2000)	14
<i>U.S. State Department Human Rights Report for Rwanda</i> , 2008	17

STATEMENT OF JURISDICTION

The parties to this dispute, Canada and the United States, present this matter to the International Court of Justice pursuant to Article 36(1) of the Statute of the International Court of Justice.¹ The Parties have met all the requirements of Article 36(1). Both parties have stipulated to the Court's jurisdiction and agree to adhere to the conclusion of this Court.

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

STATEMENT OF FACTS

Emanuel Rutaganda was born in Canada and grew up in Kigali, Rwanda.² Following his father's death, he was recruited by the *Interhamwe* militia, and remained a member during the Rwandan genocide of 1994.³ That same year, he and his mother relocated to Canada and opened a curio shop.⁴ Rutaganda was married in 2000 and has three children.⁵

In 2001, an indictment was issued for the arrest of Rutaganda and six other members of the *Interhamwe* for incidents that occurred during the Boutaire High School massacre, in which 275 Tutsi children were killed.⁶ Since 2001, Rwanda has requested extradition, and Canada has refused because Rutaganda was a child soldier.⁷ A Red Notice was issued by INTERPOL in 2002 seeking Rutaganda's arrest, and he was subsequently featured on the NBC television show "The Wanted."⁸ Following notification that Rutaganda's mother was entering the United States for a specialized medical procedure, Immigration and Customs Enforcement (ICE) created a plan to apprehend Rutaganda, which was subsequently approved by U.S. President Obama.⁹ Despite the surgery's success, ICE sent a fraudulent email to Rutaganda's BlackBerry instructing him

² Compromis, ¶ 2.

³ *Id.*

⁴ *Id.* at ¶ 3.

⁵ *Id.* at ¶ 3.

⁶ *Id.* at ¶ 4.

⁷ *Id.* at ¶ 5.

⁸ *Id.* at ¶ 5, 7.

⁹ *Id.* at ¶ 8, 9.

that his mother was near death and asking for him.¹⁰ Using a borrowed passport, Rutaganda entered the United States and arrived at the hospital, where he was arrested by ICE authorities.¹¹ Canada was notified, and despite protest, U.S. immigration and judicial decisions have affirmed Rutaganda's extradition.¹²

¹⁰ *Id.* at ¶ 9.

¹¹ *Id.* at ¶ 10.

¹² *Id.*

QUESTIONS PRESENTED

- I. Whether the “luring” of Canadian citizen, Emanuel Rutaganda, from Canada violated Canada's territorial sovereignty, the U.S.-Canada extradition treaty, the January 11, 1988 Exchange of Letters Between Canada and the United States on Transborder Abduction, and/or the internationally protected human rights of Emanuel Rutaganda guaranteed by 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 would violate international law because: neither the United States nor Canada have an extradition treaty with Rwanda; as a child soldier Rutaganda lacked criminal culpability; and/or the courts of Rwanda are not capable of providing Rutaganda with a fair trial.

SUMMARY OF ARGUMENT

Rutaganda's luring constitutes an automatic violation of Canada's territorial sovereignty because Rutaganda was a Canadian citizen and resided in Canada at the time of the luring. The luring action was taken without Canada's knowledge or consent and despite Canada's decision not to extradite. While international law recognizes a difference between luring and forcible abduction, luring that places "irresistible coercion" on the individual is found to constitute fraudulent abduction and is thus impermissible. Further, the U.S. violated its obligation to perform the U.S.-Canada Extradition Treaty in good faith by directly circumventing provisions granting Canada discretion to decline extradition of Rutaganda. If condoned, this activity will encourage American bounty hunters to attempt to secure Canadian citizens in this manner, thereby promoting criminal conduct contrary to the Treaty and the Exchange of Letters regarding transborder abduction.

Further, there is an international trend against prosecuting child soldiers, who are held to have lessened criminal culpability. As he was 14 years old at the time he was recruited into the *Interhamwe*, Rutaganda should not be held liable for actions allegedly taken by him during this time. There is also no indication that Rutaganda can receive a fair trial if extradited to Rwanda, because while the Rwandan Constitution does provide fair trial procedures to defendants, these procedures are not actually practiced in Rwandan courts.

ARGUMENT

I. THE LURING OF RUTAGANDA TO THE U.S. VIOLATED CANADA'S TERRITORIAL SOVEREIGNTY BECAUSE RUTAGANDA WAS A CANADIAN CITIZEN AND THE ACTION WAS TAKEN WITHOUT CANADA'S KNOWLEDGE OR CONSENT

The luring of Canadian citizen Rutaganda from Canada to the United States (U.S.) for extradition violated Canada's territorial sovereignty because Canada has ultimate jurisdiction to

enforce its laws, the U.S.'s actions substantially affected a Canadian citizen, and these actions were taken without Canada's express permission.

The principle of territorial sovereignty permits countries to regulate activities taking place within their territorial boundaries.¹³ Thus, Canada has absolute jurisdiction within its territorial boundaries and over external activities that either affect Canadian nationals or have a substantial effect within Canada.¹⁴ Territorial sovereignty principles must be respected as an "essential foundation of international relations."¹⁵

As a sovereign state, Canada has ultimate jurisdiction within its territory, including the discretion to enforce its laws.¹⁶ Limited exceptions to this principle have been recognized, such as the action of a state in self-defense, issuance of a United Nations Security Council Resolution authorizing invasion, or consent from the territorial state.¹⁷ Absent one of these exceptions, entry into another state's territory to obtain custody of a criminal violates international law and may be considered an unlawful abduction.¹⁸ None of the exceptions apply here. It has been stated that the luring of any country's citizen constitutes an automatic violation of territorial sovereignty unless specifically approved by the home country.¹⁹ Because the U.S. took action to

¹³ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(1).

¹⁴ *Id.* at § 402(1)(c), 402(2).

¹⁵ *Corfu Channel*, 1949 ICJ 4, 35 (1949).

¹⁶ See U.N. Charter art. 2 (4); J.L. BRIERLY, *THE LAW OF NATIONS* 162 (Sir Humphrey Waldock ed. Oxford Univ. Press 6th ed. 1963) (5th prtg. 1970); Scharf, "The Tools for Enforcing International Criminal Justice in the New Millenium: Lessons from the Yugoslavia Tribunal." 49 *DePaul L. Rev.* 925, 967; *Lotus case*, PCIJ, Ser. A., No. 10, 1927 at 18.

¹⁷ Scharf, *supra*, at 965-967.

¹⁸ *Id.* at 967.

¹⁹ Thomas G. Snow, *Investigation and Prosecution of White Collar Crime: International*

lure Rutaganda into its territory without Canadian consent, the action taken was illegal.

The U.S.-Canada extradition treaty establishes protocol for extradition of wanted individuals for prosecution. The primary purpose of an extradition treaty is to avoid international conflict through “retaliatory invasions of territorial sovereignty” such as with abduction or luring.²⁰ While the U.S.-Canada extradition treaty is well-established, neither state has an extradition treaty with Rwanda.²¹ It violates both the extradition treaty and Canada’s sovereignty for the U.S. to lure Rutaganda into its territory when it would otherwise have no claim to him. This is especially true where the U.S.’s ultimate goal is not its own prosecution, but further extradition.

1. *Luring is Fraudulent Abduction*

While international law recognizes a difference between forcible abduction of an accused and the less objectionable “luring” into the territory of a foreign state,²² luring is unacceptable when facts indicate that the individual has been subject to coercion.²³ The only international tribunal to have heard a case on luring is the International Criminal Tribunal for the Former Yugoslavia.²⁴ In *Prosecutor v. Dokmanovic*, the court found Dokmanovic left Yugoslavia of his

Criminal Challenges 11 Wm. & Mary Bill Rts. J. 209, 230 (2002).

²⁰ *U.S. v. Alvarez-Machain*, 504 U.S. 655, 673 n. 4 (Stevens, J. dissenting) (1992).

²¹ *Compromis*, ¶ 13(b).

²² *Prosecutor v. Dokmanovic*, Case No. IT-95-13a-PT, Decision on the Motion for Release (Oct. 22, 1997), in *2 Substantive and Procedural Aspects of International Criminal Law (Documents and Cases)*, 1551 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman, eds. 2000).

²³ *Stoche v. Germany*, BverfG, Nov. 5, 2003, docket no. 2 BvR 1506/03: ¶ 61, at http://www.bverfg.de/entscheidungen/rs20031105_2bvr150603en.html (2003) (last visited Jan. 13, 2010.)

²⁴ *Dokmanovic*, Case No. IT-95-13a-PT.

own free will and for his own purposes which was to receive compensation for property owned in Croatia.²⁵ Thus, the luring was permissible; it did not rise to the level of forcible abduction. The court is careful to state that forcible abduction may form the basis for reversal in a future case.²⁶ Additionally, a country is permitted to ban luring as a violation of its own criminal law.²⁷ The only country in the world to have accepted forcible abduction as a basis for exercise of sovereignty is the U.S., in *United States v. Alvarez-Machain*.²⁸

The method of luring used by the U.S. to obtain jurisdiction over Rutaganda was abduction by fraud and coercion. The U.S. contends Rutaganda made a voluntary choice to enter the country; he had the option to remain safely in Canada and decided against it. This is false. The email used to lure Rutaganda onto U.S. soil was fraudulent – it falsely stated that his mother was near death and asking for her son.²⁹ Rutaganda is incredibly close to his mother; she raised him following the death of his father.³⁰ The two returned to Canada fifteen years ago and established a successful business together.³¹ Given this relationship, the U.S.’s actions forced Rutaganda to leave Canadian territory when he otherwise would not have done so.

2. *The Actions Taken By the U.S. Constitute Forcible Abduction, Not Luring, Because of the Irresistible Coercion Placed on Rutaganda*

²⁵ RACHEL KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 164 (Oxford Univ. Press 2004).

²⁶ *Dokmanovic*, Case No. IT-95-13a-PT, at ¶ 78.

²⁷ Snow, *supra*, at 230.

²⁸ *Alvarez-Machain*, 504 U.S. at 665 (1992).

²⁹ Compromis, ¶ 9.

³⁰ Compromis, ¶ 2.

³¹ *Id.*

In *Stocke v. Germany*, the court held that the luring of Yemeni citizen Stocke was permissible because “the acts of deception were not performed by German authorities, . . . [nor] are they attributable to them.”³² This presents an additional distinction between *Stocke* and this case. Here, the U.S. is clearly to blame for the act of deception that lured Rutaganda into U.S. territory by sending the email to Rutaganda’s BlackBerry.³³ *Stocke* also expounded upon the coercion issue, stating, “[T]he boundary between luring someone out of a state by means of trickery and breaking someone’s will by the use of force can be fluid in a borderline area, for instance if someone is deluded into believing something that has the effect of an irresistible coercion”³⁴ The effect of the U.S.’s actions precisely represent this irresistible coercion. No person reasonably believing his mother to be near death would be able to resist the “bait” put forth by the U.S. government. The absence of choice distinguishes this case from *Dokmanovic* or *Stocke*, where the accused left the country for personal gain. While there was no physical force involved here, the U.S. still utilized emotional coercion sufficient to remove this case from the realm of permissible luring and into that of forcible abduction. Rutaganda would not have left Canadian territory had the U.S. not forced him to do so by manipulating his emotions.

3. *Rutaganda’s Luring Violated His Right to Be Free From Arbitrary Arrest and Detention Under Article 9 of the International Covenant on Civil and Political Rights*

Rutaganda’s luring also violated his rights under Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which provides that an individual has the right to be safe

³² *Stocke*, docket no. 2 BvR 1506/03, at ¶ 55.

³³ *Compromis*, ¶ 9.

³⁴ *Stocke*, docket no. 2 BvR 1506/03, at ¶ 61.

in the security of his person, and free from arbitrary arrest or detention.³⁵ At the time Rutaganda was lured from Canada, there was no international warrant out for his arrest, only an INTERPOL Red Notice meant to “assist national police forces in *identifying or locating* these persons, with a view to their arrest and extradition (emphasis added).”³⁶ In the absence of a warrant, the U.S.’s actions violated Rutaganda’s rights under this Article.

Article 9 further provides that a state may not deprive an individual of liberty unless in accordance with customary procedures established by law.³⁷ The Human Rights Committee, charged with monitoring the ICCPR, has determined that forcible abductions violate this Article.³⁸ Because of the emotional coercion placed on Rutaganda, his luring rises to the level of forcible abduction and constitutes an additional violation of his rights.

4. *Customary International Law Prevents Luring in This Manner, and Prohibits the U.S. from Intervening in the Internal Affairs of Canada*

Luring Rutaganda for purposes of extradition violates his rights under customary international law. It has been established by much the world that forcible kidnapping of an individual in order to bring him before a tribunal for punishment violates international law principles.³⁹ The mere occurrence of a forcible kidnapping is sufficient to prompt an

³⁵ International Covenant on Civil and Political Rights (ICCPR), art. 9, Dec. 16, 1966, 999 U.N.T.S. 171.

³⁶ Interpol – Wanted, <http://www.interpol.int/Public/Wanted/Default.asp> (last visited Jan. 13, 2010).

³⁷ ICCPR, art. 9, Dec. 16, 1966, 999 U.N.T.S. 171.

³⁸ Scharf, *supra*, at 969.

³⁹ See; e.g. Brief for the Government of Canada as Amicus Curiae in Support of Respondent in *U.S. v. Alvarez-Machain*, 31 LL.M 919 (1992); *Levinge v. Director of Custodial Services* (1987) 9 NSWLR 546 (Austl.); *In Re Jolis*, (1933-1934) 7 Ann. Dig. 191 (1933) (Trib. Correctionnel d’Avesnes) (Fr.); *State v. Ebrahim* (SC) (1988) 1 SALR 991, 31 ILM 88 (1991) (S. Afr.).

international tribunal to dismiss a case because the accused has been brought before the court illegally.⁴⁰ While Rutaganda is alleged to have committed a serious crime, the action taken by the U.S. was a clear violation of customary international law. To allow the U.S. to benefit from its illegal actions would violate the principle of *ex injuria non oritur jus* (“no benefit should come from an illegal act”).⁴¹

Further, a duty not to extradite arises under customary international law when that decision directly conflicts with another nation’s sovereignty. Since 2001, Canada has repeatedly considered and denied Rwanda’s request to surrender Rutaganda.⁴² The decision to decline transfer of Rutaganda, a Canadian citizen on Canadian soil, is strictly a Canadian matter. The U.S. recognizes that “[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State” as a principle of international law.⁴³ If the U.S. surrenders Rutaganda to Rwanda, it will have shown a blatant disregard for Canada’s right to handle its own affairs inside its own territory.

The U.S.’s actions in luring Rutaganda to its territory for extradition violated Canadian sovereignty because Canada did not give permission to the U.S. to extradite one of its citizens, and because Canada had the ultimate authority to decide Rutaganda’s fate. Rutaganda’s rights under both the ICCPR and customary international law were also violated, because he had the right to be free from arbitrary arrest and detention, and not to be fraudulently lured under

⁴⁰ Scharf, *supra*, at 968, 970.

⁴¹ Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 Duke J. Comp. & Int’l L. 185, 203-04 (1996).

⁴² Compromis, ¶ 5.

⁴³ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV) at 121, UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (Oct. 24, 1970).

circumstances of irresistible emotional coercion.

II. THE LURING OF RUTAGANDA IS A VIOLATION OF THE U.S.'S DUTY TO PERFORM THE U.S.-CANADA EXTRADITION TREATY IN GOOD FAITH

The Vienna Convention on the Law of Treaties imposes an obligation on parties to perform in good faith any treaties in force.⁴⁴ Having signed the Convention, the U.S. is “obliged to refrain from acts which would defeat the purpose and object of a treaty.”⁴⁵ It has been stated that, “[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of ‘good faith.’”⁴⁶

1. Rutaganda Falls Within the Scope of Article 3(2) of the Extradition Treaty

The U.S. is a party to the U.S.-Canada Extradition Treaty.⁴⁷ The Treaty creates the obligation to extradite “persons found in its territory. . . charged with, or convicted of, any of the offenses covered by Article 2 of this Treaty committed . . . outside [the territory of the other] under the conditions specified in Article 3(3) of this Treaty.”⁴⁸

The parties amended Article 3(3) of this Treaty on January 11, 1988⁴⁹ to read:

(2) When the offense for which extradition is requested was committed outside the territory of the requesting State, the executive or other appropriate authority of the requested State shall grant extradition if the laws of the requested State provide for jurisdiction over such an offense committed in similar circumstances. If the laws in the

⁴⁴ Vienna Convention on the Law of Treaties, art. 26, Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter VCLT].

⁴⁵ VCLT at art. 18(a).

⁴⁶ Nuclear Tests (Austl. v. Fr.; N.Z. v. Fr.) 1974 I.C.J. 253, 268 (Dec. 20).

⁴⁷ Extradition Treaty Between the United States of America and Canada, U.S.-Can., Dec. 3, 1971, 27 U.S.T. 983 [hereinafter Extradition Treaty].

⁴⁸ Extradition Treaty at art. 1.

⁴⁹ Protocol Amending the Extradition Treaty Between the United States of America and Canada, Jan. 11, 1988, 1853 U.N.T.S. 407. [hereinafter Protocol].

requested State do not so provide, the executive authority in the requested State may, in its discretion, grant extradition.⁵⁰

The Treaty does not define “similar circumstances,” and requires interpretation.

2. *Proper Interpretation of Article 3(2) of the Extradition Treaty Gives Canada Discretion to Refuse Transfer of Rutaganda to the U.S.*

The Vienna Convention imposes an obligation upon the parties to interpret this treaty “in good faith in accordance [with] the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁵¹ The purpose of the treaty is to improve cooperation between “the two countries in the repression of crime by making provision for the reciprocal extradition of offenders.”⁵² Given reciprocity, “in similar circumstances” under Article 3(2) should be read as “if the roles of the requesting and requested States were reversed.” Rwanda’s district court in Boutaire indicted Rutaganda on 275 counts of murder.⁵³ Upon information and belief, all 275 Tutsi victims were Rwandan citizens.⁵⁴ Rutaganda, a Canadian citizen,⁵⁵ resided in Canada prior to his luring.⁵⁶ For purposes of analysis under Article 3 of the extradition treaty, “similar circumstances” consist of an American citizen located in America indicted by Rwanda for murder of Rwandan citizens. Canada’s murder statute⁵⁷ does not

⁵⁰ Protocol at art. 3.

⁵¹ VCLT at art. 31(1).

⁵² *See* Extradition Treaty.

⁵³ *Compromis*, ¶ 4.

⁵⁴ *Id.*

⁵⁵ *Id.* at ¶ 1.

⁵⁶ *Id.* at ¶ 3.

⁵⁷ Criminal Code of Canada, 1985, R.S.C. c. C-46, sec. 235.

provide for jurisdiction over an American citizen in these circumstances. Because the laws of Canada do not provide for jurisdiction in these circumstances, Canada may exercise its discretion to extradite⁵⁸ but is under no obligation to do so.

3. *The Extradition Treaty is the Exclusive Method By Which the U.S. May Obtain Control Over Rutaganda, and His Luring Obviates Canada's Discretionary Authority, Giving Rise to a Good Faith Violation of the Treaty*

The U.S. and Canada are parties to an extradition treaty.⁵⁹ The treaty contains provisions compelling,⁶⁰ permitting,⁶¹ and prohibiting⁶² transfer of a person found in a state. "All treaties must be interpreted according to their reasonable, in contradiction to their literal, sense."⁶³ Reason and meaning should be attributable to every word in a legal text.⁶⁴ As Stevens noted in his dissent in *United States v. Alvarez-Machain*, permitting the U.S. to abduct, kidnap, or otherwise exert "self-help" in securing foreigners where an extradition treaty is in place invalidates these provisions.⁶⁵ As in *Alvarez-Machain*, the U.S.-Canada Extradition Treaty "covers the entire subject of extradition"⁶⁶ between Canada and the U.S. and addresses the situation faced by Rutaganda. "Operation Motown Express" is a direct attempt to secure

⁵⁸ Protocol at art. 3.

⁵⁹ *See* Extradition Treaty.

⁶⁰ *Id.* art. 3.

⁶¹ *Id.* art. 6.

⁶² *Id.* art. 4.

⁶³ LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 554(1) (1919).

⁶⁴ *Anglo-Iranian Oil Company, (U.K. v. Iran)*, 1952 I.C.J. 93, 105 (July 22, 1952).

⁶⁵ *Alvarez-Machain*, 504 U.S. at 673 (Stevens, J., dissenting).

⁶⁶ *Id.*

Rutaganda through means other than the Extradition Treaty and to circumvent the treaty's provisions allowing Canada discretionary authority. The U.S. committed a violation of its duty of perform the Treaty in good faith pursuant to Article 26 of the Vienna Convention and the principle of *pacta sunt servanda* ("agreements must be kept").

III. THE LURING OF RUTAGANDA WILL ENCOURAGE ABDUCTION BY BOUNTY HUNTERS IN VIOLATION OF THE EXCHANGE OF LETTERS ON TRANSBORDER ABDUCTION

The U.S. violated the duties owed to Canada when it lured Rutaganda because it will encourage bounty hunters to act similarly. U.S. and Canada executed the Exchange of Letters when they signed the Protocol Amending the Treaty on Extradition.⁶⁷ Amending a treaty is permitted by the Vienna Convention.⁶⁸ The Exchange of Letters "concern[s] the protocol amending the treaty on extradition"⁶⁹ and constitutes a "related document" under the Vienna Convention.⁷⁰ Thus, the same interpretation rules apply, including *pacta sunt servanda*.⁷¹ The Exchange of Letters contains three relevant sections: transborder abduction by bounty hunters is an extraditable offense,⁷² the parties agree to deter transborder abduction,⁷³ and the letter is "not

⁶⁷ 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 Signed at Ottawa on January 11, 1988, U.S.-Can., Jan. 11, 1988, 27 I.L.M. 422 [hereinafter Exchange of Letters].

⁶⁸ VCLT at art. 39.

⁶⁹ See Exchange of Letters.

⁷⁰ *Id.*

⁷¹ VCLT at art. 26.

⁷² See Exchange of Letters.

⁷³ *Id.*

intended to create or otherwise alter legal obligations. . . .”⁷⁴ The Vienna Convention requires consideration of the Exchange of Letters as “an agreement relating to the treaty.”⁷⁵

1. *The Exchange of Letters Clarifies the U.S. Obligation to Deter Transborder Abductions, and “Non-Binding” Language Has No Effect*

The non-committal language of the Exchange of Letters suggests no obligation exists and therefore neither can a violation. This logic fails for two reasons: the U.S. recognizes that an “understanding” may be a binding document. It has been stated that “simply calling a document a ‘Memorandum of Understanding’ does not automatically indicate that the document is non-binding.”⁷⁶ The non-committal language does not intend to create or alter obligations between the parties. The term should be given plain meaning to clarify an already existing obligation.⁷⁷

2. *Luring is Abduction by Fraud, and the Luring Here Will Encourage Abduction By Bounty Hunters*

The Exchange of Letters clarifies the position of both governments that transborder abduction by bounty hunters is one of the offenses prohibited by the Treaty.⁷⁸ If luring is abduction by fraud, it violates the Exchange of Letters. The purpose of the Extradition Treaty is to “make more effective the cooperation of the two countries in the repression of crime.”⁷⁹ The Exchange of Letters interprets the Extradition Treaty to mean that that transborder abduction by

⁷⁴ *Id.*

⁷⁵ VCLT at art. 31(2)(a).

⁷⁶ Office of the Legal Adviser to the Secretary of State, Guidance on Non-Binding Documents, <http://www.state.gov/s/l/treaty/guidance/index.htm> (last visited Jan. 22, 2010).

⁷⁷ VCLT at art. 31.

⁷⁸ *See* Exchange of Letters.

⁷⁹ *See* Extradition Treaty.

bounty hunters is a crime.⁸⁰ The U.S. therefore has a duty under both the Treaty and the Exchange of Letters to refrain from encouraging transborder abduction. If a State engages in criminal activity, its citizens are more likely to engage in the same behavior. This is a violation of the U.S.'s duty to perform both the Treaty and the Exchange of Letters in good faith.⁸¹

IV. CHILD SOLDIERS HAVE LESSENED CULPABILITY AND THERE IS AN INTERNATIONAL TREND AGAINST PROSECUTING THEM

Children who commit crimes are less culpable than adults who commit similar crimes. The Supreme Court notes, “[t]he susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’”⁸² Because of this, “juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”⁸³ Rutaganda’s alleged actions at the Boutaire High School massacre were thus less morally reprehensive than if committed by an adult, because he was 15 years old.

An international trend suggests a general practice of not prosecuting child soldiers. The Rome Statute of the International Criminal Court (“Rome Statute”) disallows the Court jurisdiction “over any person who was under the age of 18 at the time of the alleged commission of a crime.”⁸⁴ Child soldiers are unlikely to face prosecution due to a decision made by the initial Prosecutor of the Special Court for Sierra Leone, David Crane.⁸⁵ He stated, “[t]he

⁸⁰ See Exchange of Letters.

⁸¹ VCLT at art. 26.

⁸² *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

⁸³ *Id.*

⁸⁴ Rome Statute of the International Criminal Court art. 26, July 17, 1998, 2187 U.N.T.S. 90.

⁸⁵ Press Release, Special Court for Sierra Leone Public Affairs Office, Special Court Prosecutor

children of Sierra Leone have suffered enough both as victims and perpetrators”⁸⁶ and that he sought to “prosecute [those] who forced thousands of children to commit unspeakable crimes.”⁸⁷

The United Nations Security Council agreed, stating that jurisdiction should be limited to “persons who bear the greatest responsibility for the commission of crimes [or] those who played a leadership role.”⁸⁸

In February 2007, the Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups explicitly provided that “[c]hildren should not be prosecuted by an international court or tribunal.”⁸⁹ The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, committed the signatories

“[t]o ensure that children under 18 years of age who are or who have been unlawfully recruited or used by armed forces or groups and are accused of crimes against international law are considered primarily as victims of violations against international law and not only as alleged perpetrators.”⁹⁰

Says He Will Not Prosecute Children (Nov. 2, 2002) (available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=XRwCUe%2baVhw%3d&tabid=196>) (last visited Jan. 20, 2010).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ U.N. Sec. Council, *Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General*, ¶ 1, U.N. Doc. S/2000/1234 (Dec. 22, 2000).

⁸⁹ U.N. Children’s Fund [UNICEF], *The Paris Principles. Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*, ¶ 8.6 (2007), <http://www.unhcr.org/refworld/docid/465198442.html> (last visited Jan. 20, 2010).

⁹⁰ U.N. Children’s Fund [UNICEF], *The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups (Consolidated Version)*, ¶ 11 (February 2007), available at: http://www.un.org/children/conflict/documents/pariscommitments/ParisCommitments_EN.pdf (last visited Jan. 20, 2010).

Based on this international trend against prosecuting child soldiers, Rutaganda should not be punished for the alleged killings during the Boutaire High School Massacre.

Additionally, international law recognizes child soldiers primarily as victims, and punishes those who recruit them. Articles 4(1) and 4(2) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict state “[a]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years”⁹¹ and that “States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.”⁹² The Rome Statute Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) go a step further, stating that “[c]onscripting or enlisting children under the age of 15 years into the national armed forces or using them” during international armed conflict⁹³ and “[c]onscripting or enlisting children under the age of 15 years into armed forces or groups or using them” during non-international armed conflict are considered “war crimes.”⁹⁴

Based on the prevailing international legal trends, child soldiers have lessened criminal culpability and should not be prosecuted. Rutaganda was 15 years old at the time of the Boutaire High School massacre. Even if he was present at the time, he is not culpable for his actions.

V. THE PROPOSED RENDITION OF RUTAGANDA FROM THE U.S. TO RWANDA WOULD VIOLATE THE U.S.’S OBLIGATION UNDER THE ICCPR BECAUSE RWANDA CANNOT PROVIDE RUTAGANDA WITH A FAIR TRIAL

⁹¹ G.A. Res. 54/263, Annex I at art. 4, ¶ 1, U.N. Doc. A/RES/54/263 (May 25, 2000).

⁹² *Id.* at art. 4, ¶ 2.

⁹³ Rome Statute at art. 8, ¶ (2)(b)(xxvi).

⁹⁴ *Id.* at art. 8, ¶ (2)(e)(vii).

1. *Rwanda is a Signatory to the ICCPR and its Constitution Requires a Fair Trial, But Actual Procedures Do Not Provide a Fair Trial*

Canada, the U.S. and Rwanda are all signatories to the ICCPR. The Covenant states, “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁹⁵ The Covenant goes on to define specific due process rights under Article 14 that shall be afforded to the accused.⁹⁶ These include: the right to be equal before the courts, the right to be presumed innocent until proven guilty, the right to counsel, the right to know the charges, the right to a speedy trial, the right against self-incrimination, and the right to appeal.⁹⁷

As a signatory, the U.S. will be in violation of the ICCPR if it extradites Rutaganda back to Rwanda to stand trial. Article 2(1) of the ICCPR states, “each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind.”⁹⁸

2. *The U.S. State Department Human Rights Report for Rwanda Identifies Deficiencies That Prevent Rutaganda From Receiving a Fair Trial*

According to the U.S. State Department Human Rights Report for Rwanda, there are several significant problems with the Rwandan judicial system that make the system inherently unfair. Government officials have attempted to influence individual cases; members of the executive branch consider it appropriate to contact judges to discuss ongoing cases; a

⁹⁵ ICCPR at art. 14.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ ICCPR at art. 2.

constitutional amendment potentially limits judicial independence; and there are no procedures or resources for juries, indigent counsel, or speedy trials.⁹⁹

Several reports on the Rwandan criminal justice system indicate that actual trial practice is anything but fair.¹⁰⁰ There is no guarantee that Rutaganda will receive a fair trial if extradited to Rwanda, and the U.S. will be in violation of Article 14 of the ICCPR.¹⁰¹

3. *The International Criminal Tribunal for Rwanda and Non-Governmental Organizations Agree that a Fair Trial in Rwanda is Impossible*

It is recognized that, “it is not sufficient for these rights to be guaranteed in theory by the criminal law of the requesting state. They must be enforced in practice, in the particular circumstances of the case against the person whose extradition is requested.”¹⁰² If extradited, Rutaganda will not receive the protections of a fair trial guaranteed to him under the Rwandan Constitution, and his sole remedy will be an appeal in the Rwandan court system. Additionally, while “the right to an independent tribunal is guaranteed in theory, it [is] question[ed] whether sufficient safeguards exist to ensure this right in practice.”¹⁰³

The International Criminal Tribunal for Rwanda (ICTR) and several non-governmental organizations have serious doubts about Rwanda’s ability to provide a fair trial. The ICTR, which tries genocide cases, has procedures allowing for the transfer of defendants back to

⁹⁹ U.S. State Department Human Rights Report for Rwanda, 2008.

¹⁰⁰ E.g., Human Rights Watch [HRW], *Law and Reality: Progress in Judicial Reform in Rwanda*, HRW Doc. 1-56432-366-8, July 24, 2008; Amnesty Int’l, *Gacaca: A Question of Justice*, AI Index AFR 47/007/2002, Dec. 17, 2002.

¹⁰¹ ICCPR at art. 14.

¹⁰² Christine Van Den Wyngaert, *Reconciling Extradition with Human Rights*, 92 Am. J. Int’l L., 187 (1998).

¹⁰³ Amelia S. Canter, “*For These Reasons, the Chamber Denies the Prosecutor’s Request for Referral*”: *The False Hope of Rule 11 Bis*, 32 Fordham Int’l L.J., 1614, (2009).

national courts.¹⁰⁴ Even so, the ICTR has refused to transfer the cases of numerous defendants back to Rwandan courts based on concerns that a fair trial is impossible.¹⁰⁵ The ICTR identified "a real risk [that] the four persons would suffer a flagrant denial of justice by reason of their likely inability to adduce the evidence of supporting witnesses" if returned to Rwanda.¹⁰⁶

Human Rights Watch and Amnesty International also express concern regarding the fairness of Rwandan trials. Human Rights Watch reports governmental influence and interference in judicial proceedings that defeat the presumption of innocence and the ability to have a fair trial.¹⁰⁷ It suggested the legislature revise the penal code to make certain practices that inhibit fair trials a crime.¹⁰⁸ Ultimately, Human Rights Watch has taken the position that the independence of the courts and the assurance of fair trial rights in Rwanda are insufficient to promote extradition or transfer.¹⁰⁹

Amnesty International has found that "[t]he Rwand[an] government has repeatedly violated an individual's right to be presumed innocent until guilt is proven in a court of law whose proceedings meet minimum standards of fair trial."¹¹⁰ Amnesty has also found that

¹⁰⁴ *Id.*

¹⁰⁵ *Rwanda Accused Win UK Court Case*, BBC News, Apr. 8, 2009, available at http://news.bbc.co.uk/2/hi/uk_news/7989534.stm (last visited Jan. 20, 2010); see also Amnesty Int'l, *Rwanda: Genocide Suspects Must Not Be Transferred Until Fair Trial Conditions Met*, AI Index AFR 47/014/2007, Nov. 2, 2007.

¹⁰⁶ *Id.*

¹⁰⁷ *Law and Reality*, at 70.

¹⁰⁸ *Id.* at 77.

¹⁰⁹ *Id.* at 70-88

¹¹⁰ Amnesty Int'l, *Gacaca: A Question of Justice*, AI Index AFR 47/007/2002, Dec. 17, 2002.

“[t]ens of thousands of Rwand[ans] have been arrested and detained for prolonged periods of time with little or no judicial investigation of the accusations leading to their arrest and detention or trial in a court of law.”¹¹¹

Based on the current state of Rwandan courts, no circumstances exist which would provide Rutaganda a fair trial if he were extradited.

CONCLUSION

The luring of Rutaganda from Canadian territory into the U.S. constitutes an automatic violation of Canada’s territorial sovereignty because Rutaganda was a Canadian citizen residing in Canada, and the luring was done without Canada’s knowledge or consent. While international law generally permits luring, it does not permit forcible abduction, and luring combined with the “irresistible emotional coercion” that occurred here consists of an illegal abduction by fraud.

The U.S. has also violated its obligations to Canada under the U.S.-Canada Extradition Treaty by directly circumventing the provisions of the Treaty providing Canada with discretionary authority over its citizens. Approval of this practice by this Court would encourage further transborder abduction by bounty hunters, violating both the Treaty and the U.S.-Canada Exchange of Letters.

As a child soldier, Rutaganda cannot be culpable and should not be prosecuted for crimes that occurred at the Boutaire High School Massacre in 1994. Extradition of Rutaganda to Rwanda would violate his rights under customary international law and the ICCPR, because it is clear that he will not be provided with a fair trial in the Rwandan court system.

THEREFORE, we respectfully submit this Honorable Court adjudge and declare

¹¹¹ *Id.*

- I. The “luring” of Rutaganda under these circumstances constitutes a violation of international law.
- II. Declare rendition of Rutaganda to Rwanda under these circumstances would constitute a violation of international law.
- III. Declare “luring” in general to be “abduction by fraud” and illegal under international law.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

Counsel for the Applicant, the Government of Canada (Team #2010-16A).