



NIAGARA INTERNATIONAL
MOOT COURT COMPETITION

February 26 – 27, 2010

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)

BENCH MEMORANDUM

*** CONFIDENTIAL (NIAGARA RULE 3(a)&(b)) ***

FOR JUDGES' EYES ONLY



Canada • United States
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Niagara Problem and Bench Memo written by Michael P. Scharf

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During the first Bush and Clinton Administrations, Professor Scharf served in the Office of the Legal Adviser of the U.S. Department of State, where he held the positions of Counsel to the Counter-Terrorism Bureau, Attorney-Adviser for Law Enforcement and Intelligence, Attorney-Adviser for United Nations Affairs, and delegate to the United Nations General Assembly and to the United Nations Human Rights Commission. A graduate of Duke University School of Law, and judicial clerk to Judge Gerald Bard Tjoflat on the Eleventh Circuit Federal Court of Appeals, Professor Scharf is the author of over seventy scholarly articles and thirteen books, including *Balkan Justice*, which was nominated for the Pulitzer Prize in 1998, *The International Criminal Tribunal for Rwanda*, which was awarded the American Society of International Law's Certificate of Merit for the Outstanding book in International Law in 1999, *Peace with Justice*, which won the International Association of Penal Law Book of the Year Award for 2003, *Enemy of the State*, won the International Association of Penal Law Book of the Year Award for 2009, and *Shaping Foreign Policy in Times of Conflict*, which was published by Cambridge University Press in January 2010.

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PART 1: GENERAL INFORMATION

I. Introduction

The purpose of this Bench Memorandum is to provide judges in the Niagara Moot Court Competition a summary of the basic factual and legal issues in the 2010 Niagara Problem (the “Compromis”). This Bench Memorandum should be read in conjunction with the teams’ briefs that you are judging; the Compromis, which is in essence a stipulation of facts agreed to by the two Parties; and the Corrections/Clarifications which supplements the Compromis. The Compromis and Corrections/Clarifications are appended to this Bench Memorandum. The Compromis is intended to present the competitors with a balanced problem, such that each side has strengths and weaknesses in its case. This Bench Memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Compromis, and Judges should not be surprised when, in evaluating either a Brief or an oral argument, they see arguments or authorities not discussed in this memorandum. This does not suggest that such arguments are not relevant or credible.

II. Synopsis of the Facts

A. Summary of Facts in the Compromis

Emanuel Rutagonda is a dual national of Canada (where he was born and has lived for the past fifteen years) and Rwanda (where his parents are from, where he did military service, and where he lived the first fifteen years of his life). He has Hutu ethnicity. When Emanuel was 14 years old, his father died and he was recruited into the *Interhamwe* militia. The next year, when genocide broke out in Rwanda, 15 year-old Emanuel allegedly participated in a terrible atrocity: According to an indictment issued in 2001 by a Rwandan District Court, Emanuel and several other members of Rwanda’s *Interhamwe* militia locked 275 Tutsi children in the Boutaire High School, and then set the building on fire, killing all the Tutsis. (Note, the Clarifications stipulate that Emanuel was born on September 10, 1978, not April 10, 1978 as stated in the Compromis – this is potentially important as it means that he was 15 and not 16 at the time of the atrocity in May 1994).

When the Hutu government fell to the Tutsis in August 1994, Emanuel fled to Canada. Since 2001, the Rwandan government has been requesting that Canada surrender Emanuel to Rwanda for prosecution on 275 counts of murder in an ordinary Rwandan District Court (not a *Gacaca* court), but Canada has denied these requests because: (1) Canada does not have an extradition treaty with Rwanda, (2) Canada views Emanuel as a child soldier and therefore a victim not a criminal, and (3) Canada believes that the courts of Rwanda are not able to give Emanuel a fair trial. At the request of Rwanda, Interpol has issued an international “wanted persons” notice for Emanuel (a copy of this “Red Notice” document is attached to the Corrections/Clarifications).

The United States learned that Emanuel was living in Canada when he was the subject of an episode of the reality TV series, “The Wanted.” In July 2009 the United States government found out that Emanuel’s mother was having a heart procedure at the Detroit Clinic, and decided to try to lure Emanuel from Canada to the United States so that he could be arrested and surrendered to Rwanda for trial. US agents sent Emanuel an email purporting to be from the Detroit Clinic, telling him to come right away because his mother was about to die. Emanuel borrowed a passport from a Canadian friend, entered the United States, was arrested by US agents, and subjected to “removal” (deportation) proceedings for transfer to Rwanda. All appeals have been exhausted.

Although the United States initially rebuffed Canada’s protests, Canada convinced the United States to agree to have the dispute settled by the ICJ by threatening to withdraw the Canadian troops from Afghanistan in 2010 rather than 2011 as previously agreed.

There are two main issues, each with several sub issues: The first (to be dealt with by the First Applicant and First Respondent) is whether the “luring of a Canadian citizen from Canada violated international law, and in particular (1) Canada’s territorial sovereignty; (2) the US-Canada Extradition Treaty and the January 11, 1988 Exchange of Letters Between Canada and the US on Transborder Abduction; and (3) Emanuel’s internationally protected human rights under the International Covenant on Civil and Political Rights.

The second issue, to be dealt with by the Second Applicant and Second Respondent, is whether the rendition of Emanuel from the US to Rwanda would violate international law because (a) neither the US nor Canada has an extradition treaty with Rwanda, (2) as a child soldier he lacked criminal culpability, and (3) the courts of Rwanda are not capable of providing him a fair trial/punishment.

B. Summary of Facts Related to the Situation in Rwanda

The fictional Niagara Compromis is set in the context of the real-life situation in Rwanda. During a four-month period, from April to August 1994, 800,000 members of the minority Tutsi tribe were murdered by the majority Hutu tribe in Rwanda. In June 1994, the UN condemned the mass killing as “genocide.” The mass killing was done by both the Rwandan Armed Forces and an associated paramilitary force known as the *Interhamwe* militia. In August 1994, the Tutsi army prevailed over the Hutu forces and a Tutsi-dominated coalition government was established in Rwanda, which continues to rule the country today.

In 1994, the UN established the International Criminal Tribunal for Rwanda (ICTR), located in Arusha Tanzania, to prosecute the worst perpetrators of the Rwandan genocide. Twenty-three Hutu have been tried and convicted of war crimes, crimes

against humanity, and genocide; 8 have been acquitted; and 8 cases are currently in the process of appeal. Several lower level Hutu perpetrators have been prosecuted in national courts in Europe under universal jurisdiction. Thousands of others who committed atrocities during the genocide have been prosecuted in Rwanda’s ordinary criminal courts and its *Gacaca* courts (lay courts based on notions of traditional justice and forgiveness). To date, several States have refused to extradite suspects to Rwanda, and the ICTR has declined to transfer cases to Rwanda (despite pressure from the Security Council to do so as part of its “completion strategy”), because of fair trial concerns.

In 2000, Canada enacted the Crimes against Humanity and War Crimes Act, which gives Canada universal jurisdiction to prosecute perpetrators accused of grave breaches of the Geneva Conventions, crimes against humanity, and genocide. On May 22, 2009, Canada completed its first trial under the Act, and sentenced Desire Munyaneza, a Rwandan Hutu convicted of genocide and crimes against humanity, to a life sentence. On November 2009, Canada arrested a second Rwandan accused of genocide, Jacques Mungwarere.

In 2007, the United States enacted the Genocide Accountability Act, which gives U.S. courts universal jurisdiction to prosecute any perpetrator of genocide found in the United States. To date there have been no prosecutions under this law.

III. Sources of International Law

This section is an introduction to public international law for judges who might not have professional experience or training in the field. Feel free to skip to section IV if you have judged International Law Moot Courts in the past and/or feel that you have a good familiarity with the general principles of international law. There are important distinctions between international law and domestic legal systems. The most significant for the international law moot judge is the rigid definition of what sources of law are acceptable before the Court.

A. General

The conduct and rules of the International Court of Justice (the “ICJ”) are governed by the Statute of the International Court of Justice (the “ICJ Statute”). Under Article 38(1) of its Statute, the International Court of Justice may consider the following sources of international law in order to decide disputes before it:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Commentators disagree as to whether these sources are listed in order of importance.

Judges from common-law systems should note the status of precedent. Article 59 of the ICJ Statute deprives decisions of the Court any status as precedent, stating, “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” In practice, however, the ICJ often cites its prior decisions, and those of its predecessor, the Permanent Court of International Justice, as persuasive authority, pursuant to Article 38(1)(d). Additionally, the Court frequently evaluates rules of customary international law in its opinions and subsequently relies upon those evaluations in later decisions.

Decisions by other tribunals are dealt with in the discussion in Subsection E (“Decisions and Publicists”) *infra*.

Resolutions of the United Nations General Assembly are not, of themselves, binding before the Court. Although Resolutions may be evidence of customary international law, the General Assembly’s position in international law is not analogous to that of a domestic legislature, and resolutions of the General Assembly do not create positive international law.

B. Treaties

Treaties are agreements between and among States, by which parties obligate themselves to act, or refrain from acting, according to the terms of the treaty. Rules regarding treaty procedure and interpretation are defined in the 1959 Vienna Convention on the Law of Treaties¹ (the “VCLT”), which is accepted by both the United States and Canada as Customary International Law.

The fundamental principle relating to treaties, reiterated in Article 26 of the VCLT, is that of *pacta sunt servanda*: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” In other words, once a State becomes a party to a treaty, it is bound by that treaty. Article 27 of the VCLT provides that a State cannot plead its Constitution, domestic laws, or domestic court cases as an excuse for non performance of a treaty obligation.

Article 34 of the VCLT adds that a treaty is generally not binding on a State which is not party to the treaty, and does not create rights or obligations for such a State. Article 18 tempers this rule with respect to States that have signed – but not yet ratified – a treaty: “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty...” pending ratification, unless it has “made its intention clear not to become a party to the treaty.” For example, a State which has signed but not ratified a treaty forbidding testing of nuclear weapons would not be

¹1155 U.N.T.S. 331 (1969), available at <http://fletcher.tufts.edu/multi/texts/BH538.txt>. (hereinafter, the “VCLT”).

held to the minute procedural details of the treaty; however, actual nuclear-weapons testing by the State would probably be seen as a violation of international law, constituting a breach of the “object and purpose” of the treaty.

The treaties potentially relevant to this case, to which both Canada and the United States are parties, include: the U.N. Charter, the Statute of the International Court of Justice, the Canada-US Extradition Treaty, the International Covenant on Civil and Political Rights, the four Geneva Conventions, the Refugee Convention, and the Torture Convention.

Even if a State is not party to a treaty, a treaty may serve as evidence of customary international law. Article 38 of the VCLT recognizes this “back-door” means by which a treaty may become binding on non-parties. Judges should be aware, however, that situations arise where some provisions of a treaty – for example, many provisions of the 1977 Protocols to the Geneva Conventions -- may reflect or codify customary international law, while other parts do not.

C. Customary International Law

The second source of international law is customary international law. A rule of customary international law is one that, whether or not it has been codified in a treaty, has binding force of law because the community of States treats it and views it as a rule of law. In contrast to treaty law, a rule of customary international law is binding upon a State whether or not it has affirmatively assented to that rule. The exception to this is that a State which has been “a persistent objector” to the rule of customary international law will not be bound by it.

In order to prove that a given rule has become a rule of customary international law, one must prove two elements: widespread state practice and *opinio juris* – the mutual conviction that the recurrence (of state practice) is the result of a compulsory rule.

“State practice” is the material element of customary international law, and simply means that a sufficient number of states behave in a regular and repeated manner consistent with the customary norm. As alluded to above, State practice may also be shown when a sufficient number of States sign, ratify, and accede to a convention. There is some dispute among commentators as to whether the practice of a small number of states in a particular region can create “regional customary international law” or whether the practice of particularly affected states, e.g. in the area of space law or antitrust law, can create custom that binds states which later become affected by these issues, although the ICJ appears to have acknowledged the possibility.²

Opinio juris is the psychological or subjective element of customary international law. It requires that the State action in question be taken out of a sense of legal obligation, as

² *North Sea Continental Shelf Cases*, (F.R.G. v. Den.), 1969 I.C.J. 1 (1969).

opposed to mere expediency. Put another way, *opinio juris*, is the "conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it."³

Customary international law is shown by reference to treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and the practice of international organizations. Each of these items might be employed as evidence of State practice, *opinio juris*, or both.

With respect to the burden of proof, in *The North Sea Continental Shelf Cases*, the ICJ stated that the party asserting the existence of a rule of customary international law bears the burden of proving the existence of such a rule.

D. General Principles of Law

The third source of international law consists of "general principles of law." Such principles are gap-filler provisions: on occasion, the ICJ must have recourse to rules typically found in domestic courts and domestic legal systems in order to address procedural and other issues.

The bulk of recognized general principles are procedural in nature, for example, the laws regarding burden of proof and admissibility of circumstantial evidence. Many others, for example estoppel, waiver, unclean hands, necessity, and *force majeure*, may sound to a common-law practitioner as equitable doctrines. The principle of general equity in the interpretation of legal documents and relationships is one of the most widely cited general principles of international law. The ICJ has upheld the application of equitable principles generally in, among other cases, the *North Sea Continental Shelf Cases* (1969); its predecessor, the Permanent Court of International Justice, recognized equitable principles as part and parcel of international law in *The Diversion of Water from the Meuse*.⁴

It is important to note, however, that "equity" in this sense is a source of international law, brought before the court under Article 38(1)(c) of the Statute of the ICJ. It is an *inter legem* application of equitable principles, and not a power of the Court to decide the merits of the case *ex aequo et bono*, a separate matter treated under Article 38(2) of the Statute.

E. Decisions and Publicists

The final source of international law is judicial decisions and teachings of scholars. This category is described as "a subsidiary means of finding the law." Judicial decisions and scholarly writings are, in essence, research aids for the Court, used for example to

³ MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

⁴ P.C.I.J. Ser. A/B, No. 70, 76-78 (1937).

support or refute the existence of a customary norm, to clarify the bounds of a general principle or customary rule, or to demonstrate state practice under a treaty.

Judicial decisions, whether from international tribunals or from domestic courts, are useful to the extent they address international law directly or demonstrate a general principle.

“Teachings” refers simply to the writings of learned scholars. Many student competitors make the mistake of believing that every single published article constitutes an Article 38(1)(d) “teaching.” However, the provision is expressly limited to teachings of “the most highly qualified publicists.” For international law generally, this is a very short list, and includes names like Grotius, Lauterpacht, and Brownlie. Within the context of a specific field of international law – for example, environmental law or law of the sea – there are additional experts who would be regarded within their field as “highly qualified publicists.”

IV. Burdens of Proof

In the *Corfu Channel Case*,⁵ the ICJ set out the burdens of proof applicable to cases before it. The Applicant (in this case Canada) normally carries the burden of proof with respect to factual allegations contained in its claim, by a preponderance of the evidence.

Participants cannot, however, be held responsible for the lack of information in the *Compromis*. They can only be held responsible for the quality of their argument in light of this lack of detail. Judges should not dwell on the evidentiary gaps unless the competitors have themselves drawn implausible or unsupported inferences.

V. Jurisdiction and Admissibility

The *Compromis* stipulates that procedural and jurisdictional issues, including standing and exhaustion, are to be considered outside the scope of the Problem.

⁵ *Corfu Channel Case (Merits) (U.K. v. Alb.)*, 1949 I.C.J. Rep. 4.

PART 2: LEGAL ANALYSIS

I. Did the luring and arrest of Emmanuel Rutaganda violate Canada’s territorial sovereignty or Rutaganda’s human rights?

This issue raises two main questions: First, is “luring” the equivalent of “abduction,” which is generally viewed as a violation of territorial sovereignty and the human rights of the abducted person? Second, if they are equivalent, is this a case in which release of the individual would nevertheless not be appropriate because of the gravity of the charges?

Transborder abduction occurs when an individual is forcibly transferred across a State’s borders without that State’s consent.⁶ With the exception of cases falling within the self-defense exception contained in Article 51 of the UN Charter, “nations consider abduction illegal.”⁷

Despite this view, historically, courts did not inquire into the means by which the accused was brought into their jurisdiction. Europe and the British Commonwealth in particular were governed by the rule of *mala captus bene detentus* – which said that even if wrongly captured, the accused was rightly kept and tried. The rule was first stated in 1829 in the English case of *Ex parte Scott*,⁸ and was generally applied by countries across the globe until the 1990s. One of the most famous cases of application of this rule was that of Adolf Eichmann,⁹ a leading architect of the Nazi’s genocidal policies during World War II. When Israel abducted Eichmann from Argentina, the UN Security Council condemned Israel’s violation of Argentina’s sovereignty. But the Security Council did not require Israel to return Eichmann to Argentina, and Israel proceeded to try, sentence, and execute Eichmann for his genocidal crimes without protest by the Security Council.¹⁰

In recent decades, courts around the world have increasingly departed from the *mala captus bene detentus* principle. A developing emphasis on individual rights, extradition

⁶ Aimee Lee, *United States v. Alvarez Machain: The Deleterious Ramifications of Illegal Abductions*, 17 *FORDHAM INT’L L.J.* 126 (1993).

⁷ Aimee Lee, 17 *FORDHAM INT’L L.J.* 126.

⁸ See *Ex parte Scott*, 109 Eng. Rep. 166 (1829).

⁹ See *Att’y Gen. of Isr. v. Eichmann*, 36 *I.L.R.* 277 (1962).

¹⁰ Aparna Sridhar, “The International Criminal Tribunal for the Former Yugoslavia’s Response to the Problem of Transnational Abduction,” 42 *STAN. J. INT’L L.* 343, 344-345 (2006).

treaties, and deterring abuses of process have all contributed to this evolution.¹¹ Today, where law enforcement officers from one state cross into another state to abduct a suspect, the courts of most States would dismiss the case because of the violation of state sovereignty and the individual’s rights. The law is much less settled as to Rutaganda’s situation, which involves luring and trickery, rather than a direct breach of a national border and forcible abduction.

A. Territorial Sovereignty

The first major issue related to luring a suspect from one nation to another for arrest is whether or not territorial sovereignty has been violated. In the present case, the United States will argue that luring does not violate state sovereignty and is an acceptable alternative to abduction when an asylum state is reluctant to extradite. Luring is not a violation of state sovereignty because the United States law enforcement officers did not enter Canada to arrest Rutaganda. There was no reason for them to make an extradition request since they were able to get the suspect to enter the U.S. voluntarily (although on false pretenses). Luring is seen by some as a way for nations to avoid the adverse impact on international relationships and reputation typically caused by transnational abduction, while still bringing international criminals to justice.¹²

The International Criminal Tribunal for the Former Yugoslavia (ICTY) exercised jurisdiction in the *Dokmanovic*¹³ case on the basis of a distinction it drew between abduction and luring. The ICTY opined that abduction might well have provided grounds for dismissal, but “the trickery used by the Prosecution to arrest Dokmanovic did not amount to a ‘forcible abduction or kidnapping’ and such ‘luring’ was consistent with principles of international law and the sovereignty of the FRY.”¹⁴ The ICTY developed its approach further in the *Nikolic* and *Tolimir* cases. In those cases, the Tribunal weighed the severity of violations against the importance of prosecuting the individual. According to the ICTY, the more egregious the violation of territorial sovereignty or individual rights, the more likely the ICTY will be to dismiss the case. However, when dealing with crimes like genocide, war crimes, and crimes against humanity (universally condemned offenses), the Tribunal said dismissal would be appropriate only in the most extreme cases involving torture or other severe abuses.¹⁵ The ICTY thus did not dismiss either case, despite the fact that the defendants had been abducted by agents of the ICTY.

¹¹ *Id.* at 346, 347.

¹² Melanie Laffin, “Kidnapped Terrorists: Bringing International Criminals to Justice through Irregular Rendition and Other Quasi-Legal Options,” 26 J. LEGIS. 315, 325 (2000).

¹³ See Prosecutor v. Dokmanovic, IT-95-13a-PT, ICTY Trial Chamber I, 22 October 1997.

¹⁴ See Prosecutor v. Tolimir, IT-05-88/2-PT, ICTY Trial Chamber II, 14 December 2007, at footnote 60.

¹⁵ Aparna Sridhar, “The International Criminal Tribunal for the Former Yugoslavia’s Response to the Problem of Transnational Abduction,” 42 STAN. J. INT’L L. 343, 350 (2006).

Given that Rutaganda is accused of 275 counts of murder in the context of genocide, the United States will argue that the international community has a strong interest in not releasing him despite the questionable way in which he was apprehended. Genocide is a universally condemned offense, while luring is accepted by many nations as a legitimate way to bring persons accused of serious crimes to trial. In *ex rel Lujan v. Gengler*,¹⁶ a U.S. court foreshadowed the ICTY approach when it said that the circumstances of the accused’s arrest must, among other things, “shock the conscience” to warrant dismissal.¹⁷

On the other hand, Canada will argue that their territorial sovereignty was in fact violated because the deception by U.S. law enforcement amounted to an abduction by trickery. As one commentator has put it:

“[I]t may prove difficult to distinguish the forcible abduction of a fugitive from the coerced or fraudulent luring of a fugitive into a jurisdiction. Force and fraud should be viewed as being on a continuum of coercion. While abduction by force will almost certainly create a strong presumption in favour of issuing a stay, the status of an abduction by fraud is less clear... The real question is how far the police may go before their conduct becomes objectionable.”¹⁸

Getting a suspect to enter the jurisdiction through threats to the person’s family, for instance, is clearly extremely coercive and more likely to result in dismissal. Luring someone for their own personal gain (such as a lucrative drug deal) is less offensive, and the accused will most likely still face trial. Rutaganda’s case is situated somewhere in between. Lying to him about the health of his mother put him in a very difficult position, and certainly moved this incident farther down the “continuum of coercion.” The stress and emotional impact of receiving such information should also be considered. “The key question is the degree of duress imposed by the police upon the fugitive: the greater the duress, the more likely it is that a stay will be appropriate.”¹⁹

Additionally, the perpetration of the lie itself may constitute a crime committed in Canadian territory by the U.S. authorities:

“The force-fraud distinction has been supported on the basis of policy arguments, namely, that fraud does not violate the territorial sovereignty of foreign states, and does not present the risk of violence to the fugitive or third parties. While the latter point may

¹⁶ See *Ex rel Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975).

¹⁷ Melanie Laffin, “Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-Legal Options,” 26 J. LEGIS. 315, 325 (2000).

¹⁸ Paul Mitchell, “English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain,” 29 CORNELL INT’L L.J. 383, 491 (1996).

¹⁹ *Id.* at 493.

be accurate, it is not determinative of the issue. Further, the former point is simply untrue. According to conflict of laws rules, a fraud perpetrated upon a person located in a foreign state occurs in that state. Although fraud is not strictly equivalent to sending police agents into the territory of a foreign state, it still amounts to a wrong committed by domestic authorities in that foreign state.”²⁰

Even if luring is acceptable in some instances, Canada has a strong argument that it should not have been used against Rutaganda. The purpose of overlooking abuses and retaining jurisdiction is to bring to justice individuals that have committed heinous crimes and are a threat to the international community. Rutaganda was not a threat. He was living peacefully and without incident in Canada. The state sovereignty of Canada was violated without a valid excuse or justification. Finally, Canada may argue that the United States authorities should have tried other means, for example entering into negotiations with Canada for the trial of Rutaganda in Canada, or for Canada’s cooperation for his transfer to a third state or the ICTR for trial.²¹

B. Human Rights

In addition to the sovereignty issue, Canada will argue that the luring violated Article 9(1) of the International Convention on Civil and Political Rights (ICCPR), which states:

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established in law.”

If a person is subject to an unlawful arrest or detention, that person may sue for release and/or compensation. But, the ICCPR gives limited guidance as to when and how a remedy would be applied.

The US will argue that it did not violate Rutaganda’s human rights. He voluntarily entered the US. He entered illegally (with someone else’s passport) and so the arrest should not have been a surprise. The arrest was not unlawful. As a result, his arrest and detention were not arbitrary and were consistent with the standard set forth in Article 9 of the ICCPR.

Even if it is established that the trickery used to lure him into the U.S. was a violation of his right to liberty and due process, the U.S. will argue that the violations were not serious enough to require the release of Rutaganda. The ICTY asserted in *Nikolic* that jurisdiction should be exercised unless the human rights violations were of an “egregious nature” – such as serious mistreatment, cruel, inhuman, or degrading treatment, or

²⁰ *Id.* at 492-493.

²¹ Melanie Laffin, “Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-Legal Options,” 26 J. LEGIS. 315, 315 (2000).

torture.²² This is consistent with the U.S. Federal Court of Appeals opinion in *Toscanino*.²³ In that case, the suspect was abducted and tortured prior to being brought to trial. The court declined jurisdiction so as not to “reward police brutality and lawlessness”.²⁴ The International Criminal Tribunal for Rwanda in the *Barayagwiza*²⁵ case held that a court should not exercise jurisdiction when there are “serious and egregious violations of the accused’s rights.” Absent such extreme circumstances, refusal to exercise jurisdiction is a “disproportionate” response, when considering the interest of the international community in bringing criminals to justice.²⁶

On the other hand, Canada will respond that Rutaganda’s arrest and intent to return him to Rwanda to be tried for mass murder (rather than just the passport violation) was a complete surprise. Law enforcement used extremely coercive and deceitful means to lure him. So, the arrest and detention should be viewed as unlawful and arbitrary. As such, it was a violation of Rutaganda’s basic right to liberty and due process under the ICCPR. It is also important to note that the U.S. intends to give up Rutaganda to the Rwandan justice system where he may be subject to other violations of his rights. Canada provided him de facto asylum (and refused to send him to Rwanda), in part based on the risks that he faced in Rwanda from an overzealous justice system.

II. Does the Canada-US Extradition Treaty and January 11, 1988 Exchange of Letters Between Canada and the US on Transborder Abduction prohibit Luring?

The US Supreme Court considered whether an abduction violated the US-Mexico extradition treaty in the case of *United States v. Alvarez Machain*. Although Supreme Court precedents are not binding on the International Court of Justice. The Court can choose to treat either the majority opinion or the dissenting opinion as persuasive authority. In the *Alvarez Machain* case, the US Supreme Court ruled that even though the “forcible abduction from Mexico to the United States of a Mexican citizen who had been indicted on federal criminal charges may have been shocking and in violation of international law, the abduction was not in violation of the Extradition Treaty” and thus that the U.S. did not have to dismiss the case as a violation of the Treaty.²⁷ However, (consistent with several Amicus Briefs including one submitted by Canada) the dissent in

²² See Prosecutor v. Nikolic, IT-94-2-AR73, ICTY Appeals Chamber, 5 Jun 2003, at para. 28.

²³ See *United States v. Toscanino*, 500 F.2d 267 (1974).

²⁴ Melanie Laffin, “Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-Legal Options,” 26 J. LEGIS. 315, 325 (2000).

²⁵ See *Barayagwiza v. Prosecutor*, ICTR-97-19-AR72, 3 Nov 1999.

²⁶ See Prosecutor v. Nikolic, IT-94-2-AR73, ICTY Appeals Chamber, 5 Jun 2003, at paras. 29, 30.

²⁷ *United States v. Alvarez-Machain*, 504 U.S. 655 (U.S. 1992).

that case opined that the extradition treaty had been violated, providing grist for Canada’s argument in this case before the International Court of Justice.

Similar to the dissent in *United States v. Alvarez Machain*, Canada is likely to argue that there is an implied term in the Extradition Treaty prohibiting the prosecution of a lured individual. Here, Canada will contend that it is true that there is no express promise within the Extradition Treaty to refrain from luring but it is incorrect for one to conclude that the parties reserved this right.²⁸ Explicitly, Canada will argue that just because certain means exist of circumventing the formalized process of extradition, this does not mean that those means constitute equally available methods within a consensual agreement which on its face appears to have been “intended to set forth a comprehensive and exclusive rules concerning the subject of extradition.”²⁹

To further this argument, Canada could bring up an analogy: assassination may be a more effective and efficient means of dispensing justice than extradition; but, just because it is not explicitly included within the extradition treaty does not mean that it is a permissible way to deal with fugitives located across the Canada-US border.³⁰ This analogy, which was utilized by the dissent in *Alvarez-Machain*, is extreme but highlights that it would be counter to the object and purpose of the Extradition Treaty if it could be avoided in this manner. Similarly, Canada can argue that allowing luring would run counter to a treaty whose purpose is to transfer alleged defendants through a formalized process in order to protect the rights of the accused and the sovereignty of the States.³¹

Thus, Canada might argue that although the current treaty does not explicitly include luring, the implicit reasons behind the treaty, cooperation between the two nations, would be frustrated. According to this argument, reading the Extradition Treaty to not include luring is a “highly improbable interpretation” of an agreement that is supposed to signify a cooperative relationship.³² Canada would urge one to look at the intent of the parties in drafting the Extradition Treaty, especially after it was clarified through the “January 11, 1988 Exchange of Letters Between Canada and the United States on Transborder Abduction” to spell out that transborder abductions by bounty hunters was an extraditable offense. Canada is likely to argue, much like Justice Stevens in *Alvarez-Machain*, that “in looking to the party’s expectations when making the Treaty [one would assume that] the drafters of the Treaty would not have imagined that the Treaty”

²⁸ Halle Fine Terrion, *United States v. Alvarez-Machain: Supreme Court Sanctions Governmentally Orchestrated Abductions as Means to Obtain Personal Jurisdiction*, 43 CASE W. RES. 625, 635 (1993).

²⁹ Terrion, *supra*, 43 Case W. Res. 625, 635.

³⁰ Terrion, *supra*, 43 Case W. Res. 625, 635.

³¹ Terrion, *supra*, 43 Case W. Res. 625, 627.

³² Terrion, *supra*, 43 Case W. Res. 625, 635.

would allow the United States to lure individuals, especially “given its stated purpose of fostering cooperation and mutual assistance.”³³

The United States will argue in turn that, while the January 11, 1988 Exchange of Letters Between Canada and the United States on Transborder Abduction clarifies that private transborder abductions, such as those committed by bounty hunters, constitute an extraditable offense, the Treaty is silent on the concept of luring. The United States may argue that Canada had the opportunity, when it explicitly exchanged letters with the United States regarding transborder abductions, to include similar language on luring. Because it did not, the United States will offer, it must have meant that luring was not intended to be disallowed within the treaty. If luring does not violate the Treaty, “the treaty thereby [would] not prevent the United States Court from obtaining personal jurisdiction over the defendant” through luring.³⁴ The reasoning of the majority in *Alvarez-Machain* supports the position of the United States. The Court in *Alvarez-Machain* read the Treaty between Mexico and the United States strictly, finding that because transborder abduction was not explicitly mentioned, it was not disallowed.³⁵

III. Whether the United States can lawfully deport a dual national who is illegally in the United States to either country of the person’s nationality, especially where the person prefers one State (Canada) over the other (Rwanda) and Canada is willing to take him.

Emanuel Rutaganda, a citizen of Canada by birth and a citizen of Rwanda by naturalization, is being held in the United States for entering the country on false documents. Rwanda has requested surrender of Rutaganda via removal (deportation) so that Rwanda can try him in its national courts for mass murder committed as a child soldier in Rwanda in 1994. Canada, where Rutaganda wants to return, is requesting repatriation of Rutaganda as an exercise of diplomatic protection. The issue thus presented is whether international law requires the United States to deport Rutaganda to Canada rather than Rwanda.

Nationality, according to the *Encyclopedia of Public International Law*, “entails mutual rights and duties, such as the individual’s right to diplomatic protection and the state’s obligation to admit the individual into its territory. Nationality is also ‘said to constitute the juridical expression of the fact that the individual upon whom it is conferred . . . is in fact more closely connected with the population of the State conferring nationality than with that of any other State.’”³⁶ Matters of nationality are generally considered

³³ Jonathan Lonner, *Supreme Court Review: Official Government Abductions in the Presence of Extradition Treaties*, 83 J. CRIM L. & CRIMINOLOGY 998, 1003 (1993)

³⁴ *Id.* at 998.

³⁶ Zsuzsanna Deen-Racsmany, *The Nationality of the Offender and the Jurisdiction of the International Criminal Court*, 95 A.J.I.L 606, 607 (2001).

matters of state sovereignty and are thus rarely subject to intervention. While each state may regulate its nationality laws without interference, the right of a state to exercise diplomatic protection over its nationals raises unique issues where (as in this case) two or more states claim the individual. The response to these issues has evolved as the international community has become more interconnected, yet there remain no determinate treaties or norms regarding the subject. Thus, the differing approaches to dual citizenship will play a role in the outcome of Rutaganda’s case.

A. How has nationality traditionally been treated internationally?

Aggressive nationalism in early international relations led dual citizenship to be discouraged and highly regulated through multilateral treaties restricting dual nationality.³⁷ Article IV of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (The Hague Convention) thus elaborated that “[a] State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.”³⁸ The basic approach of the Convention was to resolve disputes over dual nationals by simply disallowing interference by *either state*. Where two states wished to exercise diplomatic protection of a dual national against a third state, The Hague Convention Article V, stated that a “person having more than one nationality shall be treated as if he had only one . . . [A] third State shall . . . recognize exclusively in its territory *either* the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.”³⁹ The early approaches thus restricted protection available to anyone with multiple nationalities. However, due to increased movement of people in the mid-twentieth century, the rise in multiple nationalities threatened non-protection of numerous people if the non-responsibility system was continued. In response, principles recognizing protection by the *dominant state* were espoused and embraced beginning in the 1950s.

B. What is the prevailing norm in the diplomatic protection of a dual national?

The leading case regarding diplomatic protection of a dual national is *Liechtenstein v. Guatemala (Nottebohm)*. In that case, Nottebohm, a German national living for more than 40 years in Guatemala had received Liechtenstein citizenship before Guatemala attempted to deport him to Germany. In finding that Nottebohm’s Liechtenstein

³⁷ Kim Rubenstein and Daniel Adler, *International Citizenship: The Future of Nationality in Globalized World*, 7 IND. J. GLOBAL LEGAL STUD. 519, 532 (2000).

³⁸ Adam Muchmore, *Passports and Nationality in International Law*, 10 U.C. DAVIS J. INT’L L & POLICY 301, note 136 (2004).

³⁹ Craig Forcese, *A capacity to Protect: Diplomatic Protection of Dual Nationals in the ‘War on Terror’*, 17 EUR. J. INT’L L. 369, 390 (2006) (Change in original, emphasis added).

nationality had no effect vis-à-vis diplomatic protection from Guatemala, “the International Court of Justice held that ‘nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties’ . . . it need only be recognized in the international arena when ‘the legal bond of nationality accord(s) with the individual’s genuine connection with the state which assumes the defense of its citizens by means of protection against other states.’”⁴⁰ Thus, in deciding diplomatic protection of dual citizens, the *Nottebohm* precedent only allows international protection where a real, effective connection with the state can be claimed despite any acknowledgement of nationality by the state’s laws. The European Court of Human Rights affirmed the supremacy of social attachment in the *Beljoudi v. France* case in 1950. In that case, the majority found that under Article 8 of ECHR “expulsion of a person from the country in which his or her immediate family resides will give rise to a contravention of ‘the right to respect for family life afforded by Article 8’”⁴¹ Thus, family life, rather than legal standing, was dispositive in matters of expulsion.

In addition to diplomatic protection cases, the principle has been used significantly in determining nationality for reparations claims, suggesting that it is the dominant norm regarding nationality. The Italian-U.S. Conciliation Commission in the *Mergé* case applied *Nottebohm*. There, a dual American (by birth) and Italian (by marriage), who had only lived in the United States for a few years and had comported herself as an Italian for the majority of her life, was determined not eligible for reparations as her effective citizenship was that of Italy and not the United States.⁴² Similarly, the Iran-U.S. Conciliation Commission in *Islamic Republic of Iran v. United States of America, Case No. A-18*, refused to recognize The Hague Commission rules of dual nationals. Instead, the Commission recognized the *Nottebohm* principle as the modern norm. Claims under the Commission would thus be determined by “considering all relevant factors, including habitual residence, center of interests, family ties, participation in public life, and other evidence of attachment.”⁴³ Likewise, in the aftermath of the first Gulf War, the UN Compensation Commission refused reparations claims (to be paid by Iraq) to dual citizens who could not show effective Iraqi citizenship. The Commission used “a test of bona fides [to determine claims] . . . Thus, Iraqi dual nationals were entitled to have their applications considered as long as they were not seen to have acquired their second nationality mainly or solely for the purpose of claiming compensation.”⁴⁴

⁴⁰ Rubenstein, *supra*, at 534-35.

⁴¹ Rubenstein, *supra*, at 539-40.

⁴² Forcese, *supra*, at note 140.

⁴³ Craig Forcese, *Shelter from the Storm: Rethinking Diplomatic Protection of Dual Nationals in Modern International Law*, 37 GEO. WASH. INT’L L. REV. 469, 494-95 (2005).

⁴⁴ Rubenstein, *supra*, at 538.

The *Nottebohm* principle remains the prevailing rule in diplomatic protection of dual national questions and has been used in numerous cases involving the United States. In 2003, the ICJ in *Mexico v. United States* used the *Nottebohm* principle. There, Mexico attempted to invoke diplomatic protection of fifty-four nationals who stood trial in capital cases in the United States. Holding that Mexico could not show “real and effective” nationality of many of the individuals claiming dual American-Mexican citizenship, the ICJ denied Mexico’s claims in favor of the United States.⁴⁵ The ample case law applying *Nottebohm* suggests its adoption as the customary international law rule for determining citizenship internationally. As Forcese notes, “The ILC’s special rapporteur on diplomatic protection, and more recently the International Law Commission itself, have clearly opted in favour of diplomatic protection for dual nationals . . . in draft Article 6 . . . ‘the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual’s (dominant) (effective) nationality is that of the former State.’”⁴⁶

Using the *Nottebohm* principle, Canada will argue that Rutaganda’s effective personality for matters of international law and diplomatic protection is Canadian rather than Rwandan. Rutaganda has lived in Canada for the past fifteen years, has married a Canadian woman, has three children of Canadian citizenship and has an established business in Canada. Furthermore, Mr. Rutaganda is Canadian by birth and has lived in Canada for nearly fifteen years without maintaining a connection (other than business) to Rwanda. Canada can thus illustrate that Rutaganda’s Canadian citizenship was not falsely attained to escape liability. Having established the requirements of effective nationality, Canada may point out that the United States’ recognition of the *Nottebohm* principle in the U.S.-Iran Commission and the *Mexico v. US* cases shows United States acknowledgement of the principle as an international norm regarding nationality. Canada can thus argue that such recognition should continue to apply in this case to determine the effective nationality of Rutaganda. As such, he should be found deportable only to Canada.

The United States will rebut Canada’s claims by arguing that the ICJ in *Nottebohm* determined dominant nationality “at the time of naturalization . . .”⁴⁷ and not at the time of diplomatic protection. As such, the United States will note that Mr. Rutaganda’s parents were both Rwandan nationals at the time of his birth, and that he spent his formative years in Rwanda rather than Canada, thus creating more substantial ties at naturalization than those to Canada, which bestowed nationality solely on the basis of the location of his birth while his parents were temporarily in Canada. Significantly, Rutaganda served in the Rwandan militia for two years, and serving in the armed

⁴⁵ Case concerning *Avena and other Mexican Nationals (Mexico v. United States)*, Court-Memorial of the USA, 2003 ICJ Lexis 17 (3 Nov 2003).

⁴⁶ Forcese, *Capacity to Protect, supra*, at 389.

⁴⁷ Forcese, *Shelter, supra*, at 486 (emphasis added).

services of a State is usually seen as a strong, if not determinative, factor in determining dominant linkage. Furthermore, it has been recognized that “a nationality that meets the real and effective link requirements at the time bestowed does not dissipate with subsequent attenuation . . .” and that international law has never recognized a right to discard a nationality.⁴⁸ In addition, the United States may argue that Rutaganda fled to Canada to avoid prosecution, thereby undermining his claim to legitimate ties with Canada. Finally, the United States will point out that Rutaganda’s business (selling African curios) means that he still has links to Rwanda.

In addition, while the United States has recognized and employed the *Nottebohm* principle in the past, it is likely to argue that modern trends and the international nature of Rutaganda’s crimes leave the principle inapplicable in this case. The United States will thus turn to international norms regarding citizenship for trials for war crimes and under multilateral treaties such as the Genocide Convention.

C. What role does international crime play in regard to citizenship?

Although the effective nationality principle has generally been upheld in matters of dual nationality, increased interest in human rights has decreased such emphasis where international crimes are concerned. Thus, international tribunals and the prosecution of crimes under multinational treaties such as the Genocide Convention call for the prosecution or surrender (by extradition or other means) of an international criminal regardless of citizenship. The Convention on the Prosecution and Punishment of the Crime of Genocide states in Article VI that “Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal”⁴⁹ Thus, the courts in Rwanda, if judged to be competent, have recognized jurisdiction to try offenses committed in the 1994 genocide. Article VII further states that, “[t]he Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.”⁵⁰ Thus, the Convention establishes a duty for all states to cooperate in the prosecution of genocide, regardless of nationality and protection of its citizens. Though under US domestic law the United States cannot extradite in the absence of an extradition treaty, US courts have allowed the US government to deport non-US citizens for prosecution by countries to which the US does not have an extradition treaty despite complaints that this would constitute a “disguised extradition.”⁵¹

⁴⁸ *Id.*

⁴⁹ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (ellipsis added).

⁵⁰ *Id.*

⁵¹ See e.g., *Linas v. INS*, 790 F. 2d 1024, (2nd Cir. 1986) (World War II war criminal of Soviet nationality deported to Soviet Union where he would be prosecuted for his war crimes).

The establishment of the International Criminal Tribunal for Rwanda reflects the emphasis on prosecutions of war crimes and the requirement of all states to cooperate in so prosecuting. Article 28 of the Rwanda Tribunal Statute requires that “States shall cooperate with the International Tribunal [for Rwanda] in the investigation and *prosecution* of persons accused of committing serious violations of international humanitarian law . . . States shall comply without undue delay with an request for assistance including but not limited to: . . . (d) arrest or detention of persons; (e) the surrender or the transfer of the accused.”⁵²

The United States will thus argue that the Genocide Convention, to which Canada and the United States are parties, necessitates the prosecution of Rutaganda and the cooperation by both the United States and Canada. In fact, the United States can point to Canada’s War Crimes Act, which provides that ‘[e]very person who . . . commits outside Canada (a) genocide, (b) a crime against humanity, or (c) a war crime, is guilty of an indictable offense.’ The act requires life imprisonment for any such crimes that involve intentional killing”⁵³

Furthermore, the United States may argue that, although the Rwandan court is not connected to the ICTR, obligations to the ICTR may be analogized to the domestic Rwandan courts in prosecution of war criminals that would have been tried in the ICTR. By recognizing the established principle requiring extradition or trial of accused war criminals, the US may avoid the *Nottebohm* principle, which the judges might conclude favors Canada.

In response, Canada will argue that the Genocide Convention was never intended to serve as the equivalent of a binding extradition treaty. Further, in ratifying the Convention, Canada (as well as the United States) maintained a privilege of non-extradition. Additionally, Canada will assert, the concern that the Rwandan courts will not be capable of providing a fair trial will excuse any duty Canada has of releasing Rutaganda for trial in Rwanda. As such, Canada may point to the mention of “a *competent* tribunal” in Article VI of the Genocide Convention, as relinquishing Canada’s duty to extradite if the domestic courts are found incompetent to provide a fair trial to Rutaganda.

Additionally, Canada will argue that obligations to the ICTR are based on Chapter VII power of the UN exclusively regarding the ICTR. Therefore, Canada will assert, there is no similar obligation to surrender fugitives to Rwanda’s domestic courts.

⁵² Kenneth J. Harris and Robert Kushen, *Prosecuting International Crime: Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution*, 7 CRIM. L.F. 561, 566-67 (1996) (change in original, emphasis added, first ellipsis added, second ellipsis in original).

⁵³ Ayeola J. Williams, “American Process for a Canadian Terrorist? The Future of Omar Khadr,” 40 U. Tol. L. Rev 1075, 1097 (2009) (first ellipses in original).

D. How is Rutaganda’s dual citizenship treated within the United States?

Extradition by the US is permitted only pursuant to an extradition treaty with requesting states, which must be in force *at the time the request is made*.⁵⁴ That said, the United States has utilized numerous loopholes to this requirement by “disguising” extradition under deportation and immigration laws. Thus, deportation may be accomplished Under 8 USCS § 1231(b)(2), which cedes great discretion to the Attorney General regarding nationality.

(i) any alien . . . who has been ordered removed may designate one country to which the alien wants to be removed, and (ii) the Attorney General shall remove the alien to the country the alien so designates. . . . (C) . . . The Attorney General may disregard a designation . . . if . . . (iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States. . . . [the alien may be remove to] another country whose government will accept the alien into that country.⁵⁵

Thus, under US immigration law, an individual may select any country of his choice with no preference to nationality of the individual. However, the Attorney General retains the authority to override such designation if it is deemed “inadvisable.”⁵⁶

Canada will likely argue that the practice by the United States of using deportation in place of extradition violates international law. Further, Canada might point out that 8 USCS § 1231 makes removal to a country designated by the Attorney General a *last resort*, whereas Mr. Rutaganda has requested Canada and Canada will accept him. Conversely, the United States will likely maintain that state sovereignty in matters of national security and immigration allows the United States to pursue the course of action most advisable so long as no rights are violated. In this regard, the United States may argue that the International Court of Justice should apply the “margin of appreciation” doctrine, pursuant to which international tribunals are traditionally very deferential to domestic judicial interpretations of a State’s own laws and perceptions of national security interests.⁵⁷

⁵⁴ M. Cherif Bassiouni, “International Extradition: United States Law and Practice,” 5h Ed., Oxford Press (2007) (emphasis added).

⁵⁵ 8 USCS § 1231(b)(2)(A)(i)-(ii), (C)(iv), (E)(iv) (2009) (omissions and ellipsis added).

⁵⁶ See, e.g., *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (In Banc Rehearing), vacated 532 F.3d 157 (2009). (in which a Syrian-Canadian citizen was removed to Syria despite requesting Canada).

⁵⁷ Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 INT’L & COMP. L. Q. 638-650 (1999).

E. What can be expected in the Rutaganda case?

Canada will urge Rutaganda’s nationality to be treated according to the most widely recognized principle, effective nationality. In so arguing, Canada will illustrate that Rutaganda retains no effective connection to Rwanda, but has strong familial ties to Canada. The United States, conversely, will argue that the international nature of Rutaganda’s crimes warrants punishment regardless of citizenship, and that prosecution in the State where the crime occurred is preferable to prosecution elsewhere. Under United States law, the nationality of Rutaganda will be unimportant since the deportation to Canada would be ill-advised considering US obligations in trying war criminals. The case may thus turn on whether the Court concludes that the obligation to punish war crimes overrides the right of diplomatic protection by a state of dominant nationality.

IV. Can someone who committed an atrocity during war as a child soldier be subject to prosecution for murder?

In this case, Emanuel Rutaganda was fourteen when he was recruited into the *Interhamwe* militia and fifteen years old when he was involved in the killing of the 275 Tutsi children. The international legal community has not resolved the issue of whether child soldiers should face prosecution for atrocities that they commit in armed conflict. Moreover, there is a divergence of views about what age a child soldier should be deemed a victim rather than a perpetrator. Although this is an open question for the Court to decide in this case, as set forth below, recent developments in national and international law provide useful jurisprudential and policy guidance.

A. Prosecution of Juveniles across the globe

The United States will point out that nations seeking to prosecute child soldiers see no difference between child soldiers and juveniles that commit other serious crimes outside of armed conflict, such as murder, rape, or abduction. Most countries allow the prosecution of fifteen year olds for such crimes.⁵⁸ For instance, a 1997 UNICEF report found the minimum ages to be seven in India, South Africa and Sudan, ten in England, thirteen in France, and fourteen in China.⁵⁹

Moreover, International Human Rights bodies have upheld prosecution of persons under fifteen for murder. In *T. v United Kingdom* and *V. v United Kingdom*, two eleven

⁵⁸ UNICEF, Progress of Nations 1997: Special Protections, Progress & Disparity, <http://www.unicef.org/pon97/p56a/htm>.

⁵⁹ *Id.*

year old boys were tried in public before a judge and jury at an adult court faced with charges for murder and abduction when T and V (then aged ten) abducted and killed a two-year old boy.⁶⁰ They were and sentenced to an indefinite period of detention.⁶¹ The children applied to the European Court of Human Rights arguing that their treatment had violated Article 3 of the European Convention on Human Rights, which prohibits torture and other inhuman or degrading treatment or punishment. The court denied their claim and found that their case did not violate Article 3.⁶² This court found that there was no common standard as to the minimum age of criminal culpability in the States of the Council of Europe by which to prevent T and V’s prosecution. Finding no standard age, the court ruled “the age of ten cannot be said to be so young as to differ disproportionately from the age limit followed by the other European states.”⁶³ Canada will argue that child soldiers should be distinguished from ordinary juvenile offenders for several reasons. First, psychologists suggest that a child’s understanding of the world differs from adult’s in that they do not possess the same abilities to act independently or appreciate the rights of others and have a difficult time understanding the concept of individual and minority rights juxtaposed with state power.⁶⁴ Additionally, children are usually forced into fighting and do not have much choice over whether or not they enlist. Most children are drugged, intoxicated or orphaned by recruiters, in order to make them more compliant and to enable them to commit acts they would not normally commit.⁶⁵

The United States will respond that it is important that child soldiers are prosecuted in Rwanda so that the community can be confident that human rights violators will be punished. The prosecution itself can be important healing process for victims and can allow them closure to their experiences. “Done well, determinations of moral culpability for abuses committed both against and by children can advance the child’s moral development and reinsertion into a family or community.”⁶⁶ Another fear is that not prosecuting child soldiers may encourage commanders to use them to commit crimes in an effort to avoid consequences. In order for International Human Rights law to retain its credibility, the court may have to prosecute anyone involved in war crimes.

⁶⁰ *T v. United Kingdom and V. v. United Kingdom*, 30 Eur. Ct. H.R. 121

⁶¹ Matthew Happold,, *supra*, at 77.

⁶² *T v. United Kingdom and V. v. United Kingdom*, 30 Eur. Ct. H.R. 121

⁶³ *Id.* at 176.

⁶⁴ Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEO. J. INT’L L. 232 (2007).

⁶⁵ Katherine Fallah, *Perpetrators and Victims: Prosecuting Children for the Commission of International Crimes*, A.J.I.C.L. 2006, 14(1), 83-103, 84 (2006).

⁶⁶ Ilene Cohn, *The Protection of Children in Peacemaking and Peacekeeping Processes*, 12 HARV. HUM. RTS. J. 129, 181 (1999).

In national courts, there have been several efforts to prosecute former child soldiers, with mixed results. In 2001, the Democratic Republic of Congo, for example, sentenced 4 child soldiers to death who had been aged between fourteen and sixteen at the time they were arrested.⁶⁷ Although the NGO Human Rights Watch successfully intervened to persuade the Congolese government to forego their execution, the government had executed a 14-year-old child soldier the year prior.⁶⁸ Similarly, in Uganda, two boys aged fourteen and sixteen were charged with treason for participation in the Lord’s Resistance Army. The charges, however, were withdrawn, again due to pressure by human rights organizations.⁶⁹

Particularly relevant is the case of Omar Khadr,⁷⁰ a Canadian citizen who was captured in 2002 by US forces in Afghanistan and transferred to Guantánamo Bay. He is alleged to have killed a US soldier during the battle that preceded his capture. He was fifteen years old when apprehended, and has now spent eight years in detention. He is slated to be the first case to be tried by President Obama’s al Qaeda Military Commissions. On April 23, 2009, the Federal Court of Canada held that the Canadian government was required by its obligations under both the Charter of Rights and Freedoms and international human rights law including the Convention Against Torture and the Convention on the Rights of the Child to seek the repatriation of Khadr to Canada.⁷¹ His age at the time of the alleged crime was one of the factors the Court considered relevant to its decision. On August 14, the Federal Court of Appeal upheld that decision, and the case is now pending before the Canadian Supreme Court.

B. Relevant International Legal Instruments

Any discussion of the international legal instruments relevant to this issue should start with the Geneva Conventions of 1949 and their 1977 Additional Protocols, which are recognized as the preeminent rules of armed conflict. The Geneva Conventions establish a minimum acceptable age of military participation as *fifteen*, with enlistment preferences for older children.⁷² Canada will point out that the Geneva Conventions,

⁶⁷ 29 U. La Verne L. Rev. 56, 71 (2008). See: Human Rights Watch, Letter to Foreign Minister of Democratic Republic of Congo, May 2, 2001, <http://www.hrw.org/wr2k1/index.html>; Press Release, Human Rights Watch, Congo: Don’t Execute Child Soldiers: Four Children to be Put to Death (May 2, 2001), <http://www.hrw.org/press/2001/05/congo0502.html>; Human Rights Watch, Congo Spares Child Soldiers, June 2001, <http://hrw.org/updatew/2001/06.html>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See http://www.law.utoronto.ca/faculty_content.asp?itemPath=1/3/4/0/0&contentId=1617

⁷¹ http://www.law.utoronto.ca/documents/Mackin/Khadr_v_Canada-Repatriation.htm

⁷² Article 77(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict of 8 June 1977 (“First Additional Protocol”); and

although silent on the issue of the prosecution of child soldiers, limits the age for which children can be soldiers and therefore suggests that their participation in war crimes cannot be as punishable the same as adult soldiers. Rather, the Geneva Conventions set up standards for the special treatment of children, which includes the protection of children from forcible recruitment in armed conflict, indicating that child soldiers should be treated as victims of the war rather than its perpetrators.⁷³ The United States will respond that, as a fifteen year-old at the time of the atrocity in this case, prosecution of Rutaganda is permissible under the Geneva Conventions.

Canada, in turn, will point to several more recent Conventions that suggest that children under 18 shall not serve in the military, and that recruitment of such child soldiers is a crime, suggesting that the critical age is now eighteen rather than fifteen. The International Labor Organization’s Convention Concerning the Prohibition and Immediate Action for Elimination of the Worst Forms of Child Labor of 1999 declared the use of child soldiers as one of the worst forms of child labor.⁷⁴ The Convention sets the minimum age of 18 to serve in a military force and suggests the criminalization of child soldier recruitment for any soldiers under that age. This convention sought to eliminate the atrocities of child labor by prosecuting those responsible for putting the children in the position of fighting.⁷⁵

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPCRC) (2002) provides more forceful guidelines. It states that every human being below 18 is a child unless the national law applicable of majority is earlier.⁷⁶ Article 38 of the OPCRC sets the minimum age allowable for military involvement at 18. The OPCRC sets forth stricter guidelines for armed groups (such as

Article 4(3) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977 (“Second Additional Protocol”).

⁷³ *Id.*

⁷⁴ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (I.L.O. No. 182), arts. 1-3, June 17, 1999, 38 I.L.M 1207 (1999) (entered into force Nov. 19, 2000)

Article 1: Each Member which ratifies this convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a mater of urgency.

Article 2: For the purposes of this Convention, the term child shall apply to all persons under the age of 18.

Article 3: For the purposes of this Convention, the term the worst form of child labour comprises: (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict...

⁷⁵ *Id.*

⁷⁶ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, Annex I, art. 1, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49 (2000) (entered into force Feb. 12, 2002) [hereinafter OPCRC].

Article 1: States Parties shall take all feasible measure to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

Article 2: States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.” *Id.*

the *Interhamwe Militia*) distinct from a state’s armed forces, suggesting that children aged 15 to 18 may not join armed opposition groups although they may join the state’s armed forces voluntarily.⁷⁷ Furthermore, the OPCRC directs state parties to demobilize and release from service any child soldier within their jurisdiction. For those children that were responsible for atrocities against humanity during armed conflict, Article 40, suggest that states handle these children: “In a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s re-integration and the child’s assuming a constructive role in society.”⁷⁸

C. *The Approach of International Tribunals*

While the domestic cases present a murky picture, and the international conventions are not dispositive, Canada is likely to point out that despite several known cases of atrocities committed by Serb and Rwandan youths, the International Criminal Tribunals for Former Yugoslavia and Rwanda did not indict any person below the age of 18.⁷⁹

Canada will further point out that the International Criminal Court (ICC), established in 2003, cannot prosecute persons who were under the age of 18 at the time of the commission of a war crime per Article 26 of the Rome Statute.⁸⁰ The Statute instead focuses on prosecuting the recruiters of child soldiers, limiting the age of recruitment to youths over the age of 15.⁸¹ (Emanuel Rutaganda was recruited at the age of 14. The International Criminal Court issued its first warrant for the arrest of Thomas Lubanga Dyilo for the war crime of “conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities.”⁸² His trial, beginning on January 26, 2009 is the first prosecution of a recruiter and user of child soldiers.⁸³ This case suggests that the focus of international criminal law centers on the recruiters of child soldiers rather than the soldiers themselves. The children are considered victims of the war and the adult perpetrator who put them in this situation. Nevertheless, some Nations seeking

⁷⁷ Office of the U.N. High Comm’r for Human Rights, Ratifications and Reservations, Optional Protocol to the Convention on the rights of the Child on the Involvement of Children in Armed Conflict, http://www.ohchr.org/english/countries/ratification/11_b.thm (last visited Nov. 13, 2009).

⁷⁸ CRC, *supra*, art 40, 1.

⁸⁰ Rome Statute of the International Criminal Court art. note 62, art. 8, 2(b) (xxvi) July 17, 1998, U.N. Doc.A/Conf.183/9* (1998).

⁸¹ Rome Statute, *Supra* note i, art. 8, 2(b) (xxvi), “Conscripting or enlisting children under the age of fifteen into the national armed forces or using them to participate actively in hostilities” is a war crime. *Id.*

⁸² International Criminal Court (17 March 2006)

⁸³ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06

justice for war crimes seek to punish the child soldiers who committed various atrocities and crimes against humanity.

The Special Court for Sierra Leone provides a mixed precedent. On the one hand, Article 7(1) of the Tribunal’s Statute provides that “the Special Court shall have jurisdiction over any persons who were 15 years of age at the time of the alleged commission of the crime.”⁸⁴ No explicit justifications were provided for determining the age of 15, however it seems that it was chosen to mirror the age set forth in the Geneva Conventions, suggesting that if children under fifteen are too young to be recruited, they must be too young to be prosecuted for war crimes.⁸⁵ Since Rutaganda was fifteen at the time of the crime in this case, the United States will argue that the Special Court for Sierra Leone precedent suggests he is old enough to be prosecuted by an international tribunal.

Canada will argue, however, that it is significant that the Statute of the Special Court for Sierra Leone provides for different treatment of offenders between the ages of 15-18. It says that such persons “shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into an assumption of a constructive role in society...at all stages of the proceedings, including investigation, prosecution and adjudication.”⁸⁶ Moreover, Canada will point out that the Prosecutor of the Special Court for Sierra Leone announced early on that, as a matter of policy, he would not indict persons for crimes committed under the age of 18.⁸⁷

The United States may respond that the Prosecutor’s policy is not dispositive. Since the Special Court for Sierra Leone focused its prosecution on “leaders and those most responsible”⁸⁸ for the worst atrocities, there was never serious consideration of prosecuting juvenile offenders despite the fact that doing so would be permissible under the Statute.

⁸⁴ Report of the Security Council mission to Sierra Leone, UN Doc. S/2000/992 (16 October 2000), para. 50.

⁸⁵ Matthew Happold, *supra*, at 81.

⁸⁶ Article 7(2), draft statute, *supra*, Enclosure.

⁸⁷ Public Affairs Office, Special Court for Sierra Leone, press release, “Special Court Prosecutor Says He Will Not Prosecute Children”, 2 November 2002.

⁸⁸ Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40, para. 1.

V. Are the Rwandan courts capable of providing Rutaganda a fair trial?

A. Is Rwanda’s judiciary sufficiently independent to ensure Rutaganda a fair trial?

Article 14 of the International Convention on Civil and Political Rights provides for equality before the courts and “the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law.” The Constitution of Rwanda provides for an independent judiciary.⁸⁹ Article 13 of the Rwandan Organic Law of March 16, 2007 (which governs the transfer of genocide cases to Rwanda) guarantees the rights of the accused, including the presumption of innocence.⁹⁰

The Rwandan judiciary has become increasingly professionalized in the aftermath of the 1994 genocide. All High Court judges have law degrees and receive a high salary commensurate with their position, and most have between 8 and 10 years’ experience at the bench.⁹¹ The Rwandan judiciary has made great strides in becoming more independent of the executive branch. A United States State Department Report from 2006 found that in most cases, the judiciary has operated independently and without government interference.⁹²

Canada is likely to argue that there is great pressure on Rwandan judges to remain in line with the ruling party. Candidates for the presidency and vice presidency of the Supreme Court are proposed by the President of Rwanda, and may be dismissed by Parliament for “undignified behavior, incompetence, incapacity, or serious professional misconduct.”⁹³ Observers have found that Tutsis dominate the judiciary, while Hutus play only a nominal role.⁹⁴ In light of this, Canada is likely to claim that the composition of the judiciary renders it impossible for Rutaganda to receive a fair trial in Rwanda.

Canada may also point to several international tribunal and national court decisions questioning the ability of Rwandan courts to render an impartial decision. In *The Prosecutor v. Munyakazi*, the International Criminal Tribunal for Rwanda (ICTR)

⁸⁹ Philippe Sands, *Report on Criminal Justice and Fair Trial Issues in Rwanda* at para 69, *Brown v. Rwanda*, No. CO/5521/2008, 2009 WL 908144 (DC, 2009).

⁹⁰ William A. Schabas, *Criminal Justice for Genocide-Related Offences in Rwanda* at para 30, *Brown v. Rwanda*, No. CO/5521/2008, 2009 WL 908144 (DC, 2009).

⁹¹ *Id* at para 24.

⁹² *Id* at para 32.

⁹³ Sands, *supra*, at para 69.

⁹⁴ *Id* at para 73.

denied the transfer of a genocide suspect’s case to Rwanda’s national courts.⁹⁵ The Trial Chamber was concerned with the Rwandan government’s condemnation of foreign judges who attempted to prosecute members of the Rwandan Patriotic Forces (RPF) and Rwanda’s decision to bar the ICTR prosecutor from Rwanda after the successful appeal of another genocide suspect, Jean-Bosco Barayganza. The Chamber felt this demonstrated the willingness of the executive branch to pressure the judiciary to render a desirable decision. Rwandan authorities have also proposed prosecuting a Spanish judge for issuing arrest warrants for several high ranking Rwandan Tutsi army officials for spreading “genocide ideology.”⁹⁶ Rwandan authorities have been heavy-handed in their treatment of political opponents in the past. At the trial of Pasteur Bizimungu, the former President of Rwanda, the defendant’s attorney was detained 24 hours for contempt, the judge prevented the defense from fully cross-examining a witness, and the defense was only allowed to present a limited number of witnesses.⁹⁷ Professor William Schabas, who researched Rwanda’s judicial system in 2007, claims he was told that the trial judge said the decision was “dictated to him,” and admits there was probably judicial interference in this case.⁹⁸

The United States can point to portions of decisions which hold that Rwanda is capable of conducting a fair trial, despite its history of judicial interference. In *The Prosecutor v. Hatagekimana*, in which referral to Rwanda was denied on other grounds, the ICTR Chamber held that the ethnic imbalance of the judiciary alone was not enough to show its impartiality or lack of independence, and that the involvement of the President in appointing judges is not problematic as it is a common feature of many Western judicial systems.⁹⁹ The Appeals Chamber overturned the *Munyakazi* Trial Chamber’s decision on judicial independence, although it denied referral due to fairness issues relating to witness testimony.¹⁰⁰ The Chamber held there was no evidence that single-judge trials were susceptible to pressure as a rule, and noted that single-judge trials are a common feature of many judicial systems.

⁹⁵ Prosecutor v. Muynakazi, ICTR-97-36-R11bis, ICTR Trial Chamber III, 28 May 2008, at paras. 41-49 [hereinafter *Muynakazi* Trial Decision].

⁹⁶ Brown v. Rwanda, No. CO/5521/2008, 2009 WL 908144 at para 45 (DC, 2009).

⁹⁷ *Id* at para 101.

⁹⁸ *Id* at para 103.

⁹⁹ Prosecutor v. Hatagekimana, ICTR-00-55B-R11bis, ICTR Trial Chamber Designated Pursuant to Rule 11 *BIS*, 19 June 2008, at para 40.

¹⁰⁰ Prosecutor v. Munyakazi, ICTR-97-36-411bis, ICTR Appeals Chamber, 8 October 2008, at paras. 22-31 [hereinafter *Munyakazi* Appeal].

B. Will witness intimidation prevent Rutaganda from having a fair trial?

Rwanda’s Organic Law lays out how cases transferred from the ICTR are to be tried. The Organic Law (1) states that the High Court “shall not convict a person solely on written statements of witnesses who do not give evidence during trial,” (2) allows the accused examine the witnesses presented against him, and (3) provides protection and assistance to defense witnesses.¹⁰¹ It is unclear, however, whether these provisions also apply to suspects who are transferred from other jurisdictions for trial in lower Rwandan provincial courts.

Canada is likely to point to a litany of decisions denying the transfer or extradition of genocide suspects to Rwanda due to concerns that they would be unable to find witnesses willing to testify on their behalf. In *Brown v. The Government of Rwanda*, the High Court of England denied Rwanda’s request to extradite four Rwandan genocide suspects because of a “real risk of flagrant denial of justice by reason of their inability to adduce the evidence of supporting witnesses.”¹⁰² The *Brown* decision drew on four similar decisions in Toulouse, Frankfurt, Paris and Lyon denying extradition on similar grounds.¹⁰³ The *Brown* Court was primarily concerned that witnesses would be intimidated to the point they would be unwilling to testify due to a fear of being charged with harboring “genocidal ideology,” which is a crime punishable by imprisonment in Rwanda.¹⁰⁴ The *Hatagekimana* decision at the ICTR echoes this position, denying referral of a genocide case to Rwandan national courts due to concern that witnesses in Rwanda may be unwilling to testify as a result of facing threats, arrest, or being accused of harboring genocidal ideology.¹⁰⁵

The United States may respond that Rwanda has secured monitoring agreements for cases referred from the ICTR, and they may do the same in cases transferred from other jurisdictions. In 2007, the Office of the Prosecutor secured an agreement with the African Commission on Human and Peoples’ Rights to monitor any trial referred by the ICTR to Rwanda.¹⁰⁶ In addition, the Organic Law provides a protection service for witnesses who testify in Rwanda. The ICTR’s *Kanyarukiga* decision notes that this service

¹⁰¹ *Brown, supra*, at para 36.

¹⁰² *Id* at para 66.

¹⁰³ *Brown, supra*, at para 47.

¹⁰⁴ *Id* at para 49.

¹⁰⁵ *Hatagekimana, supra*, at para 67.

¹⁰⁶ U.N. SCOR, 62nd Sess., 5697th mtg. at 15, U.N. Doc S/PV.5697 (June 18, 2007).

is experienced and that the majority of witnesses who have testified in genocide cases have done so without consequence.¹⁰⁷

Canada is likely to respond that there are real concerns that this service is not sufficient to ensure the safety of witnesses in Rwanda, and thus witnesses are unlikely to be induced to testify in favor of persons accused of genocide. Funding for the witness protection program is limited, and it serves more as a referral agency to local police.¹⁰⁸ In addition, the program is understaffed and defense witnesses may view it as being biased since it is operated by the Rwandan police and the Office of the Prosecutor.¹⁰⁹

The United States may point to the availability of video link testimony. In cases referred from the ICTR, video link testimony may be allowed if a witness is unwilling or unable to travel to Rwanda to testify. This has been proposed by proponents of referral of genocide cases to Rwanda as a solution to the problem of witness intimidation.¹¹⁰

Canada will likely respond that the availability of video link testimony is not certain in a case such as this, and that the use video link testimony puts the defense at a disadvantage. It is not clear if video link testimony would be available in cases where there is no mutual legal assistance treaty between Rwanda and the country in which the witness resides.¹¹¹ In addition, there are concerns that use of video link testimony would put an additional strain on the already over-stretched legal budget of Rwanda.¹¹² There are also concerns that video link testimony would place the defense at a disadvantage, since video link testimony creates a distance between a witness and the court and does not have the same impact as live testimony.¹¹³ This perceived distance between the defense’s witnesses and the court may create the perception that the defense’s witnesses are less credible than those of the prosecution, and thus act to prevent the defense from providing an adequate defense.

C. Will Rutaganda receive a fair punishment if convicted?

Article 7 of the International Convention on Civil and Political Rights prohibits prolonged solitary confinement. In 2007, Rwanda passed the “Death Penalty Law,”

¹⁰⁷ Prosecutor v. Kanyarukiga, ICTR 2002-78-R11bis, ICTR Trial Chamber, 6 June 2008, at para 69.

¹⁰⁸ REDRESS and African Rights, *Extraditing Genocide Suspects from Europe to Rwanda*, Report of a Conference Organized by REDRESS and African Rights at the Belgian Parliament, 1 July 2008, page 36.

¹⁰⁹ Munyakazi Trial Decision, *supra*, at para 62.

¹¹⁰ Hatagekimana, *supra*, at para 70.

¹¹¹ Brown, *supra*, at para 64.

¹¹² Sands, *supra*, at para 122.

¹¹³ Amelia S. Canter, *The False Hope of Rule 11 BIS*, 32 Fordham Int’l L.J. 1614, 1653 (2008-2009).

which replaces the death penalty with life imprisonment or life imprisonment with special provisions.¹¹⁴ Article 4 of the Death Penalty Law states that if the defendant is given life imprisonment with special provisions they are to be “kept in isolation.”¹¹⁵ However, the Rwandan government claims the Transfer Law governs proceedings such as these, and that “the highest possible penalty for referred defendants [is] life imprisonment, not life imprisonment with special provisions.”¹¹⁶

Canada is likely to point to numerous decisions that call into question whether the highest punishment for referred defendants is life imprisonment in isolation. In *Munyakazi*, the Appeals Chamber denied referral in part because it found there was a “genuine ambiguity” as to which punishment would be applied.¹¹⁷ *The Prosecutor v. Kayishema* agreed that the death penalty would not be imposed, but denied referral in part because it found there was a chance that the applicable sentence could be life imprisonment in isolation.¹¹⁸ *Kanyarukiga* found that the possibility of monitoring by an international organization was not sufficient to prevent the defendant from being sentenced to life imprisonment in isolation.¹¹⁹ *Hatagekimana* denied referral in part because they believed the defendant may have been deprived of his rights through a 20-year sentence in isolation.¹²⁰

Canada may also argue that even if Rutaganda is acquitted, he may still be subject to additional punishment by local courts. Human Rights Watch has noted several instances in which acquitted genocide suspects were not released from prison or were released and re-arrested shortly afterward.¹²¹ Some have raised the concern that a suspect acquitted in an ordinary court in Rwanda may be re-tried in a local *gacaca* court. The Organic Law governing *gacaca* courts does not prohibit the re-trial of those who are acquitted in ordinary courts, and it is possible they may be re-tried by *gacaca* courts if new facts emerge.¹²² *Gacaca* courts have been criticized for rendering unfair decisions. For example, in 2008 a *gacaca* appeals court sentenced a former presidential candidate to 15 years’ imprisonment for genocide without explanation after he had been acquitted by the lower court.¹²³

¹¹⁴ *Id* at 1634.

¹¹⁵ *Id*.

¹¹⁶ *Id* at 1635.

¹¹⁷ *Munyakazi Appeal, supra*, at paras. 20-21.

¹¹⁸ *Prosecutor v. Kayishema*, ICTR-01-67-R11bis, ICTR Trial Chamber III, 16 December 2008, at para 27.

¹¹⁹ *Kanyarukiga, supra*, at para 103.

¹²⁰ *Prosecutor v. Hatagekimana, supra*, at para 25.

¹²¹ *Brown, supra*, at para 88.

¹²² *Sands, supra*, at para 145.

¹²³ Rwanda – Human Rights Watch 2009 Country Summary, <http://www.hrw.org/en/node/79182>.

The United States may respond that these concerns are overstated, as cases transferred from other jurisdictions would not be tried in *gacaca* courts. During questioning by the Security Council, Hassan Jallow, Prosecutor of the ICTR, clarified that Rwandan law provides that all cases transferred to Rwanda will be tried by the High Court, not a *gacaca* court.¹²⁴ The United States may also argue that fears regarding the *gacaca* courts are unfounded, as they have been found to be equitable. Professor Schabas found that “by and large” the *gacaca* courts are equitable, and that they have a twenty percent acquittal rate.¹²⁵

Canada may also claim that if Rutaganda is convicted his punishment will be unduly harsh due to the poor prison conditions in Rwanda. Rwanda has “some of the world’s most miserable and overpopulated prisons,” and both Kigali Central Prison and Rwandan local detention centers have been described as “dismal.”¹²⁶

The United States is likely to respond that Rwanda has built new facilities to be used for genocide suspects transferred to Rwanda from the ICTR and other jurisdictions. The Mpanga prison has a special section set aside for prisoners transferred from the ICTR and other states, and the standards at Mpanga have been deemed acceptable by the ICTR.¹²⁷ Other observers have found substantial improvements in the Rwandan prison system in recent years, and have found the Mpanga prison facility to be satisfactory.¹²⁸

D. Does public policy favor holding genocide trials in Rwanda?

The United States may argue that Rwanda is the best location for this case to be tried, and that holding this trial in Rwanda will help in the healing process and demonstrate whether Rwanda is capable of conducting a fair trial for a genocide suspect transferred from another state. Critics in Rwanda claim that the international community “which sat idly by during the genocide” should not have the authority to decide whether Rwanda can grant genocide suspects a fair trial.¹²⁹ Genocide victims are also generally in favor of having these cases tried in Rwanda, despite any perceived imperfections in their judicial system.¹³⁰ Members of the Rwandan

¹²⁴ U.N. SCOR, 62nd Sess., 5697th mtg. at 38, U.N. Doc S/PV.5697 (June 18, 2007).

¹²⁵ Schabas, *supra*, at para 4.

¹²⁶ *Id* at paras. 48-49.

¹²⁷ *Id* at para 51.

¹²⁸ REDRESS et al., *supra*, at 32.

¹²⁹ Canter, *supra*, at 1622.

¹³⁰ REDRESS et al., *supra*, at 40.

government and judiciary also believe Rwanda is the most appropriate place for these trials to take place. At the United Nations, the Rwandan representative argued that these cases must be transferred so justice can be done where the crimes were committed to reinforce the government’s policy toward reconciliation, and because it would be more efficient to try these cases in Rwanda since evidence and witnesses are mostly in Rwanda.¹³¹ Some also argue that cases such as Rutaganda’s should be tried in Rwanda in order to test Rwanda’s capability to conduct a fair trial. Chief Justice Rugege argues that Rwanda should be allowed at least one suspect to be tried so their law can be tested.¹³² His sentiment is echoed by other critics, who argue that even though there is some indication an unfair trial may take place, the government of Rwanda deserves to be given the benefit of the doubt.¹³³

Canada may respond that there is no guarantee that prosecuting Rutaganda in Rwanda will aid in the reconciliation process, and that the government does not deserve to be given the chance to conduct this trial in light of its tolerance to judicial deficiencies. According to Human Rights Watch, the trial of a former minister of justice attracted little media attention, and there are doubts that holding trials in Rwanda could satisfy genocide victims.¹³⁴ Even if these trials would satisfy genocide victims, there may be little to indicate that the government is willing or able to conduct a fair trial. Some observers have decried various injustices in the *gacaca* system, and argue that the government’s toleration of this system demonstrates that they are tolerant of deficiencies in their judicial system.¹³⁵ The government of Rwanda has demonstrated an unwillingness to change its justice system, and often does not tolerate criticism of its justice system.¹³⁶

¹³¹ U.N. SCOR, 62nd Sess., 5697th mtg. at 32, U.N. Doc S/PV.5697 (June 18, 2007).

¹³² Sands, *supra*, at para 151.

¹³³*Id* at para 153.

¹³⁴ REDRESS et al., *supra*, at 36.

¹³⁵Sands, *supra*, at para 154.

¹³⁶ *Id* at para 155.