

2009-2010
NIAGARA INTERNATIONAL MOOT COURT COMPETITION

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

February 2010

**THE GOVERNMENT OF CANADA
(Applicant)**

v.

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

MEMORIAL OF THE APPLICANT

TEAM#: 2010-03A

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STATEMENT OF FACTS

Mr. Emanuel Rutaganda (Rutaganda) is an upright Canadian citizen¹ who lives a normal life in Ontario.² He is a successful business owner, a productive member of Canadian society, a son to his mother, a husband, and father to three young children.³ He has not been subject to any criminal proceeding, even a traffic ticket, in 15 years.⁴ Despite having lived through the Rwandan genocide as a child,⁵ Rutaganda has adjusted perfectly to life in Canada ever since.

From childhood, Rutaganda lived in Kigali, Rwanda, with his family.⁶ When he was 14-years-old,⁷ shortly after the death of his father,⁸ the *Interhamwe* militia recruited Rutaganda as civil war erupted in Rwanda.⁹ Rutaganda was a member of the *Interhware* when the genocide escalated in April 1994.¹⁰ Rutaganda and six other *Interhamwe* members are accused of participating in the Boutaire High School massacre in which 275 Tutsi children were killed.¹¹

¹ Compromis Between Canada (Applicant) and the United States of America (Respondent) to Submit to the International Court of Justice Their Differences Regarding Emanuel Rutaganda, ¶ 2 (jointly notified to the Court on 24 October 2009) [hereinafter Compromis].

² *Id.* at ¶ 2.

³ *Id.* at ¶ 3.

⁴ *Id.* at ¶ 3.

⁵ *Id.* at ¶¶ 3-4.

⁶ *Id.* at ¶ 2.

⁷ Niagara Moot Court Clarification, Jan. 19, 2010.

⁸ Compromis, *supra* note 1, at ¶ 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at ¶ 4.

The current Tutsi-dominated government has sought Rutaganda's extradition back to a Boutaire district court on 275 counts of murder since 2001.¹²

The US involved itself in Rutaganda's life after an episode of the American television show "The Wanted" aired to public outcry in the US that an alleged genocidaire was living across the border.¹³ With knowledge of Rwanda's desire to obtain Rutaganda via the INTERPOL Red Notice,¹⁴ the US government set about to lure Rutaganda into the US to then deport him to Rwanda. This plan reached all the way to President Obama, who approved "Operation Motown Express" himself.¹⁵

On July 21, 2009, Rutaganda's mother traveled across the US-Canadian border to receive treatment at the Detroit Clinic's Cardiac Center.¹⁶ On July 22, Rutaganda received an email on his personal Blackberry from the Clinic telling him that his mother's condition was rapidly declining and she was asking to see him before she died.¹⁷ In reasonable belief that his mother was near death, a friend lent Rutaganda a passport and Rutaganda immediately traveled to Detroit through the Windsor-Detroit Tunnel.¹⁸ When Rutaganda arrived at the Clinic and asked

¹² *Id.*

¹³ *Id.* at ¶ 7.

¹⁴ *Id.* at ¶ 5.

¹⁵ *Id.* at ¶ 6, 8-9.

¹⁶ *Id.* at ¶ 8.

¹⁷ *Id.* at ¶ 8.

¹⁸ *Id.* at ¶ 10.

for his mother, ICE agents appeared and arrested him.¹⁹ Only then did Rutaganda learn his mother's health was perfectly fine.²⁰ The ICE agents, in conjunction with the Clinic, had lied to him about her condition in order to lure him across the border into the US.²¹

Rwanda has requested Rutaganda's extradition,²² but Canada has consistently rejected these requests because, without an extradition treaty or other binding agreement, Canada asserts that it has no obligation to surrender Rutaganda to Rwanda.²³ Canada has used its discretion to deny Rwanda's extradition requests because Canada believes that child soldiers are victims, not criminals, and should not be prosecuted.²⁴ Further, Canada maintains that Rwandan cannot provide Rutaganda a fair trial.²⁵

Canada was notified of the situation according to the 2004 Canada-US Consular Notification Agreement.²⁶ Despite Canada's continued, formal protestations,²⁷ the US has continued to process Rutaganda through its judicial system in an attempt to deport Rutaganda to Rwanda for his passport violation.²⁸ Canada has attempted to negotiate with the US to no avail.²⁹

¹⁹ *Id.* at ¶ 10.

²⁰ *Id.* at ¶ 9.

²¹ *Id.* at ¶ 9.

²² *Id.* at ¶¶ 4-5.

²³ *Id.* at ¶ 5.

²⁴ *Id.* at ¶ 5.

²⁵ *Id.* at ¶ 5.

²⁶ *Id.* at ¶ 10.

²⁷ *Id.* at ¶¶ 10-11.

²⁸ *Id.* at ¶ 10.

The US has agreed to submit this problem concerning the luring of Emanuel Rutaganda before this Court.³⁰

²⁹ *Id.* at ¶ 12.

³⁰ *Id.* at ¶ 13.

QUESTIONS PRESENTED

- A. By luring Canadian citizen Emanuel Rutaganda from Canada, did the US violate:
1. Canada's territorial sovereignty;
 2. the US-Canada Extradition Treaty;
 3. the January 11, 1988 Exchange of Letters; and/or
 4. Emanuel Rutaganda's internationally protected human rights guaranteed by the International Covenant on Civil and Political Rights and customary international law?
- B. Would Emanuel Rutaganda's rendition from the US to Rwanda for trial violate international law because:
1. neither the US nor Canada have an extradition treaty with Rwanda;
 2. as a child soldier Rutaganda lacked criminal culpability; and/or
 3. Rwandan courts cannot provide Rutaganda a fair trial?

JURISDICTIONAL STATEMENT

The governments of Canada and the United States, the Parties, appear before the International Court of Justice pursuant to Article 36(1) of the Statute of the International Court of Justice.³¹ The Parties have complied with all the provisions of Article 36(1), and through the Compromis the Parties agree to submit their dispute to the jurisdiction to this Court.

³¹ Statute of International Court of Justice arts. 36, 40, June 26, 1945, 59 Stat. 1055.

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SUMMARY OF ARGUMENT

The US violated Canada's territorial sovereignty when it lured Emanuel Rutaganda from Canada to the US for rendition to Rwanda. As part of its guaranteed sovereignty rights, Canada has sole legal jurisdiction over its citizens; the US breached Canada's sovereignty by exerting its police powers into Canada to bring Rutaganda into the US justice system. Further, luring, in and of itself, is a violation of territorial sovereignty.

The US circumvented its obligations under the US-Canada Extradition Treaty by luring Rutaganda. The US violated the language of the Treaty that gave Canada discretion not to extradite Rutaganda. By luring, the US also violated the purpose of the Treaty and the spirit of cooperation between the countries that the Treaty is intended to foster. The Treaty requires that Canada consent to the US's rendition of Rutaganda to a third party state; Canada has not consented to Rutaganda's rendition so his transfer to Rwanda would violate the Extradition Treaty. Rutaganda's deportation is a disguised form of extradition, which the US used in an attempt to evade its obligations under the Extradition Treaty.

The luring violated Rutaganda's internationally protected human rights under the ICCPR and customary international law. Transferring Rutaganda to Rwanda would further erode his rights because Rwandan courts cannot provide Rutaganda with a fair trial. International courts and investigations have concluded that the Rwandan justice system is biased against defendants. Rutaganda's rendition to Rwanda would also violate international law because Rutaganda is not criminally culpable for his actions. As a former child soldier, Rutaganda was recruited illegally. The international community favors rehabilitation of child soldiers, as opposed to prosecution, because child soldiers are considered victims, not criminals. For the above reasons, the Court should repatriate Rutaganda to Canada.

ARGUMENT

I. THE US ILLEGALLY LURED EMANUAL RUTAGANDA

A. Luring Violated Canada's Territorial Sovereignty

Territorial integrity and political independence are foundational elements of international law.¹ This Court's rulings in the *Corfu Channel* and *Military and Paramilitary Activities* cases articulate the right of political independence as a guarantee against states using their police powers in other states without consent.² The Restatement on Foreign Relations Law, UN Sixth Legal Committee, and UN Working Group on Arbitrary Detention confirm the right to retain sole criminal jurisdiction over one's citizens.³ There are three exceptions to territorial sovereignty: self-defense, consent, or Security Council authorization;⁴ none are applicable here. Thus, the US violated Canada's territorial sovereignty by exercising its police powers on a Canadian citizen without Canada's consent.

The International Law Association (ILA) recognized that luring, as a form of abduction by deception, violates a country's territorial sovereignty.⁵ Similarly, the Canadian trial court in

¹ U.N. Charter art. 2; *See, e.g.* *Corfu Channel* (United Kingdom v. Albania), Merits, Judgment of 9 April 1949, 1949 ICJ Rep. 4, at 35; *Military and Paramilitary Activities* (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14, at 106, ¶ 202.

² *Id.*

³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 432(2) (1987); Virginia Morris & M. Christiane Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Forty-Eighth Session of the UN General Assembly*, 88 A.J.I.L. 343, 357-58 (1993); *Report of the Working Group on Arbitrary Detention, UN Commission on Human Rights, 50th Sess., Agenda item 10*, at 139-40, UN Doc. E/CN.4/1994/27 (1993).

⁴ U.N. Charter art. 51; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(2) (1987).

⁵ JORDAN J. PAUST, M. CHERIF BASSIOUNI & MICHAEL P. SCHARF, *INTERNATIONAL CRIMINAL LAW* 449, Carolina Academic Press (2nd ed. 2000).

Walker v. Bank of New York, a case involving the US luring a Canadian, held that a person is “abducted” when his or her will is overcome by fraud or force.⁶ The US abducted Rutaganda by fraudulently overcoming his will power with lies about his mother’s impending death. Accordingly, this Court should follow the ILA and the *Walker* finding and conclude that the US violated Canada’s territorial sovereignty by luring Rutaganda.

The US may assert that luring does not violate territorial integrity because of the International Criminal Tribunal for the Former Yugoslavia’s (ICTY) holding in *Dokmanović*.⁷ *Dokmanović* was lured from the Federal Republic of Yugoslavia (FRY) to Eastern Slavonia where he was arrested and taken to the ICTY. However, *Dokmanović* is distinguishable for three reasons. First, there was no extradition treaty between FRY and the ICTY. The trial chamber distinguished cases that rejected luring because “there was an established extradition treaty that was, in each case, circumvented,”⁸ suggesting the court would have ruled differently if an extradition treaty had been in place. Secondly, since the ICTY was established by a Security Council resolution, arguably the ICTY was operating with Security Council authorization—an exception to territorial sovereignty—when it lured *Dokmanović*.⁹ Thirdly, transfers to tribunals are different than extradition.¹⁰ The trial chamber also declined to answer the question presented

⁶ *Walker, et al. v. Bank of New York, et al.*, 15 O.R. (3d) 596, 602; 1993 Ont. Rep. LEXIS 410.

⁷ *Prosecutor v. Dokmanović*, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanović, ¶¶ 57, 77 (Oct. 22, 1997).

⁸ *Id.* at ¶ 75.

⁹ Michael Scharf, *The Prosecutor v. Slavko Dokmanović: Irregular Rendition and the ICTY*, 11 LEIDEN J. INT’L L. 369, 378 (1998).

¹⁰ *Id.* at 375.

here: whether FRY's sovereignty would have been violated if another state lured the defendant.¹¹ Therefore, *Dokmanović* is inapplicable. The US' luring of a Canadian citizen without Canada's consent breached Canada's territorial sovereignty.

B. Luring Violated the US-Canada Extradition Treaty

An extradition treaty is "a contract" between states.¹² The US signed and ratified the Treaty, signaling its intent to be bound by it.¹³ The US's luring of Rutaganda violated the language and the spirit of the Treaty. The Court should repatriate Rutaganda to Canada as a remedy for the US's breach of the Treaty.

1. Luring Violated the Language of the Extradition Treaty

Per the 1988 Protocol Amending the Extradition Treaty, Canada had discretion to deny Rutaganda's extradition. Article 3(2) states that if the crime was committed outside the requesting State (US), the requested State (Canada) has discretion to deny extradition if the requested State (Canada) law does not provide for punishment of the crime under similar circumstances. Canadian law does not provide for punishment of child soldiers,¹⁴ and the crime at issue was not committed on US soil, so Canada had discretion to deny extradition. The US violated this provision of the Treaty and Canada's *right* of discretion not to extradite Rutaganda.

¹¹ Prosecutor v. Dokmanović, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanović, ¶ 77 (Oct. 22, 1997).

¹² R. v. Governor of Ashford Remand Centre, Ex parte Beese, [1973] 1 W.L.R. 969, 973, per Lord Widgery, C.J." *Belgium v. Postelwaite, et al.*, House of Lords, London, England, 13 July 1987 (1987 N.R. LEXIS 2424; 80 N.R. 369).

¹³ Vienna Convention on the Law of Treaties art. 11-12, May 23, 1969, 1155 U.N.T.S. 331.

¹⁴ Compromis Between Canada (Applicant) and the United States of America (Respondent) to Submit to the International Court of Justice Their Differences Regarding Emanuel Rutaganda, ¶ 5 (jointly notified to the Court on 24 October 2009) [hereinafter Compromis].

2. Luring Violated the Spirit of the Extradition Treaty

The US may argue that the Extradition Treaty is inapplicable because the US never initiated extradition procedures and because the Treaty does not prohibit luring, but these arguments are illogical. Extradition treaties would be moot if states evaded them at their convenience. Treaties, as contracts, should be construed to make their purpose effective; “an interpretation which would render a treaty null and inefficient cannot be admitted.”¹⁵ Luring is contrary to the spirit and purpose of the Treaty: to improve US-Canada co-operation in crime repression via extradition.¹⁶ The Court would strip the Treaty of meaning, rendering it inapplicable, if it adopted the US’s stance. Instead, the Court should give logical meaning to the language and spirit of the Treaty and find that the US violated it by luring Rutaganda.

3. Canada Was Not on Notice as to the US’s Practice of Luring Canadian Citizens Over Canada’s Protestations

The US may argue that Canada was on notice as to the US’s approval of luring because American case law has continuously condoned luring since 1886.¹⁷ However, all of the US cases are distinguishable: the governments from where the defendants were lured consented to the US’ jurisdiction; extradition treaties were never an issue.¹⁸ Canada, however, has not consented to the US’ breaching of the Extradition Treaty or Canada’s territorial sovereignty.

¹⁵ Am. Jur. *Treaties* § 20, n. 4 (2009).

¹⁶ Extradition Treaty Between the United States of America and Canada, U.S.-Canada, Dec. 3, 1971, 27 UST. 983, Preamble [hereinafter US-Canada Extradition Treaty].

¹⁷ See, e.g., *Ker v. Illinois*, 199 US 436 (1886); *Frisbie v. Collins*, 342 US 519 (1952); *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992); *United States v. Yunis*, 681 F. Supp. 909 (1988).

¹⁸ *Id.*

4. Because the US Violated the Extradition Treaty, the Court Should Repatriate Rutaganda to Canada

Because the US violated the Extradition Treaty by luring a Canadian citizen without Canada's consent, the appropriate remedy is to repatriate Rutaganda to Canada. In repatriating Rutaganda, the Court would follow international precedent. In *Regina v. Horseferry Road*, a British court considered whether it had jurisdiction over a defendant abducted by the UK from South Africa. The court held that a court should dismiss a case when a country ignores extradition procedures in breach of international law and the domestic laws where the defendant was found.¹⁹ The *Horseferry Road* case rejected the *mala captus bene detentus* rule that allows a state to retain jurisdiction over a suspect, regardless of how the suspect was brought to the court.²⁰ The Swiss Federal Supreme Court also declined to extradite a defendant who had been lured. When considering the case of German officials luring a Belgian citizen into Switzerland to be extradited, the court held that it could not extradite the defendant because Germany had evaded its extradition treaty with Belgium, which infringed upon Belgium's sovereignty.²¹

C. Luring Violated the January 11, 1988 Exchange of Letters

On January 11, 1988, the US and Canada exchanged letters agreeing that civilian bounty hunters who abducted Canadian citizens in Canada would be extradited under the Extradition

¹⁹ *Regina v. Horseferry Road Magistrates' Court (Ex parte Bennett)*, [1994] 1 App. Cas. 42 (Eng. HL 1993).

²⁰ See Paul Michell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 CORNELL INT'L L. J. 383 (1996); Scharf, *supra* note 9, at 380; Stephan Wilske & Teresa Schiller, *Jurisdiction Over Persons Abducted in Violation of International Law in the Aftermath of United States v. Alvarez-Machain*, 5 U. CHI. L. SCH. ROUNDTABLE 205 (1998).

²¹ EuGRZ (1983) 435 (cited in *Prosecutor v. Dokmanović*, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanović, n. 105 (Oct. 22, 1997)).

Treaty at Canada's request.²² Here, the Detroit Clinic has acted as a civilian bounty hunter in aiding the luring because the hospital consented to the US sending Rutaganda a fake email on Clinic letterhead and to Rutaganda's arrest on hospital property.²³ The Detroit Clinic, in effect, was a bounty hunter at the US government's bequest. The letters are evidence of "an Understanding" between the countries that the US ignored when involving the Clinic.²⁴

D. Luring Violated Rutaganda's Human Rights under the ICCPR and Customary International Law

By luring Rutaganda, the US violated his human rights, including the requirement that arrests be in accordance with procedures established by law, prohibition against arbitrary arrest, and prohibition against arbitrary interference with his privacy, family, home and correspondence.

Article 9(1) of the International Covenant of Civil and Political Rights (ICCPR) prohibits depriving an individual of liberty except "on such grounds and in accordance with such procedures as are established by law." Since the US evaded the Extradition Treaty with Canada,²⁵ Rutaganda was not arrested under such a procedure established by law and his due process rights were violated. "'Lawfulness' ... also implies absence of any arbitrariness,"²⁶ and Article 9(1) of the ICCPR and Article 9 of the Universal Declaration of Human Rights

²² Exchange of Letters Constituting an Understanding Between the Government of Canada and the Government of the United States of America Concerning the Protocol Amending the Treaty on Extradition Signed at Ottawa On January 11, 1988, 27 I.L.M. 422 [hereinafter 1988 Exchange of Letters].

²³ Compromis, *supra* note 14, ¶¶ 9-10.

²⁴ 1988 Exchange of Letters, *supra* note 22.

²⁵ *See, infra*, Part III.

²⁶ *Bozano v. France*, Judgment of 18 Dec. 1986, E.C.H.R. (Ser. A), No. 111, para. 59.

specifically prohibit arbitrary arrest.²⁷ “[A]rbitrary” has been construed broadly.²⁸ The UN Human Rights Committee put forth the most authoritative definition in 1964: “an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law.”²⁹ The Committee explicitly stated that a legal arrest may nonetheless be “arbitrary” and the definition should include considerations of “inappropriateness, injustice and lack of predictability.”³⁰ Because Rutaganda’s arrest was not within the procedures established by law, it was “arbitrary” under the Committee’s definition. The arrest was also arbitrary because it was unpredictable for Rutaganda; he had no way of knowing that traveling to see his mother would result in the US’s attempt to extradite him.

The Universal Declaration of Human Rights guarantees against “arbitrary interference with [one’s] privacy, family, home or correspondence.”³¹ The US interfered in Rutaganda’s privacy, family and correspondence by sending him an email falsifying his mother’s condition.

The XVth Congress of the International Penal Law Association adopted a resolution that if there is a conflict between human rights and international criminal cooperation, human rights obligations take precedence. The resolution condemns luring and urges that luring be a bar to

²⁷ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; Universal Declaration of Human Rights G.A. Res. 217A, art. 12, U.N. GAOR, 3d Sess., 1st plen. mtg. U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Universal Declaration of Human Rights].

²⁸ Reed Brody, *The United Nations Creates a Working Group on Arbitrary Detention*, 85 Am. J. Int’l L. 709, 713 (1991); Prosecutor v. Dokmanović, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanović, ¶ 60 (Oct. 22, 1997).

²⁹ Brody, *supra* note 28, at 713.

³⁰ *Id.*

³¹ Universal Declaration of Human Rights, *supra* note 27, art. 12. *See also* American Convention on Human Rights, Nov. 22, 1969, art. 11(2), 1144 U.N.T.S. 123, 148 (entered into force July 18, 1978).

prosecution.³² Considering that the US violated numerous of Rutaganda's human rights, and that human rights obligations take precedence over criminal cooperation, the Court should dismiss the order of removal and repatriate Rutaganda to Canada.

Case law supports Canada's position that Rutaganda's human rights have been violated.³³ The European Court of Human Rights (ECHR) considered a similar situation in *Bozano v. France*.³⁴ Bozano was an Italian citizen who was arrested by French police and taken to Switzerland for extradition to Italy. Bozano alleged his deportation was really an illegal extradition since France forced him into Switzerland, the country most likely to extradite him out of France's neighboring countries.³⁵ The ECHR considered Bozano's claims under Article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees that "no one shall be deprived of liberty save ... in accordance with a procedure prescribed by law."³⁶ The ECHR found that Bozano's arrest and removal to Switzerland was neither "lawful" nor consistent with the "security of person," within the meaning of Article 5.³⁷

The US may argue that Canada had an obligation to the international community to extradite or prosecute Rutaganda, but this is inaccurate. The *aut dedere aut judicare* obligation,

³² Scharf, *supra* note 9, at 380 (citing *Mutual Assistance in Criminal Matters: XVth Congress of International Penal Law Association Adopts Resolution*, 10 INT'L ENFORCEMENT L. REP. 385, 386 (1994)).

³³ See, e.g. *Stocké v. Germany*, Judgment of 19 March 1991, E.C.H.R. (Ser. A), No. 199 (Annex, Opinion of the Commission, ¶ 167); *Bozano v. France*, Judgment of 18 Dec. 1986, E.C.H.R. (Ser. A), No. 111.

³⁴ *Bozano v. France*, Judgment of 18 Dec. 1986, E.C.H.R. (Ser. A), No. 111.

³⁵ *Id.* at ¶ 29.

³⁶ *Id.* at ¶ 52.

³⁷ *Id.* at ¶ 59.

meaning “extradite or prosecute,”³⁸ only arises for universally condemned crimes, such as genocide, crimes against humanity, and piracy.³⁹ Rutaganda is charged with domestic murder, which is not a universally condemned crime.⁴⁰ Similarly, the US may urge the Court to apply the “*Eichmann* exception,” which allows a state to breach territorial sovereignty to acquire a suspect accused of a universally condemned crime.⁴¹ This argument fails for the same reason: Rutaganda was not charged with a universally condemned crime. Further, the *Eichmann* exception encourages abuse of power and circumvention of international law. Thus, the Court should not apply the *Eichmann* exception or the principle of *aut dedere aut judicare*.

II. RUTAGANDA’S RENDITION FROM THE US TO RWANDA FOR TRIAL VIOLATES INTERNATIONAL LAW.

A. The US Violated the US-Canada Extradition Treaty Because There is No Extradition Treaty with Rwanda

Article 12 of the US-Canada Extradition Treaty requires that Canada consent to the US’s rendition of Rutaganda to a third party state.⁴² Canada has not consented to the rendition, so the US’s rendition of Rutaganda violates the US-Canada Extradition Treaty.

The US also violated the US-Canada Extradition Treaty by trying to circumvent it with deportation.⁴³ The ECHR has recognized that deportation can be improperly used to evade an extradition treaty. The court held in *Bozano* that “the deportation process was abused” so that

³⁸ Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations*, 39 VA. J. INT’L L. 425, 442 (1999).

³⁹ *Id.*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 404 (1987).

⁴⁰ *See, e.g.*, Michell, *supra* note 20, at n. 205.

⁴¹ *Id.* at n. 205; Attorney General of Israel v. Eichmann, 36 I.L.R. 277, 306 (Sup. Ct. 1962).

⁴² US-Canada Extradition Treaty, *supra* note 16.

⁴³ Compromis, *supra* note 14, at ¶ 10.

Bozano's deportation was a "disguised form of extradition."⁴⁴ Like France in *Bozano*, the US distorted the deportation process to extradite Rutaganda while evading the US-Canada Extradition Treaty. Rutaganda was not allowed to choose what country he wanted to be deported to, like Bozano, which is evidence that the US ignored traditional deportation procedure to effectively extradite Rutaganda to its country of choice.⁴⁵ The US's deportation of Rutaganda to Rwanda is a disguised extradition, in violation of the US-Canada Extradition Treaty.

The US may cite *Bembenek v. Canada* for the proposition that a disguised extradition is only illegal where two countries collude in deportation to bypass a weak case for extradition.⁴⁶ Yet the court noted it was the "typical," not exclusive, situation to find that countries have colluded to deport someone to avoid a weak extradition case. The court's fundamental rule is that a bad faith effort to bypass a weak case for extradition through deportation is not allowed.⁴⁷ Canada deported the defendant in *Bembenek* instead of extraditing her,⁴⁸ but the decision to deport her was not in bad faith because Canada had equally valid cases for deportation and extradition.⁴⁹ Here, the US acted in bad faith because the US sought to avoid an extradition request, which it knew Canada would not grant. The Court should find the US's attempted deportation of Rutaganda to be a disguised extradition in violation of the Extradition Treaty.

⁴⁴ *Id.* at ¶¶ 60-61.

⁴⁵ 8 U.S.C. § 1231(b)(2)(A) (2000).

⁴⁶ *Bembenek v. Canada*, (Minister of Employment & Immigration) (1991), 1991 CarswellOnt 556, 69 C.C.C. (3d) 34 (Ont. Gen. Div.).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

B. Rutaganda Lacked Criminal Culpability Because He Was Recruited as a Child

Rutaganda lacked culpability as a child soldier because customary international law grants child soldiers amnesty for their crimes based on the fact that: (1) international law prohibits child soldier recruitment,⁵⁰ (2) the international community does not view child soldiers as criminals, but as victims⁵¹ of militias who prey on their vulnerability (3) and because they are victims, the international community rehabilitates child soldiers instead of prosecuting them.⁵²

1. International Law Prohibits Child Soldier Recruitment

International law prohibits nations from recruiting children under 18 to serve in active hostilities.⁵³ Today, 126 countries, including Rwanda, the US, and Canada, have ratified the Optional Protocol to the Convention on the Rights of the Child (CRC), which prohibits the use of child soldiers under 18.⁵⁴ In 2009, only 15 countries recruited child soldiers.⁵⁵ Rutaganda's recruitment by the *Interhamwe* violated international law.⁵⁶

⁵⁰ Rome Statute of the International Criminal Court art. 8(2)(b)(xxvi), July 17, 1988, 2187 U.N.T.S. 90 [hereinafter ICC Statute]; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, arts. 1-2, U.N. Doc. A/Res/54/263 (May 25, 2000) [hereinafter CRC Optional Protocol].

⁵¹ See, e.g., Secretary General, *The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. SCOR, ¶ 23, U.N. Doc. S/2000/915 (Oct. 4, 2000).

⁵² Michael Odeh and Colin Sullivan, Recent Developments in International Rehabilitation of Child Soldiers, available at <http://www.yapi.org/rpchildsoldierrehab.pdf>.

⁵³ ICC Statute, *supra* note 49, art. 8(2)(b)(xxvi); CRC Optional Protocol, *supra* note 49, art. 2.

⁵⁴ CRC Optional Protocol, *supra* note 49, arts. 1-2; *Facts and Figures on Child Soldiers*, Child Soldiers Global Report, <http://www.childsoldiersglobalreport.org/content/facts-and-figures-child-soldiers> (last visited Jan. 2, 2010); See also Child Soldiers Accountability Act, 18 USC. §§ 118, 213 (2008).

2. The International Community Views Child Soldiers as Victims

Rutaganda is not criminally culpable because of the international consensus that 14-year-old child soldiers are victims.⁵⁷ US courts agree; “the normal 15-year-old is not prepared to assume the full responsibilities of an adult.”⁵⁸ Children’s brains lack mental and moral development to comprehend the consequences of their actions, especially under stress.⁵⁹ Militias exploit this vulnerability. Rutaganda was extremely vulnerable prey for the *Interhamwe* considering his father’s recent death⁶⁰ and the stress of a sudden civil war. In a civil war, joining militias is often the only means of survival.⁶¹ If Rutaganda had refused the *Interhamwe*, they may have killed him as a Tutsi sympathizer. The Court should agree with international consensus that Rutaganda was a victim.

3. Because Child Soldiers are Victims, the International Community Rehabilitates Child Soldiers Instead of Prosecuting Them

⁵⁵ *UN: Strengthen Action to End Use of Child Soldiers*, HUMAN RIGHTS WATCH, Feb. 2, 2009, <http://www.hrw.org/en/news/2009/02/12/un-strengthen-action-end-use-child-soldiers>.

⁵⁶ ICC Statute, *supra* note 49, art. 8(2)(b)(xxvi).

⁵⁷ *The Report of the Secretary-General*, *supra* note 51.

⁵⁸ *Thompson v. Oklahoma*, 487 U.S. 815, 825 (1988).

⁵⁹ Ronald E. Dahl, *Adolescent Brain Development: A Period of Vulnerabilities and Opportunities*, NEW YORK ACADEMY OF SCIENCES 3, (2004), available at http://pmbcii.psy.cmu.edu/dahl/Dahl_Adolescent_brain_development.pdf; Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE AMERICA INC. 10 (Oct. 1999).

⁶⁰ *Compromis*, *supra* note 14, ¶ 2.

⁶¹ *Why Children Join*, The Coalition to Stop Child Soldiers, <http://www.child-soldiers.org/childsoldiers/why-children-join> (last visited Jan. 2, 2010).

If children under 18 were illegally recruited as soldiers, the international community will not prosecute because they are victims.⁶² In fact, no international body has prosecuted a child soldier since Nuremburg.⁶³ International courts, like the International Criminal Court, do not have jurisdiction over people under age 18.⁶⁴ Among courts that do have jurisdiction over child soldiers, at least one prosecutor has openly declared that he will not indict them.⁶⁵ Even US courts have found “complete or near unanimity among all 50 States and the District of Columbia in treating a person under 16 as a minor” in capital sentence cases.⁶⁶ While there are isolated instances where nations pursue indictments against child soldiers, they have done so against enormous international opposition.⁶⁷

Instead of prosecuting former child soldiers, the international community supports their rehabilitation. Ongoing efforts to rehabilitate child soldiers exist in nearly every country that

⁶² Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations: Australia, CRC/C/15/Add.268 (Oct. 20, 2005), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.268.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.268.En?OpenDocument).

⁶³ *US: Federal Court Prosecution of 9/11 Suspects a Victory for Justice*, Human Rights Watch, Nov. 13, 2009, <http://www.hrw.org/en/news/2009/11/13/us-federal-court-prosecution-911-suspects-victory-justice>.

⁶⁴ ICC Statute, *supra* note 49, art. 26.

⁶⁵ Press Release, Special Court for Sierra Leone, Special Court Prosecutor Says He Will Not Prosecute Children, (November 2, 2002), available at www.sc-sl.org/LinkClick.aspx?fileticket=JdyF7IVNEvA%3D&tabid=115.

⁶⁶ *Thompson v. Oklahoma*, 487 U.S. 815, 824 (1988).

⁶⁷ *France Asks U.S. to Drop Charges Against Khadr*, CBS News, Jan. 24, 2008, <http://www.cbc.ca/world/story/2008/01/24/khadr-france.html>.

once recruited child soldiers.⁶⁸ And the US supports such efforts, “voting for six Security Council resolutions that condemn the recruitment of child soldiers and call[ing] for [their] rehabilitation.”⁶⁹ Secretary General Kofi Annan and the Security Council both agreed over this preference.⁷⁰ Here, Rutaganda has been successfully rehabilitated. He is a productive member of Canadian society with an impeccable record.⁷¹ He has a steady job, a wife, and children.⁷² Sending Rutaganda to Rwanda to stand trial would be contrary to the international community’s goal of rehabilitating child soldiers and make him victim for a second time.

The US may cite the CRC, the UN Standard Minimum Rules for the Administration of Juvenile Justice, or the Geneva Conventions for the proposition that child soldiers should be, and are, prosecuted.⁷³ Yet, neither of these documents addresses the culpability of child soldiers. The US may also cite *Moreno v. Minister of Employment and Immigration* as proof that Canada prosecutes child soldiers.⁷⁴ This argument is also misguided. In *Moreno*, immigration officials

⁶⁸ Michael Odeh & Colin Sullivan, Recent Developments in International Rehabilitation of Child Soldiers, available at <http://www.yapi.org/rpchildsoldierrehab.pdf>.

⁶⁹ Christopher L. Dore, *What to do with Omar Khadr? Putting a Child Soldier on Trial: Questions of International Law, Juvenile Justice, and Moral Culpability*, 41 J. MARSHALL L. REV. 1281, 1300 (2008).

⁷⁰ 'No Trials' for Leone Child Soldiers, BBC News, Dec. 27, 2000, <http://news.bbc.co.uk/2/hi/africa/1089255.stm>.

⁷¹ Compromis, *supra* note 14, ¶ 3.

⁷² *Id.* at ¶ 3.

⁷³ Convention on the Rights of the Child, G.A. Res. 44/25, arts. 37, 40 (Nov. 20, 1989); U.N. Standard Minimum Rules for the Administration of Juvenile Justice A/RES/40/33 (Nov. 25, 1985).

⁷⁴ Jose Rodolfo Moreno, et al., v. The Minister of Employment and Immigration, 1993 N.R. LEXIS 1441; 159 N.R. 210 (1993).

analyzed a case for asylum. Moreno was forcibly conscripted into the Salvadoran Army at age 16. Under Canada's law, immigration officials could deny asylum if they had "serious reasons for considering" that he had committed serious crimes.⁷⁵ Yet, this case is distinguishable because Moreno faced immigration proceedings, not criminal charges. The immigration court never analyzed his criminal culpability.

The US will argue that Secretary General Kofi Annan's plan to bring child soldiers under 18 within the jurisdiction of the Special Court for Sierra Leone (SCSL) is proof that the international community prosecutes children.⁷⁶ Yet, this decision was a compromise devoid of any use.⁷⁷ Annan narrowed the scope of the SCLS's jurisdiction to be only over the extremely rare (if not non-existent) child that was "most responsible" by being in a leadership position.⁷⁸ The Security Council wrote that it was "extremely unlikely," that youths charged in Sierra Leone would be tried,⁷⁹ a premonition that has come true.⁸⁰ Annan also required mandatory rehabilitation to accompany any child soldier's sentence⁸¹ and the Security Council expressed its

⁷⁵ *Id.* at 213.

⁷⁶ *No Trials, supra* note 70.

⁷⁷ ELIN SKAAR, ET. AL., *ROADS TO RECONCILIATION* 64, (Lexington Books 2005).

⁷⁸ *Report of the Secretary-General, supra* note 51.

⁷⁹ *Juvenile Prosecutions "Unlikely" – Security Council*, U.N. Wire, Feb. 5, 2001, available at http://www.unwire.org/unwire/20010205/12873_story.asp.

⁸⁰ Press Release, *supra* note 65.

⁸¹ *The Report of the Secretary-General, supra* note 51.

preference not to prosecute them, but rather send them to the truth and reconciliation commission.⁸²

C. Rwanda Cannot Provide Rutaganda a Fair Trial

An individual's right to a fair trial has a strong foundation in international law that both the US and Rwanda have ratified.⁸³ The international community established the ICTR because Rwandan could not provide fair trials.⁸⁴ ICTR Procedural Rule 11*bis* allows for transfer of cases to Rwanda if Rwanda demonstrates "that the accused would receive a fair trial."⁸⁵ Rwanda cannot ensure Rutaganda a fair trial because the ICTR has repeatedly deemed the Rwandan system unfair, Rwanda has not remedied the problems that lead the ICTR to this conclusion.

The ICTR denied Rwanda's Rule 11 transfer requests in three cases—*Munyakazi*, *Kanyarukiga*, and *Hategekimana*—because there was an absence of fairness in the Rwandan district courts, despite apparent legal guarantees.⁸⁶ In *Munyakazi*, the court found that Rwanda could not sufficiently guarantee the accused the right to obtain and to examine witnesses.⁸⁷ The court noted an understaffed witness protection program⁸⁸ run by the prosecutor and police

⁸² *No Trials*, *supra* note 70.

⁸³ ICCPR, *supra* note 27, art. 14; Universal Declaration of Human Rights, *supra* note 27, art. 10.

⁸⁴ Joanna Pozen, *Justice Obscured: The Non-Disclosure of Witness' Identities in ICTR Trials*, 38 N.Y.U. J. INT'L L. & POL. 281, 312 (2006).

⁸⁵ ICTR R. P. & Evid. 11*bis*(B).

⁸⁶ Case No. ICTR-97-36-R11*bis* (May 28, 2008); Case No. ICTR-2002-78-R11*bis* (June 6, 2008); Case No. ICTR-00-55B-R11*bis* (June 19, 2008).

⁸⁷ Prosecutor v. Munyakazi, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*, ¶ 40 (Oct. 8, 2008).

⁸⁸ *Id.*

caused few defendants to avail themselves of its protection.⁸⁹ The courts also noted that defendants would have difficulty obtaining testimony when many witnesses had left Rwanda.⁹⁰ In addition to witnesses, the Rwandan system made it difficult for defendants to procure documents.⁹¹ Finally, the ICTR described one case where the Rwandan High Court shifted the burden of proof onto the defendant accused of complicity in genocide and adopted the principle of guilty by association.⁹²

Rwanda's judicial system cannot protect witnesses and is not independent. In 2008, Human Rights Watch found that Rwanda's judiciary lacks independence and basic trial rights such as the rights to present defense witnesses, equal access to justice, and protection from double jeopardy.⁹³ In 2008, the Rwandan Ombudsman's Office conducted several dozen investigations into judicial corruption, resulting in the dismissal of several judges and court registrars for abuse of office or corruption.⁹⁴ Even the US State Department's Rwandan country report states that while Rwanda took steps towards judicial independence, there is evidence of government officials attempting to influence cases, the executive branch discussing with judges the executive's preference of cases' outcomes, and 16 instances of "[v]iolence against genocide .

⁸⁹ *Id.*; *Kanyarukiga*, Case No. ICTR-2002-78-R11bis, ¶ 70 (June 6, 2008).

⁹⁰ *Kanyarukiga*, at ¶ 81; *Munyakazi*, at ¶ 66.

⁹¹ *Kanyarukiga*, at ¶ 21.

⁹² *High Court, Kigali*, RPA/Gen/0016/05/HC/KIG, July 7, 2006.

⁹³ *Law and Reality: Progress in Judicial Reform in Rwanda*, § VIII, Human Rights Watch (Jul. 24, 2008) available at <http://www.hrw.org/en/node/62097/section/1>.

⁹⁴ *Id.*

. . . witnesses . . . to prevent [their] testimony.”⁹⁵ In reality, the Rwandan judicial system is subservient to the executive branch.⁹⁶

Not only does the US want Rutaganda to stand trial in a country that cannot afford fair trials, they want to send him to the district least likely to offer him a fair trial. The Rwandan community was ravaged by the genocide. As a result, the ICTR was established not in Rwanda, but in Tanzania, so defendants could have a better chance at a fair trial.⁹⁷ Rwanda wants to try Rutaganda in the Boutaire district court—the site of the crime that he is accused of committing.⁹⁸ Rwanda cannot offer Rutaganda a fair trial. But Rutaganda’s trial would be the least fair tried in Boutaire.

The US may erroneously argue that since Rwanda has abolished the death penalty it has cured its flawed penalty structure. Yet the *Munyakazi* court considered this factor and still found the Rwandan penal system unfair, absent safeguards that to ensure a defendant would not receive life imprisonment in isolation under Rwanda’s ambiguous legal code⁹⁹ And while these courts have suggested the Rwandan Parliament might cure this ambiguity via an official interpretation, neither this nor a law of clarification has passed the Rwandan Parliament.¹⁰⁰

⁹⁵ U.S. DEPARTMENT OF STATE, HUMAN RIGHTS REPORT: RWANDA (2008), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119019.htm>.

⁹⁶ *Law and Reality*, *supra* note 92, § VIII.

⁹⁷ EVO POPOV, *Inconsistency and Impunity in International Human Rights Law*, 33 G. WASH. INT’L L. REV. 363, n.98 (2001) (citing S.C. Res. 977, U.N. SCOR, 50th Sess., 3502nd mtg., U.N. Doc. S/RES/977 (1995)).

⁹⁸ Compromis, *supra* note 14, ¶ 4.

⁹⁹ Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36-R11bis, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis, ¶ 40 (Oct. 8, 2008).

¹⁰⁰ *Id.* at ¶ 18.

The US may point to new laws, improved efficiency, and trained judges as evidence of Rwandan judicial independence. But as one former Rwandan policeman stated, “[y]ou see what’s on paper but you don’t know the truth.”¹⁰¹ Technical changes, on their face, do not take into account their effect on the fairness of a judicial system. Actual fairness, not the appearance of it, was the basis of the ICTR transfer denials and should be this Court’s concern for Rutaganda.

The US may assert that *Munyakazi*, *Kanyarukiga*, and *Hategekimana* are inapplicable because in Rule 11 transfers, the burden is on the prosecutor to establish the fairness, while here the burden is on the defendant to establish unfairness. Yet, this argument is misguided. First, regardless of where the burden lies, the importance of these rulings is that in all three instances an international court came to the same conclusion: Rwanda’s judiciary is unfair. Second, the court’s conclusion deserves weight because it is one of the few instances where an international court analyzed the Rwandan judicial system. The recent ICTR cases finding that the Rwandan district courts are unfair despite apparent legal guarantees should lead the Court to one conclusion: Rwanda cannot afford Rutaganda a fair trial.

CONCLUSION

The US violated Canada’s territorial sovereignty, and its obligations under the US-Canada Extradition Treaty. The US also evaded the Treaty, in violation of international law. Finally, the US violated Rutaganda’s human rights, which would be further violated if the Court transferred him to Rwanda where he could not get a fair trial.

Respectfully Submitted,

Agents for Canada, 2010-03A

¹⁰¹ *Id.*