

**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 RESPONDENT

TEAM#: 2010-3R

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STATEMENT OF JURISDICTION

The United States of America (“U.S.” or “Respondent”) and Canada (“Canada” or “Applicant”), (Collectively “the Parties”), have submitted their differences regarding Emanuel Rutuganda to the International Court of Justice in accordance with Article 36(1) of the Statute of the International Court of Justice.¹ The Parties have agreed to the facts presented in the Compromis² and any subsequent clarifications. The U.S. and Canada have agreed to accept the judgment of the International Court of Justice as final and binding.

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

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

STATEMENT OF FACTS

Emanuel Rutuganda is an ethnic Hutu with Rwandan and Canadian citizenship.³

Rutuganda's parents, both Rwandan nationals, raised him in Kigali, Rwanda from shortly after his birth on April 10, 1978.⁴ His father, Pierre Rutuganda, died in 1993 as a Colonel in the Hutu dominated Rwandan army.⁵ Shortly after his father's death, Rutuganda followed in his father's footsteps by joining the *Interhamwe*, a paramilitary organization linked with the Hutu army.⁶ Rutuganda continued as a soldier in the *Interhamwe* throughout the duration of the Tutsi Genocide.⁷

In June 1994, Emanuel Rutuganda and twelve other Hutu soldiers burned alive and shot at least 275 defenseless Tutsi children in the Boutaire High School Massacre, one of the worst atrocities comprising the Rwandan Genocide.⁸ Rutuganda and his co-conspirators surrounded a detention center for Tutsi children established by the Hutu army and positioned themselves at each exit, ensuring that no child could escape.⁹ After securing a perimeter around the detention center, Rutuganda set fire to the wood building, burning hundreds of children alive and shooting any that tried to escape.¹⁰ There is no evidence that suggests Rutuganda was ever ordered by the *Interhamwe* to murder the Boutaire children, and thus it is likely he and his co-conspirators committed such atrocities out of pure malice and hatred towards the Tutsis.¹¹ Shortly after this

³ Compromis Between Canada and the United States of America to Submit to the International Court of Justice Their Differences Regarding Emanuel Rutuganda, ¶ 1 (jointly notified to the Court on 24 October 2009) [hereinafter *Compromis*].

⁴ *Compromis*, *supra* note 3, ¶ 2.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Compromis*, *supra* note 3, ¶ 4.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Compromis*, *supra* note 3, ¶ 4.

unspeakable atrocity, Rutuganda and his mother, Marie, escaped any criminal proceedings by sneaking off to Canada.¹² Adding insult to the families of the victims of the Boutaire children, Rutuganda was never subject to any criminal proceedings of any kind in Canada, in fact, Rutuganda prospered financially.¹³ Rutuganda lived free from criminal consequences in Canada, and later married a Canadian woman, Lucette Campbell, and had three children together.¹⁴

In 2001, after starting to recover from the genocide, the Rwandan government issued an indictment for Rutuganda for his role in the Boutaire High School Massacre.¹⁵ Canada repeatedly ignored Rwanda's reasonable request for extradition because Canada feels, erroneously, that Rutuganda was a victim and that Rwanda could not provide a fair trial.¹⁶ Because Canada was acting as a safe haven for international criminals, INTERPOL, at the request of Rwanda, began circulating a Red Notice for Rutuganda's arrest with a view towards extradition in January of 2002.¹⁷

To implement the Genocide Accountability Act of 2007, Congress delegated to the President the Inter-Agency Working Group for Human Rights Violators ("IAWGHR"), which was comprised of various executive cabinet members.¹⁸ On July 7, 2009 the IAWGHR began focusing on Emanuel Rutuganda.¹⁹

On July 21, 2009 the US Immigration and Customs Enforcement ("ICE") notified the IAWGHR that Rutuganda's mother, Marie, was traveling to the Detroit Clinic for a medical

¹² Compromis, *supra* note 3, ¶ 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Compromis, *supra* note 3, ¶ 4.

¹⁶ Compromis, *supra* note 3, ¶ 5.

¹⁷ *Id.*

¹⁸ Compromis, *supra* note 3, ¶ 6.

¹⁹ Compromis, *supra* note 3, ¶ 7.

procedure.²⁰ The IAWGHR used this information to develop Operation Motown Express (“Motown”), which was a plan to lure Rutuganda into the United States so he could be transferred to Rwanda pursuant the Red Notice.²¹ President Obama signed his approval for Motown the next morning.²²

On July 22, 2009 ICE agents sent Rutuganda an email purportedly from the Detroit Clinic saying that his mother’s health was getting worse, and that he should hurry to see her.²³ Later that day Rutuganda illegally entered the United States using someone else’s passport.²⁴ Upon entering the Detroit Clinic to see his mother, Rutuganda was immediately arrested and taken into custody by ICE agents, and an order of removal was thereafter issued based on his illegal entry into the United States.²⁵ Rutuganda had the opportunity to challenge his removal to Rwanda in several different courts, including the Federal Court of Appeals and the Supreme Court.²⁶ The courts dismissed Rutuganda’s complaints at every stage of the legal process.²⁷

The Government of Canada protested the luring and apprehension of Rutuganda through its Embassy in D.C.²⁸ In an attempt to coerce the U.S. Government, Canada threatened to breach an agreement with the U.S. to keep Canadian troops in Afghanistan until 2011.²⁹ In the interest of maintaining close relations between the two countries, the United States agreed to submit the

²⁰ Compromis, *supra* note 3, ¶ 8.

²¹ *Id.* at ¶¶ 8-9.

²² *Id.*

²³ *Id.*

²⁴ Compromis, *supra* note 3, ¶ 10.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Compromis, *supra* note 3, ¶ 11.

²⁹ Compromis, *supra* note 3, ¶ 12.

dispute regarding Emanuel Rutuganda to the International Court of Justice pursuant to Article 36(1) of the Statute of the International Court of Justice.³⁰

³⁰ *Compromis*, *supra* note 3, ¶ 13.

QUESTIONS PRESENTED

A. Whether the luring of Emanuel Rutuganda violated Canada's territorial sovereignty, the Canada-US extradition treaty, the 1988 Exchange of letters, or Rutuganda's individual rights.

B. Whether the rendition of Emanuel Rutuganda to Rwanda was a violation of international law because neither the U.S. nor Canada had an extradition treaty with Rwanda, Rutuganda was a child soldier when he committed the Boudaire High School Massacre, and/or the courts of Rwanda are incapable of providing a fair trial.

SUMMARY OF ARGUMENT

The U.S. did not violate Canada's territorial sovereignty, the Canada-U.S. extradition treaty, the 1988 Exchange of Letters or Rutaganda's individual rights when it lured Emanuel Rutaganda to the United States. The U.S. never entered Canada and did not exercise any police power or other act of legal process within Canada. Rutaganda entered the U.S. under his own power and for his own interests. Additionally, non-violent luring does not violate customary international law. The U.S.-Canada extradition treaty is a non-exclusive instrument of formal cooperation between the U.S. and Canada. The U.S. practice of luring as an alternative to extradition is well documented and Canada has made no attempt to amend the treaty. Likewise, the U.S. did not violate the 1988 Exchange of Letters, which refers explicitly to civilians and forcible transborder abduction. The U.S. also did not violate Rutaganda's internationally protected human rights. Rutaganda was afforded all the rights given under the ICCPR and customary international law.

Rutaganda's rendition to Rwanda is not a violation of international law because it is widespread state practice to extradite or deport a criminal suspect in the absence of an extradition treaty. Because there was no applicable treaty between Rwanda and either the U.S. or Canada, Rutaganda's rendition could have been achieved in a variety of ways. Rutaganda's status as a child soldier does not relieve him of criminal culpability because he murdered the Boudaire children when he was over the age of fifteen and customary international law holds persons over fifteen accountable for their criminal actions.

Rwanda is also capable of providing Rutaganda with a fair trial in compliance with international standards. If sentenced, Rutaganda will have humane detention conditions.

ARGUMENT

I. The US did not violate Canada’s territorial sovereignty, the U.S.-Canada Extradition Treaty, the Exchange of Letters on Transborder Abduction, or Rutaganda’s internationally protected human rights by luring him to the U.S.

A. The U.S.’s luring of Rutaganda did not violate Canada’s territorial sovereignty.

Luring Emanuel Rutaganda (“Rutaganda”) from Canada did not violate Canada’s territorial sovereignty. The U.S. never exercised its police powers within Canada, and Rutaganda was arrested in the U.S. only after he chose to cross the U.S.-Canada border. In addition, customary international law holds that *jus cogens* crimes are a matter of concern to the international community.³¹ Because Rutaganda’s crimes were part of the Rwandan genocide, his apprehension through luring is acceptable for such an international fugitive.

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1. The U.S. did not physically breach Canada’s boundaries when it lured Rutaganda and therefore did not violate Canada’s territorial sovereignty.

The principle of territorial integrity is not an absolute bar to the U.S.’s ability to lure Rutaganda into the U.S. The traditional concept of territorial sovereignty focuses on physical boundaries and “[s]overeignty in the relations between States ... is the right to exercise therein, to the exclusion of any other State, the functions of a State.”³³ Generally, a

³¹ R Regina v. Klassen, 2008 CarswellBC 2747, 240 C.C.C. (3d) 328, at ¶ 68.

³² Prosecutor v. Dokmanović, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanović (Oct. 22, 1997); *See also* German Federal Constitutional Court, In the Proceedings on the Constitutional Complaint of Mr. Al-M, and his Motion for a Temporary Injunction, Nov. 5, 2003, 2 BvR 1506/03, 43 I.L.M. 774 (2004); Prosecutor v. Nikolić, Case No. IT-94-2-AR73, Decision on the Interlocutory Appeal Concerning Legality of Arrest, ¶ 25 (June 5, 2003).

³³ Island of Palmas (Netherlands v. U.S.) Scott, Hague Court Reports 2d 83 (1932).

sovereign state may not exercise its criminal jurisdiction beyond its territory.³⁴ Notwithstanding, the U.S. did not exercise its criminal jurisdiction within Canada by sending an email to Rutaganda. Similarly, the International Criminal Tribunal for the Former Yugoslavia (ICTY) opined in *Dokmanovic* that luring does not violate the principle of territorial integrity.³⁵ Frustrated that the Federal Republic of Yugoslavia (FRY) refused to extradite Dokmanovic, the ICTY Office of the Prosecutor arranged a meeting with Dokmanovic outside the FRY. Once Dokmanovic crossed the border, ICTY officials promptly arrested him.³⁶ Stressing the lack of “actual physical violation of FRY territory in gaining custody of Mr. Dokmanovic,” the ICTY found that luring is consistent with principles of international law and territorial sovereignty.³⁷ Similarly, Canada’s territorial sovereignty was not breached when the U.S. offered Rutaganda an incentive to cross the U.S. border under his own power and for his own interests.³⁸ Rutaganda’s border crossing was motivated by his own interests despite significant obstacles that afforded him the

³⁴ *The Work of the Sixth Committee at the Forty-Eight Session of the U.N. General Assembly*, 88 AJIL 343, at 357-58 (1993).

³⁵ Prosecutor v. Dokmanović, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanović, ¶ 57 (Oct. 22, 1997).

³⁶ See, e.g., *Dokmanović*, Case No. IT-95-13a-PT.

³⁷ *Id.* at ¶ 77.

³⁸ German Federal Constitutional Court, In the Proceedings on the Constitutional Complaint of Mr. Al-M, and his Motion for a Temporary Injunction, Nov. 5, 2003, 2 BvR 1506/03, 43 I.L.M. 774 (2004).

opportunity to decide against departing Canada – including the lack of a valid passport and the INTERPOL red notice.³⁹

2. The luring of Rutaganda is not a violation of customary international law.

Customary international law requires widespread state practice and *opinion juris*.⁴⁰ However, the ICTY found that luring did not violate territorial sovereignty or customary international law.⁴¹ The ICTY further recognized that national and international case law exists *both in favor and against luring*.⁴² In addition, the German Federal Constitutional Court stated that “it is even doubtful under which preconditions the luring of a prosecuted person out of his or her state of residence by means of trickery – unlike the use of force – can be regarded as an act that is contrary to international law at all.”⁴³ This lack of consensus indicates there is no uniform widespread state practice regarding the use of non-violent luring. Therefore, the U.S. did not violate customary international law when it lured Rutaganda into the United States.

3. The international community’s desire for enforcement of *jus cogens* crimes outweighs Canada’s interest in territorial sovereignty.

³⁹ 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].

⁴⁰ George E. Edwards, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, 26 YALE J. INT’L L. 323 (2001).

⁴¹ Prosecutor v. Dokmanović, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanović, ¶¶ 62-75 (Oct. 22, 1997).

⁴² *Id.*

⁴³ German Federal Constitutional Court, In the Proceedings on the Constitutional Complaint of Mr. Al-M, and his Motion for a Temporary Injunction, Nov. 5, 2003, 2 BvR 1506/03, 43 I.L.M. 774 (2004).

Even if this Court finds that Rutaganda's luring constituted a violation of territorial sovereignty, the U.S. still has jurisdiction over him due to the severity of his alleged crimes.⁴⁴ The international community recognizes that *jus cogens* crimes such as crimes against humanity and genocide affect all nations and consequently, the international community has an interest in punishing these crimes.⁴⁵ The ICTY Appeals Chamber opined that "the damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the [territorial] sovereignty of a state by a limited intrusion in its territory."⁴⁶ Ultimately, this Court should employ a balancing test, in which the principles of justice and accountability outweigh a single state's territorial interests, thereby providing the greater benefit to the international community.⁴⁷

The ICTY Appeals Chamber held that "[u]niversally [c]ondemned [o]ffences are a matter of concern to the international community as a whole. This legitimate expectation needs to be weighed against the principle of State sovereignty."⁴⁸ Professor Michael Scharf also states that "[i]n recent years, several leading scholars...have argued that there is a

⁴⁴ Attorney General of Israel v. Eichmann, 36 I.L.R. 277, 306 (Sup. Ct. 1962).

⁴⁵ Michael P. Scharf, *Aut Dedere, Aut Judicare*, Max Planck Encyclopedia of Public International Law, available at <http://www.mpepil.com/>.

⁴⁶ Prosecutor v. Nikolić, Case No. IT-94-2-AR73, Decision on the Interlocutory Appeal Concerning Legality of Arrest, ¶ 26 (June 5, 2003).

⁴⁷ *Id.*; See also Andrew Calica, *Self-Help is the Best Kind: The Efficient Breach Justification for Forcible Abduction of Terrorists*, 37 CORNELL INT'L L.J. 389, 414 (2004).

⁴⁸ Nikolić, Case No. IT-94-2-AR73, at ¶¶ 25-26.

customary international law to prosecute persons accused of crimes against humanity.”⁴⁹ Further, the German Federal Constitutional Court states that “recent state practice also takes the seriousness of the crime with which the person is charged into account...The protection of high ranking legal interests, which has been intensified on an international level in recent years, can lend itself to justifying the violation of a state’s personal sovereignty that possibly goes along with the use of trickery.”⁵⁰

Genocide and crimes against humanity are *jus cogens* crimes. While Rutaganda is charged with the brutal murder of 275 Tutsi school children and not with crimes against humanity, his alleged crimes were committed in the course of the Rwandan genocide.⁵¹ Similarly, Dokmanovic, who allegedly murdered 200 individuals, was accused of genocide and crimes against humanity.⁵² Therefore, because the number of counts of murder exceed those of Dokmanovic, Rutaganda’s alleged crimes rise to the level of *jus cogens* crimes.⁵³ Coupled with Canada’s failure to prosecute or extradite Rutaganda pursuant to customary international law,⁵⁴ the U.S. had an obligation to the international community to

⁴⁹ Michael P. Scharf, *Aut Dedere, Aut Judicare*, Max Planck Encyclopedia of Public International Law, available at <http://www.mpepil.com/>.

⁵⁰ German Federal Constitutional Court, In the Proceedings on the Constitutional Complaint of Mr. Al-M, and his Motion for a Temporary Injunction, Nov. 5, 2003, 2 BvR 1506/03, 43 I.L.M. 774 (2004) (citing Prosecutor v. Nikolić, Case No. IT-94-2-AR73, Decision on the Interlocutory Appeal Concerning Legality of Arrest (June 5, 2003)).

⁵¹ Compromis, *supra* note 9, at ¶ 4.

⁵² Prosecutor v. Dokmanović, Case No. IT-95-13a-PT, Amended Indictment (Dec. 2, 1997); Rome Statute of the International Criminal Court arts. 5-6, July 17, 1988, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

⁵³ Compromis, *supra* note 9, at ¶ 4.

lure Rutaganda to the U.S. in the pursuit of international justice and healing for the victims of the Rwandan genocide.⁵⁵

B. Luring Rutaganda did not violate the U.S.-Canada Extradition Treaty.

Interpretation of the U.S.-Canada Extradition Treaty (“Treaty”) in light of subsequent state practice reveals that extradition is not the exclusive means by which the U.S. can obtain fugitives from Canada. Even if the luring violated the Treaty, the breach was efficient given the international community’s desire to prosecute *jus cogens* crimes.

1. The U.S. does not view extradition treaties as the exclusive means by which to obtain a fugitive.

The Vienna Convention on the Law of Treaties (VCLT) states that treaties should be interpreted according to “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁵⁶ The Treaty is triggered by a formal request which specifically refers to either the “requesting state” or the “requested state.”⁵⁷ In this case, Canada asserts that the U.S. violated the Treaty, but cannot identify any terms that make the Treaty the exclusive means by which to transfer fugitives between the U.S. and Canada. Further, the U.S. expressly notified Canada that nothing in the Treaty or any other multilateral treaties “provides a basis for the assertion that these treaties are,

⁵⁴ Michael P. Scharf, *Aut Dedere, Aut Judicare*, Max Planck Encyclopedia of Public International Law, available at <http://www.mpepil.com/>; See also Prosecutor v. Nikolić, Case No. IT-94-2-AR73, Decision on the Interlocutory Appeal Concerning Legality of Arrest, ¶ 26 (June 5, 2003).

⁵⁵ *Id.*

⁵⁶ Vienna Convention on the Law of Treaties art. 33, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

⁵⁷ Extradition Treaty Between the United States of America and Canada, U.S.-Canada, Dec. 3, 1971, 27 U.S.T. 983 [hereinafter US-Canada Extradition Treaty].

or were ever intended to be, the exclusive means by which fugitive offenders can be transferred between Canada and the [U.S].”⁵⁸

2. The subsequent practice of alternative means of rendition gave notice to both Parties that extradition is not the exclusive means of rendition.

The VCLT interprets treaties by “subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation.”⁵⁹ The U.S. and Canada ratified the Treaty on December 3, 1971.⁶⁰ The subsequent practice of both the U.S. and Canada indicate that luring is a viable alternative to extradition. For example, the U.S. continues to rely on the Ker-Frisbie doctrine established in 1952, which allows for prosecution of criminal defendants whether or not they have been formally extradited.⁶¹ U.S. case law subsequent to the Treaty reinforces the U.S.’s interpretation that the Treaty is not meant to be exclusive.⁶² Canada also engaged in luring as an alternative means to extradition. In 1973, Canadian officials lured two American citizens to Canada under the guise of testifying as witnesses, but instead arrested them upon entry into Canada.⁶³

⁵⁸ Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 86 AM. J. INT’L L. 109, n. 4 (citing Dept. of State File No. P91 0149-1190/1192); *Id.* at 109 (citing US Embassy Note No. 133, dated May 23, 1991).

⁵⁹ VCLT, *supra* note 26, art. 31(3)(b).

⁶⁰ US-Canada Extradition Treaty, *supra* note 27.

⁶¹ David Levenson, *Court of Appeals of the State of Oregon Rejects Turkish Man’s Claim of Violation of United States-Turkey Extradition Treaty*, 25 No. 9 Int’l Enforcement L. Rep. 360 (2009) (citing *State v. Aydiner*, 228 Or.App. 282, 208 P.3d 515 (2009)).

⁶² *See, e.g.*, *U.S. v. Toscanino*, 500 F.2d 267 (2d Cir. 1974); *Lujan v. Gengler*, 510 f.2d 62 (2d Cir. 1975); *U.S. v. Wilson*, 732 F.2d 404 (5th Cir. 1984); *U.S. v. Yunis* 681 F. Supp. 909 (1988); *U.S. v. Alvarez-Machain*, 504 U.S. 655 (1992); *State v. Aydiner*, 208 P.3d 515 (2009).

⁶³ *R. v. Hartnett, Re Hartnett and the Queen, Re Hudson and the Queen*, 1973 CarswellOnt 273, 1 O.R. (2d) 206, 14 C.C.C. (2d) 69.

In addition, Canada was on notice that the U.S. practiced luring as an alternative to extradition. Canada filed an *amicus* brief in the *Alvarez-Machain* case, which involved alternative means of rendition and the existence of an extradition treaty. Nevertheless, despite Canada's concern for the use of alternatives, Canada has not attempted to formally protest the U.S.'s practice of luring in the Treaty or subsequent Protocols thereto.

Further, Canada had an opportunity to amend the Treaty in 1987 in response to *Jaffee v. Smith*.⁶⁴ In that case, a Canadian citizen was abducted by an American civilian bounty hunter to stand trial in Florida. Afterward, Canada and the U.S. exchanged letters agreeing that *transborder abduction* by civilian bailbond companies or bounty hunters was an extraditable offence under the Treaty. In addition, Canada agreed that the letters were "not intended to create or otherwise alter legal obligations for either Government,"⁶⁵ thereby indicating that Canada did not intend to change the Treaty to make it the exclusive means of rendition between the Parties. Thus, based on the subsequent state practice of both the U.S. and Canada and in light of the plain meaning of the Treaty, extradition is not the only means by which an individual may be obtained from abroad for criminal prosecution.

3. Even if luring violated the Treaty, the breach was efficient given the international community's concern for prosecuting *jus cogens* crimes.

⁶⁴ *Jaffee v. Smith*, 825 F.2d 304 (1987).

⁶⁵ 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].

In the alternative, if this Court finds the U.S. violated the Treaty, this Court should find that the violation was an efficient breach.⁶⁶ In balancing justice and the legal interests of the international community, this Court should find that Canada's failure to prosecute or extradite Rutaganda justified the luring of Rutaganda from Canada. Canada's unilateral position that Rutaganda is not culpable⁶⁷ for his alleged participation in the Rwandan genocide does not reflect customary international law. Efficient breach, in this case, preserves the fundamental principles of accountability where Rutaganda would use international borders to escape justice.

C. The U.S. did not violate the January 11, 1988 Exchange of Letters on Transborder Abduction.

In response to *Jaffe*,⁶⁸ the U.S. and Canada agreed that *forceful transborder abductions* between the U.S. and Canada by civilian bounty hunters is an extraditable offense.⁶⁹ The 1988 Exchange of Letters ("Exchange Letters") refer explicitly to forceful transborder abduction by civilians.⁷⁰ In this case, Rutaganda crossed the U.S. border under his own power and for his own interests. The U.S. law enforcement agents involved were acting under direct order from the President of the United States.⁷¹ The Detroit Hospital

⁶⁶ Andrew Calica, *Self-Help is the Best Kind: The Efficient Breach Justification for Forcible Abduction of Terrorists*, 37 CORNELL INT'L L.J. 389, 414 (2004).

⁶⁷ *Compromis*, *supra* note 9, at ¶ 5.

⁶⁸ *Jaffee v. Smith*, 825 F.2d 304 (1987).

⁶⁹ 1988 Exchange of Letters, *supra* note 35.

⁷⁰ *Id.*

⁷¹ *Compromis*, *supra* note 9, at ¶ 9.

was not acting as a civilian bounty hunter, and was not directly involved in the luring.⁷² Therefore, because none of the terms of the Exchange Letters is applicable to the present case, the U.S. did not violate the Exchange Letters.

D. The US did not violate Rutaganda's protected rights under the International Covenant on Civil and Political Rights or customary international law.

Internationally protected human rights are not violated when deprived pursuant to due process of law.⁷³ As with all crime, the individual's rights are balanced against those of his victims and the interests of justice. The international community recognizes that international *jus cogens* level crimes affect all mankind and perpetrators of such crimes are *hostis humani generis*. The ICTY Appeals Chamber states that "accountability for these crimes is a necessary condition for the achievement of international justice."⁷⁴ Absent gross misconduct on the part of the capturing state,⁷⁵ an individual's fundamental and internationally protected human rights are not violated when deprived pursuant to the process of law.

The International Covenant on Civil and Political Rights (ICCPR) Article 9 states that personal liberty may be deprived "on such grounds and in accordance with such procedure

⁷² Compromis, *supra* note 9, at ¶ 10.

⁷³ European Convention on Human Rights, art. 5, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

⁷⁴ Prosecutor v. Nikolić, Case No. IT-94-2-AR73, Decision on the Interlocutory Appeal Concerning Legality of Arrest, ¶ 25 (June 5, 2003).

⁷⁵ U.S. v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

as are established by law.⁷⁶ The ICTY in *Dokmanovic* reiterated that arbitrary arrest under Article 9(1) of the ICCPR pertained only to forcible abduction and not to luring.⁷⁷

Rutaganda was not mistreated in any way when arrested by the U.S. In conformity with international law, he was informed of the charges against him and subject to full and fair due process in the U.S.⁷⁸ The international community and the people of Rwanda have the right to hold Rutaganda accountable for his alleged crimes in furtherance of the Rwandan Genocide. Therefore, any violation of his individual rights to liberty is counterbalanced by the nature and gravity of his crimes and his individual criminal responsibility for those crimes.

II. Rendition of Rutuganda to Rwanda is not a violation of international law.

A. Rutaganda's rendition to Rwanda in the absence of an extradition treaty is not a violation of international law

The United States is fully within its legal rights to transfer Rutaganda to Rwanda in the absence of an extradition treaty. United States, Canadian and international law all recognize that the transfer of a criminal may take place in the absence of a treaty. The United States is free to either extradite Rutaganda pursuant to an ad-hoc agreement or deport him.

1. International law encourages the transfer of criminal suspects, including when there is no extradition treaty between the requested and receiving states

⁷⁶ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966); ECHR, *supra* note 45, art. 5.

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

⁷⁸ ECHR, *supra* note 45, art 5.

Customary international law recognizes that extradition of a suspected criminal is based on reciprocity and comity, not upon the existence of a treaty.⁷⁹ States either see an obligation to extradite in the absence of a treaty, or the states that find no *obligation* to extradite without a treaty still do so as a ‘polite gesture of mutual regard.’⁸⁰ Several states have codified this principle by enacting domestic legislation that specifically allows for extradition in the absence of a treaty.⁸¹ Customary international law has not yet crystallized to impose an obligation on states to extradite in the absence of a treaty; however, the lack of an obligation does not eliminate a state’s discretion to do so.

2. An extradition of Rutaganda to Rwanda is permissible under US law

While international law encourages the transfer of suspects regardless of a treaty, U.S. law requires that an extradition have some basis in law.⁸² Operation Motown Express and the UN Convention on Genocide provide such a basis in law for extradition.

A congressional-executive agreement is a valid basis in law for extradition.⁸³ President Obama acted in response to Rwanda’s red notice to transfer Rutaganda for prosecution. U.S. courts have held that the President’s actions in foreign relations rise to a congressional-executive agreement if the President acts using authority delegated to him by Congress, or if Congress does

⁷⁹ Geoff Gilbert, *Aspects of Extradition Law*, International Study in Human Rights 26 (Martinus Nijhoff Publishers 1991); I. A. Shearer, *Extradition in International Law* 28 (Manchester University Press 1971).

⁸⁰ See, M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, 319 (3rd rev. ed. 1987).

⁸¹ See, Gilbert, *supra* note 1, at 27.

⁸² *Valentine v. United States*, 299 U.S. 5, 57 S. Ct. 100, 81 L. Ed. 5 (1936).

⁸³ *Elizaphan Ntakirutimana v. Janet Reno*, 184 F.3d 419, 427 (5th cir. 1999), *cert. denied*, 184 F.3d 419 (U.S. 1999).

not later challenge his actions.⁸⁴ Congress delegated to President Obama the authority for Operation Motown and they never later challenged his authority or his actions.

3. Deporting Rutaganda to Rwanda is not in violation of international law

Deportation is regularly used by states as a mechanism to transfer criminal suspects. The overwhelming state practice is to use deportation as an alternative means of transfer.⁸⁵ It is estimated that deportation for criminal charges, even in the presence of a treaty, is more common than extradition due to the relative ease of deportation.⁸⁶ Courts from Canada⁸⁷, India⁸⁸, the United Kingdom⁸⁹, France⁹⁰, Japan⁹¹, Norway⁹², Mexico⁹³, the U.S.⁹⁴, and others have validated deportations of criminal suspects, even when a treaty is present, or while extradition is pending or has been denied. The European Court of Human Rights in the case of *Ocalan v. Turkey*

⁸⁴ *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

⁸⁵ Shearer, *supra* note 1, at 87.

⁸⁶ *Id.*; Gilbert, *supra* note 1, at 194; Alona E. Evans, *International Procedures for the Apprehension and Rendition of Fugitive Offenders*, 74 Am. Soc’y Int’l L. Proc. 274, 276 (1980).

⁸⁷ *Bembenek v. Canada* (Minister of Employment & Immigration), 1991 CarswellOnt 556, 15 Imm. L.R. (2d) 220, 69 C.C.C. (3d) 34 (Ont. Gen. Div. 1991).

⁸⁸ *Muller v. Superintendent Presidency Jail Calcutta*, 22 Int’l L. Rep. 497 (1955).

⁸⁹ *R v. Plymouth Magistrates Court et al., ex p. Driver*, [1985] 2 A11 ER 681; *R v. Brixton Prison (Governor), ex p. Soblen*, [1962] 3 A11 ER 641.

⁹⁰ *R v. Secretary of State for Home Affairs, ex p. Duke of Chateau Thierry*, [1917] 1 KB 922, 932.

⁹¹ *State of Japan v. Mitsuyo Kono and Takao Kono*, 59 Int’l L. Rep. 472 (1971).

⁹² *R v. Staines Magistrates Court Ex p. Westfallen*, [1998] 1 WLR 652, 662.

⁹³ *Stevenson v. United States*, 381 F.2d 142, 143 (9th Cir. 1967).

⁹⁴ *McMullen v. United States*, 953 F.2d 761, 763 (2d Cir. 1992).

observed that the European Convention on Human Rights “does not prevent States co-operating to obtain the ... deportation of fugitive offenders.”⁹⁵”

The Canadian Supreme Court, in *Bembenek v. Canada*, validated deporting an escaped convict back to America instead of triggering the applicable extradition treaty. In explaining their reasoning, Canada admitted that the convict could have been extradited, but one of the offenses she was charged with, escape from prison, was not covered in the extradition treaty and the rule of speciality would have denied the U.S. the opportunity to prosecute that charge. Canada decided it was much less burdensome to them, and much more advantageous to the U.S., to simply deport her.⁹⁶ International criticism of deportation as an alternative to extradition has only occurred where a provision of an extradition treaty is violated. Therefore, Canada’s criticism in this case is unfounded as there is no extradition treaty to be violated between Canada or the US and Rwanda. As Satyadeva Bedi states in his treatise on extradition “... where there is no [extradition] treaty, there is no question of substituting deportation for extradition proceeding[s]. It is a purely friendly act, and if the authorities of the deporting state are able and willing to act upon the information received, they are fully entitled to [deport] the fugitive.”⁹⁷

B. Rutaganda’s status as a child soldier does not negate his criminal culpability for the murder of 275 children.

⁹⁵ Ilias bantekas & Susan Nash, *International Criminal Law* 221 (Cavendish 2003).

⁹⁶ *Bembenek*, *supra* note 11, at ¶¶ 115 – 27; Donald A. MacIntosh, *Human Rights in the Context of Extradition and Deportation*, 8 Can. Crim. L. Rev. 169, 190-91 (2003).

⁹⁷ Satyadeva Bedi, *Extradition: A Treatise on the Laws Relevant to the Fugitive Offenders Within and With the Commonwealth Countries* 407 (William S. Hein & Co., Inc. 2002).

Rutaganda's transfer to Rwanda is not in violation of international law because he was over the age of 15 when he burned and shot 275 children to death⁹⁸, and the international community regularly prosecutes people over the age of 15 for such heinous crimes

1. The bar on recruiting soldiers under the age of fifteen only establishes criminal culpability for the recruiters, and does not absolve criminal culpability for those recruited

Emanuel Rutaganda joined the *Interhamwe* when he was fourteen and a half years old.⁹⁹

The applicable international law when Rutaganda joined the *Interhamwe* was the 1989 Convention on the Rights of the Child ("CRC"), which requires "State Parties ... refrain from recruiting any person who has not attained the age of fifteen years into their armed forces."¹⁰⁰ However, while the CRC obviously establishes criminal culpability for recruiters of children under fifteen, the criminal culpability of those recruited was, curiously, not discussed.

While child soldiers are victims, they are also perpetrators of crimes. A child soldier's "duality, of being both culprit and victim,"¹⁰¹ puts them at the nexus of two separate crimes. The first, their recruitment, may result in charges against their recruiter. This must be judged according to the child's age *at the time of their recruitment*, and if the recruits are under fifteen, then the recruiters are culpable. The second, any crimes they committed while a child soldier, may result in charges against the child. Just as we must judge the culpability of the recruiters based on the child's age *at the time of recruitment*, we must judge the child's culpability based

⁹⁸ Compromis, *supra* note 8, ¶ 4.

⁹⁹ 2010 Niagara Moot Court Competition Clarifications, Correction (Jan. 19, 2010) (hereinafter "Clarifications").

¹⁰⁰ Convention on the Rights of the Child, art. 38(3), Nov. 20, 1989, 1577 U.N.T.S 3 (hereinafter "CRC").

¹⁰¹ Vesselin Popovski & Karin Arts, *International Criminal Accountability and Children's Rights*, United Nations University, Policy Brief, 2006, online at: www.unu.edu/pg/order/childrensRights.

on his age *at the time the crime was committed*. Rutaganda was over the age of fifteen when he committed the Boutaire High School Massacre¹⁰², and he is criminally culpable for his actions.

2. Minors who commit crimes over the age of fifteen are culpable under international law

In most jurisdictions, children who commit crimes when they are fifteen or older are criminally culpable.¹⁰³ There are international statutes establishing proper procedures for the trial of a minor.¹⁰⁴ These provisions would be meaningless if minors were barred from prosecution. Furthermore, the Statute of the Special Court for Sierra Leone specifically calls for the culpability of child soldiers.¹⁰⁵ And Canada has even brought a child soldier to trial.¹⁰⁶ Most illustrative is Article 77, Section 5 of Protocol I, which deals directly with child soldiers and states “[c]hildren who have committed an offense related to [an] armed conflict before their 18th birthday cannot be subject to the death penalty.”¹⁰⁷ This shows that the only limitation on a child soldier’s criminal culpability is that they are not subject to the death penalty.

3. Being a direct combatant in the Boutaire High School Massacre stripped Rutaganda of any protection he may have had as a child soldier

Under international law, a distinction is made between the protections and immunities afforded to combatants and civilians in an armed conflict. A child soldier’s duality, as a civilian

¹⁰² Clarifications, *supra* note 26.

¹⁰³ Katherine Hunt Federle, *Juvenile Justice Reform: Emancipation and Ececution: Transferring Children to Criminal Court in Capital Cases*, 1996 Wis. L. Rev. 447 (1996).

¹⁰⁴ CRC, *supra* note 27, arts. 37 & 40.

¹⁰⁵ Statute for the Special Court for Sierra Leone, Art. 7, U.N. Doc. S/2000/915 (2002).

¹⁰⁶ *Moreno v. Minister of Employment and Immigration*, 21 Imm.L.R.(2d) 221 (Can. Ct. App.).

¹⁰⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 77(5), Dec. 12, 1977, 1125 U.N.T.S. 3 (hereinafter “Protocol I”).

and as a combatant, blurs the line between which protections they may be granted. However, even if Rutaganda were given civilian *and* combatant protections, he would not be protected from prosecution for the murders of 275 defenseless children.

Provisions of international law applicable under armed conflicts include Geneva Convention III,¹⁰⁸ Geneva Convention IV¹⁰⁹ and the Protocols Additional to the Geneva Conventions.¹¹⁰ The Hutu army established a detention center in Boutaire to jail Tutsi children.¹¹¹ The ICTY ruled “every person in enemy hands must be either a prisoner of war and, as such, be covered by the Third Convention; or a civilian covered by the Fourth Convention.”¹¹² Because the Hutu’s were committing genocide against the Tutsis, the Boutaire children were in ‘enemy hands’ and as civilians, or as prisoners of war, they were protected from “violence to life and person, in particular murder of all kinds,”¹¹³ and they were required to “in all circumstances be treated humanely.”¹¹⁴ Thus, the brutal murder of the Boutaire children was a grave breach of the international law on armed conflicts and *jus cogens*.

While combatants are often not criminally culpable for the death of an enemy combatant, no protection exists for the murders of prisoners of war or civilians. Thus, any protection

¹⁰⁸ Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 (hereinafter “Third Geneva Convention”).

¹⁰⁹ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 (hereinafter “Fourth Geneva Convention”)

¹¹⁰ Protocol I, *supra* note 34, art. 51(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 (hereinafter “Protocol II”).

¹¹¹ *Compromis*, *supra* note 8, ¶ 4.

¹¹² *Prosecutor v. Delalic, et. al.*, (IT-96-21-T) (16 Nov. 1998).

¹¹³ Fourth Geneva Convention, *supra* note 36, Art. 3(a).

¹¹⁴ Third Geneva Convention, *supra* note 35, Art. 3.

Rutaganda may have had as a combatant is eliminated due to his murder of the defenseless Bourtaire children. Similarly, Rutaganda loses any protection and immunity he may have had as a civilian. The commentary to Protocol I states “[t]he immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts.”¹¹⁵

C. Rutaganda’s transfer to Rwanda does not violate international law because the Rwandan Courts are fully capable of providing a fair trial

Rutaganda has the right to a fair trial, which includes the right not to be subjected to torture or to cruel, inhuman or degrading treatment.¹¹⁶ There is a substantial burden on Rutaganda to show that there is a “risk of a *flagrant* denial justice,” or that a human rights abuse is likely.¹¹⁷ Rutaganda must do more than merely allege a human rights violation; he must show that it more probably than not will occur. Rutaganda cannot successfully challenge his transfer to Rwanda based on a fair trial because Rwanda exceeds international standards.

1. Rwanda will provide Rutaganda with a fair trial

Rutaganda’s right to a fair trial include the right to a public hearing, to call witnesses, access to adequate counsel and to be judged by an independent judiciary.¹¹⁸ Rutaganda will be provided with a public hearing in the Rwandan national courts.¹¹⁹ The independence of the

¹¹⁵ Int’l Comm. of Red Cross, Commentary: Protocol I, ¶ 1942 (J. Pictet ed. 1987).

¹¹⁶International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171 (hereinafter “ICCPR”); *Soering v the United Kingdom* [1989] 11 EHRR 439, Series A no. 161, 7 July 1989, ¶113.

¹¹⁷ *Soering*, *supra* note 41, at ¶ 113

¹¹⁸ ICCPR, *supra* note 46, art. 14.

¹¹⁹ Rwandan criminal code article 145.

judiciary is guaranteed in the Rwandan Constitution,¹²⁰ and the Appeals Chamber for the ICTR in two cases found that the Rwandan judiciary was sufficiently independent.¹²¹ Rutaganda also will have access to adequate counsel guaranteed by the criminal code¹²² and the Rwandan Bar Association has been rebuilt up to at least 280 lawyers.¹²³ Rwanda also recently received \$43.8 million from Belgium, Germany, Netherlands and the U.S. to further expand its judiciary, in direct anticipation of Rwanda being the main forum for trying suspects from the 1994 genocide after the ICTR closes down.¹²⁴ Furthermore, Rwanda is in compliance CRC and the SMRAJJ standards for juvenile trials.

2. Rutaganda will not be subject to any cruel, inhuman or degrading treatment

Rutaganda will not be subjected to cruel, inhuman or degrading treatment. Rwanda has abolished the death penalty,¹²⁵ and recently built several new prisons and remand cells that exceed international standards.¹²⁶ Rwanda enacted the Transfer Law,¹²⁷ which, *inter alia*,

¹²⁰ Rwanda const. art. 140, 26 May 2003.

¹²¹ *The Prosecutor v. Ildephonse Hategekimana*, (ICTR-00-55B-11bis) (19 June 2008); *Prosecutor v Gaspard Kanyarukiga*, (ICTR- 2002-78-R11bis) (6 June 2008) para.40.

¹²² Republic of Rwanda, Official Journal of July 30, 2004, Law no. 13/2004 of 17/5/2004 concerning the Code of Criminal Procedure, articles 64 and 96.

¹²³ *The Prosecutor v Yussuf Munyakazi*, (ICTR- 97-36A-1) Amicus Curiae Brief of the Republic of Rwanda in the Matter of an Application for the Referral of the above case to Rwanda pursuant to Rule 11bis, para.32.

¹²⁴ Catherine Riungu, *ICTR Given One Year to Wind Up As Govt Receives U.S. \$44 Million Boost*, AllAfrica, online at: <http://allafrica.com/stories/200907131596.html>. (last accessed Jan 26, 2009).

¹²⁵ Organic Law No. 31/2007 of 25 July 2007 relating to the Abolition of the Death Penalty.

¹²⁶ Schabas, *supra* note 57, at 32.

ensures that no prisoner will be subject to life imprisonment in solitary confinement. While the ICTR cited the possibility of life in prison as a concern, the Transfer Law assures that this will not happen and renowned human rights professor William Schabas stated that the ICTR “probably exaggerated the difficulties by the prospect of detention in isolation.”¹²⁸ In fact, the ICTR has recently signed an agreement with Rwanda to house ICTR convicts in Rwandan prisons, commenting that “Rwanda has made significant progress in ensuring it meets the necessary standards of prisons to accommodate ICTR convicts.”¹²⁹

3. The ICTR’s decisions to deny the transfer of suspects to Rwanda

The ICTR’s decision in three cases to deny the transfer of suspects to Rwanda is misleading for two reasons. First, the burden under the ICTR’s rule 11bis transfer statute has a much higher burden than international standards. International law puts the burden on the defendant, while the ICTR is unique in that it puts the burden on the prosecution to prove the receiving state has adequate conditions. Second, the ICTR denied the transfers based solely on reasons that are no longer issues. In fact, the lead ICTR prosecutor publicly stated, after the decision of the ICTR, that transferring cases to Rwanda is an intricate part of the ICTR’s completion strategy.¹³⁰ The main reason cited from the ICTR for denying the transfer of suspects to Rwanda is the availability of witnesses. Professor Schabas noted that the availability

¹²⁷ Organic Law 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the ICTR and other states.

¹²⁸ William Schabas, *supra* note 57, at 17.

¹²⁹ UN News Centre, *Rwanda reaches deal to enforce sentences imposed by UN Genocide Tribunal*, online at: <http://www.un.org/apps/news/story.asp?NewsID=25862&Cr=rwanda&Cr1> (last accessed Nov. 2009).

¹³⁰ Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR, to the UN Security Council, 12th December 2008, online at: <http://www.ictr.org/ENGLISH/speeches/jallow081212.htm>.

of witnesses has been a larger problem in the ICTR, due to its location in Tanzania, and that has not stopped the ICTR from issuing judgments.¹³¹ Furthermore, he states that very few witnesses live outside of Rwanda, and that the ICTR was unable to state any statistics to support their conclusion that many witnesses lived abroad. A study done by Oxford University found that “most defence witnesses [in Rwanda] are willing to testify in genocide hearings ... [and] the impact of defence testimony accounts for the high incidence of domestic acquittal of genocide suspects.”¹³²

CONCLUSION

THEREFORE, the United States respectfully submits that this Honourable Court adjudge and declare that:

- I. The luring of Emanuel Rutaganda did not violate Canada’s territorial sovereignty, the Canada-U.S. extradition treaty, the 1988 Exchange of Letters or Rutaganda’s individual rights;
- II. The rendition of Emanuel Rutuganda to Rwanda is not a violation of international law because states are free to transfer criminal suspects in the absence of an extradition treaty, Rutaganda’s status as a child soldier does not relieve him of criminal culpability and the Rwandan Courts are fully capable of providing Rutaganda a fair trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

Counsel for the Respondent, the Government of the United States (Team #2010-03R).

¹³¹ Schabas, *supra* note 57, at 32.

¹³² Phil Clark & Nicola Palmer, *The International Community Fails Rwanda Again*, Oxford Transitional Justice Research Working Paper Series, online at: <http://static.rnw.nl/migratie/www.rnw.nl/internationaljustice/specials/commentary/090513-rwanda-clarke-redirected>.

