

**2009-2010**  
**NIAGARA INTERNATIONAL MOOT COURT COMPETITION**

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**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#: 2010-5A**

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## STATEMENT OF FACTS

In February 2009 the United States executed the Genocide Accountability Act of 2007 by establishing the “Inter-Agency Working Group for Human Rights Violators.”<sup>1</sup> This Inter-Agency Group was composed of several officials from different agencies of the United States government.<sup>2</sup> This newly formed Inter-Agency’s Group’s attention was drawn to the case of Emanuel Rutaganda by the significant amount of media attention surrounding his case.<sup>3</sup> The media attention of Mr. Rutaganda’s case developed after an episode of “The Wanted” was aired, which claimed Emanuel Rutaganda had perpetrated acts of genocide in Rwanda and was living freely in Canada.<sup>4</sup>

In 1993 the Interhamwe militia, a paramilitary organization with connections to the Hutu army recruited Emanuel Rutaganda into their ranks.<sup>5</sup> Emanuel Rutaganda was only 14 when the Interhamwe militia recruited him into their armed group.<sup>6</sup> Mr. Rutaganda served in the Interhamwe militia for several months during the 1994 Rwandan genocide.<sup>7</sup> The Rwandan government alleged that Emanuel Rutaganda was a part of a group of Interhamwe militia

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<sup>1</sup> *Id.* at ¶ 6.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at ¶ 7.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at ¶ 2

<sup>6</sup> 2010 Niagara Moot Court Competition Clarifications, Correction [hereinafter Clarifications].

<sup>7</sup> *Id.*

members that committed the Boutaire High School massacre.<sup>8</sup> In June of 1994 Mr. Rutaganda and several other militia members allegedly surrounded a detention center for Tutsi children that had been established by the Hutu military.<sup>9</sup> The Interhamwe militia members allegedly set the detention center on fire and shot any individuals fleeing the burning building.<sup>10</sup> Almost 275 Tutsi children died in the blaze and a Rwandan district court charged Mr. Rutaganda and the other members of the Interhamwe militia with 275 counts of murder.<sup>11</sup> The Rwandan government has issued several requests to the Canadian government for Mr. Rutaganda's return to Rwanda to face prosecution.<sup>12</sup> However, Canada has denied these requests for Mr. Rutaganda's surrender to Rwanda for several reasons. Canada and Rwanda have never ratified a bilateral extradition treaty, child soldiers are victims as opposed to criminals in Canada's view, and the Rwandan courts are unable to guarantee Mr. Rutaganda a fair trial.<sup>13</sup>

Emanuel Rutaganda and his mother fled Rwanda and returned to Canada in August of 1994.<sup>14</sup> Mr. Rutaganda has since established a family as a Canadian citizen and has never faced any criminal proceedings in Canada since returning fifteen years ago.<sup>15</sup> In July of 2009 the United States Immigration and Customs Enforcement (ICE) provided information to the Inter-

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<sup>8</sup> *Id.* at ¶ 4

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at ¶ 3.

<sup>15</sup> *Id.*

Agency Group<sup>16</sup> that led to the development of “Operation Motown Express.”<sup>17</sup> According to ICE, Mr. Rutaganda’s mother traveled from Detroit to Canada for a medical procedure at Detroit Clinic’s Cardiac Center.<sup>18</sup> Based on this information the Inter-Agency Group initiated a plan called “Operation Motown Express,” which aimed to “lure” Mr. Rutaganda into the United States and then apprehend him.<sup>19</sup>

President Obama approved “Operation Motown Express,” which was immediately implemented with the cooperation of Detroit Clinic.<sup>20</sup> ICE agents emailed Emanuel Rutaganda’s personal BlackBerry device. This email claimed Mr. Rutaganda’s mother was dying and requesting that he immediately travel to the Detroit Clinic to see her before she died.<sup>21</sup> However, his mother’s surgery was a success and she was expected to make a full recovery.<sup>22</sup> Based on these false pretenses Mr. Rutaganda traveled to the United States using a friend’s passport and arrived at the Detroit Clinic to visit his mother.<sup>23</sup> As soon as Mr. Rutaganda entered the clinic he was apprehended and arrested by waiting ICE agents.<sup>24</sup> Based on Mr. Rutaganda’s illegal entry into the borders of the United States an order of removal was issued and Canada was notified of

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<sup>16</sup> *Id.* at ¶ 8.

<sup>17</sup> *Id.* at ¶ 9.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at ¶ 10.

<sup>24</sup> *Id.*

the situation.<sup>25</sup> Several immigration and judicial decisions ensued and finally Mr. Rutaganda's petition for certiorari was denied by the U.S. Supreme Court.<sup>26</sup>

The Canadian government and the Canadian Embassy in Washington D.C. objected to the luring, apprehending, and detention of Mr. Rutaganda, contending it violated the country's territorial sovereignty, the U.S.-Canada Extradition Treaty and the 1988 Exchange of Letters on Transborder Abduction.<sup>27</sup> In addition to these violations, Canada contended that if the United States extradited Mr. Rutaganda to Rwanda they would violate international law.<sup>28</sup>

The Prime Minister of Canada threatened the withdrawal of Canadian troops from Afghanistan in 2010 instead Canada's previously stated departure date of 2011.<sup>29</sup> According to Canada, if the United States did not submit to the jurisdiction of the International Court of Justice to decide the case of Emanuel Rutaganda then the Prime Minister would carry through on his threat and withdraw Canadian troops from Afghanistan.<sup>30</sup> After negotiations with Canada, the United States agreed to refer Mr. Rutaganda's case to the International Court of Justice under Article 36(1) of the ICJ Statute.<sup>31</sup> Canada then agreed to retract their threat to withdraw

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at ¶ 11.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at ¶ 12.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at ¶ 13.

Canadian troops from Afghanistan if the United States did not extradite Mr. Rutaganda to Rwanda until the ICJ case was decided.<sup>32</sup>

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<sup>32</sup> *Id.* at ¶ 14.

## **QUESTIONS PRESENTED**

- A. Did the luring of Canadian citizen Emanuel Rutaganda from Canada violated the U.S.-Canada Extradition Treaty, as amended; Canada's territorial sovereignty; or the internationally protected human rights of Emanuel Rutaganda guaranteed by the International Covenant on Civil and Political Rights and customary international law?
- B. Would the rendition of Emanuel Rutaganda from the United States to Rwanda for trial violate international law because neither the United States nor Canada have an extradition treaty with Rwanda; as a child soldier Rutaganda lacked criminal culpability; or the courts of Rwanda are not capable of providing Rutaganda a fair trial?

## **STATEMENT OF JURISDICTION**

The governments of Canada and the United States, the Parties, appear before the International Court of Justice pursuant to Articles 36(1) and 40(1) of the Statute of the International Court of Justice.<sup>1</sup> The Parties have complied with all requirements of Articles 36(1) and 40(1), and in the Compromis the Parties agree to submit their dispute to the jurisdiction to this Court.

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<sup>1</sup> Statute of International Court of Justice arts. 36, 40, June 26, 1945, 59 Stat. 1055, 3 Bevans 1153.

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## **SUMMARY OF ARGUMENT**

The United States violated its Treaty obligations, customary international law, and the territorial sovereignty of Canada when U.S. law enforcement officers lured Rutaganda into the U.S. The exclusive means for the U.S. to obtain jurisdiction over a Canadian citizen residing in Canada who has been accused of crimes against humanity is through the U.S-Canada Extradition Treaty. It is customary international law that where an extradition treaty exists between two countries, a party to the treaty may not use irregular rendition to circumvent the treaty. Such uses of irregular rendition have been viewed as violations of the territorial sovereignty of a nation and in violation of international law.

The use of a police force acting under color of law to lure an individual out of a country and into a second country may be a use of force under international law. Even if there is not a use of force, luring may be considered a violation of territorial sovereignty under international law and the express domestic laws of several countries, even if the luring does not involve a physical presence in the violated country.

The U.S. violated the fundamental human rights of Mr. Rutaganda when the U.S. lured him from Canada into U. S. borders, and continues to act in violation of his human rights in attempting to extradite him to Rwanda. The U.S. is precluded by customary international law from extraditing Mr. Rutaganda to a country with which the U.S. does not have an extradition treaty. Rwandan courts cannot provide Mr. Rutaganda a fair trial. Furthermore, as a child soldier, Rutaganda lacked criminal culpability and should be recognized as a victim. The only relief that will remedy the violation of the U.S.'s obligations under international treaty and customary law, the violation of Canada's territorial sovereignty, and the violation of Mr. Rutaganda's human rights, is the repatriation of Mr. Rutaganda back to Canada and the return to the *status quo ante*.

## ARGUMENT

### **I. THE “LURING” OF RUTAGANDA BY THE US WAS UNLAWFUL IN THAT IT VIOLATED THE TERRITORIAL SOVEREIGNTY OF CANADA, THE US-CANADA EXTRADITION TREATY, AND RUTAGANDA’S INTERNATIONAL PROTECTED HUMAN RIGHTS.**

#### **A. The U.S.-Canada Extradition Treaty is the Exclusive Means Whereby the Government of the United States May Acquire Personal Jurisdiction of a Canadian Citizen in Canada.**

The extradition treaty between the United States and Canada provides the exclusive means whereby the government of the United States may acquire personal jurisdiction over a fugitive residing in the territorial boundaries of Canada. The United States may not rely on luring, abduction, or any form of so-called irregular extradition to circumvent its treaty obligations. The Treaty on Extradition Between the Government of Canada and the Government of the United States of America of 1971, as amended,<sup>1</sup> provides a comprehensive framework for the extradition of criminal suspects. When the offense for which extradition is requested occurred outside the territory of the requesting country both countries must recognize the crime for which the suspect is accused.<sup>2</sup> In the instant case, both nations do recognize genocide as a crime.<sup>3</sup> The U.S.-Canada Extradition Treaty in no part permits the use of irregular rendition, whether it be by abduction, luring, or other means, as an option outside the treaty framework. In fact, the treaty was amended in 1988 by an Exchange of Letters between the United States and

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<sup>1</sup> Treaty on Extradition between the United States of America and Canada, U.S.-Can., Dec. 3, 1971, 27 U.S.T. 983 [hereinafter U.S.-Canada Extradition Treaty].

<sup>2</sup> *Id.*, art. 3, § 2.

<sup>3</sup> Genocide Accountability Act of 2007, Pub. L. No. 110-151, 121 Stat 1821 (codified at 18 U.S.C. § 1091 (2009)); Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (Can.), amended by S.C. 2001, c. 32, §§ 59-61; 2001, c. 34, § 36.

Canada to specifically acknowledge that a form of irregular rendition, trans-border abductions by U.S. bounty hunters, was a kidnapping crime punishable by the treaty.<sup>4</sup> The exchange of Letters is significant in that it specifically prohibits a form of irregular and demonstrates that the treaty framework is the correct vehicle through which to resolve any U.S.–Canada rendition issues.

Bilateral extradition treaties are widely used as a means to define the unique extradition needs between two countries.<sup>5</sup> The expectation and common understanding is that two countries will enter into a treaty that best suits the extradition needs of the parties.<sup>6</sup> Therefore, what is excluded from a bilateral extradition treaty with respect to rendition or extradition between the countries must be viewed as purposefully and intentionally excluded and not permitted by the treaty. The position of the government of the United States, that in not specifically excluding forms of irregular rendition and violations of territorial sovereignty from the U.S.-Canada Extradition Treaty, such methods are implicitly permitted, is contrary to the common expectation of countries respecting bilateral extradition treaties and customary international law.

It has been the expectation of the parties to the U.S.-Canada extradition treaty that the treaty should be exclusive. In its brief as *amicus curae* in the U.S. case of *U.S. v. Alvarez-Machain*, Canada detailed its expectation and understanding that the U.S.-Canada Extradition Treaty is exclusive.<sup>7</sup> The brief also describes how the United States had recognized the

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<sup>4</sup> Exchange of Letters, U.S.-Can., Jan. 11, 1988, 1988 U.S.T. LEXIS 182.

<sup>5</sup> GEOFF GILBERT, *Aspects of Extradition Law*, in 17 INTERNATIONAL STUDIES IN HUMAN RIGHTS 1, 20 (Martinus Nijhoff 1991).

<sup>6</sup> *Id.*

<sup>7</sup> Brief of the Government of Canada as Amicus Curiae in Support of Respondent, *U.S. v. Alvarez-Machain*, 504 U.S. 655 (1992) (No. 91-712) [hereinafter Canadian Brief].

exclusivity of the treaty up until 1991. Prior to that time, trans-border abductions under color of law were remedied by return of the seized person in the face of official protest.<sup>8</sup> In lodging an official complaint in 1991 following the arrest of Derrick Hills two hundred yards inside the United States by Canadian officials, the U.S., “rather gratuitously,” stated that under U.S. law judicial dismissal or release of fugitives is not an appropriate remedy for violations of territorial sovereignty.<sup>9</sup> The government of Canada protested and continues to protest this interpretation of U.S.-Canada treaty obligations and the use of U.S. procedural law to circumvent the remediation of treaty and territorial sovereignty violations.<sup>10</sup>

To the extent any United States domestic court cases are contrary to an interpretation of the U.S.-Canada Extradition Treaty as exclusive, those cases are not controlling or persuasive. *United States v. Alvarez-Machain* held that the practice of irregular rendition by United States government officials does not defeat the personal jurisdiction of U.S. courts over fugitives so obtained.<sup>11</sup> *Alvarez-Machain* is not binding on the ICJ.<sup>12</sup> Nor is this line of cases persuasive considered in light of customary international law and the common expectations of nations respecting bilateral treaty obligations. The U.S. decision in *Alvarez-Machain* has been roundly criticized by the international community.<sup>13</sup> For example, the Permanent Council of the

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *U.S. v. Alvarez-Machain*, 504 U.S. 655 (1992).

<sup>12</sup> Statute of the International Court of Justice, arts. 38, 59 June 26, 1945, 59 Stat. 1031, 3 Bevans 1153.

<sup>13</sup> See Stephan Wilske, *Jurisdiction Over Persons Abducted in Violation of International Law in*

Organization of American States issued a juridical opinion critical of *Alvarez-Machain*, in that “the decision ignores the obligation of the United States to return Alvarez to the country from whose jurisdiction he was kidnapped.”<sup>14</sup> Nor does the case defeat U.S. domestic obligations to enforce its international treaties<sup>15</sup> or customary international law.<sup>16</sup> *Alvarez-Machain* certainly does not express Canadian expectations of the treaty obligations between the U.S. and Canada. In any event, the ramifications of the treaty violations in *Alvarez-Machain* were vitiated by a procedural holding based on lack of standing by the defendant to claim the treaty violations as a personal defense.

If the United States sought to bring Mr. Rutaganda to justice, the only means available to the United States are the processes of the U.S.-Canada Extradition Treaty. However, the U.S. never made a formal request for the extradition of Mr. Rutaganda.<sup>17</sup> Had the U.S. successfully requested extradition of Mr. Rutaganda, the United States would then be required to try him in its own courts and may not subsequently re-extradite Mr. Rutaganda to Rwanda, under the express terms of the U.S.-Canada extradition Treaty.<sup>18</sup> Such re-extradition is prohibited, absent consent

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*the Aftermath of United States v. Alvarez-Machain*, 5 U. Chi. L. Sch. Roundtable 205, 212-13 (1998).

<sup>14</sup> Legal Opinion on the Decision of the Supreme Court of the United States of America, Organization of American States Permanent Council, *reprinted in* 4 Criminal Law Forum 119, 119 (1993).

<sup>15</sup> *See* U.S. Const. art. VI.

<sup>16</sup> *See* *Paquete Habana*, 175 U.S. 677 (1900).

<sup>17</sup> *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*]

<sup>18</sup> U.S.-Canada Extradition Treaty, *supra* n. 1, art. 12.

by Canada or other limited circumstances not relevant to this case.<sup>19</sup>

**B. The U.S. Inter-Agency Group’s “Operation Motown Express,” which was Developed by the Government of the United States and Executed by Uniformed Officers of the United States in Order to Capture Mr. Rutaganda, Violated Canada’s Territorial Sovereignty.**

1. Operation Motown Express constituted a “use of force against the territorial integrity or political independence” of Canada.

The United States operation Motown Express, implemented at the direction of the highest levels of the United States Executive Branch and conducted by uniformed officers of the United States, constitutes a use of force against the government of Canada and is therefore a violation of Canada’s territorial sovereignty. Under the United Nations Charter, “[a]ll members shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.”<sup>20</sup> This prohibition against the use of force is also reinforced by the obligations of the NATO treaty, to which both the United States and Canada are members.<sup>21</sup> In the present case, Operation Motown Express was authorized by the President of the United States. It was a military or police operation executed by officers of the United States Immigration and Customs Enforcement (ICE). The ICE officers are uniformed officers of the United States who acted under color of law. The use of lures by state officers in such circumstances may be viewed by nations as a use of force.<sup>22</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> U.N. Charter art. 2, para. 4.

<sup>21</sup> North Atlantic Treaty art. 1, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

<sup>22</sup> JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 426 (1996).

2. Even if Operation Motown Express was not a “use of force” in the conventional sense, the luring of Mr. Rutaganda to the United States was a violation of Canada’s territorial sovereignty

Even if the “luring” of Mr. Rutaganda conducted pursuant to Operation Motown express did not constitute a use of force under international treaties and conventional international law, Canada considers the luring of its citizen Rutaganda to the United States by U.S. law enforcement agencies to be in itself a violation of Canada’s territorial sovereignty. The use of subterfuge to “lure” a fugitive within the territorial jurisdiction of a country is widely viewed as a violation of territorial sovereignty.<sup>23</sup> This wide-spread interpretation of luring as a violation of territorial sovereignty is even acknowledged by the U.S. in its training manual for Federal District Attorneys: “[i]n addition, some countries may view a lure of a person from its territory as an infringement on its sovereignty. Consequently, a prosecutor must consult with the Office of International Affairs before undertaking a lure to the United States or a third country.”<sup>24</sup>

Luring may be recognized as a territorial violation even if the luring does not involve a physical presence by police agents of the luring country and is effected through email or over the phone<sup>25</sup> by the explicit decree of many countries. Its is, for example, recognized as a crime in Switzerland. The Swiss penal code states: “[w]hosoever, using violence, ruse or threat, lures a person abroad in order to deliver him to an authority, a party or another organization abroad, or

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<sup>23</sup> See Paust, *supra* n. 22; Thomas G. Snow, *The Investigation and Prosecution of White Collar Crime: International Challenges and the Legal Tools Available to Address Them*, 11 William and Mary Bill of Rights Journal 209, 230 (2002).

<sup>24</sup> U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-15.630 (1997). Available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/15mcrm.htm#9-15.630](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm#9-15.630).

<sup>25</sup> See Snow, *supra* n. 23.

to put his life or physical integrity in danger, will be punished by reclusion.”<sup>26</sup> In the courts of New Zealand, Britain, Zimbabwe South Africa, and Switzerland, a case against person over whom personal jurisdiction has been obtained through abduction from a foreign country will be dismissed.<sup>27</sup> The United States policy of using luring as a permitted method of irregular rendition stands in opposition to the world community.

3. None of the exceptions that might permit irregular rendition in some limited circumstances apply to the case of Mr. Rutaganda.

Even if luring is permitted as a method of irregular rendition in some limited circumstances, it cannot be permitted in the present case. Any apparent rulings of international courts that luring is different than kidnapping are distinguishable. The motion for release before the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Slavko Dokmanovic* distinguished luring from abduction, but it did so in the context of an absence of an explicit extradition treaty in a situation where the luring officials acted under color of a arrest warrant and UN authority.<sup>28</sup>

The present case also does not fall under the so-called “Eichmann exception.” First, it is uncertain whether there is such a thing recognized by the international community as an “Eichman exception,” or if the supposed exception is the fabrication of commentators. The abduction of Nazi fugitive Eichman by Israeli Mosad agent from Argentina in 1960 was met by

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<sup>26</sup> Schweizerisches Strafgesetzbuch, Code Penal Suisse, Codice Penale Svizzero [STGB, CP, CP] [SWISS PENAL CODE] art. 271(2) (Switz.)

<sup>27</sup> See Paust, *supra* n. 22.

<sup>28</sup> Prosecutor vs. Slavko Dokmanovic, IT-95-13a-PT, Decision on the Motion for Release by the Accused (Oct. 22 1997) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

condemnation from the government of Argentina and the U.N. Security Council.<sup>29</sup>

Furthermore, the INTERPOL Red Notice does not provide an independent basis for the United States to fail in its international obligations to Canada and Mr. Rutaganda. A red Notice is not an international arrest warrant.<sup>30</sup> More analogous to an “international wanted poster,”<sup>31</sup> the red Notice provides no basis for individual countries to violate treaty obligations and international law in the pursuit of fugitives.

**C. The U.S. Violated Mr. Rutaganda’s Internationally Protected Human Rights when he was Lured under False Pretenses from Canada and then Detained in the U.S.**

International law specifically recognizes rights that the United States violated in abducting Mr. Rutaganda. Article 9 of the International Covenant on Civil and Political Rights states “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”<sup>32</sup> The Universal Declaration of Human Rights Article 12 states: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.”<sup>33</sup> The Universal

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<sup>29</sup> M. Lippmann, *The Trial of Adolf Eichmann and the Protection of Universal Human Rights under International Law*, Houston Journal of International Law, Autumn 1982, pp.1–34.

<sup>30</sup> INTERPOL, *Wanted*, Jan. 25, 2010, <http://www.interpol.int/Public/Wanted/Default.asp>.

<sup>31</sup> *Id.*

<sup>32</sup> International Covenant on Civil and Political Rights, Article 14(1), G.A. Res. 2200A (XXI), U.N. Doc A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

<sup>33</sup> Universal Declaration of Human Rights, G.A. Res. 217 A (III), Art. X (Dec. 10, 1948) [hereinafter UDHR].

Declaration of Human Rights Article 13 also states: “Everyone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own, and to return to his country.”<sup>34</sup> The United States interfered with Mr. Rutaganda’s right to free movement, liberty, and security of person. The right to security of person has been recognized by international tribunals in the context of luring. The European Court of Human Rights in *Stocké v. Germany* stated in dicta that luring on the part of state authorities may constitute a violation of the “individual right to security” under the European Convention on Human Rights<sup>35</sup> The court in *Dokmanovic* acknowledged the reasoning of *Stocké*, but was able to distinguish the case.

## **II. THE RENDITION OF EMANUAL RUTAGANDA FROM THE UNITED STATES TO RWANDA WOULD VIOLATE CUSTOMARY INTERNATIONAL LAW AND ALSO THE FUNDAMENTAL HUMAN RIGHTS OF MR. RUTAGANDA.**

### **A. It is customary international law and preemptory international norm that a State may only extradite an individual to a country they have an extradition treaty with.**

The lack of an extradition treaty between the U.S. and Rwanda prevents the extradition of Emanuel Rutaganda from the U.S. to Rwanda. The recognized norm of the international community is to “extradite by virtue of a treaty ... though reciprocity and comity still exist as legal bases relied upon by a number of states.”<sup>36</sup> Several academics have observed that “[d]elivery of individuals to a requesting sovereign was usually based on pacts or treaties, but it also occurred on the basis of reciprocity and comity (as a matter of courtesy and good will

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<sup>34</sup> *Id.*

<sup>35</sup> *Stocké v. Germany*, Judgment of 19 March 1991, Eur.Ct.H.R. (Ser. A) No. 199 (*cited in* Prosecutor v. Slavko Dokmanovic, *supra*, n. 28).

<sup>36</sup> M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 36, FN 73 (4<sup>th</sup> ed. 2002).

between sovereigns).”<sup>37</sup> There is no history of U.S. extradition to Rwanda and also no reciprocity or comity between Rwanda and the United States that would exist as legal bases for the extradition of Mr. Rutaganda.

The Restatement (Third) of Foreign Relations Law of the United States states that “an agreement will not supersede a prior rule of customary law that is a preemptory norm of international law; and an agreement will not supersede customary law if the agreement is invalid because it violated such a preemptory norm.”<sup>38</sup> The U.S. Supreme Court has even acknowledged prior customary international law that is a preemptory norm in regards to extradition in *United States v. Rauscher*. The Court stated in this case that:

it may be stated as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.<sup>39</sup>

The U.S. recognized that in order for extradition to occur, nations must create a bilateral extradition treaty, regardless of the presence of comity between the two States.<sup>40</sup> “The development of bilateral treaties between nations has become the norm to regulate extradition. By present-day standards, extradition between countries is not considered an obligation in the absence of a formal treaty.”<sup>41</sup> In the present case involving Mr. Rutaganda there is no

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<sup>37</sup> *Id.*

<sup>38</sup> Restatement (Third) of Foreign Relations Law of the United States § 102 cmt. *j* (1987).

<sup>39</sup> *U.S. v. Rauscher*, 119 U.S. 407, 412 (U.S. 1886).

<sup>40</sup> *Id.*

<sup>41</sup> Deflem, Mathieu, and Kyle Irwin. 2006. "Extradition, International." Pg. 352-354 in

international agreement, such as an extradition treaty, in place between either the U.S. and Rwanda or Canada and Rwanda. Therefore, the customary law of not extraditing individuals to countries in the absence of a valid extradition treaty is a preemptory norm of international law and it should take precedent. The U.S. should not violate recognized customary international norms and U.S. domestic law.

The UN Model Treaty of Extradition provides mandatory and optional grounds for refusal to extradite an individual to a requesting State.<sup>42</sup> Canada is mandated to refuse extradition of Mr. Rutaganda to Rwanda under the UN Model Treaty of Extradition because he “would not receive the minimum guarantees in criminal proceedings, as contained in the ICCPR, Article 14”<sup>43</sup> under the current Rwandan justice system. Furthermore, a country may refuse to extradite an individual “[i]f the person whose extradition is requested is a national of the requested State. Where extradition is refused on this ground, the requested State shall, if the other State so requests, submit the case to its competent authorities.”<sup>44</sup> Mr. Rutaganda was a citizen of Canada and Canada,<sup>45</sup> as the requested State, was justified under Article 4(a) of the UN Model Treaty on Extradition to refuse to extradite Mr. Rutaganda to Rwanda. Furthermore, Rwanda never

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*Encyclopedia of American Civil Rights and Liberties*, edited by Otis H. Stephens, Jr., John M. Scheb II, and Kara E. Stooksbury. Westport, CT: Greenwood Press.

<sup>42</sup> UN GENERAL ASSEMBLY, UN MODEL TREATY ON EXTRADITION ADOPTED BY GENERAL ASSEMBLY RESOLUTION 45/116 (1990), *reprinted in* HUMAN RIGHTS AND THE ADMINISTRATION OF JUSTICE, PUBLISHED BY KLUWER LAW INTERNATIONAL at 614-615 (Christopher Gane ed., Mark Mackarel ed.) (1997) [hereinafter UN Model Treaty on Extradition].

<sup>43</sup> *Id.* at 614.

<sup>44</sup> *Id.* at 615.

<sup>45</sup> Compromis, *supra* n. 17, ¶ 2.

requested that Canada submit Mr. Rutaganda's case to its competent authorities.<sup>46</sup> Therefore, under the UN Model Treaty on Extradition Canada was justified in refusing to extradite Mr. Rutaganda to Rwanda because Canada lacked an extradition treaty with Rwanda, the Rwandan courts can not provide Mr. Rutaganda with a fair trial and as a child soldier, Mr. Rutaganda was a victim of the genocide under Canadian law.<sup>47</sup>

**B. Emanuel Rutaganda lacked criminal culpability as a child soldier and should be considered a victim as opposed to a proponent of crimes against humanity.**

The Rome Statute of the International Criminal Court considers the conscription of children under the age of 18 into "fighting forces as a war crime and a crime against humanity."<sup>48</sup> The UN Convention of the Rights of the Child dictates the internationally recognized rights of the child. Rwanda signed this Convention in 1990 and ratified it in 1991.<sup>49</sup> States that agree to abide by the obligations of the Convention by either ratifying or acceding to it have made a pledge to be held accountable under the terms of the Convention by the international community.<sup>50</sup> In furtherance of the Convention, States are mandated to create policies and take appropriate steps to provide for the best interests of the child and recognize a child's fundamental human rights.<sup>51</sup>

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<sup>46</sup> See generally Compromis, *supra* n. 17.

<sup>47</sup> Compromis, *supra* n. 17 at ¶ 5.

<sup>48</sup> U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90

<sup>49</sup> U.N. Convention on the Rights of the Child (1989). UN General Assembly Document A/RES/44/25.

<sup>50</sup> UNICEF, *Convention on the Rights of the Child*, Aug. 28, 2008, available at: <http://www.unicef.org/crc/>

<sup>51</sup> *Id.*

In addition to this Convention, an Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict was drafted by the UN and the international community. This Protocol's aim was to reinforce the implementation of the Convention and also increase the rights and protections of children during armed conflicts.<sup>52</sup> Under this Protocol children under the age of eighteen are entitled to special protections. In Article 1 and 2 it states that States must make sure that members of their armed forces that are not eighteen do not take direct part in hostilities and that they are not compulsorily recruited into the armed forces.<sup>53</sup> Under Article 4, armed groups that are distinct from the armed forces of the State must not recruit or use any individual in direct hostilities who has not reached the age of eighteen.<sup>54</sup> States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.<sup>55</sup>

If the Interhamwe militia, who were accused of taking part in the Boudaire Massacre in 1994,<sup>56</sup> were a military arm of the Hutu-dominated government, then the government had a duty to make sure that Rutaganda took no part in hostilities, as he was only 15.<sup>57</sup> Furthermore, Rutaganda was only 14 when he was recruited by the Interhamwe militia<sup>58</sup> in direct violation of

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<sup>52</sup> UNICEF, *Convention on Rights of the Child, Optional Protocol on the involvement of children in armed conflict*, Feb. 10, 2006, available at: [http://www.unicef.org/crc/index\\_30203.html](http://www.unicef.org/crc/index_30203.html)

<sup>53</sup> *Id.* at 2.

<sup>54</sup> *Id.* at 3.

<sup>55</sup> *Id.*

<sup>56</sup> Compromis, *supra* n. ¶ 17

<sup>57</sup> *Id.* at ¶ 2.

<sup>58</sup> 2009 Niagara Moot Court Competition Clarifications, Correction (Jan. 20, 2009) [hereinafter

the Optional Protocol. If the Interhamwe militia were considered an armed group that was distinct from the State armed forces then this militia was prohibited from recruiting or using any individual under the age of 18 in direct hostilities and the State had a duty to prevent Rutuganda's recruitment at 14 and his alleged active participation in hostilities at 15<sup>59</sup> by enacting legal measures.<sup>60</sup> Canada recognizes a child soldier as a victim<sup>61</sup> and was the first government to ratify the Optional Protocol to the Convention of the Rights of the Child on the involvement of children in armed conflict.<sup>62</sup> The United States also signed the Optional Protocol in 2000 and ratified it in 2002.<sup>63</sup> The Optional Protocol mandates governments to take all practical steps to ensure that children under the age of eighteen do not take direct part in hostilities during armed conflicts.<sup>64</sup> The Optional Protocol also applies to armed groups. Armed groups are prohibited from any voluntary/forced recruitment of child soldiers and/or the use of children under the age of 18 in direct hostilities.<sup>65</sup> The United States signed and ratified this Optional Protocol. The United States realized the need to provide additional protections for

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Clarifications].

<sup>59</sup> Clarifications, *supra* n. 58.

<sup>60</sup> U.N. Treaty Collection, Chapter IV Human Rights, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Doc.A/RES/54/263; and C.N.1031.2000.TREATIES-82 of 14 November 2000, available at: <http://treaties.un.org> [hereinafter Optional Protocol].

<sup>61</sup> Compromis, *supra* note 17, at ¶ 5.

<sup>62</sup> Optional Protocol, *supra* n. 60, at 3.

<sup>63</sup> *Id.*

<sup>64</sup> Amnesty International Canada, *Child Soldiers – In the firing line*, available at: <http://www.amnesty.ca/child/childsoldiers.php>

<sup>65</sup> *Id.*

children in armed conflicts when they ratified the Optional Protocol and should apply these protections to Mr. Rutaganda, who was recruited into the Interhamwe militia as a child soldier at the age of 14 and allegedly took part in the Boudaire Massacre at the age of 15.<sup>66</sup>

Rwanda is also a signatory of the Optional Protocol<sup>67</sup> and recognized that children were not culpable for crimes committed during the genocide. Approximately 120,000 people were detained for their roles in the 1994 genocide in Rwanda and 4,500 of these detained individuals were children that were below the age of 18 during the genocide.<sup>68</sup> In January of 2003, the President of Rwanda, authorized an order which released all “genocide minors.”<sup>69</sup> Additionally, Rwanda signed and ratified the African Charter on the Rights and Welfare of the Child, which states in Article 22(2), “States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.”<sup>70</sup> Under Article 2 of the African Charter, a child is defined as “every human being below the age of 18 years.”<sup>71</sup> Therefore, Rwanda should recognize Mr. Rutaganda as a “genocide minor” and he should be released from liability similarly to the other children who were under

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<sup>66</sup> Clarifications, *supra* n. 58.

<sup>67</sup> U.N. Treaty Collection, *supra* n. 23.

<sup>68</sup> Representative of the Commission on Human Rights, *Report of the Special Representative of the Commission on Human Rights on the situation of human rights in Rwanda*, UN Doc. A/55/269, (August 4, 2000).

<sup>69</sup> Coalition to Stop the Use of Child Soldiers, *Global Report 2008 Rwanda*, January 2009, available at: <http://www.childsoldiersglobalreport.org/content/rwanda>

<sup>70</sup> African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990), (Nov. 29, 1999). [hereinafter African Charter].

<sup>71</sup> *Id.* art. 2 at 2-3.

eighteen in 1994 who played a role in the genocide.

In 2007 the Paris Principles were signed by numerous nations in order to address the problem of children being used in armed conflicts. Eighty-four nations have signed and made a commitment to these Principles, showing the international community's resolve to implement the standards espoused in the Paris Principles.<sup>72</sup> In these Principles it states that "children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators. They must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection through numerous agreements and principles."<sup>73</sup>

**C. The international law obligations of the U.S. prevent it from extraditing Rutaganda to Rwanda, because he cannot find a fair trial or due process in that country.**

Rwanda has certain obligations under the ICCPR and the African Charter on Human and Peoples' Right. Rwanda ratified both the ICCPR and the African Charter on Human and Peoples' Rights, which mandates Rwanda to respect the international standards of a fair trial and ensure Rwandans are afforded these fundamental rights. Rwanda must recognize that every person shall have the right to a fair and public hearing by an independent and impartial tribunal and presumed innocent until proven guilty.<sup>74</sup> Under the African Charter individuals also have the

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<sup>72</sup> Bissera Kostova, *More Countries Sign on to Paris Principles Protecting Children from Armed Conflict*, UN Radio Interview with Radhika Coomaraswamy, UN Special Representative for Children and Armed Conflict, <http://www.unmultimedia.org/radio/english/detail/82763.html>.

<sup>73</sup> UN Children's Fund (UNICEF), *The Paris Principles. Principles and Guidelines on Children Associated With Armed Forces or Armed Groups* (February 2007), available at: <http://www.unhcr.org/refworld/docid/465198442.html>.

<sup>74</sup> African Charter, *supra* note 34, Art.7(b) & 7(d).

right to defend himself in person or through a lawyer of his choice.<sup>75</sup> The ICCPR guarantees that all persons shall be equal before the courts and tribunals and an individual facing criminal charges is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>76</sup>

The United Nations Human Rights Committee considered the third periodic report of Rwanda at its meetings in March 2009 and adopted concluding observations in regards to Rwanda.<sup>77</sup> The Committee noted their concerns regarding numerous cases of persons that were reported to have been killed by the Rwandan Patriotic Army (RPA) during and after the 1994 genocide and the lack of prosecution and punishment by the Rwandan courts of certain responsible RPA individuals, which violates article 6 of the ICCPR.<sup>78</sup> Although the Rwandan government has abolished the death penalty, the Committee was concerned that a sentence of life imprisonment in solitary confinement, which is treatment that violates article 7 of the ICCPR.<sup>79</sup> Amnesty International's additional concerns relate to the lack of impartiality of judges and proper protection for the rights of the accused.<sup>80</sup> Finally, the Human Rights Committee noted their concern with the lack of lawyers in the country to provide legal assistance to detained

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<sup>75</sup> *Id.* Art. 7(c).

<sup>76</sup> ICCPR, *supra* n. 32, art. 14(1)

<sup>77</sup> *See generally* U.N. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Convention, Concluding Observations of the Human Rights Committee: Rwanda, U.N. Doc. CCPR/C/RWA/CO/3 (March 31, 2009).

<sup>78</sup> *Id.* at 3.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

individuals, which is a fundamental right listed under article 14 of the ICCPR.<sup>81</sup>

The Rwandan justice system continues to be flawed and unable to provide due process and/or fair trials for the immense number of Rwandans accused of their involvement in the 1994 genocide. Amnesty International urged governments throughout the world to refrain from sending individuals to Rwanda to face charges stemming from their roles in the genocide until their courts can demonstrate that “all national trials are conducted in accordance with international fair trial standards.”<sup>82</sup> Amnesty International concerns with the Rwandan justice system relate to Rwandan court’s inability to investigate and prosecute individuals accused of crimes during the genocide in an impartial and competent manner that meets the “international standards of justice”<sup>83</sup> Furthermore, Amnesty International urged the International Criminal Tribunal for Rwanda to refrain from transferring any of its cases to Rwanda for trial.<sup>84</sup> This recommendation was based on the Rwandan government’s inability to show it can follow the international standards of justice and provide individuals with a fair and impartial trial.<sup>85</sup> In addition to the trials that do not conform to international standards, victims and witnesses are not guaranteed protection by the government.<sup>86</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> Press Release, Amnesty International USA, Rwanda: Genocide Suspects Must Not be Transferred Until Fair Trial Conditions Met (Nov. 2, 2007), available at: <http://www.amnestyusa.org/document.php?id=ENGAFR470142007&lang=e>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

Human Rights Watch published a report titled “Law and Reality: Progress in Judicial Reform in Rwanda.”<sup>87</sup> In this report Human Rights Watch stated, “[b]ased on two years of research for the report, Human Rights Watch has taken the position that, at this time, the independence of the courts and the assurance of fair trial rights in Rwanda are insufficient to permit extradition or transfer.”<sup>88</sup> The Rwandan court system is unable to provide individuals, such as Emanuel Rutaganda with a fair trial and due process, which prohibits the U.S. from extraditing Mr. Rutaganda to Rwanda to face trial. Emanuel Rutaganda will not be afforded the internationally recognized standards of justice if he is extradited to Rwanda and tried under its current court system.

### **III. CONCLUSION**

By improperly luring Emanuel Rutaganda from Canada, his country of citizenship, the U.S. violated the U.S. - Extradition treaty, Canada’s territorial sovereignty, customary international law and Mr. Rutaganda’s internationally protected human rights. Rwanda’s lack of an extradition treaty with the U.S. or Canada, Mr. Rutaganda’s status as a child soldier when he is accused of committing crimes and the Rwandan justice system’s inability to provide a fair trial all contribute to a violation of international law if Emanuel Rutaganda were extradited to Rwanda.

Respectfully Submitted,

Agents for Canada, 2010-5

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<sup>87</sup> Human Rights Watch, *Rwanda: Progress in Judicial Reforms Falls Short, Technical Advances, but Insufficient Fair Trial Guarantees*, July 25, 2008, available at: <http://www.hrw.org/en/news/2008/07/23/rwanda-progress-judicial-reforms-falls-short>

<sup>88</sup> *Id.*