

**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 THE CANADA**

**(Applicant)**

**v.**

**THE GOVERNMENT OF THE UNITED STATES**

**(Respondent)**

**MEMORIAL OF THE RESPONDENT**

**TEAM#: 2010-5R**

**TABLE OF CONTENTS**

Index of Authorities.....iv

Questions Presented.....vii

Jurisdictional Statement.....ix

Statement of the Facts.....x

Summary of the Argument.....1

Argument.....4

  

I. The “luring” of Rutaganda by the U.S. is lawful where the U.S.-Canada Extradition Treaty and Canada’s Territorial Sovereignty have not been violated and Rutaganda’s internationally recognized human rights have been protected. ....3

    A. The United States did not violate the plain language of the U.S.-Canada Extradition Treaty in luring Rutaganda, and luring is consistent with the history and practice between the two states. ....3

    B. The United States did not violate Canada’s territorial sovereignty because the practice of luring is not a use of force and does not constitute a physical intrusion upon the requested state. ....6

    C. The United States did not violate Rutaganda’s internationally protected human rights by luring him into the United States. ....8

  

II. The rendition of Rutaganda from the United States to Rwanda for trial would not violate international law. ....9

    1) Despite neither the United States nor Canada having extradition treaties with Rwanda. Rutaganda’s age at the time of his alleged crimes does not prevent the United States from extraditing him to Rwanda. ....9

        A. As a member state of the United Nations Charter, the United States is obliged to extradite Rutaganda to the International Criminal Tribunal for Rwanda. ....9

        B. The United States may extradite individuals discretionarily in the absence of a formal extradition treaty. ....11

        C. In the absence of a formal extradition treaty with Rwanda the United States may rely upon the Convention on the Prevention and Punishment of the Crime of Genocide as a treaty basis for extradition. ....12

        D. The lack of a Canadian extradition treaty with Rwanda is insignificant because the United States had jurisdiction over Rutaganda when he was extradited to Rwanda. .13

2) The rendition of Rutaganda from the United States to Rwanda for trial would not violate international law because at fifteen years of age Rutaganda was responsible for his actions. ....	14
A. At fifteen years old Rutaganda was competent to participate in armed conflict under the Geneva Conventions. Accordingly, at fifteen Rutaganda should be held responsible for his actions. ....	14
B. Internationally, there is no fixed age at which criminal responsibility attaches. The international policy goal of holding genocidaires accountable for their acts indicates that Rutaganda should be held accountable. ....	14
C. The United Nations has recognized that genocidaires who are fifteen years of age and older may be held accountable for their actions. ....	16
3) The rendition of Rutaganda from the United States to Rwanda for trial does not violate international law because Rwandan courts are capable of proving Rutaganda with a fair trial. ....	17
Conclusion.....	19

## INDEX OF AUTHORITIES

### MULTILATERAL TREATIES, CONVENTIONS & DECLARATIONS

Additional Protocol I to the Geneva Conventions, June 8, 1977, 1125 UNTS 609.....	17
Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, G.A. Res. 260.....	13, 14
Convention on the Rights of the Child, Sept. 2, 1990, G.A. Res. 44/25.....	17
International Criminal Tribunal for Rwanda, June 29, 1995, 331 I.L.M. 1598.....	2, 19
United Nations International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M.360.....	10
Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, Dec. 3, 1973, 39 I.L.M. 270.....	15
Protocol Amending the Extradition Treaty with Canada, U.S.-Can., Dec. 3, 1971, 27 I.L.M. 423.....	1, 5, 6
Report of the I.L.C. to the U.N. General Assembly, 1950, U.N. GAOR, U.N. Doc. A/1316.....	2, 16
Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999.....	3, 17
Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055.....	ix
Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598.....	2, 11, 12
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, Dec. 15, 1989, G.A. Res. 44/128.....	20

Treaty on Extradition Between the United States of America and Canada, U.S.-Canada, Dec. 3, 1971.....1, 4

United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Nov. 29, 1985, G.A. Res. 40/33.....17

United Nations Charter, June 26, 1945, 59 Stat. 1031, U.N.T.S. 993.....1, 7, 8, 9

### **INTERNATIONAL CASES**

The Asylum Case, (Colombia v. Peru), 1950 I.C.J. 266 (Nov. 20).....6

Prosecutor v. Slavko Dokmanovic, Case No. IT 95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanovic, (Oct. 22, 1997).....8

Re Hartnett and the Queen [1973] O.R. 2d, 209, (Can.).....6

### **UNITED STATES CASES**

United States v. Alvarez- Machain, 504 U.S. 655 (1992).....5

United States v. Rauscher, 119 U.S. 407, 412 (1886).....17

### **UNITED STATES REGULATIONS**

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S., § 432(2) (1987).....7

## MISCELLANEOUS

Brief of the Government of Canada as Amicus Curiae Supporting Respondent, U.S. v. Humberto Alvarez-Machain, 504 U.S. 655 (1992) (No. 91-712).....	5
BARBARA M. YARNOLD, INTERNATIONAL FUGITIVES: A NEW ROLE FOR THE INTERNATIONAL COURT OF JUSTICE 56 (Praeger Publishers, 1991).....	11
Chen Reis, <i>Trying The Future, Avenging The Part: Implications Of Prosecuting Children For Participation In Armed Conflict</i> , 28 COLUM. HUM. RTS. 629.....	18
GARY BOTTING, EXTRADITION BETWEEN CANADA AND THE UNITED STATES (M. CHERIF BASSIOUNI ED. 2005).....	6, 7
ICTR Factsheets - <a href="http://www.ictr.org/default.htm">http://www.ictr.org/default.htm</a> .....	12
International Commission of the Red Cross, Child Soldiers 8 (2003) <a href="http://www.icrc.org">http://www.icrc.org</a> .....	17
M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (4 <sup>th</sup> ed. 2002).....	2, 13, 14, 15
Michael Plachta, <i>(Non-)Extradition of Nationals: A never Ending Story?</i> , 13 EMORY INT’L L. REV. 77, (1999).....	7
Michael Scharf, <i>The Prosecutor v. Slavko Dokmanovic: Irregular Rendition and the ICTY</i> , 11 LEIDEN J. OF INT’L LAW 369, (2004).....	1, 9
Melanie M. Laflin, <i>Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-legal Options</i> , 26 J. LEGIS. 315 (2000).....	9
Philippe Kirsch, <i>Applying the Principles of Nuremberg in the International Criminal Court</i> , 6 WASH. U. GLOBAL STUD. L. REV. 555 (2007).....	20
Steven Freeland, <i>Mere Children or Weapons of War – Child Soldiers and International Law</i> , 19 UNIV. LA VERNE L. REV. 19, 49 (2008).....	8, 18

WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW, THE CRIME OF CRIMES 2  
(2d ed. 2009).....10

## **Questions Presented**

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

## **Jurisdictional Statement**

The parties to this dispute, Canada and the United States, hereby present this matter to the International Court of Justice pursuant to Article 36(1) and (2) of the Statute of the International Court of Justice.<sup>1</sup>

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<sup>1</sup> Statute of the International Court of Justice, art. 36, June 26, 1945, 59 Stat. 1055.

## Statement of the Facts

Emanuel Rutaganda (hereinafter “Rutaganda”) was born in Montreal, Quebec on September 10, 1978.<sup>2</sup> Rutaganda was born to Pierre and Marie Rutaganda, Rwandan nationals of Hutu ethnicity.<sup>3</sup> Pierre and Marie moved to Kigali, Rwanda with Rutaganda after they graduated from McGill University in 1979.<sup>4</sup> Rutaganda, born in Canada and raised in Rwanda has citizenship in both countries.<sup>5</sup> At the age of fourteen, Rutaganda was recruited into the *Interhamwe* militia group,<sup>6</sup> a paramilitary organization loosely associated with the Hutu army.<sup>7</sup>

During the Rwandan genocide from April to August of 1994, the Hutu army established a detention center for Tutsi children at the Boudaire High School.<sup>8</sup> Allegedly, during June of 1994 Rutaganda and six other *Interhamwe* militia members set the school on fire and shot anyone attempting to exit,<sup>9</sup> killing 275 Tutsi children<sup>10</sup> during what has come to be known as the “Boudaire High School massacre.”<sup>11</sup> Rutaganda and his mother fled Rwanda for Canada when

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<sup>2</sup> *Clarifications to the Compromis*, Correction.

<sup>3</sup> *Compromis*, ¶ 2.

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

<sup>5</sup> *Id.*

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

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

<sup>8</sup> *Id.* at ¶ 4.

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

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

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

the Hutu government fell, in August of 1994, where he has lived since.<sup>12</sup> As far back as 2001, the Rwandan government has requested that Canada extradite Rutaganda to Rwanda to stand trial for genocide but Canada has refused to do so.<sup>13</sup> In 2002, Rwanda requested that INTERPOL issue a Red Notice mandating Rutaganda's arrest in any country he was found in.<sup>14</sup>

During the summer of 2009 a television show focusing on Rutaganda aired in the United States.<sup>15</sup> The fact that an indicted Rwandan genocidaire was living freely in Canada caused outrage in the United States,<sup>16</sup> and in response the United States government planned and executed "Operation Motown Express."<sup>17</sup> United States agents sent a communiqué<sup>18</sup> to Rutaganda from a clinic where Rutaganda's mother was having a medical procedure done.<sup>19</sup> The communiqué lead Rutaganda to believe that his mother was dying, and that he needed to see her at once.<sup>20</sup> Rutaganda travelled to the United States on a passport borrowed from a friend, and when he arrived at the clinic he was arrested and taken into custody by government agents.<sup>21</sup> A removal order was issued based on Rutaganda's illegal entry, and Canada was notified per the

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<sup>12</sup> *Id.* at ¶ 3.

<sup>13</sup> *Id.* at ¶ 5.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at ¶ 7.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at ¶ 8.

<sup>18</sup> *Id.* at ¶ 9.

<sup>19</sup> *Id.* at ¶ 8.

<sup>20</sup> *Id.* at ¶ 9.

<sup>21</sup> *Id.* at ¶ 10.

2004 Canada-U.S. Consular Notification Agreement.<sup>22</sup> After a series of judicial decisions in which Canada was involved, United States courts determined that Rutaganda could be removed to Rwanda.<sup>23</sup> Canada has protested the removal,<sup>24</sup> and the Prime Minister threatened to withdraw Canadian troops from Afghanistan in 2010 unless the United States agreed to subject the case to the International Court of Justice.<sup>25</sup>

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

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at ¶ 11.

<sup>25</sup> *Id.* at ¶ 12.

## Summary of the Argument

The United States in luring Rutaganda did not violate the extradition treaty between the U.S. and Canada, nor did the act violate principles of territorial sovereignty or human rights. The act of luring Rutaganda does not fall within the purview of the extradition treaty because Rutaganda was not formally requested by the U.S. Even when applicable the plain language of the extradition agreement between the United States and Canada in its present form does not bar acts of luring.<sup>26</sup> Any prohibition on irregular rendition is strictly limited to the use of forced physical abductions by civilians;<sup>27</sup> therefore, luring does not constitute a violation of treaty prohibitions. Furthermore, the act of luring did not breach the physical territory of Canada<sup>28</sup> nor was the act a use of force as contemplated by the U.N. Charter,<sup>29</sup> Therefore, Canada is precluded from making a claim based on territorial sovereignty. Moreover, Rutaganda has not suffered any violations of his protected human rights as his arrest was lawful under U.S. immigration law prohibiting movement between U.S. and Canada without proper legal identification.

The United States will not violate international law by extraditing Rutaganda to Rwanda. Because the United States is a signatory to the United Nations Charter<sup>30</sup> the United States is

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<sup>26</sup> Treaty on Extradition Between the United States of America and Canada, U.S.-Canada, Dec. 3, 1971

<sup>27</sup> Protocol Amending the Extradition Treaty with Canada, U.S.-Can., Dec. 3, 1971, Treaty Doc. 101-17.

<sup>28</sup> Michael Scharf, *The Prosecutor v. Slavko Dokmanovic: Irregular Rendition and the ICTY*, 11 LEIDEN J. OF INT'L LAW 369, 374 (2004).

<sup>29</sup> U.N. Charter, art. 2(4), June 26, 1945, 59 Stat. 1031, U.N.T.S. 993

<sup>30</sup> M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 48 n. 73 (4<sup>th</sup> ed. 2002).

obliged to cooperate with the International Criminal Tribunal for Rwanda (hereinafter “ICTR”).<sup>31</sup> Ultimately, the ICTR will take jurisdiction<sup>32</sup> over Rutaganda and accordingly, the U.S. will act consistently with its obligations as a United Nations Charter Signatory by extraditing Rutaganda. The lack of a formal extradition treaty between the U.S. and Rwanda or Canada and Rwanda is not an impediment. The United States may extradite discretionarily,<sup>33</sup> or may rely upon the Convention on the Prevention and Punishment of the Crime of Genocide as a treaty basis for extradition.<sup>34</sup> Canadian law has no bearing on legal actions taken by the U.S. respecting persons within the territory of the U.S.<sup>35</sup> Rutaganda’s young age does not immunize him from his actions while a member of the *Interhamwe*,<sup>36</sup> he must be held accountable to further the international goal of holding genocidaires accountable.<sup>37</sup> Finally, extraditing Rutaganda to Rwanda does not violate international law, as the ICTR has sufficient safeguards in place to guarantee Rutaganda a fair trial.<sup>38</sup>

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<sup>31</sup> Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 28, U.N. Doc. S/RES/955 (November 8, 1994).

<sup>32</sup> S.C. Res. 955, *supra* note 27, art. 2, art. 3, art. 5.

<sup>33</sup> BASSIOUNI, *supra* note 30, at 36.

<sup>34</sup> *Id.* at 38.

<sup>35</sup> *Id.* at 316.

<sup>36</sup> Principle IV, *in* Report of the I.L.C. to the U.N. General Assembly, U.N. GAOR, Supp. Nos 12, 13-14, U.N. Doc. A/1316 (1950).

<sup>37</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 preamble ¶ 4 (July 17, 1998).

<sup>38</sup> International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev.1 (June 29, 1995).

## ARGUMENT

### **I. The “luring” of Rutaganda by the U.S. is lawful where the U.S.-Canada Extradition Treaty and Canada’s Territorial Sovereignty have not been violated and Rutaganda’s internationally recognized human rights have been protected.**

#### **A. The United States did not violate the plain language of the U.S.-Canada Extradition Treaty in luring Rutaganda, and luring is consistent with the history and practice between the two states.**

The U.S. – Canada Extradition Treaty provides the means by which the U.S. may formally request and acquire personal jurisdiction over a Canadian national such as Rutaganda.<sup>39</sup> The treaty does not explicitly prohibit the use of irregular rendition and provides no bar on the use of luring or enticement by fraud as a means whereby the U.S. may ascertain jurisdiction.<sup>40</sup> Since the U.S. did not initiate a formal extradition request for Rutaganda, and he voluntarily crossed the border into the United States and used a false passport, the extradition treaty is inapplicable to this situation.<sup>41</sup>

Even if the treaty *was* applicable, however, the plain language of the treaty was not violated because there is no express prohibition on the use of luring. The United States has consistently interpreted extradition treaties as permissive of irregular rendition practices, which Canada is aware of and recognizes.<sup>42</sup> This is exemplified in Canada’s *amicus curiae* brief filed in *United States v. Alvarez-Machain*, where the government stated that the decision raised “doubt

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<sup>39</sup> Treaty on Extradition Between the United States of America and Canada, U.S.-Canada, Dec. 3, 1971.

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

<sup>41</sup> Compromis, at ¶ 10.

<sup>42</sup> *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

concerning the correctness of Canada’s perception of the mutually agreed upon manifest scope and purpose of the [U.S.-Canada Extradition] Treaty.”<sup>43</sup>

While the *amicus curiae* brief demonstrates Canada’s recognition of differences in interpretation of the treaty, no limitations on the practice of luring were or have since been negotiation between the two states. The only treaty-related prohibition regarding irregular rendition is that on forced physical abduction. The 1988 Exchange of Letters between the United States and Canada clearly demonstrates the intent of both parties to prohibit only the use of forced physical abduction by private civilians.<sup>44</sup> The narrow scope of this limitation is illustrated by the Canadian Minister’s lamenting on his “honor to acknowledge receipt of today’s letter concerning *transborder abduction of persons found in Canada to the United States of America by civilian agents of bail bonding*” (emphasis added).<sup>45</sup> The fact that the U.S. – Canada Treaty provides for this explicit prohibitive measure, which was amended into the treaty numerous years later, implies that the treaty is neither exclusive nor exhaustive, and demonstrates the state’s evolving needs concerning criminal apprehension. Furthermore, Canadian courts *dicta* has distinguished between “trickery, force, fraud or without legal authority” in the apprehension of a person.<sup>46</sup> This implies that Canadian courts would differentiate luring Rutaganda from an arrest and detention where physical force is used.

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<sup>43</sup> Brief of the Government of Canada as Amicus Curiae Supporting Respondent, *U.S. v. Alvarez-Machain*, 504 U.S. 655 (1992) (No. 91-712).

<sup>44</sup> Protocol Amending the Extradition Treaty with Canada, U.S.-Can., Dec. 3, 1971, Treaty Doc. 101-17.

<sup>45</sup> Protocol Amending the Extradition Treaty with Canada, U.S.-Can., Dec. 3, 1971, Treaty Doc. 101-17.

<sup>46</sup> *Re Hartnett and the Queen*, [1973] 1 O.R.2d 206, 209, (Can.)

Moreover, while the plain language of the treaty fails to suggest that the treaty's means of extradition are exclusive or exhaustive, the voluntary nature of international law and bilateral agreements should further dictate the context in which the treaty is interpreted. As recognized by the International Court of Justice, "local practice" or "regional customary law" provides an analytical context in which the treaty should be interpreted.<sup>47</sup> As a voluntary, reciprocal treaty between two sovereigns sharing a 3,000 mile border and a depth of history, recognition of "regional customary law," is necessary to contextualize the relationship between the United States and Canada in terms of irregular rendition. A historical survey concludes that luring has been a practice of both sovereigns.<sup>48</sup> Asserting that luring is contrary to the mutual understanding as to how individuals may pass between the two governments would be inconsistent with Canada's domestic practice towards wanted suspects residing in the United States.<sup>49</sup>

The United States has consistently interpreted extradition treaties as permissive of irregular rendition practices.<sup>50</sup> Thus, since the plain language of the U.S.-Canada Extradition Treaty was not violated, and luring is consistent with the history and practice between the sovereign states, any claim contrary to the lawfulness of the United States' luring Rutaganda must be dismissed as a permissive form of irregular rendition.

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<sup>47</sup> The Asylum Case, (Colombia v. Peru), 1950 I.C.J. 266 (Nov. 20).

<sup>48</sup> GARY BOTTING, EXTRADITION BETWEEN CANADA AND THE UNITED STATES, (M. Cherif Bassiouni ed. 2005).

<sup>49</sup> *Id.*

<sup>50</sup> U.S. v. Alvarez Machain, *supra* note 42.

**B. The United States did not violate Canada’s territorial sovereignty because the practice of luring is not a use of force and does not constitute a physical intrusion upon the requested state.**

The concept of territorial sovereignty rests largely upon the notion of a nation’s right to exclusively enforce the laws within the boundaries of its territory.<sup>51</sup> International law recognizes that authorities exercising their functions in another State, without the consent of that other State, is a violation of state sovereignty.<sup>52</sup> Territorial sovereignty may be violated by physical intrusions, such as forced, physical abductions, as well as the unlawful use of force by another state.<sup>53</sup>

The practice of luring does not constitute a physical intrusion upon territorial sovereignty. The International Court Tribunal for former Yugoslavia (hereinafter “ICTY”) held in *Dokmanovic v. Prosecutor* that arresting a lured suspect outside of the requested state did not violate territorial sovereignty, even when agents had entered that state to “trick” or lure the suspect.<sup>54</sup> The International Tribunal concluded that “trickery... [or] a ruse... [does not amount] to a forcible abduction or kidnapping.”<sup>55</sup> Operation Motown Express lured Rutaganda to come to the United States under false pretenses.<sup>56</sup> However, as demonstrated by the *Dokmanovic* case, this is not forcible abduction or kidnapping. Furthermore, the Operation was far less intrusive as

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<sup>51</sup> Michael Plachta, *(Non-)Extradition of Nationals: A never Ending Story?*, 13 EMORY INT’L L. REV. 77, 88 (1999).

<sup>52</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S., § 432(2) (1987).

<sup>53</sup> U.N. Charter, art. 2(4), June 26, 1945, 59 Stat. 1031, U.N.T.S. 993.

<sup>54</sup> *Prosecutor v. Slavko Dokmaovic*, Case No. IT 95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanovic, ¶ 36 (Oct. 22, 1997) (hereinafter “Dokmanovic”).

<sup>55</sup> *Id.* at ¶ 57.

<sup>56</sup> *Compromis*, at ¶ 9.

it was conducted solely on U.S. soil, and participating agents did *not* cross the Canadian border at any time.<sup>57</sup> As a member of the United Nations, the United States adhered to the United Nations Charter provisions, which provide that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”<sup>58</sup> Canada’s territorial integrity was not violated because U.S. authorities did not cross the border. Additionally, the state’s political independence was not threatened as military equipment nor action was used by U.S. forces. Operation Motown Express did not constitute a use of force and was therefore consistent with the U.N. Charter.<sup>59</sup>

Furthermore, as scholars have suggested, the use of electronic communiqué to lure suspects from a requested state insulates agents from potential breaches of territorial sovereignty.<sup>60</sup> As was the case in Operation Motown Express, e-mail was the exclusive mean by which Rutaganda was lured from Canada.<sup>61</sup> Comparable to the suspect in *Dokmanovic*, who was apprehended after crossing into neutral territory, Rutaganda was lawfully detained outside the requested state. Moreover, Rutaganda knowingly and voluntarily entered the United States with a false passport<sup>62</sup>, a violation of well-established immigration law. The use of luring by the

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<sup>57</sup> Compromis, at ¶ 5.

<sup>58</sup> U.N. Charter art 2(4).

<sup>59</sup> *Id.*

<sup>60</sup> Michael Scharf, *The Prosecutor v. Slavko Dokmanovic: Irregular Rendition and the ICTY*, 11 LEIDEN J. OF INT’L LAW 369, 374 (2004).

<sup>61</sup> Compromis, at ¶ 5.

<sup>62</sup> Compromis, at ¶ 10.

United States was a non-intrusive means by which it ascertained jurisdiction over Rutaganda without violating Canada's territorial sovereignty. Therefore any claim to a physical intrusion upon Canadian territory must be outright dismissed.

Even if Canada's territorial sovereignty was violated, this Court should apply an exception because Canada has breached its duty of "due diligence" under the penumbras of multilateral treaties in failing to extradite or prosecute Rutaganda for his involvement in acts of genocide.<sup>63</sup> As international public policy, a State's refusal to extradite suspected genocidaires when there is a call for extradition undermines the very core values protected by human rights instruments and customary norms.<sup>64</sup>

**C. The United States did not violate Rutaganda's internationally protected human rights by luring him into the United States.**

There is nothing in the record to support a claim that Rutaganda's basic human rights under the International Covenant on Civil and Political Rights (hereinafter "ICCPR") and the Universal Declaration of Human Rights have been violated, and he is precluded from claiming otherwise. The ICCPR provides that "[n]o 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>65</sup> The Universal Declaration of Human Rights further provides that: "[n]o one shall be subjected to arbitrary interference with his privacy, family,

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<sup>63</sup> Melanie M. Laflin, Comment, *Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-legal Options*, 26 J. LEGIS. 315 (2000).

<sup>64</sup> WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW, THE CRIME OF CRIMES* 2 (2d ed. 2009).

<sup>65</sup> International Covenant on Civil and Political Rights, Art. 9, ¶ 1, *adopted on Dec. 16, 1966*, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316.

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>66</sup> In particular, Rutaganda’s arrest and detainment are not arbitrary; rather, he was lawfully detained in accordance with United States penal law when he illegally crossed the border with falsified documentation.<sup>67</sup>

In the event that Rutaganda has suffered a slight infringement on his protected rights, the proper remedy is not to absolve jurisdiction or bar prosecution. Due to the gravity of his offenses, his arrest should be allowed “[because of] the nature and extent of the crimes charged and by the impossibility of extradition . . . [I]n extreme situations the positive law must yield to natural and moral law.”<sup>68</sup> The acts of genocide committed by Rutaganda, which include the burning of 275 schoolchildren<sup>69</sup>, are so heinous that any imposition on his rights should be exonerated by this Honorable Court.

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<sup>66</sup> Universal Declaration of Human Rights, Dec. 10, 1948, G.A. res. 217A (III), U.N. Doc A/810.

<sup>67</sup> Compromis, at ¶ 10.

<sup>68</sup> BARBARA M. YARNOLD, INTERNATIONAL FUGITIVES: A NEW ROLE FOR THE INTERNATIONAL COURT OF JUSTICE 56 (Praeger Publishers, 1991).

<sup>69</sup> Compromis, at ¶ 4.

## II.

### 1) **The rendition of Rutaganda from the United States to Rwanda for trial would not violate international law despite neither the United States nor Canada having extradition treaties with Rwanda.**

#### **A. As a member state of the United Nations Charter, the United States is obliged to extradite Rutaganda to the International Criminal Tribunal for Rwanda.**

The United States signed the United Nations Charter on June 26, 1945 and ratified it on August 8, 1945,<sup>70</sup> and accordingly the United States is bound by the Charter.<sup>71</sup> The United Nations established the International Criminal Tribunal for Rwanda (hereinafter “ICTR”), which is a sub-organ of the Security Council.<sup>72</sup> As a member state the United States is obligated under Article 28 of the Statute of the ICTR to “cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.”<sup>73</sup>

The ICTR has personal jurisdiction over Rutaganda under several provisions of the ICTR statute,<sup>74</sup> and accordingly the ICTR will ultimately be the judicial body that tries Rutaganda. Article 1 of the Statute of the ICTR provides that the court will have “the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda ... between 1 January 1994 and 31 December 1994.”<sup>75</sup> The Boutaire High

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<sup>70</sup> BASSIOUNI, *supra* note 30, at 48 n. 73 (4<sup>th</sup> ed. 2002).

<sup>71</sup> *Id.* at 48.

<sup>72</sup> *Id.*

<sup>73</sup> S.C. Res. 955, *supra* note 31, art. 28.

<sup>74</sup> *Id.* art.2, art.3, art.5.

<sup>75</sup> *Id.* art.1.

School Massacre occurred in May of 1994<sup>76</sup>, and accordingly falls within the jurisdiction conferred by the Statute of the ICTR. While Rutaganda's indictment was issued by the Rwandan district court in Boutaire,<sup>77</sup> the ICTR ultimately will dispose of the case. The ICTR statute itself "requires United Nations Member States to co-operate with the Tribunal's investigations and the prosecution of accused persons, by complying with the Tribunal's orders or requests to identify, arrest, detain and extradite them to the Tribunal."<sup>78</sup> As Rwanda is a United Nations Charter signatory,<sup>79</sup> Rwanda is obliged to cooperate with the ICTR by extraditing Rutaganda at the Tribunal's request. By extraditing Rutaganda to Rwanda, and ultimately to the ICTR, the United States will act responsibly as a State committed to the stated international goal of the punishment of genocidaires.<sup>80</sup>

**B. The United States may extradite individuals discretionarily in the absence of a formal extradition treaty.**

The United States would not violate international law by extraditing Rutaganda to Rwanda despite the absence of an extradition treaty between the United States and Rwanda. While the recognized norm is to "extradite by virtue of a treaty ... reciprocity and comity still

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<sup>76</sup> *Compromis*, ¶ 4.

<sup>77</sup> *Compromis*, ¶ 4.

<sup>78</sup> ICTR Factsheets - <http://www.ictr.org/default.htm> (follow "About the Tribunal to Facts Sheets to International Cooperation with the Tribunal") (last visited Jan. 26, 2010).

<sup>79</sup> United Nations Member States - <http://www.un.org/en/members/index.shtml> (last visited Jan. 26, 2010).

<sup>80</sup> Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) art.1 (December 9, 1948).

exist as legal bases relied upon by a number of states.”<sup>81</sup> Scholars have noted 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 between sovereigns).”<sup>82</sup> Discretionary extraction has historically been recognized by the United States Supreme Court.

Prior to these treaties, and apart from them, 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 [sic] principles of international law.<sup>83</sup>

Considering the acknowledged goal of the international community to end to the international crime of genocide<sup>84</sup>, and to hold genocidaires accountable<sup>85</sup> the United States would be acting responsibly as a United Nations Charter signator<sup>86</sup> by extraditing Rutaganda to Rwanda, and ultimately the ICTR.

**C. In the absence of a formal extradition treaty with Rwanda the United States may rely upon the Convention on the Prevention and Punishment of the Crime of Genocide as a treaty basis for extradition.**

In the absence of a formal extradition treaty with Rwanda, the Convention on the Prevention and Punishment of the Crime of Genocide may “be relied upon by states that require

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<sup>81</sup> BASSIOUNI, *supra* note 30, at 36.

<sup>82</sup> *Id.* at 30.

<sup>83</sup> United States v. Rauscher, 119 U.S. 407, 412 (1886).

<sup>84</sup> G.A. Res. 260 (III), *supra* note 80, art.1.

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

<sup>86</sup> BASSIOUNI, *supra* note 30, 48 n. 73.

a treaty for extradition.”<sup>87</sup> Per the convention, Rwanda is the proper forum for Rutaganda’s trial.<sup>88</sup> Article I of the Convention on the Prevention and Punishment of the Crime of Genocide recognizes genocide as an international crime, and Article VII mandated Rutaganda’s extradition to Rwanda.<sup>89</sup> The doctrine of *aut dedere aut judicare* dictates that there is a “general obligation to extradite or punish [] with respect to all offenses by which another state is particularly injured. The injured state has a natural right to exact punishment.”<sup>90</sup> By recognizing and responding to the international obligation of *aut dedere aut judicare*, the international community will reduce impunity and increase deterrence for the worst crimes against humanity, because offenders will be held accountable wherever they are found.<sup>91</sup> Holding accountable those involved in the crime of genocide is an established goal of the international legal community,<sup>92</sup> and co-operation in executing this goal has been mandated.<sup>93</sup>

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<sup>87</sup> *Id.* at 38.

<sup>88</sup> G.A. Res. 260, *supra* note 80, ¶ 6.

<sup>89</sup> *Id.* at ¶ 4.

<sup>90</sup> BASSIOUNI, *supra* note 30, at 38.

<sup>91</sup> *Id.* at 39.

<sup>92</sup> Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074 (XXVIII), ¶ 5 (Dec. 3, 1973).

<sup>93</sup> *Id.* at ¶ 3.

**D. The lack of a Canadian extradition treaty with Rwanda is insignificant because the United States had jurisdiction over Rutaganda when he was extradited to Rwanda.**

Rutaganda was arrested by United States ICE officers in Detroit, Michigan.<sup>94</sup> As Rutaganda is in the United States, the United States has territorial jurisdiction over him. Scholars have noted that “[e]very state exercises jurisdiction over all persons, whether they are nationals, resident or nonresident aliens ... within its physical boundaries.”<sup>95</sup> The United States acted consistently with its territorial sovereignty by exacting jurisdiction over a person within its physical boundaries. Canadian law has no controlling effect over actions taken by the United States.

**2) The rendition of Rutaganda from the United States to Rwanda for trial would not violate international law because at fifteen years of age Rutaganda was responsible for his actions.**

**A. At fifteen years old Rutaganda was competent to participate in armed conflict under the Geneva Conventions. Accordingly, at fifteen Rutaganda should be held responsible for his actions.**

The extradition of Rutaganda from the United States to Rwanda would not violate international law because at the time of the Boudouiri High School massacre Rutaganda was fifteen years old.<sup>96</sup> Additional Protocol I states:

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who

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<sup>94</sup> *Compromis*, ¶ 10.

<sup>95</sup> BASSIOUNI, *supra* note 30, at 316.

<sup>96</sup> *Compromis*, ¶ 4.

have attained the age of fifteen years but who have not attained the age of eighteen years the parties to the conflict shall endeavour to give priority to those who are oldest.<sup>97</sup>

At fifteen years of age Rutaganda was competent to take a direct part in hostilities. The Nuremberg Principles recognized “[a]ny person who commits an act which constitutes a crime under international law is responsible and therefore liable to punishment.”<sup>98</sup> Therefore, Rutaganda should be held accountable for his actions.

**B. Internationally, there is no fixed age at which criminal responsibility attaches. The international policy goal of holding genocidaires accountable for their acts indicates that Rutaganda should be held accountable.**

There is no fixed standard at what age criminal responsibility attaches in international law. The Beijing Rules states: “In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.”<sup>99</sup> Similarly, The Convention on the Rights of the Child dictates that States should “establish[] a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.”<sup>100</sup> At fifteen years old Rutaganda was competent to take a direct part in hostilities,<sup>101</sup> and accordingly he was responsible for his actions. Consistent with this proposition, the International Committee of the Red Cross has recognized the principle that “child soldiers are

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<sup>97</sup> Additional Protocol I to the Geneva Conventions, June 8, 1977, Art.77 (2).

<sup>98</sup> Principle IV, *in* Report of the I.L.C. to the U.N. General Assembly, U.N. GAOR, Supp. Nos 12, 13-14, U.N. Doc. A/1316 (1950).

<sup>99</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, ¶ 4.1 (Nov. 29, 1985) (hereinafter “The Beijing Rules”).

<sup>100</sup> Convention on the Rights of the Child, G.A. Res. 44/25, art.40 ¶ 3(a) (Sept. 2, 1990).

<sup>101</sup> Additional Protocol I to the Geneva Conventions, June 8, 1977, Art.77 (2).

responsible, like any soldier, for violations of international humanitarian law, for which they can be held accountable.”<sup>102</sup> This recognition that a child soldier is accountable for his acts is consistent with one of the stated purposes of the Rome Statute: “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured ...”<sup>103</sup>

The issue of child soldiers’ culpability for criminal acts has already been considered by those most affected by the genocide: Rwandans.<sup>104</sup> A study conducted by the Save the Children Federation found that Rwandans supports the view that children who took part in the 1994 genocide should be held accountable.<sup>105</sup> In consideration of this issue, United Nations Children’s Fund project director Ray Torres explained:

[y]ou will hear Rwandans say that if a child was able to kill, if a child was able to discriminate between two ethnic groups, to decide who was a Hutu moderate and who wasn’t, and was able to carry out murder in that way, why should that child be considered differently from an adult? And therefore the punishment should be the same.”<sup>106</sup>

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<sup>102</sup> INT’L COMM. OF THE RED CROSS, CHILD SOLDIERS 8 (2003), [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0824/\\$File/ICRC\\_002\\_0824.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0824/$File/ICRC_002_0824.PDF!Open) (last visited Jan. 26, 2010).

<sup>103</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 preamble ¶ 4 (July 17, 1998).

<sup>104</sup> Steven Freeland, *Mere Children or Weapons of War – Child Soldiers and International Law*, 29 UNIV. LA VERNE L. REV. 19, 49 (2008).

<sup>105</sup> *Id.*

<sup>106</sup> Chen Reis, *Trying The Future, Avenging The Past: The Implications Of Prosecuting Children For Participation In Internal Armed Conflict*, 28 COLUM. HUM. RTS. L. REV. 629, 634-635 (1996).

The international community has made the punishment of the crime of genocide a priority<sup>107</sup>, and holding Rutaganda accountable for his actions is an affirmative step towards that end.

**C. The United Nations has recognized that genocidaires who are fifteen years of age and older may be held accountable for their actions.**

The United Nations has extended the mandate of the Special Court for Sierra Leone (hereinafter “SCSL”) to include children between the ages of fifteen and eighteen.<sup>108</sup> This approach to the question of criminal responsibility of child soldiers is desirable because it

ensures that the crimes committed ... are themselves dealt with. Besides bringing some element of closure and justice to victims and their families, this highlights the unacceptable nature of the crimes *in any circumstance*. This is the important message of international criminal law—that there is certain behavior (acts amounting to international crimes) that is not and cannot be tolerated and will be prosecuted.<sup>109</sup>

As genocide is an international crime<sup>110</sup>, the message must be clear that genocide will not be tolerated and those guilty of committing genocide will be punished as mandated by international law.<sup>111</sup>

**3) The rendition of Rutaganda from the United States to Rwanda for trial does not violate international law because Rwandan courts are capable of proving Rutaganda with a fair trial.**

The ICTR has jurisdiction over Rutaganda, and accordingly Rutaganda will stand trial before the ICTR. As established, the ICTR has jurisdiction over this matter.<sup>112</sup> Accordingly, Rutaganda’s

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<sup>107</sup> G.A. Res. 260 (III), *supra* note 80, art.I.

<sup>108</sup> Freeland, *supra* note 104, at 52.

<sup>109</sup> *Id.*

<sup>110</sup> G.A. Res. 260 (III), *supra* note 80, art.1.

<sup>111</sup> *Id.* at art.4.

<sup>112</sup> *See supra* text accompanying notes 74-79.

trial will be subject to the Rules of Procedure and Evidence (hereinafter “Rules of Procedure and Evidence”).<sup>113</sup> The Rules of Procedure and Evidence provide safeguards sufficient to provide Rutaganda with a fair trial before the ICTR.

Even if Rutaganda were to stand trial in Rwandan courts, Rutaganda would receive a fair trial. As Rwanda became a signatory to the ICCPR on April 16, 1975,<sup>114</sup> Rutaganda would enjoy all of the protections of the ICCPR if tried in Rwanda. These protections guarantee that Rutaganda will receive a fair trial in Rwanda. Further, Rwanda ratified the Second Optional Protocol<sup>115</sup> to the ICCPR on December 15, 2008,<sup>116</sup> effectively eliminating the death penalty in Rwanda. Amnesty International noted that the abolition of the death penalty is a “step forward”<sup>117</sup> for Rwanda, and that the abolition removes what was once a major obstacle to justice in Rwanda.

The right to a fair trial is the most fundamental aspect of any legitimate judiciary. In evaluating whether a particular judiciary does provide a fair trial “we cannot expect [the judiciary] to exactly mirror our national experience. What we should expect is that it guarantees

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<sup>113</sup> International Criminal Tribunal for Rwanda, *supra* note 31.

<sup>114</sup> ICCPR Member States - [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Jan. 26, 2010).

<sup>115</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. Res. 44/128 (Dec. 15, 1989).

<sup>116</sup> United Nations Treaty Collection - [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=enhttp://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-12&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=enhttp://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en) (last visited Jan. 26, 2010).

<sup>117</sup> Rwanda Abolishes Death Penalty - <http://www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-20070802> (last visited Jan. 26, 2010).

due process and a fair trial, which can be and is done in different ways in different countries.”<sup>118</sup>  
Rutaganda will be accorded due process and a fair trial. While some of the processes Rutaganda may be subject to will not mirror exactly the processes that we are used to, we should not allow this to be an impediment to the international goal of bringing genocidaires to justice, and allowing Rwanda to heal in the process.

### **Conclusion**

Premises considered, the government of the United States humbly requests this Honorable Court declares that the United States may, consistent with international law, surrender Emanuel Rutaganda to the government for Rwanda to be tried for genocide and without violation to its great sovereign neighbor Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

Counsel for the Respondent, the Government of the United States (TEAM#: 2010-5).

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<sup>118</sup> Philippe Kirsch, *Applying the Principles of Nuremberg in the International Criminal Court*, 6 WASH. U. GLOBAL STUD. L. REV. 555 (2007).