

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

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

February 2010

**THE GOVERNMENT OF CANADA
(Applicant)**

v.

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

MEMORIAL OF THE APPLICANT

TEAM#: 2010-06A

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QUESTIONS PRESENTED

- I. Whether the “luring” of Canadian citizen Emanuel Rutaganda from Canada violated Canada’s territorial sovereignty, the U.S.-Canada Extradition Treaty, and/or the internationally protected human rights of Emanuel Rutaganda guaranteed by the International Covenant on Civil and Political Rights and customary international law.

- II. 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 the courts of Rwanda are not capable of providing Rutaganda a fair trial.

JURISDICTIONAL STATEMENT

Canada and the United States of America have agreed to submit this dispute to the International Court of Justice pursuant to article 40(1) of the Statute of the International Court of Justice (“Statute”)¹ and in accordance with the Compromis notified to the Court on 24 October 2009. Pursuant to article 36(1) of the Statute, the Court has jurisdiction to decide all matters referred to it for decision. The Parties have agreed to fully implement the decision of the Court.

¹ Statute of the International Court of Justice, June 26, 1945

STATEMENT OF FACTS

I. OPERATION MOTOWN EXPRESS

On July 22, 2009, the United States, initiated “Operation Motown Express” in order to lure Emanuel Rutaganda, a Canadian citizen and former child soldier from Rwanda, from Canada into the United States with the express purpose of transferring him to Rwanda. The Operation was developed by the Inter-Agency Working Group established under the Genocide Accountability Act of 2007 and was approved by U.S. President Obama. Though Rutaganda, his wife, and their three young children had been living in Canada for over 15 years without his receiving a single citation, traffic or otherwise, it was not until a July 7, 2009, broadcast of the NBC television series, “The Wanted,” that the Inter-Agency Working Group focused its attention on Rutaganda.

To implement the Operation, the United States, through its Immigration and Customs Enforcement (“ICE”) agency, sent an email to Rutaganda’s personal BlackBerry device from the Detroit Clinic where Rutaganda’s mother, Marie, was undergoing a specialized medical procedure. The email indicated that his mother’s health was “deteriorating,” that she had asked to see him, and that he should urgently come to the Clinic in order to see her before she died. In reality, the surgery was successful and Rutaganda’s mother was recovering well. That same day, Rutaganda borrowed a friend’s passport in order to enter the United States and visit his mother at the clinic. On entering the Detroit Clinic, ICE agents immediately arrested Rutaganda and an order was issued to remove him to Rwanda based on his illegal entry into the United States.

II. EMANUAL RUTAGANDA

Emanuel Rutaganda was born September 10, 1978 in Canada; however, he also maintains Rwandan citizenship. At the age of 14, following the death of his father, Rutaganda was

recruited into the *Interhamwe* militia, a paramilitary group in Rwanda. Rwanda alleges that, in June 1994, thirteen members of the *Interhamwe* militia, including Rutaganda, set a two-story building on fire, resulting in the deaths of 275 Tutsis. Rwanda has charged the seven identified members with 275 counts of murder in the District Court of South Province Rwanda. In August 1994 Rutaganda and his mother fled to Canada where they established an extremely successful African curio shop. Rwanda has requested that Canada surrender Rutaganda to its criminal justice system for prosecution since 2001. However, the Canadian government views child soldiers like Rutaganda as victims, not criminals. Moreover, Canada does not have an extradition treaty with Rwanda and further believes Rwanda is incapable of offering Rutaganda a fair trial. In January, 2002, at the request of the Rwandan government, INTERPOL issued a Red Notice seeking the arrest of Rutaganda wherever he is found.

III. NEGOTIATIONS

Canada protested the luring and apprehension of Rutaganda and claimed the actions violated its territorial sovereignty and the U.S.-Canada Extradition Treaty. Canada also claimed a violation of its citizen's right to freedom from arbitrary arrest, and that the United States would further violate international law by transferring Rutaganda to Rwanda. In order to preserve the relationship between Canada and the United States, both parties agreed to submit the dispute to this Court and to implement its decision.

SUMMARY OF ARGUMENT

The United States violated the international customary law of non-intervention by luring Emanuel Rutaganda from Canada to the United States in order to remove him to Rwanda. U.S. ICE agents interfered with Canada's sovereign prosecutorial function by sending fraudulent information across the border that had effect within Canada's territory. Additionally, ICE did not receive the consent of Canada before it took action. Consequently, the United States violated customary international law proscribing the use of force or fraud to obtain jurisdiction over a person outside of a state's territory.

The luring also violated the U.S.-Canada Extradition Treaty. Cooperation in law enforcement, the object and purpose of the treaty, is defeated by an interpretation that allows abduction and luring. Especially when interpreted within the context of the relevant international law, the treaty provides the exclusive method of obtaining possession of criminal suspects. The method by which the United States obtained Rutaganda also violated his internationally protected human rights under customary international law. The United States circumvented established procedure for obtaining criminal suspects within the territory of another state and in doing so, violated Rutaganda's right to freedom from arbitrary arrest.

Rendition of Emanuel Rutaganda from the United States to Rwanda for trial would violate international law because the United States has unilaterally declared it will not extradite in the absence of a bilateral extradition treaty. Rwanda and the United States do not have such a treaty, so rendition would violate the legal obligation created by the declaration. Additionally, when the charged crimes occurred, Rutaganda lacked criminal culpability because he was a child by international standards. His arrest and potential rendition to Rwanda therefore amount to a violation of his internationally protected right to freedom from arbitrary arrest.

Finally, the rendition of Rutaganda from the United States to Rwanda for trial would violate his right to a fair trial under international law. Numerous international organizations and tribunals, as well as many national courts, have found that Rwanda is incapable of providing fair trials for those accused of crimes related to the genocide of 1994. By sending Rutaganda to Rwanda, the United States would violate its duty under international customary law to not aid in the commission of an international wrong.

ARGUMENT

I. THE LURING OF EMANUAL RUTAGANDA VIOLATED CANADA’S SOVEREIGNTY, THE EXTRADITION TREATY BETWEEN CANADA AND THE UNITED STATES, AND THE INDIVIDUAL RIGHTS OF RUTAGANDA UNDER INTERNATIONAL LAW.

A. The interference of the United States in Canada’s internal justice system violated the sovereignty of Canada.

“[T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.”² The principle of non-interference with a state’s internal functions has become so essential to international relations that it has crystallized into customary international law. Under the Statute of the Court, custom is “evidence of a general practice accepted as law.”³ To show custom a party must prove “the actual practice and *opinio juris* of States.”⁴

Diplomatic actions and treaties show the practice of non-interference. Two United

² The S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

³ Statute of the International Court of Justice art. 38(1)(b), June 26, 1945.

⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 253 (July 8).

Nations General Assembly resolutions have expressly prohibited intervention.⁵ A number of American states have ratified the Montevideo Convention on the Rights and Duties of States, which forbids the intervention in the affairs of other states.⁶ There have been instances of deviation from this practice, but these exceptions should be viewed as breaches of the rule, not “indications of recognition of a new rule.”⁷ The charters and formative documents of a number of regional organizations show not only a common practice, but also a sense of duty among states to follow the principle of non-intervention.⁸ The basic parameters established by these actions and documents prohibit states from intervening in the internal affairs of any other State. Interpretations of the doctrine by this Court have included the prohibition against both direct and indirect intervention.⁹

As the United States and Canada are bound by the custom of non-intervention, the United States violated Canada’s sovereignty by luring Rutaganda into the United States in order to extradite him to Rwanda. “Operation Motown Express” was an exercise of enforcement

⁵ Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States, G.A. Res. 2625 (XXV), Annex, U.N. Doc. A/8082 (Oct. 24, 1970); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131 (XX), ¶ 1, U.N. Doc. A/RES/36/103 (Dec. 21, 1965).

⁶ Convention on the Rights and Duties of States (inter-American) art. 8, Dec. 26, 1933, 165 L.N.T.S. 19.

⁷ See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 88 (June 27).

⁸ See Charter of the Organization of American States art. 19, Apr. 30, 1948, 119 U.N.T.S. 48; Conference on Security and Co-operation in Europe Final Act art. 1(a)(VI), Aug. 8, 1975; Constitutive Act of the African Union art. 4(g), July 11, 2000, 2158 U.N.T.S. 3; Charter of the Association of Southeast Asian Nations art. 2(e), Nov. 20, 2007, *available at* <http://www.aseansec.org/publications/ASEAN-Charter.pdf>.

⁹ See *Armed Activities in the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 1 (Dec. 19); *Military and Paramilitary Activities*, 1986 I.C.J. 14.

jurisdiction, as it was police action designed to punish noncompliance with the laws of a state.¹⁰ Even though ICE agents did not enter Canadian territory, their actions had effects in Canada. Agents sent fraudulent information, designed to produce action, into Canada, where Rutaganda then responded and reacted based on that information. The European Court of Human Rights has found the exercise of jurisdiction when the acts of a state's authorities produce effects outside of their own territory, independent of whether the acts take place within or outside of their territory.¹¹ In the same way, this Court should determine that the actions taken by ICE agents interfered with Canada's internal prosecutorial function.

The interference by the United States in the sovereign functions of Canada not only violated the doctrine of non-intervention, it also violated the customary international law proscribing the use of force or fraud to obtain jurisdiction over a person outside of a state's territory without the consent of the other state. Official protest by the offended state and acquiescence by the offending state provide examples of the widespread practice of prohibiting abductions and luring. For many years, the United States denounced abductions on its soil and demanded the return of the abducted person.¹² The country also returned a number of abducted and lured persons upon request of the offended state.¹³ Other countries, including Canada, Mexico, and numerous European countries have followed the policy of requesting and returning

¹⁰ See Restatement (Third) of Foreign Affairs Law of the United States § 401 (1987).

¹¹ See *Loizidou v. Turkey (Preliminary Objections)*, App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A) at 18 (1995); *Drozd v. France*, App. No. 12747/87, 240 Eur. Ct. H.R. (ser. A) at 29 (1992).

¹² See 1 JOHN B. MOORE, A TREATISE ON EXTRADITION & INTERSTATE RENDITION section 189 (1891); Note from acting Secretary of State Wilson to the Mexican Ambassador de la Barra (Mar. 14, 1911), in 2 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 309-311 (1941).

¹³ See 1 HACKWORTH, *supra* note 12, at 624; C.V. Cole, *Extradition Treaties Abound, but Unlawful Seizures Continue*, INT'L PERSP., Mar.-Apr. 1975, at 42.

in cases of abduction and luring.¹⁴

The decisions of national courts dealing with abductions and luring not only reflect state practice, but also can show that the state believes the practice to be a legal obligation. A Swiss Federal Court found that Switzerland could not extradite an individual to another state when the individual was tricked into entering Switzerland.¹⁵ A U.S. court of appeals stated that “abductions by one state of persons located within the territory of another violate the territorial sovereignty of the second state and are redressable usually by the return of the person kidnapped.”¹⁶ Germany recognized that the Netherlands had a right to restitution for the luring of a criminal defendant into Germany, and that restitution may be the physical return of the individual.¹⁷ The French Court of Cassation acknowledged that Germany would have had a claim to reparation for abduction of an individual within its territory had Germany made such a claim.¹⁸ While not in case law, the Supreme Court of Costa Rica denounced the U.S. Supreme Court’s decision in *Alvarez-Machain* as contrary to international law.¹⁹ The multitude of state

¹⁴ See Cole, *supra* note 13, at 40-42; Brief of the United Mexican States as Amicus Curiae 3-5, *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (No. 91-712); Letter from Lord Lyons to Mr. William H. Seward (Mar. 19, 1863), in 1 U.S. DEPT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 524 (1863); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 235 (1987).

¹⁵ X, Belgian Citizen v. Swiss Justice & Police Dep’t, 1983 *Europäische Grundrechte-Zeitschrift* 435 (1983) (Switz.).

¹⁶ *United States v. Toscanino*, 500 F.2d 267, 278 (2d Cir. 1974).

¹⁷ Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 19, 1986, 1987 *Neue Juristische Wochenschrift* [NJW] 3087 (F.R.G.).

¹⁸ *In re Argoud*, 45 I.L.M. 90, 95 (1964).

¹⁹ SECRETARIA DE RELACIONES EXTERIORES, 2 LIMITS TO NATIONAL JURISDICTION: DOCUMENTS AND JUDICIAL RESOLUTIONS ON THE *Alvarez Machain* CASE 81-82 (1993).

actions and decisions emanating from states' courts show that the states consider abductions and luring illegal and hold the offending state responsible for reparation.

Abductions and luring should receive the same treatment under the international law of sovereignty, and the luring of Rutaganda should be treated as an extraterritorial abduction. The law prohibiting the abduction of individuals includes cases of luring, and many courts addressing the issue have treated luring and abduction in the same manner.²⁰ In the *Savarkar* case, the Permanent Court of Arbitration did not find a violation of sovereignty, but reasoned that there was no violation because recourse to "fraud or force" had not been made.²¹ The laws of many countries also include fraud as a means of taking when proving the elements of kidnapping or abduction.²² A particularly relevant example is the conviction of two people in an Austrian court for kidnapping based on the luring of another across the border to Germany, where the subject was arrested.²³ Therefore, using fraud to induce an individual to go to a particular place, especially when subject to forcible capture once that person arrives at the place, should receive the same level of treatment as if the individual had been forcibly captured at the outset.

B. The luring of Rutaganda violated the U.S.-Canada Extradition Treaty.

The Vienna Convention on the Law of Treaties²⁴ governs the interpretation of the Extradition Treaty in this dispute. The United States has consistently accepted that its provisions

²⁰ See *supra*, notes 15 and 17 and accompanying text; see also Guillermo Colunje v. United States (Pan. v. U.S.), 6 R. Int'l Arb. Awards 342 (U.S.-Pan. Gen. Claims Comm'n 1933).

²¹ See *Savarkar* (Fr. v. Gr. Brit.), 11 R. Int'l Arb. Awards 243, 254 (Perm. Ct. Arb. 1911).

²² See, e.g., *R v. D*, [1984] A.C. 778 (H.L.) (appeal taken from Eng.) (U.K.); Penal Code Act, sec. 253, 7 L. Rep. of Zambia Ch. 87 (2006).

²³ See *Nazi Kidnappers of Mate Punished*, N.Y. TIMES, Apr. 6, 1935, at 4.

²⁴ May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLOT].

on interpretation are binding as customary international law.²⁵ The first step in treaty interpretation is to look to “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²⁶ The U.S.-Canada Extradition Treaty does not expressly prohibit luring or abductions. However, the object and purpose of the treaty support the interpretation that the treaty is meant to preempt the field of obtaining possession of criminal suspects. The purpose of the treaty, as stated in the preamble, is to “make more effective the cooperation of the two countries in the repression of crime.”²⁷ There is no cooperation when one country acts without the consent or knowledge of the other, and a state may hesitate on future cooperation if it feels offended by the unilateral actions. Interpreting the treaty to allow luring or abduction would also make the thoughtful negotiation and drafting of specific procedures for transferring criminal suspects meaningless. Allowing a state to avoid the negotiated procedures by luring or abducting the suspect without requesting extradition must violate the object and purpose of the treaty.

The Exchange of Letters in 1988 on Transborder Abduction between the Secretary of State for External Affairs of Canada and the U.S. Secretary of State²⁸ provide further context for the interpretation of the treaty under the Vienna Convention article 31(2)(b). Provoked by a contemporary incident involving American bounty hunters in Canada, the understanding

²⁵ See *Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 803, 812 (Dec. 12). See also *VCLLOT*, *supra* note 24, art. 38; *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)* (Judgment of July 13, 2009), available at <http://www.icj-cij.org/docket/files/133/15321.pdf> (last visited Jan. 16, 2010).

²⁶ *VCLLOT*, *supra* note 24, art. 31(1).

²⁷ Treaty on Extradition, Can.-U.S., pmb., Dec. 3, 1971, 27 U.S.T. 983.

²⁸ Exchange of Letters on Transborder Abduction, Can.-U.S., Jan. 11, 1988, available at http://www.oas.org/juridico/mla/en/traites/en_traites-ext-usa-can.pdf.

between the countries shows their disapproval of methods of obtaining suspects outside of the provisions of the treaty. That the incident involved civilian actors explains the focus on civilians and not government agents.²⁹ At the time of the letters the United States had not yet officially adopted a policy of rejecting the exclusivity of the extradition treaty, so the letters represent the last agreement between the countries regarding the treaty.³⁰ Later unilateral statements and practice do not affect interpretation according to international law, as any context to be used must establish the agreement of the parties.³¹ Therefore, when interpreting the extradition treaty in international law, the actions of the United States contrary to the original understanding of both parties cannot alter the provisions without the consent of Canada.

Finally, relevant international law must be taken into account when interpreting a treaty.³² The preceding section discusses the international prohibition of the use of force or fraud to obtain jurisdiction over a person outside of a state's territory without the consent of the other state. This Court should find that Canada and the United States "intend[ed] something not inconsistent with generally recognized principles of international law," the purpose of this particular rule of interpretation, the principle of consistency.³³ The Court should not, contrary to the U.S. Supreme Court in the *Alvarez-Machain* case,³⁴ look to the doctrine of *male captus, bene*

²⁹ Brief of the Government of Canada as Amicus Curiae in Support of Respondent at 3, *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (No. 91-712).

³⁰ *Id.* at 17.

³¹ VCLOT, *supra* note 24, art. 31(2), (3).

³² *Id.* art. 31(3)(c).

³³ LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 1275 (9th ed., pts. 2-4, R. Jennings & A. Watts eds., 1992).

³⁴ *See Alvarez-Machain*, 504 U.S. at 668-70.

detentus as the relevant international law. Even if the doctrine is customary international law, it does not apply for the purposes of interpretation of the extradition treaty. The doctrine generally states that a court will not divest itself of jurisdiction because of the method by which the individual was brought before the court.³⁵ In this case a state is claiming a violation of the treaty in an international tribunal, not an individual contesting jurisdiction of a national court. Many of the limited number of courts that still apply the doctrine acknowledge that a state may validly claim a violation of its sovereignty based on abduction or luring.³⁶ The treatment of the issue in the International Criminal Tribunal for the Former Yugoslavia may similarly be distinguished. In the *Dokmanovic* case, the luring party was a United Nations agent fulfilling an obligation given by the Security Council, not another state. For that reason the tribunal did not address whether *male captus, bene detentus* applies to a claim of a violation of sovereignty based on the actions of another state.³⁷

C. The United States also violated Rutaganda’s internationally protected human rights under customary international law.

The right to liberty and freedom from arbitrary arrest is a fundamental right of all mankind enshrined in customary international law. Numerous international human rights agreements³⁸ evidence a widespread existence of the right to liberty and freedom from arbitrary

³⁵ *Ex parte* Scott, (1829) 109 Eng. Rep. 166 (K.B.).

³⁶ *See In re Argoud*, 45 I.L.M. 90; *Att’y Gen. v. Eichmann*, 36 I.L.R. 18, 63 (Isr. Dist. Ct. 1961).

³⁷ *See Prosecutor v. Mrkšić*, Case No. IT-95-13a, Decision on the Motion for Release by the Accused Slavko Dokmanović, ¶ 77 (Oct. 22, 1997).

³⁸ *See, e.g.*, International Covenant on Civil and Political Rights art. 9(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(1), Nov. 4, 1950, Europ. T.S. 5 [hereinafter ECHR]; African Charter on Human and Peoples’ Rights art. 6, June 27, 1981, 21 I.L.M. 58 [hereinafter African

arrest. The fact that many states around the world include the right in their constitutions supports the existence of *opinio juris*.³⁹ Courts interpreting and applying this right have repeatedly included within the right to liberty a freedom from detention except according to established law; in fact, many of the international agreements include such language in the document.⁴⁰

Luring and forcible abduction fall outside of the procedures and methods established by law. The U.N. Human Rights Committee has consistently determined that abduction from one state to another constitutes arbitrary arrest and detention in violation of article 9(1) of the International Covenant on Civil and Political Rights (“ICCPR”).⁴¹ Using fraud deprives “the victim of the power of autonomous decision and action as surely as does physical coercion,”⁴² so for the purposes of arbitrary arrest, taking by force and fraud should receive the same treatment. The European Court of Human Rights has interpreted freedom from arbitrary arrest to include situations where a state circumvents established procedures for obtaining custody, including extradition treaties.⁴³ In particular, the court has found circumvention by fraud to violate article 5 of the European Convention on Human Rights (“ECHR”).⁴⁴

Charter]; American Convention on Human Rights art. 7, Nov. 22, 1969, O.A.S.T.S. No. 36 [hereinafter American Convention].

³⁹ See, e.g., S. AFR. CONST. 1996, art. 12(1); INDIA CONST. art. 21; KENPŌ art. 31 (Japan).

⁴⁰ See, e.g., ECHR, *supra* note 38, art. 5(1).

⁴¹ See, e.g., *García v. Ecuador*, Commc’n No. 319/1988, Human Rights Comm., U.N. Doc. CCPR/C/43/D/319/1988 at 90 (1991); *Celiberti de Casariego v. Uru.*, Commc’n No. 56/1979, U.N. Doc. CCPR/C/OP/1 at 92 (1984).

⁴² *In re Schmidt*, (1995) 1 A.C. 339, 359 (H.L.) (appeal taken from Eng.) (Sedley, J.) (U.K.).

⁴³ *Bozano v. France*, App. No. 9990/82, 9 Eur. H.R. Rep. 297 (1986).

⁴⁴ *Conka v. Belgium*, 34 Eur. H.R. Rep. 54 (2002).

United States agents fraudulently coerced Rutaganda to travel to the United States, where he was subsequently arrested. Canada and the United States have an extradition treaty in force, but instead of requesting extradition the United States avoided any formal procedures and lured Rutaganda into its jurisdiction. Based on the interpretations of international law by international bodies, this Court should find that the luring violated Rutaganda's right to freedom from abduction by fraud and in circumvention of extradition treaties.

II. THE RENDITION OF EMANUAL RUTAGANDA FROM THE UNITED STATES TO RWANDA FOR TRIAL WOULD VIOLATE INTERNATIONAL LAW.

A. The United States has unilaterally declared it will not extradite in the absence of a bilateral extradition treaty or statute which is a legal obligation under international law.

International law provides for the removal of an individual from one state to another by “treaty, reciprocity, comity, or on the basis of national legislation.”⁴⁵ However, these methods can be limited by the state's unilateral declarations. In the *Nuclear Test Cases*,⁴⁶ this Court acknowledged that “[i]t is well recognized that declarations made by way of unilateral acts . . . have the effect of creating legal obligations.”⁴⁷ Under international law, a state is bound by its declarations when “it is the intention of the State making the declaration that it should become bound according to its terms.”⁴⁸ This Court has also noted that it “depends on the intention of the State in question.”⁴⁹

⁴⁵ M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 1 (2007).

⁴⁶ *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec. 20).

⁴⁷ *Id.* at 472.

⁴⁸ *Id.*

⁴⁹ *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554, 573 (Dec. 22).

The United States has repeatedly and consistently declared that it will not extradite an individual absent an extradition treaty or statute, and its intent to be bound by these statements is clear. As a result, the United States would violate international law if allowed to proceed with the removal of Rutaganda to Rwanda. As early as 1853, the United States publicly declared, through the U.S. Attorney General, that “it is the settled policy of the United States not to make . . . extradition except in virtue of express stipulations to that effect.”⁵⁰ Moreover, the Attorney General explicitly rejected the doctrine of comity in international law while acknowledging that “it is unjust and unwise in point of principle for the United States to ask as an act of comity from any other Government what it refuses to do in the like case itself.”⁵¹ More recently, the U.S. Office of Legal Counsel issued an advisory opinion echoing its previous sentiments, “[t]he President cannot order any person extradited unless a treaty or statute authorizes him to do so.”⁵² *Valentine v. United States*, the controlling U.S. Supreme Court opinion on international extradition, elucidates the Attorney General’s opinion in acknowledging that a treaty is required for extradition.⁵³ The United States’s reliance on the principle of *stare decisis* makes clear that the it intended to be bound by the decision of its highest court.

Moreover, the notion that the United States cannot extradite in the absence of a treaty or statute is codified under U.S. law.⁵⁴ The law was amended in 1996 to explicitly allow “exercise

⁵⁰ International Extradition, 6 Op. Att’y Gen. 85 (1853).

⁵¹ *Id.* at 86.

⁵² The President’s Authority to Force the Shah to Return to Iran, 4A Op. Off. Legal Counsel 149 (1979).

⁵³ *See Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936).

⁵⁴ *See* 18 U.S.C. § 3181 (1996).

of comity” in the limited situation where an individual commits “crimes of violence against nationals of the United States in foreign countries”⁵⁵ The codification of a principle into a law is an overt act which signifies the State’s intention to be bound.

While the United States might try and charade the attempted extradition of Rutaganda to Rwanda as deportation in order to circumvent international law as well as its own laws, this Court of should not accept such an act. Portraying the removal of Rutaganda as an act of deportation or other immigration proceeding would further violate international law.

Under the Universal Declaration of Human Rights⁵⁶ (“Universal Declaration”) and the ICCPR,⁵⁷ everyone has the right to leave any country and not be arbitrarily deprived of the right to enter their own country. Further, U.S. immigration law provides the right for deportable aliens to specify their preference as to where they will be deported, provided the choice is not prejudicial to the interests of the United States.⁵⁸ Therefore, if the United States insisted on removing him to Rwanda, it would be an arbitrary denial of his right to return to Canada. The crimes for which Rutaganda is being accused of were not committed in the United States and the United States is under no obligation to send Rutaganda to Rwanda. Therefore, such a removal would be tantamount to violating international law.

⁵⁵ *Id.* § 3181(b).

⁵⁶ *See* Universal Declaration of Human Rights, G.A. Res. 217A, at art. 13(2), U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration].

⁵⁷ *See* ICCPR, *supra* note 38, art. 12(4).

⁵⁸ 8 U.S.C. § 1231(b)(2)(A) (2000).

B. The arrest of Rutaganda was arbitrary, because as a child soldier Rutaganda lacked criminal culpability.

Under customary international law, a child is defined as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”⁵⁹ Because neither the United States nor Canada specifies that majority is attained earlier, Rutaganda was a child at the time he allegedly committed the crime. Though it is clear he was a child, there is significant international variance regarding the age of criminal culpability. While there is a general principle of law regarding a minimum age of culpability, state practice varies considerably as to the specific age of culpability.⁶⁰

Consequently, it is necessary to consult international tribunals and courts as they are the designated bodies for traditionally handling violations of international law.⁶¹ The practice of international tribunals and courts indicates that child soldiers lack criminal culpability under international law. The enabling statute of the International Criminal Court, the Rome Statute, expressly states that “[t]he Court shall have no jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of a crime.”⁶² And while international tribunals including the International Criminal Tribunal for Rwanda (“ICTR”) and the Special Court for Sierra Leone (“SCSL”) do not prohibit the prosecution of child soldiers, none have

⁵⁹ Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

⁶⁰ UNICEF, *Progress of Nations 1997, Old Enough To Be A Criminal?*, available at <http://www.unicef.org/pon97/p56a.htm>.

⁶¹ I.C.J. Statute, *supra* note 1, art. 38(1)(d).

⁶² Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

opted to prosecute child soldiers.⁶³ These sources of law clarify that international law precludes criminal culpability of child soldiers. Furthermore, many child soldiers are subjected to drugs, alcohol, and other mind-altering and psychologically debilitating substances and tactics in order to encourage them to commit horrible acts.⁶⁴ Therefore, it would be unjust and both morally and legally reprehensible to hold child soldiers culpable for crimes committed while mentally incapable of comprehending their acts.

International law, as clarified by the actions of international tribunals and courts, holds that children cannot be culpable for crimes committed while employed as child soldiers. As previously argued,⁶⁵ individuals can only be detained according to established law. Since Rutaganda is not culpable for the alleged crimes, his arrest was not in accordance with established law. Therefore, the rendition of Rutaganda to Rwanda would be arbitrary and in violation of international law as outlined both in the Rome Statute⁶⁶ and the ICCPR.⁶⁷

C. In transferring Rutaganda to Rwanda, the United States would aid in the violation of Rutaganda's rights because Rwanda is unable to offer a fair trial as required under international law.

Under international law, individuals accused of committing crimes are entitled to a fair trial. This principle is codified in numerous treaties and conventions of which the United States,

⁶³ Lakmini Seneviratne, *Accountability of Child Soldiers: Blame Misplaced?*, 20 SRI LANKA J. INT'L L. 29, 43-4 (2008).

⁶⁴ Jennifer C. Everett, *The Battle Continues: Fighting for a More Child-Sensitive Approach to Asylum for Child Soldiers*, 21 FLA. J. INT'L L. 285, 287 (2009).

⁶⁵ See discussion *supra* Part I.C.

⁶⁶ Rome Statute, *supra* note 61, art. 55(1)(d).

⁶⁷ ICCPR, *supra* note 38, art. 9(1).

Canada, and Rwanda are parties.⁶⁸ Specifically, the ICCPR provides that everyone receive the right “to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”⁶⁹

Further, according to customary international law, states have an obligation, as codified in the International Law Commission’s Draft Articles on Responsibility of States (“ARS”),⁷⁰ to not aid or assist “another State in the commission of an internationally wrongful act.”⁷¹ While the ARS are not binding themselves, in the words of their author, James Crawford, they “seek to formulate, by way of codification . . . , the basic rules of international law concerning the responsibility of States.”⁷² Therefore, the principles embodied in the ARS are binding rules of customary international law. Indeed, a highly qualified publicist⁷³ stated that “no country may send any person to another country, knowing that the latter will violate rights which the sending country is itself obligated to respect.”⁷⁴ Additionally, this Court cited and endorsed a draft of the ARS in *Gabčíkovo-Nagymaros Project*.⁷⁵ The principle behind Article 16 of ARS is both

⁶⁸ See generally American Convention, *supra* note 38; African Charter, *supra* note 38; ICCPR, *supra* note 38.

⁶⁹ ICCPR, *supra* note 38, at Art. 14(3)(e).

⁷⁰ See Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) [hereinafter Responsibility of States].

⁷¹ *Id.* art. 16.

⁷² JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 74 (2002).

⁷³ I.C.J. Statute, *supra* note 1, art. 38(1)(d).

⁷⁴ Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT’L J. REFUGEE L. 567, 568 (2003).

⁷⁵ See *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7 (Sep. 25).

morally and logically sensible. If a state could violate its international obligations merely by facilitating their occurrence in another state which adheres to less stringent standards, then international obligations would be meaningless. Therefore, international law prohibits the United States from sending an individual to a country where there is knowledge that the person's rights will be violated.

Moreover, because the United States has ratified the ICCPR, it has an additional obligation to not frustrate its purpose of protecting the right to a fair trial.⁷⁶ Here, it is all but guaranteed that Rutaganda would not receive a fair trial if tried in Rwanda. Thus, the removal of Rutaganda by the United States to Rwanda would facilitate and aid the deprivation and violation of Rutaganda's rights.

Recently, the High Court of Justice (England and Wales) reached the same conclusion in *Brown v. Rwanda*, holding that it would violate international law to remove the defendants from the United Kingdom to Rwanda because doing so would result in "a real risk that they would suffer a flagrant denial of justice."⁷⁷ The court in *Brown*, in reaching its decision, examined several cases before the ICTR in which the issue was whether to remove the case from the ICTR to Rwanda's judicial system. In each of the instances, the decision was made to deny removal to Rwanda's courts on the ground that a fair trial would not be possible. Specifically, in the ICTR case of *Munyakazi*, the Trial Chamber was "not convinced that Rwanda respects the independence of the judiciary" and was concerned that there would be "direct or indirect pressure being exerted on judges to produce judgments in line with the wishes of the Rwandan

⁷⁶ VCLOT, *supra* note __, art. 18(a).

⁷⁷ *Brown v. Rwanda*, [2009] EWHC (Admin) 770 (Eng.).

Government.”⁷⁸ Additionally, the Chamber concluded that the accused would have difficulty

[I]n securing Defence witnesses to testify on his behalf because of their fears of harassment, arrest and detention. Specifically, the Chamber is concerned about the reports of murdered witnesses. Furthermore, many witnesses fear their appearance will lead to an indictment being issued against them, as has happened in numerous Gacaca trials. Defence witnesses may fear being accused of “genocidal ideology.”⁷⁹

The Appeals Chamber subsequently upheld this decision.⁸⁰ The Appeals Chamber recognized that while video-link capabilities might mitigate some of the concerns about witnesses being protected and testifying, such practices would violate “the principle of equality of arms.”⁸¹ A second case before the ICTR, *Kanyarukiga*,⁸² is analogous to *Munyakazi* and reached similar conclusions. There, the Appeals Chamber concluded that the “information available to the Trial Chamber demonstrates that regardless of whether their fears are well-founded, witnesses in Rwanda may be unwilling to testify for the Defence as a result of the fear that they may face serious consequences.”⁸² Similar conclusions were reached in the ICTR cases of *Hategekimana*,⁸³ and *Gatete*,⁸⁴ and *Kayishema*.⁸⁵ Furthermore, the Toulouse Court of

⁷⁸ Prosecutor v. Munyakazi, Case No. ICTR-97-36-R11bis, Decision on the Prosecutor’s Request for Referral of Case to the Republic of Rwanda, ¶ 48 (May 28, 2008).

⁷⁹ *Id.* at ¶ 60-1.

⁸⁰ Prosecutor v. Munyakazi, Case No. ICTR-97-36-R11bis, Decision on the Prosecutor’s Appeal Against Decision on Referral Under Rule 11bis, ¶ 42 (Oct. 8, 2008).

⁸¹ *Id.*

⁸² Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-R11bis, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis, ¶ 26 (Oct. 30, 2008).

⁸³ Prosecutor v. Hategekimana, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis (Dec. 4, 2008).

⁸⁴ Prosecutor v. Gatete, Case No. ICTR-2000-61-T, Decision on the Prosecutor’s Request for Referral of Case to the Republic of Rwanda, (Nov. 17, 2008).

Appeal, the Appellate Court of Frankfurt am Main, the Court of Appeal of Paris, and the Lyon Court of Appeal have all reached the same conclusion: that Rwanda is incapable of providing a fair trial for alleged criminals of the 1994 Genocide.⁸⁶

Moreover, the government of Rwanda appears to condone unequal treatment of witnesses for the defense. In February 2007,

Rwandan Minister of Justice, Tharcisse Karugarama, was quoted as saying [regarding offering protection to witnesses for the defense the current]: ‘We have nothing to lose [by granting immunity] if anything, we have everything to gain, by these people turning up, it will be a step toward their being captured. They will have to sign affidavits on which their current address will be shown and that would at any other time lead to their arrest.’⁸⁷

Further, a report issued by the Human Rights Watch (“HRW”) in July 2008 concluded:

[B]asic fair trial standards are not fully assured. These include the presumption of innocence, the right of equal access to justice, the right to present witnesses in one’s own defense, the right to humane conditions of detention, the right to freedom from torture, and the right to protection from double jeopardy.⁸⁸

The HRW report also notes that “the greater the public attention to the case, the greater the difficulty in securing witnesses for the defense. A lawyer summed up the problem saying that Rwandans were well aware that ‘any statement can bring misfortune.’”⁸⁹ Given that the current case involving Rutaganda has already received international attention, it is even more likely that he will not receive a fair trial. The government of Rwanda appears too concerned

⁸⁵ Prosecutor v. Kayishema, Case No. ICTR-01-67-R11bis, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11bis (Dec. 16, 2008).

⁸⁶ *Brown*, *supra* note 74, ¶ 47.

⁸⁷ *Id.* at ¶ 43.

⁸⁸ HUMAN RIGHTS WATCH, LAW AND REALITY PROGRESS IN JUDICIAL REFORM IN RWANDA 70 (2008).

⁸⁹ *Id.* at 75.

with its own reputation for it to risk a “not-guilty” verdict.

These are systemic and pervasive flaws in the Rwandan judicial system. While there have admittedly been improvements in Rwanda’s judicial system since 1994, the improvements fall short of those required under the most basic definition of a fair trial. Thus, the United States would violate the ICCPR and other international law if allowed to render Rutaganda to Rwanda thereby facilitating the violation of his most basic rights under international law.

CONCLUSION

The United States violated the sovereignty of Canada, the Extradition Treaty between the two states, and the international human rights of Emanuel Rutaganda. Rendition of Rutaganda to Rwanda would further violate international law because the U.S. is obligated, based on its own unilateral declaration, not to extradite outside of an extradition treaty, Rutaganda may not be held liable for his actions before he reached the age of culpability, and Rwanda cannot protect his international right to a fair trial. For these reasons Canada requests this Court to return Rutaganda to Canada in order to “re-establish the situation which existed before the wrongful act was committed.”⁹⁰

⁹⁰ Responsibility of States, *supra* note 68, art. 35. *See also* Chorzow Factory (Indemnity) (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47-48; Spanish Zones of Morocco Claims (Spain v. U.K.) 2 R. Int’l Arb. Awards 615, 641 (1923).