

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#: 2010-7A

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QUESTIONS PRESENTED

- I. Did the United States breach Canada's territorial sovereignty, the U.S.-Canada Extradition Treaty and the human rights of Emanuel Rutaganda guaranteed under international law when it fraudulently lured Rutaganda from Canada into the United States?

- II. Would the U.S. rendition of Emanuel Rutaganda to Rwanda violate international law considering that neither the United States nor Canada has an extradition treaty with Rwanda, Rutaganda was a mere child soldier at the time of the alleged crime, and Rwanda has had a history of providing unfair trials to those charged with severe crimes?

JURISDICTIONAL STATEMENT

Canada and the United States, the Parties in this dispute, seek resolution before this Court under Article 36(1) of the Statute of the International Court of Justice.¹ The Parties have agreed to submit to the jurisdiction of this Court under Article 40(1).² The Parties have met all the requirements enumerated in those Articles.

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

² *Id.* at art. 40(1).

STATEMENT OF THE FACTS

Emanuel Rutaganda (“Rutaganda”) is a dual-national of Canada and Rwanda who has lived peacefully in Canada for the past fifteen years.³ He lives with his Canadian wife and their three children and operates a successful African curio shop in Windsor, Ontario.⁴ He has not been subject to any criminal proceedings in Canada during that time, not even a traffic citation.⁵ In 1993, the *Interhamwe*, a paramilitary militia group loosely associated with the Hutu army, recruited the 14-year-old Rutaganda into its ranks.⁶ Rutaganda continued to serve as a child soldier in the *Interhamwe* militia group during the Rwandan genocide, from April to August 1994.⁷

Rwanda alleges that in June 1994, when Rutaganda was a mere sixteen-years-old, he and a dozen other members of the *Interhamwe* militia burned down a high school, killing approximately 275 Tutsi children.⁸ In 2001, the Tutsi-dominated government of Rwanda indicted Rutaganda on 275 counts for murder associated with the high school incident.⁹ Since 2001, the Canadian government has persistently denied the Rwandan government’s request to extradite Rutaganda to Rwanda for prosecution on the ground that Canada does not have an extradition treaty with Rwanda, Canada does not view child soldiers as criminally culpable, and

³ Compromis, ¶¶ 2,3.

⁴ *Id.* at ¶ 3.

⁵ *Id.* at ¶ 3.

⁶ *Id.* at ¶ 2; Clarifications to the Compromis.

⁷ Compromis, ¶ 2.

⁸ *Id.* at ¶ 4; Clarifications to the Compromis.

⁹ *Id.* at ¶ 4.

Canada believes that Rwanda's judiciary is not capable of providing Rutaganda a fair trial.¹⁰

On July 21, 2009, the U.S. Customs and Immigration Enforcement ("ICE") notified the Inter-Agency Working Group for Human Rights Violators, the implementing body for the Genocide Accountability Act of 2007, that Rutaganda's mother had traveled from Canada to Detroit for a medical procedure at the Detroit clinic cardiac center.¹¹ The Inter-Agency Working Group devised a plan, called Operation Motown Express, which President Obama authorized, to lure Rutaganda to the clinic and apprehend him on the premises.¹² At 12:30PM on July 22, ICE agents deliberately sent a false e-mail from the Detroit clinic to Rutaganda's personal Blackberry stating that his mother's health was deteriorating, that she was asking for her son, and that he should come right away before she died.¹³ In actuality, his mother's surgery was a success and the doctors predicted that she would make a full recovery.¹⁴

Later that day, Rutaganda entered the United States via a passport he borrowed from a Canadian friend for the sole purpose of visiting what he believed to be his dying mother.¹⁵ ICE agents immediately arrested Rutaganda upon his entry into the clinic where his mother was being treated.¹⁶ An order of removal was thereafter issued for Rutaganda based on his illegal entry

¹⁰ *Id.* at ¶ 5.

¹¹ *Id.* at ¶¶ 6, 8.

¹² *Id.* at ¶¶ 8, 9.

¹³ *Id.* at ¶ 9.

¹⁴ *Id.*

¹⁵ *Id.* at ¶¶ 9,10.

¹⁶ *Id.* at ¶ 10.

into the United States.¹⁷ Rutaganda challenged his removal in a series of immigration and judicial decisions, all of which affirmed that he could be removed to Rwanda.¹⁸

After the U.S. Supreme Court denied Rutaganda's petition for certiorari on September 15, 2009, the United States and Canada submitted the issue to this Court to determine whether (1) the United States' luring of Rutaganda violated Canada's territorial sovereignty, the U.S.-Canada Extradition Treaty, the 1988 Exchange of Letters on Transborder Abduction, and the international human right not to be subjected to arbitrary arrest;¹⁹ and (2) the rendition of Rutaganda from the U.S. to Rwanda would violate international law because neither the U.S. nor Canada has an extradition treaty with Rwanda, Rutaganda may lack criminal culpability as a child soldier, and Rwanda may be incapable of providing him a fair trial.

¹⁷ *Id.*

¹⁸ *Id.* at ¶ 10.

¹⁹ *Id.* at ¶ 11.

SUMMARY OF THE ARGUMENT

Canada argues that (1) the United States violated international law through the fraudulent luring of Rutaganda from the U.S. into Canada, and (2) Rutaganda's rendition to Rwanda would constitute a second international law violation. With regard to the luring issue, the U.S. first breached Canada's territorial sovereignty. As a sovereign state, Canada possessed discretion to decide whether or not to extradite Rutaganda to Rwanda. By luring Rutaganda into the U.S., the ICE agents impermissibly interfered with Canada's relations with its own citizen.

Second, the U.S. breached the U.S-Canada Extradition Treaty ("Extradition Treaty"), which mandates diplomatic cooperation between the two states in securing the arrest of criminal suspects. Instead of complying with its legal obligations to formally request Rutaganda's extradition, the U.S. unilaterally coerced Rutaganda to enter the United States. In implementing this plan, the U.S. failed to perform its treaty obligations in good faith. In fact, the fraudulent luring violated both the object and purpose and the plain meaning of the Extradition Treaty.

Lastly, the U.S. violated Rutaganda's internationally protected right to liberty and freedom from arbitrary arrest. Canada argues that the U.S. arbitrarily arrested Rutaganda, even though he crossed the border illegally, because the U.S. caused his entry with inappropriate and unjust conduct—two elements of arbitrary arrest under the International Covenant on Civil and Political Rights ("ICCPR"). Because the U.S. violated Rutaganda's right to liberty, the subsequent arrest is tainted, and pursuant to the "clean hands" principle, the U.S. cannot reap the benefits of its illegal action. For these reasons, the luring violated international law.

With regard to the rendition of Rutaganda from the U.S. to Rwanda for criminal prosecution, there are three independent grounds upon which the U.S. stands to violate international law. First, because neither the U.S. nor Canada has an extradition treaty with

Rwanda, there is no mechanism to ensure the protection of Rutaganda's human rights. Particularly, the U.S. cannot ensure Rutaganda's freedom from torture or cruel, inhuman and degrading treatment ("CIDT"); diplomatic assurances are an inadequate substitute for an extradition treaty in a country like Rwanda that has had a history of serious human rights abuses.

Second, because Rutaganda was a child soldier who was merely fifteen-years-old when the alleged incident occurred, he lacks criminal culpability. International instruments have articulated that a minimum age of criminal culpability exists with regard to acts committed while participating in hostilities, although no such instrument has explicitly stated this age. Accordingly, Canada urges this Court to clarify international law standards and hold that that minimum age of criminal culpability is the same as the current age at which an individual may be recruited into hostilities under international law, age eighteen.

Finally, the rendition of Rutaganda to Rwanda would violate international law because Rwanda is incapable of providing him a fair trial. Numerous countries and human rights organizations, not to mention the International Criminal Tribunal for Rwanda ("ICTR"), have held that Rwanda is incapable of providing a fair trial, despite improvements in its legal framework. Because each of these three grounds independently provides a basis to prohibit the U.S. from rendering Rutaganda to Rwanda, Canada requests that this Court grant relief.

ARGUMENT

I. THE UNITED STATES VIOLATED CANADA'S TERRITORIAL SOVEREIGNTY, THE U.S.-CANADA EXTRADITION TREATY, AND EMANUEL RUTAGANDA'S HUMAN RIGHTS GUARANTEED BY THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND CUSTOMARY INTERNATIONAL LAW WHEN IT FRAUDULENTLY LURED RUTAGANDA FROM CANADA INTO THE UNITED STATES.

The United States' decision to fraudulently lure Rutaganda from Canada into the U.S. was impermissible under international law because Canada possessed the sovereign right to deny

Rwanda's extradition request for Rutaganda. Additionally, the U.S. circumvented the Extradition Treaty, which mandates diplomatic cooperation for rendition of criminal suspects between the two states. Moreover, the fraudulent luring violated Rutaganda's right to liberty guaranteed by article 9 of ICCPR.

A. The United States breached Canada's territorial sovereignty when it lured Rutaganda into the U.S by interfering in Canada's relations with its own citizen.

Sovereignty is a fundamental principle of international law and international relations.²⁰ Article 2(1) of the United Nations ("U.N.") Charter recognizes the "sovereign equality of all of its Members."²¹ Territorial sovereignty describes the power of a state to exercise supreme legal authority over all persons and activities within its borders. Accordingly, a state's activities within the borders of another state typically require the host state's consent. This Court has noted that the customary international law "principle of non-intervention involves the right of any sovereign state to conduct its affairs without outside interference."²²

In *Prosecutor v. Mrksic* ("*Dokmanovic*"), the International Criminal Tribunal for the former Yugoslavia ("ICTY") ruled that the United Nations Transitional Administration in Eastern Slavonia ("UNTAES") did not violate the territorial sovereignty of the Federal Republic of Yugoslavia ("FRY") through the luring of an individual from the FRY into Croatia, where he

²⁰ See generally *Treaties of Peace between Sweden and the Holy Roman Empire and between France and the Holy Roman Empire (Peace of Westphalia)*, Oct.14, 1648, IC.T.S. 119-356; Hugo Grotius, *DE JURE BELLI AC PACIS LIBRI TRES* (1625).

²¹ U.N. Charter, art. 2, para. 1.

²² See *Military and Paramilitary Activities in and Against Nicar.* (Nicar. v. U.S.), 1986 I.C.J. 14, 106, ¶ 202.

was subsequently arrested.²³ The individual in that case, Slavko Dokmanovic, was tricked into going to Croatia to discuss the possibility of compensation for his property.²⁴ The Court emphasized, however, that UNTAES was not a sovereign state with a horizontal relationship with the FRY.²⁵ Although it did not definitively address the issue, the Court suggested that the FRY's territorial sovereignty may have been violated if the accused was lured into Croatia by another sovereign state.²⁶

Unlike the power dynamic in *Dokmanovic* between UNTAES and the FRY, the U.S. and Canada are both sovereign states. The ICE agents' e-mail to Rutaganda infringed Canada's territorial sovereignty by interfering in Canada's relations with its own citizen. The fraudulent e-mail was sent with the intent to lure Rutaganda out of Canada. Yet, it was the Canadian government's sovereign right to determine if Rutaganda, a Canadian citizen within the territory of Canada, should be removed to Rwanda. By using the e-mail to lure Rutaganda, the U.S. blatantly defied Canada's legitimate decision to not extradite Rutaganda to Rwanda.

B. The United States breached the U.S.-Canada Extradition Treaty because it violated the object and purpose and the plain meaning of the treaty.

National and international courts have noted that the circumvention of an extradition treaty is a violation of international law. According to the *pacta sunt servanda* principle, as expressed in article 26 of the Vienna Convention on the Law of Treaties ("VCLT"), states should

²³ Prosecutor v. Mrksic, International Criminal Tribunal for the former Yugoslavia, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanovic, (Oct. 22, 1997), ¶ 76.

²⁴ *Id.* at ¶ 9.

²⁵ *Id.* at ¶ 77.

²⁶ *Id.*

perform their treaty obligations in good faith.²⁷ Article 31 of the VCLT further explains that treaties should be interpreted according to their ordinary meaning in light of their object and purpose.²⁸ This Court has specifically recognized Article 31 of the VCLT as reflective of customary international law.²⁹ In ascertaining the object and purpose of a treaty, the text of the treaty, the preamble, annexes, and supplemental agreements or instruments between the parties are all relevant.³⁰

The *Dokmanovic* case is instructive on the implications of a state circumventing its extradition treaty obligations. Specifically, in that case, the absence of an extradition treaty was the basis upon which the ICTY ruled that the luring did not constitute a violation of international law.³¹ The Court noted that in all the national or international cases which found luring to constitute a violation of international law, “there existed an established extradition treaty that was, in each case, circumvented or there was unjustified violence used against the suspect.”³²

In contrast to *Dokmanovic*, there is an established extradition treaty between the U.S. and Canada that the U.S. circumvented through its execution of Operation Motown Express. Operation Motown Express did not involve cooperation between the U.S. and Canada, which is

²⁷ Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

²⁸ *Id.* at art. 31.

²⁹ *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9), para. 94.

³⁰ VCLT, *supra* note 27, at art. 31.

³¹ *Id.* at ¶ 75.

³² *Id.* at ¶ 74.

called for by the preamble to the Extradition Treaty requires.³³ The purpose of the Extradition Treaty and the protocol amending the treaty was to facilitate the extradition of individuals for particular offenses that are criminalized in both states and to improve law enforcement cooperation.³⁴ Rather than collaborating with Canada to extradite Rutaganda to the U.S., however, the U.S. unilaterally initiated a covert mission, which violated the object and purpose of the Extradition Treaty.

It is immaterial that the U.S. did not formally request Rutaganda's extradition; of legal significance is the fact that the U.S. was obligated under the Extradition Treaty to do so. In the *Schmidt* case before the English House of Lords, Judge Sedley asserted that "the use of subterfuge must not be such as to violate the rule of law by substituting coercion for established extradition procedures."³⁵ Judge Sedley determined that the luring of a fugitive from Ireland to England amounted to coercion because a British police officer threatened the fugitive with serious adverse consequences—arrest upon his next visit to the United Kingdom—if he did not come to England to meet with British authorities.³⁶ Although he noted the distinction between forcible transborder abduction and luring, Judge Sedley reasoned that fraud "robs the victim of the power of autonomous decision and action as surely as does physical coercion."³⁷

³³ See Extradition Treaty Between the U.S. and Canada, T.I.A.S. 8237 (1971) [hereinafter "Extradition Treaty"].

³⁴ *Id.* at art. 1; see also Letter from President George H.W. Bush to the Senate of the U.S. transmitting the protocol signed at Ottawa on January 11, 1988, amending the Extradition Treaty (Apr. 24, 1990).

³⁵ *In Re Schmidt*, (1995) 1 App. Cas. 339, 362.

³⁶ *Id.* at 358.

³⁷ *Id.*

This Court should view force and fraud on a continuum of coercion. Subsequent to the passage of the Extradition Treaty, the U.S. and Canada agreed through an exchange of letters to prohibit forcible transborder abduction by civilian agents of bail bonding companies, or “bounty hunters.”³⁸ Although this exchange of letters does not specifically prohibit luring by state actors, it does represent an additional commitment by the U.S. and Canada to cooperate to deter physical coercion in favor of the formal extradition proceedings. The exchange of letters further illuminates the object and purpose of the Extradition Treaty to safeguard the sovereignty of the two states and the rights of the individual victim.

Moreover, the U.S. also violated the plain meaning of the Extradition Treaty. According to article 9(1), “[t]he request for extradition shall be made through the diplomatic channel.”³⁹ Instead of pursuing its request for extradition through the diplomatic channel per its obligations, however, the U.S. fraudulently lured Rutaganda into its territory. Additionally, article 8 states: “[t]he determination that extradition should or should not be granted shall be made in accordance with the law of the requested State...”⁴⁰ With regard to extradition for an offense committed outside the requesting state, article 3 provides that, “the executive or other appropriate authority of the requested State shall have the power to grant the extradition if the laws of the requested State provide for jurisdiction over such an offense committed in similar circumstances.”⁴¹

Articles 3 and 8 unambiguously establish that the decision about whether Canada was required to

³⁸ Exchange of letters on Transborder Abduction of Persons Between George P. Shultz, Secretary of State of the U.S. and Hon. Joe Clark, Secretary of States for External Affairs of Can., Ottawa (Jan. 11, 1988).

³⁹ Extradition Treaty, *supra* note 33, at art. 9(1).

⁴⁰ *Id.* at art. 8.

⁴¹ *Id.* at art. 3.

extradite Rutaganda to the U.S. was to be made by Canada pursuant to Canadian domestic law. Because it did not perform its treaty obligations in good faith, this Court should find the U.S. in breach of international law.

C. The United States violated Rutaganda’s right to liberty guaranteed by the ICCPR and customary international law.

The ICCPR, which codified customary international law and *jus cogens* norms, states: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention...”⁴² According to the Human Rights Committee, the monitoring body for the ICCPR, arbitrariness includes elements of inappropriateness, injustice, lack of predictability, and due process of law.⁴³

The Human Rights Committee has developed rich jurisprudence concerning the article 9 right to liberty and security of person. The U.S. will likely reference cases in which the Committee rejected allegations of arbitrary arrest or detention after the claimant illegally entered a state.⁴⁴ Despite these decisions, however, the Committee has never before considered an arbitrary arrest claim in the context of fraudulent luring. As such, this is an issue of first impression before this Court. While arrest and detention of an individual who has illegally entered a state is appropriate in some circumstances, it should be viewed as arbitrary when the arresting state’s action is the proximate cause of the illegal conduct.

Stocke v. the Federal Republic of Germany, a case decided in the European Court of

⁴² U.N. International Covenant on Civil and Political Rights, art. 9(1), G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171. [hereinafter “ICCPR”].

⁴³ Van Alpen v. Neth. (305/1988), ICCPR, A/45/40 vol. II (July 23, 1990) 108 at para. 5.8.

⁴⁴ See, e.g., J.R.C. v. Costa Rica (296/1988), ICCPR, A/44/40 (Mar. 30 1980) 293 at para. 8.4.

Human Rights, is instructive as to how another international court has interpreted the right to liberty. In that case, the applicant fled from Germany to France in an attempt to evade arrest on charges of fraud.⁴⁵ A German police informant made contact with the applicant and induced him to board a plane which flew to Germany under the pretext of taking him to Luxembourg.⁴⁶ The applicant alleged that he had been the victim of collusion between the police informant and the German authorities.⁴⁷ Based on this alleged state action, the applicant claimed a violation of the right to liberty codified in the European Convention, which directly parallels the right to liberty enshrined in article 9 of the ICCPR.⁴⁸ Because the Court found that there was no evidence of collusion, the arrest was held to be in accordance with the European Convention.⁴⁹

Unlike the *Stocke* case, however, the luring of Rutaganda, which was expressly authorized by President Obama, was an affirmative action on the part of the ICE officials. ICE is a division of the U.S. Department of Homeland Security, an organ of the United States. The officials who e-mailed Rutaganda were undoubtedly state officials acting in their official capacity, and their actions are attributable to the U.S. under international law.⁵⁰ Thus, there is clear evidence of collusion between the individuals that lured Rutaganda to cross the border illegally and the U.S. government.

⁴⁵ *Stocke v. Federal Republic of Germany*, 13 Eur. Ct. H.R. 839, ¶ 9 (1991).

⁴⁶ *Id.* at ¶ 18.

⁴⁷ *Id.* at ¶ 47.

⁴⁸ *Id.*

⁴⁹ *Id.* at ¶ 55.

⁵⁰ See Int'l L. Comm., *Report on the work of its fifty-third session, Draft articles on Responsibility of States for Internationally Wrongfully Acts* (2001), art. 2.

Moreover, the *Schmidt* case suggests that there are acts which do not involve forcible abduction, but which may still amount to an overbearing of the will of the fugitive.⁵¹ Although the fugitive in that case was not forced to enter the United Kingdom, he was coerced to clear his name of bogus check fraud charges.⁵² Judge Sedley recognized that this scenario presented a “baited trap” and imposed a high degree of duress on the individual.⁵³

The luring in this case is akin to the luring in *Schmidt*. The U.S. coerced Rutaganda to enter the United States to visit what he thought was his dying mother.⁵⁴ But for the ruse, Rutaganda would not have entered the U.S. There is no evidence in the *Compromis* that prior to this incident Rutaganda had ever entered the U.S. in the fifteen years that he had lived in Canada. Just as the fraud in *Schmidt* caused the fugitive to fear an adverse consequence—his arrest—the fraud in this case caused Rutaganda to fear the impending death of his mother. The morally reprehensible e-mail which conveyed that message likely caused Rutaganda emotional duress based on a genuine belief that his mother was dying. Rutaganda did not freely enter the U.S.; the U.S. overbore his will.

Under the “clean hands” principle of international law, a state cannot reap the benefits of its illegal action.⁵⁵ With limited exceptions, none of which are applicable here, the U.S. could not arrest and detain Rutaganda to effectuate its policy objectives under the Genocide

⁵¹ *In Re Schmidt* [1995], 1 App. Cas. at 358 (Eng. H. L.)

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Compromis*, ¶¶ 9-10.

⁵⁵ *See Legality of Use of Force (Yugo. v. Belg.)* 1999 I.C.J. 124, 184 (June 2).

Accountability Act⁵⁶ after committing an international law violation.⁵⁷ Due to the inappropriate and unjust nature of the luring, this Court should find that the U.S. arbitrarily arrested Rutaganda in violation of article 9 of the ICCPR. Applying the “clean hands” doctrine to this case, the United States should coordinate with Canadian authorities to send Rutaganda back to Canada.

II. THE UNITED STATES WILL VIOLATE INTERNATIONAL LAW IF IT RENDERS EMANUEL RUTAGANDA TO RWANDA FOR TRIAL BECAUSE NEITHER PARTY HAS AN EXTRADITION TREATY WITH RWANDA, RUTAGANDA LACKS CRIMINAL CULPABILITY AS A CHILD SOLDIER, AND RWANDA IS INCAPABLE OF PROVIDING HIM A FAIR TRIAL.

The rendition of Rutaganda from the U.S. to Rwanda would violate international law because in the absence of an extradition treaty, there is no instrument to protect Rutaganda’s right to be free from torture and CIDT. Additionally, as a mere child soldier recruited into the *Interhamwe* militia at only fourteen-years-old, Rutaganda lacks criminal culpability. Finally, the Rwandan judiciary is incapable of providing him a fair trial, as determined by numerous courts and international organizations around the world.

A. Neither the United States nor Canada has an extradition treaty with Rwanda.

Both the U.S. and Canada are parties to U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), and thus have an obligation to “ensure that they do not return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture” or CIDT.⁵⁸ All relevant considerations must be taken into account when determining whether there

⁵⁶ 18 U.S.C. § 1091.

⁵⁷ *See Int’l L. Comm., supra* note 50, at art. 20-25.

⁵⁸ U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter CAT], art. 3, 16, 1465 U.N.T.S. 85 (Dec. 10, 1984).

are substantial grounds for believing that a person would be in danger of being subjected to torture,⁵⁹ including the “vulnerability of the person concerned.”⁶⁰

Despite the fact that Rwanda has ratified CAT and integrated into its Constitution an absolute prohibition of torture,⁶¹ Human Rights Committee experts have expressed concern over Rwandan prisons, which reportedly subject prisoners to deplorable conditions.⁶² These concerns persist even though Rwandan laws require places of imprisonment to have sufficient water, ventilation, light, space and food.⁶³ Additionally, in 2007, Rwanda replaced its death penalty with the possibility of life imprisonment in solitary confinement,⁶⁴ which may amount to torture in some circumstances.⁶⁵ Although the Rwandan Parliament later passed a law prohibiting solitary confinement for transfer cases,⁶⁶ legislative changes are not synonymous with practical changes on the ground.

⁵⁹ CAT, art. 3, para. 2.

⁶⁰ The Secretary-General, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 34-38, delivered to the General Assembly, U.N. Doc. A/59/324 (Sept. 1, 2004).

⁶¹ Press Release, General Assembly, Human Rights Committee Experts Commend Rwanda for Strides Taken Towards Civil, Political Reform Since 1994 Genocide, While Highlighting Areas of Concern, U.N. Doc. HR/CT/704 (Mar. 18, 2009).

⁶² Organic Law n° 38/2006 of 9/25/2006 Relating to the Organization of the National Service of Prisons.

⁶³ U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Rwanda*, ¶15, CCPR/C/RWA/CO/3 (Mar. 31, 2009).

⁶⁴ Organic Law n° 31/2007 of 25/07/2007 Relating to the Abolition of the Death Penalty.

⁶⁵ *Concluding Observations of the Human Rights Committee: Rwanda*, supra note 63, at ¶14.

⁶⁶ Organic Law n° 31/2007 of 25/07/2007 Relating to the Abolition of the Death Penalty art. 3 (*Modified and complemented by Organic Law n° 66/2008 of 21/11/2008*).

Considering the severity of the allegations against Rutaganda, it is more likely than not that he would be placed in prison both before and during trial, and if found guilty by the court, receive life imprisonment. The recent increase in extradition requests from Rwanda, in addition to the politically charged and ethnically sensitive atmosphere surrounding the topic of the 1994 genocide, puts Rutaganda in a particularly vulnerable situation. This combined with Rwanda's history of not sufficiently effectuating its laws—not to mention the fact that life imprisonment in solitary confinement is still administered to non-transfer Rwandan detainees⁶⁷—raises substantial doubt over any assurances that Rutaganda will not be subjected to conditions that, while not constituting complete isolation, nonetheless amount to torture. Indeed, the U.N. Special Rapporteur on Torture has observed that “diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic”⁶⁸

For this reason, the Committee against Torture has emphatically expressed concern over the reliability of assurances. For instance, in December 2001, the Swedish government transferred Mohammed al-Zari and Ahmed Agiza, both suspected of terrorist activities, to Cairo following written assurances from the Egyptian authorities that they would not be subject to torture or ill-treatment, and would receive fair trials.⁶⁹ However, such assurances were

⁶⁷ *Concluding Observations of the Human Rights Committee: Rwanda*, *supra* note 63, at ¶ 14.

⁶⁸ *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 60, at ¶ 51; *see* U.N. Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Addendum, ¶¶67-69, *delivered to the General Assembly*, A/HRC/10/44/Add.2 (Feb. 18, 2009).

⁶⁹ The Secretary-General, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 42-43, *delivered to the General Assembly*, U.N Doc. A/60/316 (Aug. 30, 2005).

ineffective, as they were both subjected to torture and ill-treatment—having been subjected to electric shocks, solitary confinement and diapered—and patently unfair trials.⁷⁰ In landmark decisions, the Committee against Torture⁷¹ and the U.N. Human Rights Committee⁷² found that Sweden’s involvement in the transfer of the two men breached the absolute ban on torture despite assurances of humane treatment.

Finally, although the U.S. may argue that it is obligated to extradite or prosecute Rutaganda to Rwanda pursuant to the Geneva Conventions, this argument must fail. The public international law principle of *aut dedere aut judicare* only applies to serious international crimes—genocide, war crimes, and crimes against humanity. Significantly, Rutaganda was indicted for murder, not genocide. Further, the U.S. is not a party to Additional Protocol I of the Geneva Conventions, which gives rise to a duty to extradite.⁷³ And even if it were, Additional Protocol I specifies that in the absence of a treaty, the “law of the High Contracting Party requested shall apply in all cases.”⁷⁴ However, U.S. law only provides for the extradition of an individual in the absence of an extradition treaty when the crime alleged against the person involves violent acts against Americans abroad, which is not the case here.⁷⁵ At the very least, the United States’ refusal to abide by even its own laws certainly brings into question its

⁷⁰ *Id.*

⁷¹ *Agiza v. Sweden*, CAT/C/34/D/233/2003, para. 13.4 (May 20, 2005).

⁷² *Alzery v. Sweden*, CCPR/C/88/D/1416/2005, para. 11.5 (Nov. 10, 2006).

⁷³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 88 (8 June 1977).

⁷⁴ *Id.*

⁷⁵ 18 U.S.C. § 3181, 3184.

dedication to abiding by international law and protecting Rutaganda's human rights. Because there is no instrument in place to protect Rutaganda, this Court should not permit his rendition to Rwanda.

B. Assuming, *arguendo*, that the lack of an extradition treaty does not preclude the rendition of Rutaganda to Rwanda under international law, this Court should nonetheless rule in favor of Canada because as a child soldier, Rutaganda lacks criminal culpability.

Canada asserts that the minimum age of criminal culpability under customary international law has crystallized at age eighteen. As a result, even assuming *arguendo* that Rutaganda may be extradited in the absence of an extradition treaty, this Court should prohibit his rendition because he was merely fifteen years old at the time of the alleged crime, and therefore does not meet the current minimum age for criminal culpability—age eighteen.

1. Canada urges this Court to recognize a minimum age of criminal culpability that parallels the developing minimum age at which a person may be recruited into direct hostilities under current international standards.

The minimum age at which a child may be recruited into direct hostilities has increased over time out of awareness that children are not of adequate emotional, mental, and intellectual maturity to voluntarily participate in hostilities, or to take responsibility for their actions during that time. Thus, it stands to reason that if the international community has held that children are not capable of fully understanding what it means to partake in direct hostilities, they should not be held criminally culpable for their actions if a state chooses to recruit them.

Although international instruments do not indicate the specific minimum age of criminal culpability, they state explicitly that a minimum age does indeed exist. In particular, the U.N. Convention on the Rights of a Child (“CRC”), a treaty entered into force in 1990 and ratified by an astounding 193 countries, has made clear that there is a minimum age of criminal

culpability.⁷⁶ While it may not indicate what this age is, the relevant provisions of the U.N. Standard Minimum Rules on the Administration of Juvenile Justice (“The Beijing Rules”)—Rule 4 and its commentary—are more instructive.⁷⁷

Rule 4 states that the legal age for criminal responsibility should not be set too low due to limitations in the emotional, mental, and intellectual maturity of children.⁷⁸ More instructive, however, are the comments to the rule, which link the imposition of such responsibility to the granting of civil rights.⁷⁹ Incidentally, such rights, including the right to marry and vote, are usually only granted at ages higher than fifteen.

2. This Court should find that the minimum age of criminal culpability with regard to recruitment in direct hostilities has evolved from age fifteen to age eighteen.

A norm need not be expressly stated in an international instrument for it to crystallize under customary international law. While the CRC only prohibits the recruitment of children below fifteen in direct hostilities,⁸⁰ it nonetheless followed a growing international movement towards adopting a higher age with its first Optional Protocol on the Involvement of Children in Armed Conflict, which forbids non-state actors and guerilla forces from recruiting anyone under the age of eighteen for any purpose.⁸¹ Although the U.S. has not ratified the CRC, it has in fact

⁷⁶ U.N. Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3, art. 40(3a) [hereinafter CRC].

⁷⁷ G.A. Res. 40/33, U.N. Doc. A/40/53 (Nov. 29, 1985).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ CRC, *supra* note 78, art. 38.

⁸¹ G.A. res. 54/263, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49 (May 25, 2000), art. 1, 2.

ratified this Optional Protocol alongside 127 other nations, including Canada.⁸² The African Charter on the Rights and Welfare of the Child, adopted by the African Union shortly after the adoption of the CRC, similarly sets the minimum age at which a child can be recruited into hostilities at eighteen—primarily because the African Union felt that the CRC lacked consideration of the African perspective when dealing with the rights of a child.⁸³

International tribunals have also provided evidence of a general consensus that children below the age of eighteen should not be held criminally culpable. Article 26 of the Rome Statute excludes children under eighteen from its jurisdiction.⁸⁴ While only jurisdictional in nature, this provision was seen as a compromise between different international organizations as to what should be the minimum age of criminal culpability.⁸⁵ Additionally, the ICTY and ICTR have never indicted any person below the age of eighteen.

It is important to remember that this is a case about a child who was forcefully recruited into an oppressive militia at the age of fourteen, which itself is a crime under international law.⁸⁶ As a child, Rutaganda was thrust into the violence and chaos that spread throughout Rwanda

⁸² U.N. Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en (last visited Jan. 25, 2010).

⁸³ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, art. 22 (1990).

⁸⁴ Rome Statute of the International Criminal Court, 37 I.L.M. 1001, art. 26, (July 7, 1998).

⁸⁵ Clark and Triffterer, Article 26: Exclusion of Jurisdiction Over Persons Under Eighteen, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Baden-Baden: Nomos Verlag, 1999.

⁸⁶ Prosecutor v. Samuel Hinga Norman, Case No. SCSL-2004-14-AR729E, Appeals Chamber, Special Court for Sierra Leone, Decision on preliminary motion based on lack of jurisdiction (child recruitment), May 31, 2004.

during the 1994 genocide. There is no way to determine how his forced involvement in the *Interhamwe* militia affected his mental and emotional capacity, and regardless of what charges Rwanda alleges, it would be an injustice to hold Rutaganda culpable of something from which his country should have protected him. Canada asks this Court to find that as a child soldier, Rutaganda lacks criminal culpability.

C. Even if this Court finds that Rutaganda is criminally culpable as a child soldier, this Court should still hold that his rendition to Rwanda would violate international law because Rwanda is incapable of providing Rutaganda a fair trial.

The ICCPR states: “[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁸⁷ Additionally, the ICCPR provides for certain minimum guarantees, such as the right to have “adequate time and facilities” to prepare one’s defense and communicate with chosen counsel, as well as the right to examine prosecution witnesses and procure and examine defense witnesses in the same manner.⁸⁸ Rutaganda will be denied these rights and minimum guarantees if this Court allows the U.S. to extradite him to Rwanda.

Just over a year ago, the ICTR, in *Prosecutor v. Kunyarukiga*, found that Rwanda is incapable of providing a fair trial under standards set out by the ICCPR, and its reasoning still holds true today.⁸⁹ Based primarily on the following two grounds, the ICTR held Rwanda incapable of providing Kunyarukiga a fair trial: (1) the difficulty in procuring witnesses out of fear of death or being tortured, in addition to the possibility of inaccurate testimony of witnesses

⁸⁷ ICCPR, *supra* note 43, art. 14(1).

⁸⁸ *Id.* at art. 14(3)(b), 14(3)(e)

⁸⁹ *Prosecutor v Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Oct. 30, 2008.

who are coerced to lie out of fear;⁹⁰ and (2) an insufficient defense as evidenced by past cases where necessary documents were difficult to obtain from Rwandan authorities, as well as reported difficulties in meeting witnesses and visiting detainees.⁹¹

Other national courts have confirmed that Rwanda is not currently capable of providing Rutaganda a fair trial.⁹² For example, on April 9, 2009, the English High Court blocked an extradition request from Rwanda because it would violate Article 6 of the European Convention on Human Rights, which safeguards the right to a fair trial similar to Article 14 of the ICCPR.⁹³ The Court specifically identified the inability of the four defendants to adduce evidence of supporting witnesses,⁹⁴ and the risk of executive government interference with the judiciary in Rwanda, as adequate grounds upon which to deny the extradition request.⁹⁵

Moreover, Amnesty International issued a 2009 report in which it explained how the National Assembly amended the Rwandan Constitution to reduce judges' tenure from life to four years.⁹⁶ This presents a clear risk of compromising the independence of the judiciary, especially considering that the High Court is comprised of a single judge. Additionally, the report mentioned four ICTY decisions rejecting transfer requests by the Rwandan Prosecutor General

⁹⁰ *Id.* at ¶ 26; *see also* Prosecutor v. Munyakazi, Case No. ICTR-97-36-R11bis, Oct. 8, 2008.

⁹¹ *Id.* at ¶ 21.

⁹² *See, e.g.*, Brown v. Rwanda [2009] EWHC 770 (Admin), United Kingdom: High Court (England and Wales) (Apr. 8, 2009).

⁹³ *Id.*

⁹⁴ *Id.* at ¶¶ 37-66.

⁹⁵ *Id.* at ¶¶ 119-121.

⁹⁶ Amnesty Int'l, *State of the World's Human Rights: Rwanda*, <http://thereport.amnesty.org/en/regions/africa/Rwanda> (last visited Jan. 25, 2010).

on unfair trial grounds, explaining that “defense witnesses inside and outside Rwanda risk being . . . mistreated, arrested, detained, beaten, tortured and in some cases killed.”⁹⁷

Ultimately, even assuming that Rwanda has recently put in place an adequate legal *framework* for a fair trial, as previously asserted by the ICTR in *Prosecutor v. Munyakazi*,⁹⁸ it is crucial that this Court take into consideration the lack of the effective *implementation* of this framework. This Court should not ignore Rwanda’s history in light of recent legislative changes that will inevitably take time to effectively implement. Regardless of the laws currently in place, Rwanda has consistently failed to provide fair trials in *practice*.

Furthermore, because Rutaganda may receive a severe sentence of life imprisonment under questionable conditions if extradited, this Court should be especially weary of the trial practices in Rwanda. Both the high stakes involved and the absence of an extradition treaty to ensure the protection of Rutaganda’s human rights, make it all the more important that he receive a just and fair trial before an impartial tribunal. As such, Canada urges this Court to resolve any doubts in favor of Rutaganda, and to prohibit the U.S. from rendering him to a country where international and national tribunals all over the world have found a lack of fair trial practices.

CONCLUSION

For the foregoing reasons, Canada urges this Court to rule in its favor and grant relief. Specifically, Canada requests that this Court order the U.S. to (1) immediately return Rutaganda to Canada, (2) sign a guarantee of non-repetition, and (3) provide reparations.

⁹⁷ *Id.*

⁹⁸ Case No. ICTR-97-36-R11*bis*, at ¶ 26-30.