

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

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

February 2010

**THE GOVERNMENT OF CANADA
(Applicant)**

v.

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

MEMORIAL OF THE RESPONDENT

TEAM#: 2010-7R

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QUESTIONS PRESENTED

1. Did the United States comply with international law when it sent Emanuel Rutaganda, an accused participant in the Rwandan Genocide residing in Canada, an email designed to entice him to enter the United States, when neither United States agents nor the email physically entered Canada and Rutaganda was only arrested after he voluntarily and illegally entered the United States?

2. Would the United States' rendition of a Rwandan citizen back to Rwanda violate international law, where the suspect has been indicted for 275 counts of murder perpetrated on Rwandan soil?

JURISDICTIONAL STATEMENT

The parties to this matter, the United States of America and Canada, submit the questions contained herein to the International Court of Justice pursuant to Article 36(1) of the ICJ statute.¹ Both countries agree to fully implement the decisions this Court renders in the matter.²

STATEMENT OF THE FACTS

Emanuel Rutaganda is a former member of the *Interahamwe* militia group and is suspected of participating in the killing of 275 Tutsi children during the 1994 Rwandan Genocide.³ A dual national of Canada and Rwanda, Rutaganda fled to Canada after the Genocide with his mother and has been living there in the 16 years since, despite the Rwandan government's repeated requests that Canada surrender him to Rwanda for prosecution.⁴ Canada has not prosecuted Rutaganda for his acts during the genocide.⁵

The Boutaire High School massacre is notoriously known as one of the most violent acts committed during the genocide.⁶ It is suspected that Rutaganda, along with other militia members, set a detention center for Tutsi children ablaze and blocked the exits to prevent the students' escape from the fire.⁷ Rutaganda and his fellow soldiers allegedly then shot any

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

² Compromis, ¶ 14.

³ *Id.* at ¶¶ 2, 4.

⁴ *Id.* at ¶¶ 3, 5.

⁵ *Id.* at ¶ 3.

⁶ *Id.* at ¶ 4.

⁷ *Id.*

children who tried to leave the building.⁸ Rutaganda joined the *Interahamwe* militia at the age of 14 and participated in the massacre when he was 15 years old.⁹ Although Canada considers Rutaganda a child soldier, and as such not responsible for his crimes, Rwanda has charged him and 6 other members of the *Interahamwe* militia with 275 counts of murder for their participation in the massacre.¹⁰

In 2002, in response to the indictment and at the request of the Rwandan government, INTERPOL issued a Red Notice appealing for Rutaganda's arrest from any country where he could be found.¹¹ Soon thereafter, a news show in the United States garnered significant public interest in the case when it aired an episode about Rutaganda and his suspected involvement in the massacre during the Rwandan Genocide.¹² As a result of the attention, the Inter-Agency Working Group for Human Rights Violators (a body made up of high-level U.S. government officials that formed to implement the Genocide Accountability Act of 2007) focused on Rutaganda's suspected genocidal acts.¹³

After learning from U.S. Immigration and Customs Enforcement that Rutaganda's mother was in a United States clinic, the Inter-Agency Working Group developed a plan, called "Operation Motown Express," to entice Rutaganda to come to the United States and then transfer

⁸ *Id.*

⁹ Correction to the Compromis.

¹⁰ Compromis, ¶¶ 4, 5.

¹¹ *Id.* at ¶ 5.

¹² *Id.* at ¶ 7.

¹³ *Id.* at ¶ 7.

him to Rwanda.¹⁴ With President Obama's approval, ICE agents then sent an email from the United States to Rutaganda's email account that purported to be from the clinic where his mother was being treated.¹⁵ It stated that his she was not in good health and was asking for Rutaganda, when in reality she was doing well.¹⁶ Rutaganda, of his own accord, then used a friend's passport to illegally enter the United States.¹⁷ As a result of his illegal entry, he was arrested by ICE agents and taken into custody.¹⁸ ICE issued an order of removal and notified Canada as such in accordance with the Canada-U.S. Consular Notification Agreement.¹⁹ Subsequent immigration and judicial decisions affirmed that Rutaganda could be removed to Rwanda to stand trial for his suspected crimes during the massacre.²⁰

In response to the luring, arrest, and planned removal of Rutaganda, Canada protested the actions of the United States and threatened to prematurely withdraw its troops from Afghanistan in retaliation.²¹ Wanting to maintain friendly relations, the United States entered into negotiations with Canada and the two countries agreed to submit the case to this Court for adjudication under Article 36(1) the International Court of Justice statute.²²

¹⁴ *Id.* at ¶ 8.

¹⁵ *Id.* at ¶ 9.

¹⁶ *Id.*

¹⁷ *Id.* at ¶ 10.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at ¶¶ 11, 12.

²² *Id.* at ¶ 13; Statute of the International Court of Justice art. 36(1).

SUMMARY OF THE ARGUMENT

This Court should find that both the United States' luring of Rutaganda and the United States' rendition of Rutaganda to Rwanda are in compliance with international law.

The United States' email to Rutaganda did not breach Canada's territorial sovereignty because the email did not involve any physical intrusion into Canada. Merely sending an email from the U.S. that Rutaganda read in Canada does not constitute entry into Canada's territory, because he could have read the email anywhere. Furthermore, the agents did not exercise any physical force to remove Rutaganda from Canada; rather, Rutaganda freely entered the U.S. .

Additionally, the U.S. did not violate the Extradition Treaty or the Exchange of Letters. Because the Extradition Treaty only applies to those offenses where there is dual criminality and Canada does not consider Rutaganda to be criminally culpable, the Extradition Treaty is inapplicable to the current case. Further, neither documents' text mentions luring or states that formal extradition is the only means of obtaining a defendant for trial. Finally, the Exchange of Letters, which only addresses transborder abduction by private parties, is a nonbinding document and does not apply to official government activity.

The luring of Rutaganda did not violate his human rights under the International Covenant on Civil and Political Rights ("ICCPR") or under customary international law. The U.S. did not violate Rutaganda's Article 9 right against arbitrary arrest and detention because ICE agents arrested him in accordance with procedures established by law based his willful and unlawful entry into the United States. Additionally, the U.S. did not interfere with Rutaganda's rights to privacy, family, or correspondence, in violation of Article 17 of the ICCPR. The agents did not obtain personally protected information from him, did not deny him access to his family, and did not surveil or intercept his communications, but merely sent him an email.

Even if this Court finds that the U.S. improperly lured Rutaganda to the United States, it should permit the U.S. to render Rutaganda to Rwanda, despite the absence of an extradition treaty between Rwanda and either the U.S. or Canada. No principle of international law prohibits rendition in the absence of a treaty regime, but a principle does require the U.S. to ensure the prosecution of all perpetrators of serious international crimes. Rwanda indicted Rutaganda for 275 counts of murder, a crime that constitutes a grave breach of international law. Customary international law requires the U.S. to seek Rutaganda's prosecution for these grave breaches, which it aims to do by sending him back to Rwanda.

The fact that Rutaganda was sixteen at the time of the crime should not prohibit the rendition because, as a sixteen-year-old, Rutaganda was criminally culpable for his actions. Many states consider a sixteen-year-old mature enough to be criminally culpable, including Rwanda, the United States, and Canada. State practice reveals a wide range of minimum ages of criminal culpability, ranging from ages 7-18. With state practice varying so widely, there is no evidence of an international custom prohibiting criminal prosecution of a fifteen-year old. Thus, holding Rutaganda criminally culpable does not violate international law.

Finally, this Court should allow Rutaganda's rendition because Rwanda has a legal system capable of providing him with a fair trial. The International Criminal Tribunal for Rwanda has held that Rwanda's legal framework meets the minimum international standards of a fair trial. Further, the Rwandan government has taken great strides in improving the availability of a fair trial to prisoners. Significantly, the Supreme Court of Sweden held in July 2009 that Rwanda was capable of guaranteeing a fair trial and made plans to extradite an alleged genocide perpetrator to Rwanda for trial. In light of the substantive, good faith reforms Rwanda has made to guarantee a fair trial, this Court should allow Rutaganda's rendition to Rwanda.

ARGUMENT

I. The United States acted within international law when it lured Emanuel Rutaganda to the U.S. from Canada because it did not violate Canada’s territorial sovereignty, it did not violate the U.S.-Canada Extradition Treaty or the 1988 Exchange of Letters, and it did not violate Rutaganda’s human rights.

According to the United Nations, “the characterization of an act of a state as internationally wrongful is governed by international law.”²³ Only if an act is a violation of international law does that act “[entail] the international responsibility of that State.”²⁴ In the current case, although ICE agents represent an organ of the U.S. and they acted with governmental authority and on its behalf in carrying out those acts, the agents did not breach any international obligation to Canada or Rutaganda.²⁵ For that reason, the U.S. is not responsible for any internationally wrongful acts associated with the luring.

A. The United States did not violate Canada’s territorial sovereignty because ICE agents did not enter Canada and only arrested Rutaganda in the United States after he freely, yet unlawfully entered U.S. territory.

The concept of territorial sovereignty arises from the United Nations Charter, which states, “nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . .”²⁶ As this Court found in *Nicaragua v. United States*, it is customary international law that every state “has the duty to refrain from the threat or use of force to violate the existing international boundaries of

²³ Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, ¶ 3, Annex, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

²⁴ *Id.* at ¶ 1.

²⁵ *Id.* at ¶ 3.

²⁶ U.N. Charter art. 2, para. 7; Hans Corell, Under-Secretary-General for Legal Affairs, The Legal Counsel of the United Nations, From Territorial Sovereignty to Human Security, Canadian Council of International Law 1999 Annual Conference (October 29, 1999).

another State . . . [and] has the duty to refrain from organizing . . . incursion[s] into the territory of another State.”²⁷

Luring is best defined in opposition to transborder abduction, which involves state agents acting extraterritorially and with the consent of their host state to forcibly (or with threat of force) remove an accused or suspected criminal from another state with or without that other state’s consent.²⁸ Luring differs from abduction in that state agents induce the suspect using trickery instead of force and do not necessarily act extraterritorially to get the suspect from his asylum state to their host state.²⁹

Jurisprudence from this Court and other international courts demonstrates that luring alone does not breach a state’s territorial sovereignty. In the case of *Prosecutor v. Dokmanovic*, the International Criminal Tribunal for the Former Yugoslavia held that the luring of accused war criminal Slavko Dokmanovic from Yugoslavia to Croatia did not violate Yugoslavia’s territorial sovereignty because it was not forceful and it occurred in Croatian territory.³⁰ In that case, agents lured Dokmanovic to Croatia through a series of phone calls and he freely entered Croatian territory.³¹ In *Nicaragua*, this Court found that the U.S. breached Nicaragua’s

²⁷ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 106, 191 (quoting the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2825.)

²⁸ Paul Michell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 CORNELL INT’L L.J. 383, 389-90 (1996); Aparna Sridhar, *The International Criminal Tribunal for the Former Yugoslavia's Response to the Problem of Transnational Abduction*, 42 STAN. J. INT’L L. 343, 343-44 (2006).

²⁹ Sridhar, *supra* note 28; *Stoche v. Germany*, 13 Eur. Ct. H.R. 839, para. 49 (1991).

³⁰ *Prosecutor v. Mrksic*, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanovic, ¶ 57 (Oct. 22, 1997).

³¹ *Id.* at ¶ 10.

territorial sovereignty when the U.S., among other things, sent arms into Nicaragua and trained the *contras* that fought the government.³²

The current case is similar to *Dokmanovic* because ICE agents did not enter Canadian territory to arrest Rutaganda, just as UN forces did not enter Yugoslavia to arrest Dokmanovic. Although officials had phone contact with Dokmanovic while he was in Croatia, that phone contact did not breach Croatia's territorial sovereignty, because it did not require officials to physically enter Croatia. Similarly, the fact that ICE agents sent an email to Rutaganda is not indicative of any extraterritorial conduct on their part because the email originated in the U.S. and involved no physical intrusion into Canada. Finally, both suspects are accused war criminals who entered the arresting state's territory of their own free will.

Although this Court found a violation of territorial sovereignty in *Nicaragua*, those actions can be distinguished from the current ones. First, the U.S. supplied arms to the *contras* and those arms physically entered Nicaragua. Here, however, the email cannot be said to have physically entered Canada simply because Rutaganda read the email there; he was free to read his email in any country in the world. Sending an electronic message involves no physical intrusion into a state because it is sent to an individual's account, which has no physical location. Second, in *Nicaragua* the United States trained the *contras*, and in doing so organized their use of force against the government in Nicaragua's territory. Here, however, the agents did not use or organize any force against the Canadian government or its territory.

Because ICE agents sent an email from the United States that Rutaganda read while in Canada and Rutaganda freely and unlawfully entered U.S. territory, this Court should find that the agents did not violate Canada's territorial sovereignty.

³² *Nicaragua*, at ¶ 242.

B. The United States did not violate the Extradition Treaty or the Exchange of Letters because Rutaganda’s case is outside the scope of the Treaty, the Treaty does not state that an extradition requests are exclusive means of obtaining a defendant, and neither document prohibits luring.

The Vienna Convention on the Law of Treaties states that, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”³³

In the Extradition Treaty, the U.S. and Canada agree to extradite persons who have been charged with or convicted of “only those offenses . . . [that are] punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year.”³⁴ Thus, the purpose of the Treaty is to allow both states to extradite for those offenses where there is dual criminality. Since Canada “views child soldiers as victims not criminals,” the crimes of which Rutaganda is charged are not illegal in Canada, and thus no dual criminality exist between Canada and the U.S. in this case.³⁵ The U.S.’s failure to request Rutaganda’s extradition does not violate the purpose of the Treaty because this case falls outside the Treaty’s scope and U.S. could not formally request Rutaganda’s extradition under the Treaty.

Even if this Court finds that the Extradition Treaty was applicable to the case, neither the Treaty nor the Exchange of Letters prohibits luring. The 1988 Exchange of Letters does provide that, “Canada and the United States agree to cooperate to deter such transborder abductions [by] .

³³ Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

³⁴ Extradition Treaty arts. 1,2, U.S.- Canada, Dec. 3, 1971, T.I.A.S. 8237.

³⁵ Compromis, ¶ 5.

. . . bail bondsmen or bounty hunters.”³⁶ However, the Exchange of Letters should not be understood as applying to the instant case of luring. First, both parties agreed that the letters “constitute an Understanding between our two Governments which is not intended to create or otherwise alter legal obligations for either Government . . .”³⁷ Thus, neither the U.S. nor Canada intended the Letters to be legally binding instruments. Second, the Letters state that the Understanding was meant to deter actions by private parties “engaged in business . . . [such as] bail bondsmen or bounty hunters,” not by the U.S. government, the actor in this case.³⁸ Third, the Letters specifically refer to transborder abduction, which is forceful and violates territorial sovereignty, not luring, which involves no such force or violation of sovereignty.

Finally, had the U.S. and Canada intended to deter or prohibit luring across their borders, the states could have written express provisions in the Treaty agreeing to such or stating that extradition was the exclusive means of obtaining a defendant. Although luring cases were rare in 1971 when the Treaty was first signed, the two countries have made amendments to the Treaty—in 1974, 1988, and 2001—and by those times, several luring cases had gained international notoriety, including *Stocke v. Germany*, *Dokmanovic*, and *Re Harnett* (a case involving Canada’s luring and subsequent arrest of two U.S. citizens).³⁹ However, the states did not include a luring provision or specify that the Extradition Treaty was the sole means of securing arrest in any of

³⁶ Exchange of Letters on Transborder Abduction of Persons between George P. Schultz, Secretary of State of the U.S. and Hon. Joe Clark, Secretary of State for External Affairs of Can., Ottawa (Jan. 11, 1988).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Stocke v. Germany*, 13 Eur. Ct. H.R. 839 (1991); *Prosecutor v. Mrksic*, Case No. IT-95-13a-PT; *R. v. Harnett*, [1973] 1 O.R. (2d) 206 (Can.).

the subsequent amendments to the Extradition Treaty.

Because neither document prohibits luring, luring does not violate their purposes, and the U.S. and Canada did not prohibit luring in subsequent amendments, this Court should find that the U.S. did not violate either Extradition Treaty or the Exchange of Letters.

C. The United States did not violate Rutaganda’s human rights under the International Covenant on Civil and Political Rights or under customary international law.

1. The United States did not violate Rutaganda’s rights against arbitrary arrest because his arrest was based on his willful and unlawful entry into the United States.

Rutaganda violated U.S. law when he entered the country without a valid passport, and only then did ICE agents arrest him.⁴⁰ Article 9 of the ICCPR states that “no one should be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”⁴¹ This guarantee amounts to customary international law.⁴² In addition, Article 12 of the ICCPR states that only those persons who are “lawfully within the territory of a State . . . have the right to liberty of movement [within that territory].”⁴³

Cases in front of the Human Rights Committee, the monitoring body for the ICCPR, demonstrate that arrest and detention are not arbitrary when the person is unlawfully in the territory where he is arrested. For instance, in *J.R.C. v. Costa Rica*, the court found that Costa

⁴⁰ 8 U.S.C.A. § 1185 (2006); Compromis, ¶ 10.

⁴¹ International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁴² Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. a/810 (Dec. 12, 1948); <http://untreaty.un.org/cod/avl/ha/udhr/udhr.html>.

⁴³ ICCPR, *supra* note 41, at art. 12.

Rica did not violate the defendant's rights when it arrested him for unlawfully (and willfully) entering the state.⁴⁴ Although J.R.C. claimed that Costa Rica violated his rights against arbitrary arrest, his arrest was not arbitrary because he entered the territory illegally.⁴⁵

Here, Rutaganda similarly was not subject to arbitrary arrest and detention because he entered the U.S. illegally, having borrowed a friend's passport.⁴⁶ As Costa Rica in *J.R.C.* argued, Article 12 of the ICCPR shows that persons who are unlawfully in a state do not have the right to freedom of movement or residence within that state.⁴⁷ The U.S. acted within U.S. law when ICE agents arrested Rutaganda just as Costa Rica acted within Costa Rican law when it arrested J.R.C. after he entered without proper documentation. Thus, just as in *J.R.C.*, Rutaganda's arrest was not arbitrary because he was arrested in accordance with procedures established by law. And just as J.R.C. had no freedom of movement under Article 12 of the ICCPR, Rutaganda had no freedom of movement in the U.S because of his unlawful entry.

In *Stoche v. Germany*, the European Court of Human Rights ("ECHR") found no violation of the defendant's rights against arbitrary arrest and detention when an informant tricked him into boarding a plane that took him from France to Germany.⁴⁸ The plane's supposed destination was Luxembourg, yet the agent secretly told the pilots to land in Germany so that Stoche could be arrested there.⁴⁹ There, the court found no violation because there was

⁴⁴ *J.R.C. v. Costa Rica*, Communication No. 296/1988, ¶ 9(a) (1989).

⁴⁵ *Id.* at ¶ 8.4.

⁴⁶ *Compromis*, ¶ 10.

⁴⁷ *J.R.C.*, at ¶ 6.1.

⁴⁸ *Stoche*, at ¶¶ 51, 55.

⁴⁹ *Id.* at ¶ 18.

not enough evidence that the state agents participated in the plan.⁵⁰ Although the ECHR suggested that it might have considered the luring in *Stocke* a violation of the defendant's rights against arbitrary arrest,⁵¹ that case can be distinguished from the current case. Although *Stocke* was not physically abducted, he had no choice but to remain on the plane as it landed in Germany, making the situation in *Stocke* more akin to abduction than luring. Here, however, Rutaganda was not abducted but rather voluntarily entered U.S. territory.

Because Rutaganda's arrest was based on his willful and unlawful entry into the U.S., this Court should find that the U.S. did not violate his rights against arbitrary arrest.

2. The United States did not interfere with Rutaganda's rights to privacy, family, or correspondence because it did not obtain any personally protected information from him, intercept or surveil his communication, nor deny him access to his family.

Article 17 of the ICCPR states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence."⁵² Interference with a person's privacy only takes place when a state obtains personally protected information from that individual.⁵³ Interference with communication occurs when a state intercepts a message intended for a person, or surveils, wire-taps, or records conversations or communications.⁵⁴ Further, interference with

⁵⁰ *Id.* at ¶ 47.

⁵¹ *Id.* at ¶ 48.

⁵² ICCPR, *supra* note 41, at art. 17, para. 1.

⁵³ Van Hulst v. The Neth., Communication No. 903/2000, ¶¶ 3.8, 6.6 (2004).

⁵⁴ Human Rights Committee, General Comment 16, The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (article 17), U.N. Doc. HRI/GEN/1/Rev.6 at 142 (2003)

family only arises when a state separates family members or denies them access to one another.⁵⁵

In *Van Hulst v. The Netherlands*, the state interfered with Van Hulst's privacy and communication in violation of Article 17 of the ICCPR when it wiretapped and recorded conversations between him and his lawyer.⁵⁶ The current case can be distinguished from *Van Hulst* because although there the state obtained personally protected information from *Van Hulst*, here the U.S. did not obtain personal information from Rutaganda. Further, the U.S. did not intercept or record Rutaganda's conversations as the Netherlands did in that case—sending the email did not give the agents access to Rutaganda's private communications.

In *Fei v. Columbia*, the Committee found an interference with the author's family after the state created significant impediments to the author visiting her children after her divorce.⁵⁷ The Committee's jurisdiction suggests that interfering with relationships, separating a family, or denying access to members of a family may violate a person's rights under Article 17(1) of the ICCPR. The Committee in *Fei* discussed the importance of Fei's right to have permanent contact with and regular access to her family.⁵⁸ Unlike in *Fei*, here the U.S. did not prevent Rutaganda from having access to or having a relationship with his mother.

Because the U.S. did not interfere with Rutaganda's privacy, correspondence, or family, this Court should find that the U.S. did not violate his rights under Article 17 of the ICCPR.

II. The United States' rendition of Emanuel Rutaganda does not violate international law because international law neither prohibits his rendition in the absence of an extradition treaty nor the prosecution of crimes committed at the age of fifteen, and

⁵⁵ *Fei v. Columbia*, Communication No. 514/1992, ¶ 8.10 (1994).

⁵⁶ *Van Hulst*, at ¶ 6.6.

⁵⁷ *Fei v. Colombia*, at ¶ 2.9.

⁵⁸ *Fei v. Colombia*, at ¶¶ 8, 10.

Rwanda is capable of affording Rutaganda a fair trial.

There is a long-standing principle in international law that sovereign states are free to take actions that do not contravene an express prohibition of international law.⁵⁹ Accordingly, this Court should find that the U.S. is free to render Rutaganda to Rwanda because international law does not expressly prohibit it.

A. Rutaganda's rendition would not violate international law because there is no international custom requiring the existence of an extradition treaty.

The fact that the U.S. or Canada does not have an extradition treaty with Rwanda does not prevent the U.S. from extraditing Rutaganda. There is no principle of international law, whether by treaty or custom, that requires the U.S. to render only on the basis of an extradition treaty. Customary international law exists only when there is a general practice among states that they feel obligated to follow as a rule of law.⁶⁰ States enter into extradition treaties freely. Although the prevalence of bilateral and multilateral extradition treaties in recent years suggests the existence of state practice, there is no evidence that states enter into these treaties out of a sense of legal obligation.⁶¹ Rather, states enter into extradition treaties in order to simplify the complexity of handling extraditions on an ad hoc basis.⁶² Because there is no sense of legal obligation, extradition treaties are not required by customary international law.

There is, on the other hand, an emerging principle of customary international law that requires a state to cooperate in the extradition of those accused of serious crimes of international

⁵⁹ Case of the S.S. "Lotus," (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10.

⁶⁰ Statute of the International Court of Justice art. 38(1)(b).

⁶¹ See, e.g., Extradition Treaty, U.S.-Canada, Dec. 3, 1971, T.I.A.S. 8237; Inter-American Convention on Extradition, Dec. 13, 1957, 359 U.N.T.S. 273.

⁶² Model Treaty on Extradition, G.A. Res. 45/116, U.N. Doc. A/RES/45/116 (Dec. 14, 1990).

law. Article 88 of the Additional Protocol I to the Geneva Conventions requires states to afford one another as much assistance as possible in prosecuting grave breaches of international law.⁶³ States have used this provision as a basis for extradition in the absence of an extradition treaty.⁶⁴

The U.S. is thus required under international custom established by the Geneva Conventions to assist Rwanda's prosecution of Rutaganda by extraditing him to Rwanda. Rutaganda has been indicted for 275 counts of murder,⁶⁵ a crime that falls within the Geneva Conventions' definition of a grave breach of international law.⁶⁶ Article 88 of the Additional Protocol I requires the U.S. to actively assist in the prosecution of grave breaches of international law and thereby serves as a legal basis for Rutaganda's extradition.⁶⁷ Though the U.S. is not a party to the Additional Protocol I, and though the Protocol deals specifically with international armed conflicts, Article 88 embodies a principle of customary international humanitarian law that binds the U.S. to assist Rwanda through extradition, regardless of the locus of the crime.

Article 2 of the ICCPR requires states to safeguard the rights of individuals within their territories, and this includes extradition.⁶⁸ Further, Article 3 of the Convention Against Torture

⁶³ 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, Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter *Protocol I*].

⁶⁴ International Committee of the Red Cross, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Sandoz et al. eds.) (1987).

⁶⁵ *Compromis*, ¶ 4.

⁶⁶ *Protocol I*, *supra* note 63, at art. 85.

⁶⁷ *Protocol I*, *supra* note 63, at art. 88.

⁶⁸ ICCPR, *supra* note 41, at art. 3.

prohibits states from extraditing an individual to states where torture is foreseeable.⁶⁹ Thus states can be held accountable for human rights violations occurring outside their territory as a result of an extradition.⁷⁰

Circumstances here, however, allow the U.S. to extradite Rutaganda because there is no substantial likelihood that he will face torture in Rwanda. The U.S. seeks to render him to Rwanda for the purposes of legal proceedings; any punishment accorded to him will be within the bounds of Rwandan law. In the past, the international community was concerned with the possibility that prisoners transferred to Rwanda for genocide-related trials might face life imprisonment in solitary confinement, which can amount to torture under international law.⁷¹ However, Rutaganda does not face this prospect today. Recently enacted Rwandan laws guarantee that any prisoner transferred from another state will not receive the sentence of life imprisonment in isolation.⁷² In light of these considerable reforms, Rwanda's justice system does not pose the substantial likelihood of torture that once counseled against rendering defendants to Rwanda. In the absence of an express prohibition on extraditions without a treaty and without a substantial likelihood of torture awaiting Rutaganda, this Court should hold that Rutaganda's extradition is within the bounds of international law.

B. Rutaganda's rendition would not violate international law because there is no international custom requiring the existence of an extradition treaty.

⁶⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Feb. 4, 1985, 1465 U.N.T.S. 85.

⁷⁰ Human Rights Committee, General Comment 20, Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment (article 7), U.N. Doc. HRI/GEN/1/Rev.6 (1992).

⁷¹ Prosecutor v. Munyakazi, Case No. ICTR-97-36-R11bis, Decision on Prosecutor's Request for Referral of Case to the Republic of Rwanda, ¶¶ 17-19 (May 28, 2008).

⁷² Organic Law N° 66/2008 of 21/11/2008 art. 3 (Rwanda).

The Government of Rwanda has the right and the responsibility to try Rutaganda for his involvement in the Boudaire High School Massacre. There is no emerging principle of international law prohibiting Rwanda from trying Rutaganda, its own citizen, in its own courts for grave breaches of international law occurring within Rwandan territory. To the contrary, there is an affirmative obligation for Rwanda, as well as the U.S., to make every effort to ensure that those responsible for grave breaches of international law do not escape with impunity. This Court should recognize Rwanda's right to prosecute its own criminals within the limits of international law, and allow the United States' rendition of Rutaganda back to Rwanda.

The minimum age of criminal culpability is unresolved under international law. The Convention on the Rights of the Child only directs states to set a minimum age, providing little criteria as to what an appropriate minimum age might be.⁷³ Similarly, the United Nations' Standard Minimum Rules for the Administration of Juvenile Justice only specifies that the age "not be fixed at too low an age level, bearing in mind the facts of emotional, mental, and intellectual maturity."⁷⁴

The practice of international tribunals also does not establish a universal minimum age for criminal responsibility. The International Criminal Court has set the minimum age for its prosecutions at eighteen, but has not spoken on whether eighteen should be a universal minimum age.⁷⁵ In comparison, the Special Court for Sierra Leone has set the minimum age of prosecution for that tribunal at fifteen, specifying that the court should consider the goals of

⁷³ Convention on the Rights of the Child art. 40, ¶ 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

⁷⁴ *Id.*

⁷⁵ Rome Statute of the International Criminal Court art. 26, Jul. 17, 1998, 2187 U.N.T.S. 90.

rehabilitation and reintegration into society.⁷⁶ In establishing this minimum age, the Secretary General explained that the gravity and seriousness of a crime warrants the prosecution of individuals 15-18 years of age.⁷⁷ A lack of international consensus on the issue has led to a wide variety of minimum ages throughout the world, ranging from seven to eighteen years of age.⁷⁸

Rutaganda does not lack criminal culpability because he was at an age that many states consider mature enough to stand trial. Rutaganda was fourteen at the time he joined the *Interhamwe* militia and fifteen at the time of the Boudaire massacre.⁷⁹ State practice reveals a wide range of minimum ages, from 7-18, demonstrating that the age of fifteen is at the higher end of the spectrum. The minimum age for criminal culpability in the U.S. is as low as ten, while the minimum age in both Canada and Rwanda is twelve.⁸⁰ Thus, even under Canadian standards, it is more than appropriate to bring Rutaganda to trial. With such a broad range of minimum ages, there is no evidence of state practice setting the minimum age at higher than fourteen. Without evidence of state practice, there is no customary international law binding Rwanda to refrain from prosecuting Rutaganda for crimes committed at the age of fifteen.

To the contrary, international bodies have condoned prosecution of individuals at the age of fifteen. For instance, the Committee on the Rights of the Child itself noted that the range of

⁷⁶ Statute of the Special Court for Sierra Leone art. 7, Aug. 14, 2000, 2178 U.N.T.S. 138.

⁷⁷ The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶¶ 32-38, delivered to the Security Council, U.N. Doc. S/2000/915 (Oct. 4, 2000) [hereinafter *Report*].

⁷⁸ Committee on the Rights of the Child, General Comment 10, Children's Rights in Juvenile Justice, U.N. Doc. CRC/C/GC/10 (2007).

⁷⁹ Clarifications of the Compromis.

⁸⁰ See KAN. STAT. ANN. § 38-1602(a) (U.S.); Canada Criminal Code § 13 (Can.); Law N° 13/2004 of 17/5/2004 Relating to the Code of Criminal Procedure art. 184 (Rwanda).

ages 14-16 for criminal responsibility was a “commendable high level.”⁸¹ Prosecution of Rutaganda thus meets the approval of the Committee on the Rights of the Child.⁸² Furthermore, the Special Court’s first Secretary-General acknowledged that prosecution of fifteen year-olds is warranted for serious crimes.⁸³ Even if the age of fifteen counsels hesitation, the gravity of the crimes here warrants prosecution. The age of fifteen does not offend the international community’s conception of what age is too low for prosecution, and in the absence of an express prohibition on the prosecution of fifteen-year olds, Rwanda has a right to prosecute Rutaganda.

Rwanda has an affirmative obligation to make every effort to prosecute those guilty of grave breaches of international law. The Geneva Conventions set forth an international custom that requires states to repress grave breaches of international law, which includes the willful killing of civilians.⁸⁴ Thus, both Rwanda and the U.S. are obligated under international custom to prosecute or aid in the prosecution of grave breaches of international law during times of conflict.⁸⁵ In light of Rutaganda’s age at the time of the massacre and the gravity of the crimes for which he is accused, this Court should allow Rutaganda’s rendition and prosecution.

C. Rwanda’s legal system today is capable of affording Rutaganda a fair trial due to considerable reforms Rwanda has implemented.

Rwanda has the right to try Rutaganda in its own justice system for crimes committed within its territory. This Court should only interfere with that right if it is clear that Rwanda’s

⁸¹ Committee on the Rights of the Child, General Comment 10, Children’s Rights in Juvenile Justice, U.N. Doc. CRC/C/GC/10 (2007)

⁸² Clarifications, at 1.

⁸³ *Report, supra* note 77.

⁸⁴ *Protocol, supra* note 63, at art. 85.

⁸⁵ *Id.*

justice system currently cannot afford Rutaganda a fair trial. Although the fair trial rights of an individual should not be easily dismissed, Rwanda has recently implemented a number of changes to its legal system designed to guarantee a fair trial to defendants. Thus, it should be granted the opportunity to seek justice within its own borders.

Though there is no universal consensus on international fair trial standards, Article 14 of the ICCPR sets forth what the international community regards as minimum guarantees.⁸⁶ Article 14 provides for a “fair and public hearing by a competent, independent and impartial tribunal.”⁸⁷ Other guarantees include the right to an attorney and the right to adequate time and facilities for preparation and defense.⁸⁸ These standards should be “established by law and guaranteed in practice.”⁸⁹

Rwanda’s legal framework meets the minimum international standards of fair trial. Rwanda amended its Constitution in 2003⁹⁰ and its criminal code in 2006, in order to include fair trial guarantees enshrined in the ICCPR.⁹¹ Furthermore, Rwanda is a party to the African Charter on Human and Peoples’ Rights, which grants a defendant the right to adequate defense and counsel, among other fair trial rights.⁹² In 2007, Rwanda passed its Transfer Law,⁹³ which

⁸⁶ ICCPR, *supra* note 41, at art. 14.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Human Rights Committee, General Comment 13, Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (article 14), U.N. Doc. HRI/GEN/1/Rev.6 (1984)

⁹⁰ THE CONSTITUTION OF THE REPUBLIC OF RWANDA arts. 16-20.

⁹¹ Law N° 20/2006 of 22/04/2006 art. 1 (Rwanda).

⁹² African Charter on Human and Peoples’ Rights art. 7, Jun. 27, 1981, 1520 U.N.T.S. 218.

grants the right to adequate time and facilities to prepare a defense, the right for defense counsel to enter and move freely throughout Rwanda, and the right of the defense to obtain witnesses under the same conditions as witnesses for the prosecution.⁹⁴ In light of these efforts, the Trial Chamber of the International Criminal Tribunal for Rwanda noted that the Rwandan legal system generally guaranteed the right to a fair trial.⁹⁵

However, the Trial Chamber in *Prosecutor v. Kanyarukiga* questioned whether Rwanda could guarantee, in practice, that a defendant would receive a fair trial.⁹⁶ The Chamber was particularly concerned with reports that Kanyarukiga's defense would face difficult working conditions and that he would have problems obtaining witnesses both within and outside of Rwanda.⁹⁷ Based on the circumstances at the time, the Chamber held that Kanyarukiga could not obtain a fair trial in Rwanda.⁹⁸

Since then, however, Rwanda has passed a number of measures to address the international community's concerns about fair trial guarantees. Rwanda has requested and undergone training on witness protection by the ICTR, and several donors have offered resources

⁹³ Organic Law N° 11/2007 of 16/03/2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States art. 13 (Rwanda).

⁹⁴ *Id.*

⁹⁵ *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 31 (Jun. 6, 2008).

⁹⁶ *Id.*

⁹⁷ *Id.* at ¶ 104.

⁹⁸ *Id.*

to allow remote witnesses to testify through video-link technology.⁹⁹ Though it is possible that these rights do not ensure a fair trial for the defense, the standard must not be too high for Rwanda, or any country, to satisfy.

The Supreme Court of Sweden recognized in July 2009 that Rwanda has made great strides in improving its criminal justice system in the past year.¹⁰⁰ Accordingly, it held that extradition of a genocide suspect to Rwanda was allowable under both Swedish and international law, and that Rwanda's justice system, while flawed, demonstrated enough improvement to justify extradition to Rwanda.¹⁰¹ This Court should similarly hold that Rwanda has improved its legal system sufficiently to justify Rutaganda's rendition and is now capable of providing a fair trial to Rutaganda in both law and practice.

CONCLUSION

The United States respectfully requests that this Court find that the United States can extradite Rutaganda to Rwanda in accordance with international law because a) the luring of Rutaganda did not violate Canada's territorial sovereignty, the U.S.-Canada Extradition Treaty, the 1988 Exchange of Letters, or Rutaganda's human rights under the ICCPR or customary international law; and b) because Rutaganda can be held culpable for participating in the Rwandan Genocide and Rwanda is capable of providing him a fair trial.

⁹⁹ U.N. Security Council, *6228th Meeting*, U.N. Doc. S/PV.6228 (Dec. 3, 2009).

¹⁰⁰ *Sweden to Extradite Genocide Suspect to Rwanda*, REUTERS UK, Jul. 9, 2009, available at <http://uk.reuters.com/article/idUKL9428953>.

¹⁰¹ *Id.*