

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#: 2010-08R

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QUESTIONS PRESENTED

The United States asks the International Court of Justice to determine:

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

JURISDICTIONAL STATEMENT

The parties, through special agreement, submit this dispute to the International Court of Justice for a binding declaratory judgment pursuant to Articles 36(1) and 40(1) of the *Statute of the International Court of Justice*. Article 36(1) confers upon the Court the jurisdiction to resolve specific issues as described in the compromis. Article 40(1) permits the case to be brought before the court by the notification of the Special Agreement.

STATEMENT OF FACTS

1. The Rwandan Genocide

Emanuel Rutaganda voluntarily served in the *Interhamwe* militia group from April until August of 1994, during the Rwandan genocide. Rutaganda's father died while serving as a Colonel in the Rwandan army. After the fall of the Hutu government in 1994, Rutaganda and his mother fled to Canada.

In 2001, the government of Rwanda issued an indictment for Rutaganda, as an identified member of the *Interhamwe* militia who had been involved in the notorious Boutaire High School Massacre (the "Massacre"), one of the worst atrocities committed during the genocide. Armed members of *Interhamwe* positioned themselves at the exits of the high school and set the building on fire. They shot any student who tried to escape the blaze. As a result of the Massacre, 275 Tutsi children were killed.

2. Emanuel Rutaganda's Indictment

The Rwandan district court in Boutaire has charged Rutaganda, and other members of *Interhamwe*, with 275 counts of murder. Since 2001, the Rwandan government has repeatedly requested that Canada surrender Rutaganda for prosecution. Canada has continuously denied these requests. In January 2002, the Rwandan government requested that INTERPOL issue a Red Notice for the arrest and surrender of Rutaganda from any territory in which he should happen to be found.

3. United States' Response to the *Genocide Convention*

In accordance with the *Genocide Convention*, the U.S. implemented the *Genocide Accountability Act of 2007* as complementary domestic legislation, and established the "Inter-Agency Working Group for Human Rights Violators" to assist in its implementation.

4. Operation Motown Express

In July of 2009, the Inter-Agency Working Group for Human Rights Violators began an investigation of Rutaganda. On July 21, 2009, the U.S. Immigration and Customs Enforcement (ICE) notified the Inter-Agency Working Group that Rutaganda's mother, Marie Rutaganda, had travelled from Canada to Detroit for a medical procedure. The Inter-Agency Working Group for Human Rights Violators established a plan called Operation Motown Express, which they submitted to President Obama for approval. The plan involved ICE agents sending an email to Rutaganda, informing him that his mother's health was deteriorating. ICE agents hoped that this would motivate Rutaganda's voluntary entry into America. The president agreed with this plan.

On July 22, 2009, ICE agents sent a single email to Rutaganda, and he responded by entering the U.S. through the Windsor-Detroit tunnel. Rutaganda presented a passport he had borrowed from a Canadian friend. ICE agents arrested Rutaganda and took him into custody. Canada was provided timely notification of the situation, as per the 2004 Canada-U.S. Consular Notification Agreement.

5. Aftermath of Operation Motown Express

Through a series of immigration and judicial decisions, it was affirmed that Rutaganda could be removed to Rwanda. At each stage of the judicial process, Canada submitted Amicus briefs on behalf of Rutaganda's release. Ultimately, on September 15, 2009, the U.S. Supreme Court denied Rutaganda's petition for *certiorari*.

Despite the American courts' approval of Rutaganda's extradition, the U.S. has agreed to have this matter heard before the International Court of Justice (ICJ). The U.S. has also agreed to stay the transfer of Rutaganda pending the outcome of this case.

SUMMARY OF ARGUMENTS

Operation Motown Express did not violate Canada's territorial sovereignty. There was no act of extraterritorial policing on behalf of the U.S. Rutaganda voluntarily entered U.S. territory and presented a fraudulent passport to ICE.

The U.S.-Canada Extradition treaty was not engaged by Operation Motown Express, as no forcible abduction occurred. Further, forcible abductions are enshrined in the maxim, *male captus, bene detentus*, which allows a court to assert jurisdiction despite the improper arrest of an individual. The U.S. and the international community have endorsed the maxim through the *Ker-Frisbie* rule and *Eichmann* rationale, respectively. A treaty must be interpreted at face value, and the "luring" contemplated in Operation Motown Express is not provided for. Foreign affairs are the executive's domain, and Operation Motown Express was an executive operation.

Rutaganda's rights under the ICCPR were not violated by Operation Motown Express. There was no arbitrary arrest under Article 9, as the ICE agents who detained Rutaganda were working within their mandate. Further, the right against arbitrary interference under Article 17 was not violated, as American actions were proportional, authorized, and governed by precise laws.

The *Genocide Accountability Act of 2007*, implemented pursuant to the *Genocide Convention*, is indicative of the United States' commitment to the principles of international law. Operation Motown Express was devised to fulfill these international and domestic law obligations in the face of Canada's resistance to comply with an INTERPOL Red Notice and extradition requests from Rwanda.

The extradition of Rutaganda from the U.S. to Rwanda is supported by the *Genocide Convention* and/or the *Geneva Conventions of 1949*. American courts have held that extradition is permissible despite the absence of an extradition treaty, so long as the extradition is supported

by statute or convention. Along with these two conventions, the extradition of Rutaganda is supported by the U.S.-International Criminal Tribunal for Rwanda (ICTR) agreement and the prior decisions of the U.S. courts regarding the extradition of Rutaganda. Further, the extradition of Rutaganda is supported by U.S.C. § 3181(b) and the universal jurisdiction of genocide. Finally, the U.S. is obliged as an INTERPOL member to extradite Rutaganda to the extent authorized by its own laws.

Rutaganda remains extraditable regardless of his age. The defence of infancy is an issue to be dealt with at trial and presumably was dealt with when the U.S. courts approved Rutaganda's extradition. *Interhamwe's* violation of international recruitment standards is an issue separate and distinct from Rutaganda's criminal culpability. International law has intentionally omitted a minimum age for criminal culpability, leaving this decision to be made by domestic law. Rutaganda would be criminally culpable under Canadian and American law. He would also be culpable under the Statute of the Special Court of Sierra Leone.

As the Rwandan District Courts are capable of providing a fair trial to Rutaganda, he should be extradited. The ICTR Outreach Program, the adoption of Organic Law, the abolition of the death penalty, and the establishment of the Mpanga prison all provide proof of a rebuilt judicial system, capable of administering justice fairly.

ARGUMENT

A. Operation Motown Express did not violate Canada's territorial sovereignty

i. Mr. Rutaganda voluntarily entered American territory

The United States did not gain jurisdiction over Rutaganda through forcible abduction, as no American official entered Canadian territory. In *Stocke v. Germany*,¹ the perpetrator was

¹ (1991) 13 E.C.H.R. 839.

lured by a police agent on false pretences and his airplane was re-routed, constituting an act of kidnapping. By stark contrast, Rutaganda knowingly and voluntarily entered the United States on his own will and presented an illegitimate passport to border officials.

ii. Operation Motown Express did not involve acts of extraterritorial policing by United States agents

Operation Motown Express did not involve the traditional policing strategies of actively intercepting personal communications, nor did it use any abduction-style tactics. The United States only acquired knowledge of Rutaganda's residence in Canada after an INTERPOL Red Notice advised that an indicted genocide perpetrator was living freely abroad, and after public sentiment in the United States urged the government to enforce international law and bring the genocide perpetrator before the courts.

The operation did not involve egregious state action, but was conducted within a regulatory framework that could be monitored by appropriate officials. The Inter-Agency Working Group is composed of multiple advisory bodies, and provides informed policy advice and decisions to the executive.

B. Operation Motown Express violated neither the U.S.-Canada Extradition Treaty nor the 1988 Exchange of Letters on Transborder Abduction

i. While Operation Motown Express did not constitute a forcible abduction, abductions are enshrined in the principle *male captus, bene detentus*, and the *Ker-Frisbie* rule

International law recognizes the principle, *male captus, bene detentus*, which indicates that a person arrested in violation of international law may nonetheless be brought to trial.² This

² Andreas F. Lowenfeld, "U.S. Law Enforcement Abroad: The Constitution and International Law, Continued" (1990) 84 A.J.I.L. 444 at 460.

principle is embodied in the American *Ker-Frisbie*³ rule, which allows for a federal court to assert jurisdiction over an individual who has been improperly seized from abroad.

The exception to the *Ker-Frisbie* principle is established in *United States v. Toscanino*,⁴ where behaviour on the part of the abductor that is entirely reprehensible will divest a court of jurisdiction. The abductor's conduct must be outrageous: mere irregularities in conduct will not divest jurisdiction.⁵

ii. Neither the Treaty nor the Letters contemplates “luring;” thus, Operation Motown Express operated outside of treaty regulations

In *United States v. Alvarez-Machain*,⁶ the court held the abduction-style tactics employed by U.S. agents did not fall within the ambit of treaty regulations. Neither the *Treaty on Extradition Between the Government of Canada and the Government of the United States* (the “Treaty”),⁷ nor the 1988 Exchange of Letters on Transborder Abduction,⁸ prohibits the type of “luring” contemplated by Operation Motown Express. Accordingly, the *Ker-Frisbie* rule applies, and a court need not inquire into the method of bringing a perpetrator under its jurisdiction.

³ *Ker v. People of the State of Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952).

⁴ 500 F.2d 267 (2d Cir. 1974).

⁵ *United States ex rel. Lujan v. Gengler*, 500 F.2d 62 (2d Cir. 1975).

⁶ 504 U.S. 655 (1992) [*Alvarez-Machain*].

⁷ *Treaty on Extradition Between the Government of Canada and the Government of the United States*, United States and Canada, 11 December 1971, C.T.S. 1976 No. 3, T.I.A.S. NO. 8237 (entered into force 22 March 1976).

⁸ *Protocol Amending the Extradition Between the United States and Canada*, 11 January 1988, S. TREATY DOC. 101-17, 101st CONG., 2D SESS. (1990) [*The Letters*].

Only where there is an abduction that is specifically barred in a treaty will an exception to the *Ker-Frisbie* rule apply.⁹ This furthers the argument that the “luring” of Rutaganda was not contemplated by the Treaty, as only the prohibition of “civilian agents of bail bonding companies”¹⁰ is provided for. Operation Motown Express thus did not fall within the ambit of treaty prohibitions.

Moreover, the history of negotiation and practice under the Treaty supports the proposition that the Treaty only prohibits the abductions specified therein.¹¹ Canada was well aware of the *Ker-Frisbie* doctrine when negotiating the Treaty, and the Treaty ought to be interpreted on its face. A more liberal interpretation would constitute judicial amendment to the Treaty.¹² Thus, following the reasoning in *Alvarez-Machain*, the argument before this court is not that the treaty authorizes the style of seizure used in Operation Motown Express, but that the treaty does not prohibit the type of “luring” it contemplates. To imply such a prohibition would require an inferential leap, with only the most general of international law principles to support it.¹³

Any reliance on the proposition in *Bennett II*¹⁴ that a forcible abduction will stay proceedings has been confined to the criminal context, and not to extradition proceedings against a fugitive.¹⁵ *Bennett II* is silent as to whether it applies when no treaty has been circumvented.¹⁶

⁹ *Alvarez-Machain*, *supra* note 6 at 665.

¹⁰ *The Letters*, *supra* note 8.

¹¹ *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936) [*Valentine*].

¹² *Alvarez-Machain*, *supra* note 6.

¹³ *Ibid.* at 669.

¹⁴ *R. v. Horseferry Road Magistrates' Court, ex p Bennett*, [1993] 3 W.L.R. 90 (H.L.) [*Bennett II*].

¹⁵ *re Schmidt*, [1995] 1 A.C. 339 (H.L.).

iii. The executive is granted broad powers in foreign affairs, and Operation Motown Express was an executive operation

Matters that fall outside the scope of a treaty should be left for the executive, not the courts, to decide. Under the United States Constitution, the President has broad powers in foreign affairs, including the authority to breach a treaty. Allowing the judiciary to impose upon this authority over foreign affairs would violate the treaty process.¹⁷

In *United States v. Curtiss-Wright Export Corp.*, the Supreme court stated, “[T]he international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”¹⁸ Further, the judgment in *Banco Nacional de Cuba v. Sabbatino*¹⁹ suggests that courts are to enforce foreign acts of the state even if they violate international law, on the ground that a contrary approach might embarrass the executive in the conduct of foreign affairs.

Even if Operation Motown Express is found to have violated the extradition treaty, it does not necessarily follow that the remedy must be a divestiture of jurisdiction. The executive branches of the opposing nations may come to terms with an acceptable remedy as part of foreign relations.

C. The “luring” of Rutaganda did not violate his human rights under the International Covenant on Civil and Political Rights (ICCPR)

i. Operation Motown Express did not constitute an arbitrary arrest

¹⁶ *Bennett II*, *supra* note 14.

¹⁷ *Alvarez-Machain*, *supra* note 6.

¹⁸ 299 U.S. 304 (1936) at 319-320.

¹⁹ 193 F. Supp. 375 (S.D.N.Y. 1961) at 384-385.

Article 9 of the *International Covenant on Civil and Political Rights (ICCPR)*²⁰ stipulates that an arrest must not be arbitrary, and subsequent detention must be authorized by law.

Rutaganda was detained by Immigration and Customs Enforcement (ICE) agents working in their capacity, and they provided timely notification to Canada regarding the situation. Thus, his treatment upon entering the United States was entirely legal.

ii. Operation Motown Express did not involve arbitrary interference with Rutaganda's privacy

The United Nations Human Rights Committee has not defined the amorphous concept of privacy as it relates to Article 17 of the *ICCPR*.²¹ The committee has interpreted “arbitrary interference” as implying an element of reasonableness.²² Permissible limitations to Article 17 have not been enumerated, except for the suggestion that public interest and international comity may weigh against a fugitive's rights.²³ Operation Motown Express was developed in light of public sentiment, the persistent demands of Rwanda for extradition, and after the issuance of an INTERPOL Red Notice.

So long as a state's laws are precise, highly oppressive invasions of privacy can be authorized, with the qualification that the bodies established to interfere with privacy are

²⁰ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976, accession by Canada 19 May 1976), arts. 9, 17 [*ICCPR*].

²¹ Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2d ed. (New York: Oxford University Press, 2004) at 477 [*HRC Commentary*].

²² *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) at para. 8.3.

²³ Paul Michell, “English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain” (1996) 29 *Cornell Int'l L.J.* 383 at 444 [*Michell*].

regularly reviewed and have clear enabling legislation.²⁴ *United States v. Liangsiriprasert* indicates that police must be accorded leeway to combat criminal activity through the use of ruses.²⁵ ICE agents and the bodies involved in Operation Motown Express all worked within their mandate when “luring” Rutaganda, and his rights were not violated under the *ICCPR*.

D. The “luring” of Rutaganda did not violate his human rights under customary international law

i. Operation Motown Express was well planned and effected by the executive responsible for foreign affairs

Increasing the number of available fora to prosecute war criminals will not serve the interests of justice if the international community lacks the ability to locate and arrest those who have been indicted. Operation Motown Express was not a forcible abduction, nor did it violate treaty obligations or territorial sovereignty. Rutaganda’s rights under international law were therefore not infringed.

The President’s authority under the Constitution to take action that violates international law, customary or treaty, is well established. Professor Henkin stated in his *General Course on Public International Law at The Hague*:

Acting for the United States, the President can denounce or terminate a treaty, even if to do so violates international law....Also, like every State, the United States has the power (not the right) to act contrary to its treaty obligations or in violation of customary norms, and suffer the consequences; in the United States the constitutional authority of the President may include power to take measures related to foreign affairs that may violate a treaty undertaking or a customary norm.²⁶

²⁴ *HRC Commentary*, *supra* note 21 at 488.

²⁵ *Liangsiriprasert (Somchai) v. United States*, [1991] 1 A.C. 225 (Hong Kong P.C.) at 231.

²⁶ Louis Henkin, *International Law: Politics and Values* (Dordrecht: Martinus Nijhoff Publishers, 1995) at 70.

Thus, the “luring” in Operation Motown Express was not a violation of customary international law. Further, jurisprudential trends in the United Kingdom support the proposition that resolution of any international conflict is best achieved at the diplomatic level.²⁷

ii. United States’ domestic legislation dovetails with the aims of international law

As a ratifier of the *Genocide Convention*,²⁸ the United States has passed the *Genocide Accountability Act 2007 [GAA]*,²⁹ which allows it to prosecute perpetrators of genocide so long as they are present in the U.S. The *GAA* promotes the rule of law and ensures the compliance between domestic law and international law. It closes the loophole that previously existed, which required a crime to have been committed in U.S. territory before it could be prosecuted.³⁰

Universal jurisdiction under customary international law also gives states the right to prosecute war crimes domestically.³¹ Rutaganda was allegedly involved in an atrocious crime, and he should not be allowed to avoid the purview of justice.

iii. Operation Motown Express was permissible in the face of Canada’s resistance to co-operate with the international justice network

The stated objective of INTERPOL has been to work with, and not against, customary international rights.³² INTERPOL calls for the creation of domestic task forces to work in

²⁷ *Michell*, *supra* note 23 at 450-451.

²⁸ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 [*Genocide Convention*].

²⁹ U.S., Bill S. 888, *Genocide Accountability Act of 2007*, 110th Cong. 2007 [*GAA*].

³⁰ *No Safe Haven: Accountability For Human Rights Violators In The United States: Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Sen. Leahy, Chairman, Senate Comm. on the Judiciary), online: <http://judiciary.senate.gov/member_statement.cfm?id=3028&wit_id=262>.

³¹ Jonathan A. Bush, “How did we get here? Foreign abduction after alvarez-machain” (1993) 45 *Stan. L. Rev.* 939 at 981 [Bush].

compliance with INTERPOL goals. The United States has done this by creating the Inter-Agency Working Group for Human Rights Violators.

Principles of international law enumerate situations when abduction may be permissible. One of these categories involves the location of a fugitive in an asylum state that refuses to make efforts to arrest him and bring him to justice.³³ Similar to *Alvarez-Machain*,³⁴ where it was unlikely the Mexican government would prosecute, Canada ignored a series of requests by the Rwandan government to extradite Rutaganda. Additionally, Canada chose to ignore the Red Notice issued by INTERPOL; thus, Canada ignored its obligations under the *Genocide Convention* and its domestic legislation, the *Crimes Against Humanity and War Crimes Act*.³⁵

iv. Repatriation to Canada would be unsuitable

Should this court find that customary international law obligations were breached by the United States in deploying Operation Motown Express, the proper remedy should not be repatriation, as freeing a genocide perpetrator would go against the aims of both the United States and the international community.

E. Rutaganda is extraditable despite the absence of an extradition treaty

i. The Genocide Convention and the Geneva Conventions of 1949

Although neither the U.S. nor Canada has an extradition treaty with Rwanda, the extradition of Rutaganda is supported by treaties. The *Genocide Convention* and *Geneva*

³² INTERPOL, General Assembly, 71st Sess., “Connecting the Police, Securing the World” (21-24 October 2002), presented by Secretary General, Ronald K. Noble.

³³ *Bush*, *supra* note 31 at 978.

³⁴ *Alvarez-Machain*, *supra* note 6.

³⁵ S.C. 2000, c. 24.

*Conventions of 1949*³⁶ both contain mandatory clauses requiring party states to try or extradite war criminals to a properly constituted tribunal.³⁷

Whether the *Genocide Convention* or the *Geneva Conventions of 1949* applies depends on whether the Boutaire High School Massacre (the “Massacre”) was part of the Rwanda Genocide or the Rwanda Civil War. Since the Massacre occurred in June of 1994, after the recognized beginning of the genocide,³⁸ and the killings targeted Tutsi children, the Massacre should be considered part of the genocide and the *Genocide Convention* should apply.

Article 2 of the *Genocide Convention* defines acts of genocide and Article 3 makes them punishable.³⁹ Article 6 provides that: “persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory in which the act was committed, or by such international penal tribunal as may have jurisdiction.”⁴⁰

The United Nations Security Council has created the International Criminal Tribunal for Rwanda (ICTR), an international penal tribunal with jurisdiction over acts of genocide committed in Rwanda.⁴¹ The life of the ICTR was intended to be limited, and it is currently

³⁶ *Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 [*Geneva Conventions of 1949*].

³⁷ See Evan J. Wallach, “Extradition to the Rwandan War Crimes Tribunal: Is Another Treaty Required?” (1999) 3 *UCLA J. Int’l L. & Foreign Aff.* 59 at 72.

³⁸ *Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda*, U.N. SCOR, 1999, UN Doc. S/1999/1257 at 15.

³⁹ *Genocide Convention*, *supra* note 28, arts. 2-3.

⁴⁰ *Ibid.*, art. 6.

⁴¹ *Establishment of an International Tribunal and adoption of the Statute of the Tribunal*, U.N. SCOR Res. 955, 3453rd mtg., U.N. Doc. S/RES 955 (1994).

scheduled to close at the end of 2010.⁴² In anticipation, the prosecutor for the ICTR has been attempting to transfer cases to the Rwandan District Courts. Once the ICTR ceases to exist, state parties will be obliged to transfer those accused to the Rwandan District Courts in order to comply with the *Genocide Convention*.

Alternatively, the Massacre was a war crime committed as part of the civil war in Rwanda. Such a classification would bring the *Geneva Conventions of 1949* into effect. Common Article 3 of the Conventions provides that, “persons taking no active part in the hostilities shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith” and prohibits “violence to life and person, in particular murder of all kinds”⁴³ against such persons. Article 146 obliges party States to bring those accused of war crimes before its own courts or “if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for a trial to a High Contracting Party concerned, providing such High Contracting Party has made out a prima facie case.”⁴⁴ These Articles provide for the extradition of Rutaganda as a war criminal partaking in the Rwanda Civil War.

⁴² *International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, U.N. SCOR Res. 1824, 5937th mtg., U.N. Doc. S/RES 1824 (2008); *International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994*, U.N. SCOR Res. 1901, 6243rd mtg., U.N. Doc. S/RES/1901 (2009).

⁴³ *Geneva Conventions of 1949*, *supra* note 36, art. 3.

⁴⁴ *Ibid.*, art. 146.

ii. American Jurisprudence

In *Valentine*, the U.S. Supreme Court held that extradition may be supported by legislation without the existence of an extradition treaty.⁴⁵ U.N. Resolution 955, in addition to creating the ICTR, obliges member states to co-operate fully with the tribunal and to “take any measures necessary under their domestic law...to comply with requests for assistance or orders issued.”⁴⁶ To comply with this Resolution and Article 5 of the *Genocide Convention*, the U.S. and the ICTR entered into an Agreement to Surrender Persons⁴⁷ and Congress enacted Public Law 104-106 to implement the Agreement.⁴⁸

In *Ntakirutimana v. Reno*,⁴⁹ the U.S. Court of Appeals for the 5th Circuit held that the Agreement was sufficient to provide for extradition without a treaty. The Court based its conclusions on the *Valentine* decision. Since the ICTR is scheduled to close and the prosecutor of the ICTR is attempting to transfer cases to the Rwandan District Courts, the extradition of Rutaganda is indirectly supported by the Agreement.

This line of authorities supports the proposition that the *Genocide Convention* and the *Geneva Conventions of 1949* can support extradition without a treaty. In *Terlinden v. Ames*⁵⁰ (cited in *Reno*), the U.S. Supreme Court indicated that extradition may be based upon a

⁴⁵ *Valentine*, *supra* note 11 at 9.

⁴⁶ *Supra* note 41.

⁴⁷ *Agreement on the Surrender of Persons between the Government of the United States and the ICTR*, U.S.-Int'l Trib. Rwanda, 24 January 1995, 1996 WL 165484 art. 1, cl. 1.

⁴⁸ *National Defense Authorization Act*, Pub. L. 104-106, § 1342, 110 Stat. 486 (1996).

⁴⁹ 184 F.3d 419 (1999) [*Reno*].

⁵⁰ 184 U.S. 270 (1902).

“conventional or legislative provision” in the absence of an extradition treaty.⁵¹ Article 6 of the *Genocide Convention* and Article 146 of the *Geneva Conventions of 1949* provide the conventional basis upon which the extradition of Rutaganda is based.

Finally, the U.S. courts have approved of the extradition of Rutaganda. These judicial decisions provide further support that the U.S. has complied with its domestic laws and is another basis for Rutaganda’s extradition.

iii. Title 18, § 3181(b) of the U.S.C. and the universal jurisdiction of the crime

Title 18, § 3181(b), of the United State Code provides for:

the surrender of persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government.⁵²

Although Rutaganda did not directly commit crimes of violence against nationals of the U.S., he committed a crime of universal jurisdiction. The *GAA* codifies the U.S. acknowledgment of genocide as a crime of universal jurisdiction.⁵³ Crimes of universal jurisdiction, including acts of genocide, are thought to be committed against the entirety of humanity. Therefore, Rutaganda indirectly committed crimes of violence against nationals of the U.S., and is extraditable under § 3181(b) of the U.S.C.

iv. The INTERPOL Red-Notice

In 2004, INTERPOL adopted Resolution number AG-2004-RES-17 which recommends:

that, within the limits of national and international law, ICPO-Interpol member countries co-operate with each other and with international organizations, international criminal

⁵¹ *Ibid.* at 289.

⁵² U.S.C. tit. 18 § 3181(b) (1948).

⁵³ *Supra* note 29 and accompanying text.

tribunals, and non-governmental organizations as appropriate in a joint effort to prevent genocide, war crimes, and crimes against humanity, and to investigate and prosecute those suspected of committing these crimes⁵⁴

Interpol Red Notices are specifically issued to seek the arrest of wanted persons *with a view to extradition*.⁵⁵ The U.S., as an INTERPOL member country, shall “do all within [its] power, in so far as is compatible with [its] own obligations, to carry out the decisions of the General Assembly.”⁵⁶ As discussed above, the extradition of Rutaganda is compatible with the obligations of the U.S. Therefore, the U.S. is required to comply with the INTERPOL recommendation and co-operate with Rwanda by honouring the requested Red Notice.

F. The U.S. may extradite Rutaganda to Rwanda despite his age at the time of the offence

i. Criminal culpability is to be determined at trial or during domestic extradition hearings

For serious crimes, a requisite *mens rea* must be established. The defence of infancy is based on the presumption that human beings are not capable of having a guilty mind until they reach a certain age. Therefore, in certain circumstances, children may escape liability for their acts.⁵⁷ This issue is to be determined during Rutaganda’s trial or during his domestic extradition hearing, not as an issue to determine extraditability.

ii. Rutaganda’s unlawful *recruitment* is irrelevant to his criminal *culpability*

⁵⁴ INTERPOL, General Assembly, Res. No. AG-2004-RES-17, “Increased ICPO-INTERPOL support for the investigation and prosecution of genocide, war crimes and crimes against humanity, 73rd Session – Cancún”, 5 - 8 October 2004.

⁵⁵ INTERPOL, “INTERPOL Notices” (2 August 2007) online: INTERPOL <<http://www.interpol.int/public/Notices/default.asp>>.

⁵⁶ ICPO-INTERPOL Constitution and General Regulations (1956) art. 9 online: <<http://www.interpol.int/Public/ICPO/LegalMaterials/constitution/constitutionGenReg/constitutionon.asp>>.

⁵⁷ Matthew Happold, “Child Soldiers: Victims or Perpetrators?” (2008) 29 U. La Verne L. Rev. 56.

Article 38 of the *Convention of the Rights of the Child (CRC)*,⁵⁸ Article 3 of the Optional Protocol of the *CRC*⁵⁹, and the Additional Protocols of the *Geneva Conventions of 1949*⁶⁰ all indicate that the generally accepted age of voluntary military recruitment is 15. Although the U.S. is not a party to the Additional Protocol or the *CRC*, it has recognized this as the customary international law standard.⁶¹

It is conceded that the recruitment of Rutaganda violated this international law standard. However, accountability for violations of recruitment laws is an issue separate and distinct from the issue of criminal culpability. Accountability for international law recruitment violations is placed upon leaders or those in control of the recruitment process.⁶² International conventions have explicitly distinguished age of recruitment and age of culpability in their provisions.

iii. Rutaganda is criminally culpable under Canadian and American law

Article 40(3a) of the *CRC* provides that State parties to the Convention shall seek to establish a minimum age of criminal culpability.⁶³ The United Nations Standard Minimum

⁵⁸ *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, art. 38 [*CRC*].

⁵⁹ *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* U.N. ESCOR, Commission on Human Rights, 51st Sess., Agenda Item 24, (1995), U.N. Doc. E/CN.4/1995/96 (1995), art. 3.

⁶⁰ *Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 9 June 1977, 1125 U.N.T.S. 3, art. 77(2) [*Additional Protocol*].

⁶¹ Happold, *supra* note 57 at 64-67.

⁶² *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-04-16-T, Judgment (20 June 2007) (Special Court for Sierra Leone, Trial Chamber I); *Prosecutor v. Moinina Fofana and Allieu Kondewa*, SCSL-04-14-T, Judgment (2 August 2007) (Special Court for Sierra Leone, Trial Chamber I); *Prosecutor v. Sesay*, SCSL-04-15-T, Judgment (2 March 2009) (Special Court for Sierra Leone, Trial Chamber I).

⁶³ *CRC*, *supra* note 58, art. 40(3).

Rules on the Administration of Juvenile Justice and their commentary⁶⁴ do not provide a minimum age requirement.

Since international law does not provide a minimum age restriction on the culpability of children, this court must look to domestic standards. Minimum age of criminal liability varies between states from age 10 to 18.⁶⁵ England has a minimum age of 10,⁶⁶ and the European Court of Human Rights concluded that this standard does not violate the European Convention on Human Rights.⁶⁷ The minimum age is 12 in Canada and, in the United States, varies amongst states.⁶⁸ For those under the age of 18 but over the age of criminal culpability, legislation in both countries provides additional considerations and protections.⁶⁹ Although Rutaganda may take advantage of such legislation, he would still be above the minimum age requirement of criminal culpability. Therefore, Rutaganda may be extradited with the confidence that he will be treated consistently with the minimum age laws of Canada and the U.S.

iv. Rutaganda would be criminally liable under international tribunal legislation

Although international conventions do not provide a set minimum age for criminal culpability, some international tribunals have provided minimum age requirements in their

⁶⁴ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, G.A. Res. 40/33, U.N. Doc. A/Res/40/33 (29 November 1985) [*The UN Rules*].

⁶⁵ Sonja Grover, “‘Child Soldiers’ as ‘Non-Combatants’: The Inapplicability of the Refugee Convention Exclusion Clause” (2008) 12:1 *The International Journal of Human Rights* 53 at 60.

⁶⁶ Happold, *supra* note 57 at 72.

⁶⁷ *T v. United Kingdom* (2000), 30 E.C.H.R. 121.

⁶⁸ Lisa Micucci, “Responsibility and the Young Person” (1998) 11 *Can. J.L. & Juris.* 277.

⁶⁹ *Youth Criminal Justice Act*, S.C. 2002, c. 1; *Juvenile Justice and Delinquency Prevention Act as amended*, Pub. L. No. 93-415 (1974).

statutes. Article 7 of the Statute for the Special Court of Sierra Leone provides that: “The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime.”⁷⁰ This standard corresponds with the trend of establishing a minimum age requirement somewhere in the mid-teens.⁷¹ As Rutaganda committed the alleged crimes when he was 15, he would be criminally liable under the evolving international law standard.

G. Rwandan District Courts are capable of providing Rutaganda a fair trial

i. The ICTR

It has always been intended that the ICTR’s life would be limited. The United Nations Security Council Resolution of 18 July 2008 called for the completion of all its work in 2010.⁷² Accordingly, the prosecutor for the ICTR has recently made applications to have cases transferred to the Rwandan court system. Although no applications have been successful to date, the applications indicate that the prosecutor of the ICTR has confidence in the Rwandan courts.

ii. ICTR Outreach Program

The ICTR Outreach Program has provided extensive guidance to the Rwandan judicial system.⁷³ The Outreach Program has developed training sessions and professional workshops for personnel in the Rwandan legal sector as well as annual research fellowship and internship

⁷⁰ *Statute of the Special Court for Sierra Leone*, 16 January 2002, 2178 U.N.T.S. 145, art. 7.

⁷¹ Happold, *supra* note 57 at 83.

⁷² *Brown and others v. Government of Rwanda and another*, [2009] EWHC 1473 (Admin) at para. 15.

⁷³ Tim Gallimore, “The ICTR Outreach Program: Integrating Justice and Reconciliation” (Conference on the Challenging Impunity Kigali Novotel, 7-8 November 2006).

programs for Rwandan law students. Additionally, communications programs are in place including the *Umusanzu mu Bwiyunge* Information and Documentation Centre in Kigali.

iii. Adoption of Organic Law

In 2007 Rwanda implemented new laws guaranteeing rights to the accused.⁷⁴ Most notably, Article 13 of the Organic Law guarantees a list of rights, including the right to a fair and public hearing.⁷⁵ Article 14 of the Organic Law provides protections to witnesses in order to encourage uninfluenced testaments.⁷⁶ Other articles attempt to ensure a fair trial by creating rules of evidence and provisions promoting judicial independence. The adoption of Organic Law by the Rwandan government is a significant improvement to the judicial system since 2007.

iv. Abolition of the death penalty

Article 21 of the Organic Law indicates that the heaviest penalty shall be life imprisonment.⁷⁷ Canada has refused to extradite individuals to countries where the death penalty would be imposed as a violation of the Canadian *Charter of Rights and Freedoms*.⁷⁸ As the death penalty is now abolished in Rwanda, the extradition of Rutaganda would not violate Canada's position on this point of law.

v. The development of the Mpanga prison

⁷⁴ Organic Law No. 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 [*Organic Law*].

⁷⁵ *Ibid.*, art. 13.

⁷⁶ *Ibid.*, art. 14.

⁷⁷ *Ibid.*, art. 21.

⁷⁸ *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3; *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

A fair trial includes not only procedural fairness, but also the achievement of recognized standards in the judicial system as a whole. Rwanda has developed the Mpanga prison to meet international prison standards. Within this prison, there is an area reserved for cases transferred from the ICTR and other states.⁷⁹ This development ensures that Rutaganda would be treated fairly and humanely during any possible detention.

CONCLUSION

The “luring” of Rutaganda from Canada did not violate Canada’s territorial sovereignty, the U.S.-Canada Extradition Treaty, the January 11, 1988 Exchange of Letters Between Canada and the United States on Transborder Abduction, or the internationally protected human rights of Rutaganda guaranteed by the *ICCPR* and customary international law. Rutaganda may be extradited from the U.S. to Rwanda without an extradition treaty as he was above the established minimum age when he committed the crimes, and the courts of Rwanda are capable of providing him a fair trial.

Respectfully Submitted.

Agents for America, 2010-08R

⁷⁹ “Rwanda: Suspects must not be transferred to Rwandan courts for trial until it is demonstrated that trials will comply with international standards of justice.” Amnesty International (AFR 47/013/2007), <<http://www.amnesty.org/en/library/asset/AFR47/013/2007/en/04cd6827-d369-11dd-a329-2f46302a8cc6/afr470132007en.pdf>> (November 2, 2007) at 8.