

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

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

**February 2010**

**THE GOVERNMENT OF CANADA  
(Applicant)**

**v.**

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

**MEMORIAL OF THE RESPONDENT**

**TEAM#: 2010-10R**

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## STATEMENT OF FACTS

The genocide in Rwanda resulted in the deaths of hundreds of thousands of ethnic Tutsis at the hands of the Hutus. Several Hutu perpetrators of the genocide fled from Rwanda to escape prosecution for their crimes and have been living in other nations. One such genocide perpetrator is Emanuel Rutaganda, a Canadian by birth who is also a Rwandan citizen. Rutaganda joined the *Interhamwe* militia at age 14; at age 15 Rutaganda participated in killing 275 Tutsi children in the Boutaire High School massacre. Rutaganda and six other *Interhamwe* militia members set fire to a Tutsi detention center, positioning themselves at the exits so that no victims could escape the fire. This brutal atrocity is one of the more The Rwandan district court in Boutaire charged Rutaganda and his conspirators with 275 counts of murder.

When the government in Rwanda fell in 1994, Rutaganda and his mother used their Canadian citizenship to flee to Canada. There, Rutaganda married a Canadian woman and established a small business. The Rwandan government, discovering that a génocidaire was freely living in Canada, requested diplomatically that Canada surrender Rutaganda to Rwanda for prosecution. Canada persistently refused, claiming that extradition without a treaty was not possible, Rutaganda would not get a fair trial in Rwanda, and child soldiers should not be culpable for their crimes. Rwanda then issued an INTERPOL Red Notice seeking Rutaganda's arrest in 2002.

In 2009, the Inter-Agency Working Group for Human Rights Violators (“Working Group”), composed of representatives from agencies of National Security Council, State Department, Department of Homeland Security, and Department of Justice, begin focusing its attention on Rutaganda's case. The Working Group devised a plan to arrest Rutaganda by luring him to the United States (“U.S.”) while his mother Marie was having surgery in the Detroit

Clinic. The plan, “Operation Motown Express,” involved the Detroit Clinic and was authorized by President Obama. The plan involved emailing Rutaganda’s personal BlackBerry with the false message that Marie was near death and that Rutaganda should travel to Detroit to see her. Rutaganda borrowed a friend’s Canadian passport, entered the U.S., and went to the Detroit Clinic where he was immediately arrested by U.S. Immigration and Customs Enforcement agents.

The U.S. instituted a series of immigration and judicial proceedings against Rutaganda, resulting in a order of removal based on Rutaganda’s illegal entry to the U.S. Canada was notified at each stage of the proceedings in accordance with the 2004 Canada-U.S. Consular Notification Agreement, and Canada argued via amicus briefs at each stage of the proceedings. Additionally, the Government of Canada protested the luring and apprehension of Rutagada as a violation of international law, territorial sovereignty and the U.S.-Canada Extradition Treaty and the 1988 Exchange of Letters on Transborder Abduction. Canada further threatened to withdraw its troops from Afghanistan a year early if the U.S. did not agree to resolve the dispute surrounding Rutaganda in the International Court of Justice.

## **QUESTIONS PRESENTED**

1. Was the alleged “luring” of a Canadian citizen to the U.S. a violation of Canada’s territorial sovereignty, the U.S.-Canada Extradition Treaty, the 1988 Exchange of Letters on Transborder Abduction, and/or the protections of Emanuel Rutaganda’s human rights under the International Covenant on Civil and Political Rights and customary international law?
  
2. Would the rendition of Emanuel Rutaganda from the U.S. to stand trial in Rwanda violate international law due to an absence of both a U.S.-Rwanda and Canada-Rwanda extradition treaty, questions about Rwanda’s ability to provide a fair trial for Rutaganda, and the idea that child soldiers lack criminal culpability?

## **JURISDICTIONAL STATEMENT**

The Parties to this dispute, Canada and the United States consent to the jurisdiction of this Honourable Court, composed of a Chamber of three judges, pursuant to Article 36(1) of the *Statute of the International Court of Justice*.<sup>1</sup> Each party agrees to bring its actions and positions in conformity with the legal conclusions of this Court with respect to the questions presented as described in the *Compromis*.

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<sup>1</sup> Statute of the International Court of Justice, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 25 October 1945).

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## SUMMARY OF ARGUMENT

The alleged “luring” of Rutaganda was legal because the practice did not violate Canadian territorial sovereignty, nor did it violate any treaty-based or customary international obligations of the U.S. Furthermore, the U.S. may render Rutaganda to Rwanda because nothing in U.S. precedent or customary international law precludes this action. Finally, Rutaganda will have a fair trial in Rwanda, and child soldiers should be held culpable for their crimes.

## ARGUMENT

### **I. THE U.S. DID NOT VIOLATE CANADIAN TERRITORIAL SOVEREIGNTY, BINDING TREATY LAW, AND CUSTOMARY INTERNATIONAL LAW BY LURING RUTAGANDA TO THE U.S.**

The transmission of a false message to Emanuel Rutaganda by the U.S. government, and his subsequent arrest in the territory of the U.S., did not violate the territorial sovereignty of Canada, the U.S.-Canada Extradition Treaty, the Exchange of Letters between Canada and the U.S. on Transborder Abduction, Emanuel Rutaganda’s human rights protected by the International Covenant on Civil or Political Rights, or Rutaganda’s human rights protected under customary international law.

#### **A. Americans did not violate Canada’s territorial sovereignty by luring Rutaganda.**

“Territorial sovereignty” may be defined as “the legal condition necessary for the inclusion of such portion in the territory of any particular state.”<sup>2</sup> The essence of territorial sovereignty resides in the relationship between the parcel of land (or sea or air) and the legal

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<sup>2</sup> The Island of Palmas Arbitration (Neth. v. U.S.), 2 R. Int’l Arb. Awards 829, 838 (1928).

conditions under which the parcel is deemed to belong to a state.<sup>3</sup> To posit an infringement on territorial sovereignty, therefore, one necessarily posits an infringement on the relationship between the state and an identifiable parcel. There is nothing within the *Compromis* that suggests that Americans or their agents entered into the sovereign territory of Canada at any point or impeded Canadian sovereignty over any physical location.

Additionally, territorial sovereignty is not breached by mere communication crossing a border. In this case, United States government agents sent an email to Rutaganda's cellular phone, and had no other relevant contacts with any entity within Canada.<sup>4</sup> Breaches of territorial sovereignty are typified not by mere interstate communications, but by infringements of the physical elements of land, sea, and air, or by interventionary assistance to armed bands acting as agents of the infringing government.<sup>5</sup> Indeed, the International Court of Justice, in the *Nicaragua* case, condemned the U.S.'s violation of Nicaragua's territorial independence when the U.S. sent physical arms and monetary support to the Contras, thereby creating a principal/agent relationship.<sup>6</sup> For this Court to hold that mere communication across national borders constitutes a violation of territorial sovereignty would necessitate the adoption of a farcically broad definition, broad enough to sweep in all sorts of official governmental communications, including state television broadcasts.

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<sup>3</sup> J.L. BRIERLY, *LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 162 (6th ed. 1963).

<sup>4</sup> *Compromis*, ¶ 9.

<sup>5</sup> See Mohammad Taghi Karoubi, *Just or Unjust War?: International Law and Unilateral Use of Armed Force by States at the Turn of the 20<sup>th</sup> Century*, 5 J. Mil. Ethics 1, 130 (2004).

<sup>6</sup> *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14.

**B. The U.S. did not violate the terms of the U.S.-Canada Extradition Treaty.**

The luring of Rutaganda from Canada to the U.S. does not violate the U.S.-Canada Extradition Treaty because the U.S. did not violate any of the terms of the treaty, nor is there any bar in the treaty to the U.S. endeavoring to acquire jurisdiction over Rutaganda by means other than through the procedures elaborated in the treaty.

The U.S.-Canada Extradition Treaty, in general sets forth the procedures by which one party requests extradition from the other party.<sup>7</sup> However, the treaty does not demand that a party go through an extradition process whenever possible.<sup>8</sup> The process by which the U.S. induced Rutaganda to enter the U.S. was not extradition. Importantly, an extradition treaty is not the sole legal means by which a national of one State may come into the territory of another State that shares an extradition treaty, and therefore under another State's jurisdiction. "The treaty ... contains no express prohibition against obtaining a person's presence by any other means, including trickery or deceit."<sup>9</sup>

**C. The absence of private "bounty hunters" in the "luring" of Rutaganda aligns with the Exchange of Letters between Canada and the U.S. on Transborder Abduction.**

Throughout the Exchange of Letters between the U.S. and Canada on Transborder Abductions ("Exchange of Letters"), the parties concern themselves exclusively with the activities of civilian agents of bail bonding companies ("bounty hunters").<sup>10</sup> "The U.S. and

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<sup>7</sup> See generally, Treaty on Extradition, U.S.-Can., Dec. 3, 1971, 27 U.S.T. 983.

<sup>8</sup> *Id.*

<sup>9</sup> State v. Ayinder, 208 (P.3d) 518 (Or. Ct. App. 2009).

<sup>10</sup> Canada-United States: Protocol Amending the Treaty on Extradition ("Exchange of Letters on Transborder Abduction") 27 I.L.M. 422 (1988).

Canada recognize that the transborder abduction...by civilian agents of bail bonding companies...is an extraditable offense under the U.S.-Canada Extradition Treaty.”<sup>11</sup> Moreover, the U.S. only clarifies in the Exchange of Letters its obligation to commence extradition proceedings “against *such a person...*”<sup>12</sup> (civilian agents of bail bonding companies).

Within the Compromis, there is absolutely no mention anywhere about any involvement by civilian agents of bail bonding companies. Because the Exchange of Letters deals exclusively with regulating the affairs of such persons and regulating the affairs of states when such persons become involved in a dispute, and no such persons have been found in the context of this particular dispute, any obligations clarified by the Exchange of Letters cannot have any bearing on the eventual disposition of this dispute.

**D. Luring individuals does not generally violate that individual’s rights under treaty law or principles of customary international law.**

The International Covenant on Civil and Political Rights (ICCPR), a codification of the customary international law on the topic, guarantees to everyone “the right to liberty and security of person. No one shall be subjected to arbitrary arrest...”<sup>13</sup> Article 9(1) of the ICCPR demands that any deprivation of liberty shall be in a manner “established by law,” and “law” should be understood in a broad, abstract sense.<sup>14</sup>

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

<sup>12</sup> *Id.* (emphasis added)

<sup>13</sup> International Covenant on Civil and Political Rights, art. 9(1), Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>14</sup> Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 15, 18 (Oct. 2, 1995), in 1 Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1993-1998, at 143 (André Klip & Göran Sluiter eds., 1999).

Absent circumstances of circumvention of a treaty or of egregious maltreatment of a subject, “luring” has been accepted as customary international law.

Most if not all national and international cases in which “luring” was found to be a violation of some principle of international law, the illegality stemmed from either a circumvention of an existing extradition treaty or from unjustified violence directed against the subject.<sup>15</sup> The “luring” of Rutaganda did not occur with either of these two elements. The “luring” of Rutaganda did not violate or circumvent the U.S.-Canada extradition treaty, as stated above. In addition, because there is currently no extradition treaty between Canada and Rwanda, no extradition treaty is circumvented here either. Additionally, there are absolutely no allegations of violence present in the *Compromis*, and certainly no factual assertions similar to those found in *United States v. Toscanino*,<sup>16</sup> where a court dismissed jurisdiction due to the egregious torture inflicted upon the defendant.

For a practice to become customary international law, it must acquire two characteristics. First, the practice must be continuous in time and be as uniform as possible. Second, the practice must be generally viewed as obligatory.<sup>17</sup> The practice of deeming “luring” to be impermissible under international law fails both of these standards.

There are many recent decisions, both by national and international courts, which ratify the legality of “luring.” Importantly, the practice of “luring” has been accepted by an organ of

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<sup>15</sup> ELIHU LAUTERPACHT ET AL., (EDS.), INTERNATIONAL LAW REPORTS (VOL. 117) 490 (1998).

<sup>16</sup> U.S. v. Toscanino, 500 F.2d 267 (2d Cir.1974).

<sup>17</sup> In the Proceedings on the Constitutional Complaint of Mr. Al-M., a Yemeni Citizen, and His Motion for a Temporary Injunction, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 5, 2003, docket number 2 BVR 1506/03 (F.R.G.) [hereinafter Complaint of Mr. Al-M].

the United Nations.<sup>18</sup> The Trial Chamber of the International Tribunal for the Former Yugoslavia found that, notwithstanding the defendant's being lured from Yugoslavia to another state, the operation to arrest the defendant did not pose a legal obstacle to extradition.<sup>19</sup> Other ad-hoc criminal tribunals established by the United Nations have agreed with this assessment.<sup>20</sup> Domestic courts within the U.S.<sup>21</sup>, the United Kingdom<sup>22</sup>, Germany<sup>23</sup>, and even Canada<sup>24</sup> itself, have all ratified "luring" as legitimate state practice.

## **II. THE U.S. CAN JUSTIFY RENDERING RUTAGANDA TO RWANDA UNDER INTERNATIONAL LAW AND HUMAN RIGHTS NORMS.**

The rendition of Rutaganda from the U.S. to stand trial in Rwanda does not violate international law simply because there is no extradition treaty between the U.S. and Rwanda or Canada and Rwanda. Moreover, Rutaganda will be able to have a fair trial in Rwanda in line with human rights norms. Finally, Rutaganda cannot be immune from criminal culpability based on his status as a former child soldier.

### **A. International law obligates the U.S. to extradite or prosecute a known génocidaire.**

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<sup>18</sup> The Prosecutor v. Dokmanovic, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused, ¶ 78 (Oct. 22, 1997)

<sup>19</sup> *Id.*

<sup>20</sup> Daryl A. Mundis, *Recent Books on International Law*, 97 Am. J. Int'l L. 1012, 1018 (2003) (reviewing RICHARD MAY & MARIEKE WIERDA, *INTERNATIONAL CRIMINAL EVIDENCE* (2002)).

<sup>21</sup> U.S. v. Alvarez-Machain, 504 U.S. 655 (1992); State v. Ayinder, 208 (P.3d) 518 (Or. Ct. App. 2009).

<sup>22</sup> *In Re Schmidt* [1995] 1 App. Cas. 339 (Eng. H.L. 1994).

<sup>23</sup> See Complaint of Mr. Al-M, *supra* note 17.

<sup>24</sup> *Re Hartnett and the Queen; Re Hudson and the Queen*, [1973] 1 O.R.2d 206 (Can.).

Customary international law obligates States to investigate and prosecute war crimes committed by their nationals,<sup>25</sup> and Rwanda implicated this obligation by issuing an Interpol notice. Further, the international legal principle of *aut dedere aut judicare*<sup>26</sup> (“extradite or prosecute”) obligates the U.S. to act on Rutaganda’s case even absent a specific treaty provision. This obligation is based on “generally binding customary norms”<sup>27</sup> and may already be accepted as customary, particularly with international crimes such as genocide.<sup>28</sup> This court has not decided which obligation is preemptory – extradition or prosecution<sup>29</sup> – so rendering Rutaganda to Rwanda is not in violation of international law.

**1. Both State practice and U.S. precedent permit rendition without a treaty.**

Rutaganda has committed “grave human rights violations;” the U.S. has an international *erga omnes* obligation to bring him to justice.<sup>30</sup> Reciprocity and comity also serve as a basis for extradition without a treaty.<sup>31</sup> Other States have rendered génocidaires to stand trial in Rwanda

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<sup>25</sup> Jean-Marie Henckaerts, *The Grave Breaches Regime As Customary International Law*, 7 J. INT’L CRIM. JUST. 683, 694 (2009).

<sup>26</sup> M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 10 (5th ed. 2007).

<sup>27</sup> International Law Commission, *Preliminary Report on the Obligation to Extradite or Prosecute* (‘*aut dedere aut judicare*’) § 40 (Zdzislaw Galicki, Special Rapporteur) UN Doc. A/CN.4/571 (June 7, 2006).

<sup>28</sup> Bassiouni, *supra* note 3, at 10.

<sup>29</sup> *See, e.g.*, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), 1992 I.C.J. 114; Summary, Int’l Court of Justice, Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), (May 28, 2009) available at <http://www.icj-cij.org/docket/files/144/15146.pdf>.

<sup>30</sup> Goiburú *et al.* v. Paraguay 2006 Inter-Am. Ct. H.R. (ser. C) No. 153 at ¶¶129, 130-32 (Sept. 22, 2006).

<sup>31</sup> Bassiouni, *supra* note 3, at 79.

on the basis of comity, pointing to the development of *opinio juris*.<sup>32</sup> Rwanda and the U.S. have an agreement rooted in comity and codified by U.S. statute to render suspects to the International Criminal Tribunal of Rwanda (“ICTR”).<sup>33</sup> Rendition to Rwandan national courts is a natural extension of this practice as exemplified by practice of other states. The House of Lords in *Ex parte Bennett* found a de facto extradition treaty between South Africa and the United Kingdom where special arrangements could have been made to secure the surrender of a fugitive criminal.<sup>34</sup>

The U.S. has previously transferred a Canadian suspected of terrorism, Maher Arar, to Syria, in absence of a U.S.-Syria treaty.<sup>35</sup> Aside from concerns of Arar facing torture in Syria, the process of issuing an extradition order after U.S. judicial and immigration hearings was largely unquestioned in this case. Though Rutaganda’s crimes were not directed at U.S. citizens or terrorist in nature, his crime was one of international concern, requiring the U.S. to take action even in absence of a treaty.<sup>36</sup> Rutaganda, like Arar, was offered fair process in the form of judicial and immigration hearings prior to issuing an order of removal to Rwanda.

The U.S. has previously returned an accused Rwandan criminal even in absence of a treaty. In *Ntakirutimana v. Reno*, the U.S. used an Executive-Congressional agreement to

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<sup>32</sup> See, e.g., Sylvere Ahorugeze, Swedish Supreme Court, Stockholm, Ö 1082-09, (May 26, 2009).

<sup>33</sup> National Defense Authorization Act for Fiscal Year 1996, Pub.L. 104-106, § 1342, 110 Stat. 186 (1996).

<sup>34</sup> See *Ex parte Bennett*, [1994] 1 A.C. 42 (1993) (U.K.).

<sup>35</sup> *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009).

<sup>36</sup> See generally Henckaerts, *supra* note 2.

extradite an accused Rwandan génocidaire;<sup>37</sup> this is a similar instrument to the Inter-Agency Working Group in Rutaganda's case.<sup>38</sup> The *Ntakirutimana* case plus the formal statutory partnership with the ICTR lays the groundwork for finding an informal relationship between the U.S. and Rwanda. These examples show acknowledgement of the genocide in Rwanda and the U.S.'s pledge to address it.

**2. The U.S. has a *jus cogens* obligation to combat genocide by securing justice for the génocidaires.**

International agreements define the prevention of genocide, which includes the murder of part of an ethnic group, as a *jus cogens* norm.<sup>39</sup> Other States also agree that the prohibition on genocide is a non-derogable obligation imposed by customary international law,<sup>40</sup> requiring the U.S. to take responsibility for Rutaganda as a war criminal. The Geneva Conventions and its Additional Protocols,<sup>41</sup> codified by the U.S., impose an international duty to criminally punish grave breaches of universal humanitarian values.<sup>42</sup> Rutaganda's crime of mass murder falls under this description.

**B. In Rwanda, Rutaganda will get a fair trial in *gacaca*; moreover, it is the best forum for promoting restorative justice and preserving trust in the Rwandan legal system.**

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<sup>37</sup> 184 F. 3d 419 (1999).

<sup>38</sup> *Compromis* at 3.

<sup>39</sup> *See Bassiouni, supra* note 3, at 165.

<sup>40</sup> *See, e.g., Nulyarimma v. Thompson* (1999) FCA 1192, ¶ 18 (Austl.).

<sup>41</sup> *See* Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (1977).

<sup>42</sup> Restatement (Third) of the Foreign Relations Law, §702, comment (b) (1986).

Recently, Rwandan law established *gacaca*, a Rwandan system of local dispute resolution, staffed by community members,<sup>43</sup> as the primary court of justice for génocidaires.<sup>44</sup> Other post-conflict States such as Uganda, Mozambique, Sierra Leone, and East Timor have similarly used “local justice to provide a mix of accountability and reconciliation.”<sup>45</sup>

### **1. The newly amended *gacaca* law creates a fairer process Rutaganda.**

The amended Gacaca Law ensures more efficient trials in conformity with international agreements.<sup>46</sup> Fairness in these trials has improved as evidenced by the acquittal rate and the abolition of the death penalty as punishment.<sup>47</sup> Oversight by independent organizations such as *Avocats Sans Frontières* further ensures a fair process.<sup>48</sup>

Rutaganda’s status as a minor will be respected by *gacaca* through the built-in protection of more lenient sentencing standards for minors,<sup>49</sup> aligned with the Convention on the Rights of the Child (“CRC”).<sup>50</sup> The law establishing *gacaca* provides for a “minor’s bench” with

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<sup>43</sup> Lars Waldorf, *Mass Justice For Mass Atrocity: Rethinking Local Justice As Transitional Justice*, 79 Temp. L. Rev. 1, 48(2006).

<sup>44</sup> Organic Law No. 16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide or Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994, June 19, 2004, art. 51 [hereinafter Gacaca Law].

<sup>45</sup> Waldorf, *supra* note 43, at 3.

<sup>46</sup> Convention on the Rights of the Child, art. 40(2)(b)(iii), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; African Charter on the Rights and Welfare of the Child, art. 17(2)(c)(iv), OAU Doc.CAB/LEG/24.9/49 (1990).

<sup>47</sup> Waldorf, *supra* note 43, at 46.

<sup>48</sup> Waldorf, *supra* note 43, at 55.

<sup>49</sup> Gacaca Law, *supra* note 44, at art. 78.

<sup>50</sup> CRC, *supra* note 46, at art. 40(3).

specially-trained judges;<sup>51</sup> though minors' benches are rarely used, Rutaganda's high-profile case may reconvene such a bench.

**2. *Gacaca* will offer community healing through restorative justice and reaffirm the rule of law in Rwanda for addressing genocide on a local level.**

Trial by *gacaca* in Rutaganda's case is consistent with ideas of restorative justice, where good-faith domestic proceedings "may better preserve collective memory and promote the mollification of victims, the accountability of perpetrators, the national (and even the international) rule of law, and national reconciliation."<sup>52</sup> The social characteristics of Rwandan society, the interdependency and communitarian nature of Rwandan culture, and the local nature of the atrocities committed support the use of community-based justice.<sup>53</sup>

Rwandan *gacaca* are also the best forum for Rutaganda's trial because the "prime responsibility for consistent monitoring and prosecution of violations rests with the national authorities of the State in which the violations occurred."<sup>54</sup> Rutaganda's victims deserve this form of reconciliation. Local justice systems have provided accountability, local control, reconciliation, and access in communities recovering from war atrocities.<sup>55</sup> Additionally, the international community sends "an implicit (if perhaps intended) message that Rwandan

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<sup>51</sup> Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990, art. 19, [hereinafter Genocide Law].

<sup>52</sup> José Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 482-83 (1999).

<sup>53</sup> Mark A. Drumbl, *Punishment, Postgenocide: From Guilt To Shame To Civis In Rwanda*, 75 N.Y.U. L. Rev. 1221 (2000).

<sup>54</sup> The Secretary-General, *Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children*, ¶ 252, U.N. Doc. A/51/306 (Aug. 26, 1996) [hereinafter Machel Study].

<sup>55</sup> Waldorf, *supra* note 43, at 3-4.

institutions cannot be trusted or that its judiciary is not ready to implement the rule of law” when it denies Rwanda the right to try its own citizen in its own courts.<sup>56</sup> It is not the responsibility of another nation to hold Rutaganda accountable for his crime; he committed the crime in his community, and that community should adjudicate his case.

### **3. Submitting Rutaganda to *gacaca* upholds international standards.**

The international nature of Rutaganda’s crime supports a *gacaca* trial. In the trial of Adolf Eichmann, a German Nazi who was extradited from Argentina, the Israeli domestic court found that while Eichmann’s crimes may not be international, “their harmful and murderous effects were so embracing and widespread as to shake the international community.”<sup>57</sup>

International agreements do not completely ban the prosecution of child soldiers, instead specifying the process that children accused of crimes must be afforded and assuring the protection of the child’s dignity.<sup>58</sup> These international instruments do not specify what other judicial means of “prosecuting” child soldiers States should pursue. *Gacaca* is an alternative form of justice where neighbors can constructively confront one another, reconstruct events of the genocide, acknowledge crimes and ultimately heal, fulfilling Rwanda’s obligations under international law to provide a just forum for prosecuting child soldiers.

#### **C. Rutaganda can be tried by *gacaca* for crime committed at age 15 because there is no internationally-established minimal age of culpability.**

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<sup>56</sup> Alvarez, *supra* note 52, at 466.

<sup>57</sup> Attorney General of Israel v. Eichmann, 36 Int’l L. Rep. 277, 304 (Israel Sup. Ct. 1962).

<sup>58</sup> CRC, *supra* note 46, at art. 40(3)(b) & art. 40(1); United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Rule 1.3 & 1.9, U.N. Doc. A/40/53/Annex (Nov. 29, 1985) [hereinafter Beijing Rules].

Under customary international law, defined by *opino juris* and State practice, there is no international minimal age for criminal liability. The CRC and a U.N-sponsored study claim that States should individually determine the minimal age of capacity.<sup>59</sup> The only international limitation is set out in the Beijing Rules, which assert that nations must balance “the facts of emotional, mental and intellectual maturity” where the age of criminal responsibility is set at a low age.<sup>60</sup> Other countries have lower ages of capacity – as low as 7 years old.<sup>61</sup>

While the International Criminal Court will not try perpetrators under age 18,<sup>62</sup> other types of justice systems prosecute minors. For example, the Special Court for Sierra Leone (“SCSL”) allows for prosecution of children 15 years old,<sup>63</sup> and the Special Panel in East Timor sets the minimal age at 12 years.<sup>64</sup>

Rutaganda was 15 at the time of this massacre; this is old enough to bear criminal responsibility under Rwandan<sup>65</sup> and international law. Moreover, Rwandans embrace culpability and punishment for child soldiers. A 1995 report finds the majority of Rwandans favor

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<sup>59</sup> CRC, *supra* note 46, at art. 40(3)(a); Machel Study, *supra* note 54, at ¶ 25.

<sup>60</sup> Beijing Rules, *supra* note 58, at Rule 4.1.

<sup>61</sup> Nienke Grossman, *Rehabilitation Or Revenge: Prosecuting Child Soldiers For Human Rights Violations*, 38 GEO. J. INT'L L. 323, 340 (2007).

<sup>62</sup> Rome Statute of the International Criminal Court, art. 26, July 17, 1998, 2187 U.N.T.S. 90.

<sup>63</sup> Statute of the Special Court for Sierra Leone, art. 7, Jan. 16, 2002, 2178 U.N.T.S. 145.

<sup>64</sup> U.N. Transitional Admin. E.Timor Regulation 2000/30 on Transitional Rules of Criminal Procedure, § 45.1, (Sept. 25, 2000).

<sup>65</sup> *See* Genocide Law, *supra* note 51.

punishments for children equivalent to those for adults;<sup>66</sup> while duress may have existed, Rwandans conclude that child soldiers acted on their own and should be held culpable.<sup>67</sup>

### **1. Other nations have prosecuted individuals for crimes committed while juveniles.**

While there is little precedent on prosecution of child soldiers, several nations have instituted proceedings against juveniles who commit crimes. In *Sullivan v. Florida*, the state argues that a 13-year-old rapist should be held to adult sentencing standards due to the brutality of the crime.<sup>68</sup> The European Court of Human rights found no minimum age of criminal responsibility in international law or State practice and tried two 10-year-olds for murder.<sup>69</sup>

Child soldiers have similarly been prosecuted in national courts in Sudan and the Democratic Republic of Congo.<sup>70</sup> The U.S. will submit a Canadian-born 15-year-old child soldier from Afghanistan to a military tribunal, after finding that customary international law does not prohibit the prosecution of Khadr.<sup>71</sup> In East Timor, a 14-year-old child soldier was prosecuted in the Special Panels for Serious Crimes for the deaths of 47 people.<sup>72</sup> In these

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<sup>66</sup> See e.g., Ilene Cohn, *The Protection of Children in the Peacemaking and Peacekeeping Processes*, 12 HARV. HUM. RTS. J. 129, 187 (1999).

<sup>67</sup> HUMAN RIGHTS WATCH, *LASTING WOUNDS: CONSEQUENCES OF GENOCIDE AND WAR FOR RWANDA'S CHILDREN* 19 (2003).

<sup>68</sup> See Brief of Respondent at 11, *Sullivan v. Florida*, No. 08-7621 (2009).

<sup>69</sup> *T. v. United Kingdom and V. v. United Kingdom*, 30 Eur. Ct. H.R. 121 (2000).

<sup>70</sup> *Accused's Age is Focus at Guantanamo Tribunal*, (NPR radio broadcast June 4, 2007), available at <http://npr.org/templates/story/story.php?storyId=10693462>.

<sup>71</sup> Defense motion to dismiss at ¶ 18, *United States v. Khadr*, No. D-022 (2008).

<sup>72</sup> Judicial System Monitoring Programme, *The Case Of X: A Child Prosecuted For Crimes Against Humanity*, Dili, Timor Leste, Jan 2005, available at [http://www.essex.ac.uk/armedcon/story\\_id/000386.pdf](http://www.essex.ac.uk/armedcon/story_id/000386.pdf).

proceedings, the courts follow the rules of the CRC<sup>73</sup> and Beijing Rules<sup>74</sup> by balancing the needs of serving justice with protecting the vulnerabilities of the child.

## **2. Child soldier immunity is detrimental to transitional justice**

Absolving child soldiers of liability for their past crimes is harmful to the process of *gacaca* restorative justice, where offenders face their victims in a face-to-face mediation.<sup>75</sup> Awarding immunity to child soldiers stifles “the creation of peace and reconciliation in the community.”<sup>76</sup> Moreover, it sets a negative precedent for future use of child soldiers in conflicts. Military commanders may be more likely to use child soldiers to commit the most heinous crimes with knowledge that these juveniles will face no consequences for their crime.<sup>77</sup> Instead, punishing child soldiers will facilitate the delivery of justice to these communities.

## **CONCLUSION**

Canada incorrectly accuses the U.S. of illegally “luring” Rutaganda to Detroit. However, this action by the U.S. was legal under treaty law and customary international obligations. The rendition of Rutaganda to Rwanda is similarly allowed under international law and legal precedent. Rwanda is the best forum for a trial for Rutaganda; Rwanda can provide a fair trial

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<sup>73</sup> CRC, *supra* note 46, at art. 40(3).

<sup>74</sup> Beijing Rules, *supra* note 58, at Rule 1.4.

<sup>75</sup> *See generally* Waldorf, *supra* note 43.

<sup>76</sup> Drumbl, *supra* note 34, at 1256.

<sup>77</sup> VESSELIN POPOVSKI & KARIN ARTS, INTERNATIONAL CRIMINAL ACCOUNTABILITY AND CHILDREN’S RIGHTS 7 (Policy Brief, United Nations University, number 4, 2006) *available at* <http://www.unu.edu/publications/briefs/policy-briefs/2006/PB4-06.pdf>.

for its own national who committed an act of genocide within the borders of Rwanda. Finally, international practice does not support immunity for child soldiers.

Respectfully Submitted,

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