

2009-2010

NIAGARA INTERNATIONAL MOOT COURT COMPETITION

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

February 2010

**THE GOVERNMENT OF CANADA
(Applicant)**

v.

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

MEMORIAL OF THE APPLICANT

TEAM #: 2010-11A

TABLE OF CONTENTS

STATEMENT OF FACTS	ii
QUESTIONS PRESENTED	v
STATEMENT OF JURISDICTION	vi
INDEX OF AUTHORITIES	vii
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. The United States breached its obligations under International law by luring Emanuel Rutaganda to the United States from Canada and apprehending him	2
A. The luring of Mr. Rutaganda violated Canada’s territorial sovereignty	2
B. The United States breached its obligation under the <i>Treaty on Extradition between the United States and Canada</i> by luring Mr. Rutaganda	6
C. The luring of Mr. Rutaganda violated the January 11, 1988 Exchange of Letters Between Canada and the United States on Transborder Abduction	8
D. The luring violated the internationally protected human rights of Mr. Rutaganda guaranteed by the <i>International Covenant on Civil and Political Rights and customary international law</i>	10
II. The rendition of Emanuel Rutaganda from the United States to Rwanda for trial is a violation of international law	12
A. The rendition is a violation of international law because neither the United States nor Canada have an extradition treaty with Rwanda	12
B. Mr. Rutaganda, as a child soldier, lacked criminal culpability	13
C. The courts of Rwanda are not capable of providing Mr. Rutaganda with a fair trial	17

STATEMENT OF FACTS

Canada and the United States have been engaged in a dispute over the luring, apprehension, and extradition of Emanuel Rutaganda (“Mr. Rutaganda”).¹

Mr. Rutaganda was born in Canada on September 10, 1978.² In 1979, his family moved to Kigali, Rwanda, where Mr. Rutaganda grew up. He has both Canadian and Rwandan citizenship, and is of Hutu ethnicity. Mr. Rutaganda’s father died in 1993. Subsequently, 14 year- old Mr. Rutaganda was recruited into the *Interhamwe* militia group (“*Interhamwe*”), a paramilitary organization loosely associated with the Hutu army. It is unknown whether his recruitment was compulsory or voluntary. He was a soldier in the *Interhamwe* between April- August 1994, during the Rwandan genocide.³

In August, 1994, shortly after the fall of the Hutu government, Mr. Rutaganda and his mother fled Rwanda for Canada. In 2000, Mr. Rutaganda married a Canadian woman with whom he has three children. Mr. Rutaganda has never been subject to any criminal proceedings in Canada.⁴

In 2001, the Rwandan district court in Boutaire charged Mr. Rutaganda with 275 counts of murder. According to the indictment, in June 1994 Mr. Rutaganda, along with other members of the *Interhamwe* set fire to the Boutaire High School, in which 275 children were trapped.

They positioned themselves at the exits, shooting anyone who attempted to escape. This event is

¹ Compromis Between Canada (Applicant) and the United States (Respondent) to Submit to the International Court of Justice Their Differences Regarding Emanuel Rutaganda (jointly notified to the court on 24 October 2008) [*Compromis*].

² 2009-2010 Niagara International Moot Court Competition Corrections/Clarifications to the Compromis [*Compromis Clarifications*].

³ *Compromis*, *Supra* note 1 at para. 2.

⁴ *Ibid.* at para. 3.

referred to as the Boutaire High School massacre (“massacre”).⁵ Mr. Rutaganda was 15 years old at the time of this event.⁶

Since 2001, the Rwandan government has repeatedly requested that Canada surrender Mr. Rutaganda to Rwanda for prosecution. Canada has denied the requests citing the following reasons: Canada does not have an extradition treaty with Rwanda; Canada does not believe Mr. Rutaganda, as a child soldier, is criminally culpable for his actions; and they do not believe the Rwandan courts will provide a fair trial. On January 6, 2002, INTERPOL issued a Red Notice, seeking Mr. Rutaganda’s arrest from any country in the world.⁷

In February 2009, the US established the “Inter-Agency Working Group for Human Rights Violators” to assist in the implementation of the *Genocide Accountability Act of 2007*. On July 7, 2009, NBC aired a television episode about Mr. Rutaganda. Following the episode, other American media voiced objection to Canada housing an alleged genocide offender. In this context, the Inter-Agency Working Group trained their focus on Mr. Rutaganda.⁸

On July 21, 2009, Mr. Rutaganda’s mother attended at the Detroit Medical Clinic for a specialized procedure. The Inter-Agency Working Group sensed an opportunity and developed a plan called “Operation Motown Express” (“Operation Motown”) to lure and apprehend Mr. Rutaganda. On July 22, US Immigration and Customs Enforcement (“ICE”) agents sent an email from the Detroit Clinic to Mr. Rutaganda’s personal Blackberry. The email fraudulently stated

⁵ *Ibid.* at para. 4.

⁶ *Compromis Clarifications*, *supra* note 2.

⁷ *Compromis*, *supra* note 1 at para. 5.

⁸ *Ibid.* at paras. 6, 7.

Mr. Rutaganda's mother was dying, she was asking for him, and he must come right away.⁹

After receiving the email, Mr. Rutaganda entered the US, proceeded to the Detroit Clinic, and was immediately arrested and taken into custody by ICE agents.¹⁰

The issue of whether Mr. Rutaganda could be removed to Rwanda was litigated through the US court system. The Canadian Government protested the luring and apprehension of Mr. Rutaganda, and submitted Amicus briefs on behalf of Mr. Rutaganda's release at each stage of the proceedings. On September 15, 2009, the U.S. Supreme Court denied Mr. Rutaganda's petition for *certiorari*.¹¹

Canada and the US have agreed to refer the case to the International Court of Justice ("ICJ") for adjudication.

⁹ *Ibid.* at paras. 8, 9.

¹⁰ *Ibid.* at para. 10.

¹¹ *Ibid.*

QUESTIONS PRESENTED

1. Did the United States Breach Its Obligations Under International law by Luring Emanuel Rutaganda to the United States from Canada and Apprehending Him?
2. Is the Rendition of Emanuel Rutaganda from the United States to Rwanda for Trial a Violation of International Law?

STATEMENT OF JURISDICTION

The parties to this matter, Canada and the United States of America, hereby submit this dispute to a Chamber of the International Court of Justice pursuant to Articles 40(1) and 36(1) of the *Statute of the International Court of Justice*.¹² Both Parties have complied with all requirements of Articles 36(1) and 40(1). The parties agree to submit their dispute to the jurisdiction of this Court.

¹² *Statute of the International Court of Justice*, annexed to the *Charter of the United Nations*, arts. 36, 40, 26 June 1945, Can. T.S. 1945/7 p.48, 145 BFSP 832, SATS 1945/6 (entered into force 24 October 1945) [*ICJ Statute*].

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SUMMARY OF ARGUMENT

Luring and Apprehension of Emanuel Rutaganda

The United States violated international law when it lured Mr. Rutaganda from Canada to the United States, and apprehended him. Binding jurisprudence has indicated that sovereign states must not interfere in one another's affairs. The US breached Canada's sovereignty by exercising police power inside Canadian territory without consent.

The luring was unlawful because the US failed to follow proper extradition procedures outlined in the *Extradition Treaty*. Legislation and binding jurisprudence indicate that obligations incurred in an "Exchange of Letters" may be legally binding. Case law suggests that luring by fraudulent means can be equated to a forceful abduction. The luring of Mr. Rutaganda by US agents was a breach of the obligations incurred by the US in the *Exchange of Letters*.

International law guarantees the right to liberty and protects all persons against arbitrary actions of the state. The US shunned treaty obligations in implementing Operation Motown; their actions were arbitrary and therefore violate international law. Accordingly, the ICJ should order the US to return Mr. Rutaganda to Canada.

Extradition of Emanuel Rutaganda

The rendition of Mr. Rutaganda from the US to Rwanda is a violation of international law. Canada is not obligated by a treaty with Rwanda to extradite Mr. Rutaganda. Mr. Rutaganda is a Canadian citizen who was a child at the time of the alleged offence charged; and there is no reasonable assurance that he will be granted a fair trial in Rwanda.

ARGUMENT

I. THE UNITED STATES BREACHED ITS OBLIGATIONS UNDER INTERNATIONAL LAW BY LURING EMANUAL RUTAGANDA TO THE UNITED STATES FROM CANADA AND APPREHENDING HIM.

A) The luring of Mr. Rutaganda by the United States violated Canada's territorial sovereignty.

The Duty of Non-Interference

Article 3 of the *International Law Commission's Report to the General Assembly* indicates that sovereign states have the right to be free from interference of any other states in their internal or external affairs.¹³ The *United Nations Friendly Relations Declaration* expanded on the state's duty not to intervene and indicated that this duty includes abstinence from direct and indirect intervention.¹⁴ While the *Friendly Relations Declaration* is not a legally binding instrument, it is widely considered to be customary international law.¹⁵ In the *Nicaragua Case*, the ICJ observed: "between independent states, respect for territorial sovereignty is an essential foundation of international relations".¹⁶ Sovereignty includes the states' right to decide freely on matters relating to foreign policy.¹⁷ The ICJ ruled that a state may not intervene in affairs, even where

¹³ *Report of the International Law Commission to the General Assembly*, 1949 Y.B. Int'l L. Comm'n, pt. 2 at 278, 287.

¹⁴ *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation*, UNGA Res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970) [*Friendly Relations Declaration*].

¹⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 14 at para. 202 [*Nicaragua Case*].

¹⁶ *Ibid.* at para. 202.

¹⁷ *Ibid.* at para. 203.

they object to the “domestic policies of that country, its ideology.... or the direction of its foreign policy.”¹⁸

Operation Motown was a coercive act by the US which infringed the principle of non-intervention. Canada made a domestic policy decision not to extradite Mr. Rutaganda. The US disagreed with that decision and lured Mr. Rutaganda to their territory so they could extradite him. This action undermines Canada’s sovereign right to freely make decisions on foreign policy.

In the *Corfu Channel* case¹⁹, Royal Navy ships from England conducted mine-clearing operations in Albanian territorial waters without Albanian authorization.²⁰ The ICJ held that despite the danger posed by the mines, England’s actions were a violation of Albania’s sovereignty.²¹ The ICJ indicated that “between independent states, respect for territorial sovereignty is an essential foundation of international relations”.²² Based on this precedent, the US does not have a right to violate Canada’s sovereignty to alleviate any perceived threat posed by Mr. Rutaganda.

In the *Lotus* case, the Permanent Court of International Justice (“PCIJ”) held that a primary restriction imposed by international law is that no state may exercise its power in any

¹⁸ *Ibid.* at paras. 207-209.

¹⁹ *Corfu Channel Case (United Kingdom v. Albania)*, Merits, Judgment of April 9, 1949, I.C.J. Reports 1949, p.4 [*Corfu Channel*].

²⁰ *Ibid.* at 12, 13, 33, 34.

²¹ *Ibid.* at 34, 35.

²² *Ibid.* at 35.

form in the territory of another state, absent a permissive rule to the contrary.²³ Mr. Rutaganda was a citizen and resident of Canada, therefore Canada has exclusive jurisdiction over Mr. Rutaganda, and the luring by the US was an interference with Canada's exclusive sovereignty in this matter.

Obligations under the Charter of the United Nations

The organization of the United Nations is "based on the principle of sovereign equality of all its Members".²⁴ Article 2(4) of the *UN Charter* stipulates that members refrain from using force against the territorial integrity or political independence of any state.²⁵ The preamble to the *Vienna Convention on the Law of Treaties* ("VCT") instructs that parties to the convention should have in mind the principles of international law embodied in the *UN Charter*, including the sovereign equality of all states, and non-interference in the domestic affairs of States.²⁶

In the *Nicaragua Case*, Nicaragua claimed that the US had breached Article 2(4) of the *UN Charter* by using force against it.²⁷ The ICJ determined that the provisions in Article 2(4) are binding on the US as customary international law. Many countries believe that enticing a person

²³ The Case of the S.S. "Lotus" (*France v. Turkey*) (1927), *P.C.I.J.* (Ser. A) No. 10 [*Lotus*].

²⁴ *Charter of the United Nations, with annexed statute of the International Court of Justice*, art. 2(1), 26 June 1945, CTS 1945/7; BTS 67(1946), Cmd.7015; 145 BFSP 805 (entered into force 24 October 1945) [*UN Charter*].

²⁵ *Ibid.* at art. 2(4).

²⁶ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, Can. T.S. 1980/37, 8 I.L.M. 679 (entered into force 27 January 1980) [*VCT*].

²⁷ *Nicaragua Case*, *supra* note 15.

by fraud from another country for the purposes of arrest is contrary to public international law, and should be recognized as a bar to prosecution.²⁸

Operation Motown was “forceful” within the definition in Article 2(4). Without Canada’s permission, the ICE agents sent a fraudulent email to Mr. Rutaganda’s personal blackberry while he was located on Canadian soil with the intention of luring him off Canadian soil. While not a direct attack, this activity could be construed as forceful in that it emotionally swayed a Canadian citizen to feel he had no choice but to enter the US. If the ICE agents had entered Canada and physically forced Mr. Rutaganda into the US, this would likely constitute “force” within the meaning in the *UN Charter*. Leaving Mr. Rutaganda with the option of entering the US or never seeing his mother again negates the voluntariness of his actions and is the emotional equivalent of physically dragging him onto US soil.

Interpol Initiative

Canada, the US, and Rwanda are all members of *Interpol’s International Co-ordination of the Investigation and Prosecution of Genocide, War Crimes, and Crimes against Humanity*.²⁹ The *Interpol Initiative* is a recommendation to cooperate, not a mandatory order; and that “cooperation” must fall within the limits of national and international law. If Operation Motown is in breach of Canada’s territorial sovereignty, then the US was not acting within the ambit of the *Interpol Initiative*. In the alternative, if Operation Motown is in breach of the United States’ obligations under treaties or international customary law, it is not a legitimate operation under the *Interpol Initiative*.

²⁸ *Mutual Assistance in Criminal Matters: XVth Congress of International Penal Law Association Adopts Resolutions*, 10 *International Enforcement Law Reporter* 385, at 386 (1994).

²⁹ *Increased ICPO-Interpol Support for the investigation and prosecution of genocide, war crimes and crimes against humanity*, Interpol – General Assembly, 73rd Session – Cancun, 5-8 October 2004, Resolution No AG-2004-RES-17 [*Interpol Initiative*].

B) The United States breached its obligation under the *Treaty on Extradition between the United States and Canada* by luring Mr. Rutaganda

Treaty on Extradition between the United States and Canada

The purpose of the *Extradition Treaty* is to facilitate the cooperation of Canada and the US in the repression of crime by providing for the reciprocal extradition of offenders.³⁰ In the *United States v. Rauscher*, the United States Supreme Court stated that individuals cannot be prosecuted under circumstances violating an extradition treaty.³¹

Article 9 of the *Extradition Treaty* states that “the request for extradition shall be made through the diplomatic channel.”³² Article 9 implies that a request must be made for extradition. The US breached Article 9 by failing to make any request for extradition.

Article 5 provides for the situation where the crime occurred when the individual was under eighteen years old, and that individual is considered a resident of the requested state. Here, upon determining that the extradition would disrupt the rehabilitation of that person, the requested state may recommend that the request be withdrawn.³³ Mr. Rutaganda was fifteen at the time of the Boudaire High School massacre in Rwanda, therefore if the US had made a request for extradition; it is likely Canada would have asked that they withdraw it.

The Effect of a Finding of Abduction or Luring

³⁰ *Treaty on Extradition between the United States and Canada*, 3 December 1971, T.I.A.S. No. 8237, 27 U.S.T. 983 (entered into force 22 March 1976) [*Extradition Treaty*]; *Canada-United States: Protocol Amending the Treaty on Extradition*, 11 January 1988, 27 I.L.M. 422 (not in force) [*Extradition Treaty Am.*].

³¹ *US v. Rauscher* 119 US 407 [*Rauscher*].

³² *Extradition Treaty*, *supra* note 30 at art. 9.

³³ *Extradition Treaty*, *supra* note 30 at art. 5.

The scope and purposes of the *Extradition Treaty* imply a mutual undertaking to respect the territorial integrity of the other party. Article 12 indicates that the actions of an extradited person in entering and leaving territory must be voluntary and that the requested state must consent to extradition to a third state.³⁴ Article 12 implies a prohibition against abduction. The wording indicates that a person must have voluntarily crossed the border; and that Canada must consent to the actions of the US.

In *Stocke v. Germany*,³⁵ the European Court of Human Rights (“European Court”) held that where state authorities are involved in a luring, the rights of the lured individual under the *1950 European Convention for the Protection of Human Rights*³⁶ are violated. Article 5 of the *European Convention on Human Rights* is similar to Article 9 of the *ICCPR* which protects liberty and security of the person.³⁷ The European court further stated that a person who is illegally lured cannot be prosecuted.³⁸ Operation Motown was implemented by US state authorities. Based on the decision in *Stocke*, the luring violates Mr. Rutaganda’s rights under Article 9 of the *ICCPR*, and Mr. Rutaganda should not be prosecuted.

In *Dokmanovic*, the Trial Chamber allowed a government sanctioned luring operation. The Trial Chamber distinguished the case from *Stocke* on the grounds that Yugoslavia and

³⁴ *Extradition Treaty*, *supra* note 30 at art. 12.

³⁵ *Stocke v. Germany*, Judgment of 19 March 1991, Eur.Ct.H.R. (Ser. A.). No. 199 (Annex, Opinion of the Commission, para. 167) [*Stocke*].

³⁶ *1950 European Convention for the Protection of Human Rights and Fundamental Freedoms*, 312 UNTS 221, Art. 5 [*European Convention on Human Rights*].

³⁷ *International Covenant on Civil and Political Rights*, 19 December 1966, art. 9, 999 U.N.T.S. 171, art. 9(1), Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].

³⁸ *Stocke*, *supra* note 35 at para. 167.

Croatia did not share an extradition treaty. Similar to the case in *Stocke*, Canada and the US do share an extradition treaty, the terms of which were breached by the luring of Mr. Rutaganda. The ICJ should follow the precedent set in *Stocke*. Mr. Rutaganda's case should be dismissed based on the fact that he was lured to the US by government officials in circumvention of the *Extradition Treaty* and in violation of his rights under Article 9 of the *ICCPR*.

In sum, if extradition occurs outside the obligations of a treaty, that extradition is unlawful. The luring was unlawful because the provisions of the *Extradition Treaty* between the United States and Canada were not followed.

C) The luring of Emanuel Rutaganda violated the January 11, 1988 Exchange of Letters Between Canada and the United States on Transborder Abduction.

The Exchange of Letters

On January 11, 1988, letters were exchanged between the Right Honorable Joe Clark, Secretary of State for External Affairs of Canada ("Rt. Hon. Clark"), and the Honourable George P. Shultz, Secretary of State of the United States ("Hon. Shultz").³⁹ The letters recognized that transborder abduction of persons found in Canada to the US by bounty hunters is an extraditable offence under the *Extradition Treaty*. The US agreed to cooperate with Canada by deterring transborder abduction, and providing information about possible abductions. The US agreed to consult promptly with Canada regarding abductions and address requests by Canada to have the abducted person returned.

The Legal Significance of an Exchange of Letters

The *VCT* defines treaty as "an international agreement concluded between States in written form, and governed by international law, whether embodied in a single instrument or in two or more

³⁹ *Exchange of Letters Constituting an Understanding Between the Government of Canada and the Government of the United States Concerning the Protocol Amending the Treaty on Extradition*, 11 January 1988, 27 I.L.M. 422 [*Exchange of Letters*].

related instruments and whatever its particular designation.”⁴⁰ The ICJ has indicated that international agreements may take a number of forms and be given a diversity of names.⁴¹

Exchanges of letters have been recognized under the *VCT* as treaties. The US is not a party to the *VCT*, however, its provisions are generally regarded as customary international law.

In *Qatar v. Bahrain*, the ICJ considered whether recorded minutes of a meeting amounted to an international agreement.⁴² The court held that the minutes, which enumerated consented commitments, were an international agreement.⁴³ Generally, the court noted that an informal written record can give rise to binding treaty relations, and documents do not need to be registered with the Secretariat of the United Nations to be valid.⁴⁴

Based on the decision in *Qatar*, the intention behind the agreement is secondary to the actions of the parties involved. In *Qatar*, the ICJ held that after signing the text, the Minister could not subsequently say that he intended the statement as a political understanding rather than an international agreement.⁴⁵ In this case, the letters between Canada and the US were signed documents outlining commitments of the countries with respect to transborder abduction. These letters constitute rights and obligations in international law.

⁴⁰ *VCT*, *supra* note 26 at art. 2.

⁴¹ *Case Concerning Maritime Delimitation and Territorial Questions (Jurisdiction and Admissibility) (Qatar v. Bahrain)*, [1994] I.C.J. Rep. 112 at para. 23 [*Qatar*].

⁴² *Ibid.*

⁴³ *Ibid.* at para. 25.

⁴⁴ *Ibid.* at paras. 22-30.

⁴⁵ *Ibid.* at para. 27.

The *Exchange of Letters* between Canada and the US are a binding obligation in international law. The US will be in breach of that obligation if Operation Motown is found to constitute an abduction of Mr. Rutaganda.⁴⁶

D) The Luring Violated Internationally Protected Human Rights of Emanuel Rutaganda Guaranteed by the *International Covenant on Civil and Political Rights* and Customary International Law

Customary International Law

Article 38 of the *ICJ Statute* lists “international custom, as evidence of general practice accepted as law” as one of the sources of international law that the ICJ may rely upon.⁴⁷ The *UN Charter*, by Article 92 indicates that the ICJ shall apply customary law in resolving disputes.⁴⁸ Once established, customary international law is universally binding on all states, subject to some limited exceptions.⁴⁹

Article 9 of the *Universal Declaration of Human Rights* protects against arbitrary arrest.⁵⁰ The *Declaration on Human Rights* is not legally binding per se, but many of its provisions have come to be considered as universally binding customary international law.

International Covenant on Civil and Political Rights

Canada and the US are both parties to the *ICCPR*.⁵¹ The *ICCPR* sets out a standard for internationally acceptable behaviour. In an Executive Order, former President Clinton directed

⁴⁶ See Issue 1, subheading “A”, above, for a discussion on luring and abduction.

⁴⁷ *ICJ Statute*, *supra* note 12 at art. 38.

⁴⁸ *UN Charter*, *supra* note 24 at art. 92.

⁴⁹ John H. Currie, Craig Forcese & Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory*, (Toronto: Irwin Law Inc., 2007) at 120.

⁵⁰ *Universal Declaration of Human Rights*, art. 9, GA Res. 217A(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [*Declaration of Human Rights*].

that the US fully respect and implement its obligations under the international human rights treaties to which it is a party, including the *ICCPR*.⁵²

Article 9 of the *ICCPR* protects liberty and prohibits arbitrary arrest. The section indicates that “no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”.⁵³ This obligation applies to all persons.⁵⁴ The UN Human Rights Committee has declared that transborder abductions constitute arbitrary detention, in violation of Article 9.⁵⁵ The US acted in blatant disregard of procedures established by law when it extradited Mr. Rutaganda outside of the procedures delineated in the *Extradition Treaty*. Furthermore, the luring was a transborder abduction, in violation of Article 9.

Article 17 of the *ICCPR* guarantees no unlawful or arbitrary interference with persons’ privacy, family, or correspondence.⁵⁶ The US arbitrarily interfered with Mr. Rutaganda’s family when ICE agents used his mother as bait to lure him to the US. Moreover, the fraudulent emails sent to Mr. Rutaganda’s blackberry constitute arbitrary interference with his correspondence.

US obligations incurred under the *ICCPR* and customary law should not be set aside on a case-by-case basis based on their perceived seriousness of an offence. Such an allowance would violate fundamental principles of consistency and predictability. There is also a concern of the

⁵¹ United Nations Treaty Collections, Chapter IV – Human Rights, 4 . International Covenant on Civil and Political Rights; *U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights*, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

⁵² *Implementation of Human Rights Treaties*, Executive Order 13107, 10 December 1998.

⁵³ *ICCPR*, *supra* note 37 at art. 9.

⁵⁴ *Ibid.* at art. 2.

⁵⁵ *Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc. A/36/40 (1981), at 176 and 185.

⁵⁶ *ICCPR*, *supra* note 37 at art. 17.

political motivation behind Operation Motown; Interpol issued the Red Notice in 2002, but it was only in 2009 that the US began to focus on Mr. Rutaganda. Operation Motown was implemented just 25 days after the onslaught of media attention on Mr. Rutaganda's case. If Operation Motown was a political maneuver it is arbitrary, and violates international law.

Conclusion to Issue One

The luring and apprehension of Mr. Rutaganda from Canada to the US was a breach of international law: the US breached Canada's sovereignty by exercising police power inside Canadian territory without consent; the US failed to follow proper extradition procedures outlined in the *Extradition Treaty*; the luring amounted to an abduction of Mr. Rutaganda, contrary to the obligations incurred by the United States in the *Exchange of Letters*; finally, the luring was a breach of the *ICCPR* and international customary law. The ICJ should order the US to return Mr. Rutaganda to Canada.⁵⁷

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

A) Is the rendition of Mr. Rutaganda from the United States to Rwanda for a trial a violation of international law because neither the United States nor Canada have an extradition treaty with Rwanda?

Canada does not have an extradition treaty with Rwanda:

Canada does not have an extradition treaty with Rwanda.⁵⁸ Therefore, Canada has no

⁵⁷ *Oppenheim's International Law* 295, and n. 1 (H. Lauterpacht 8th ed. 1955) [*Oppenheim*].

⁵⁸ Canada Treaty Information, Government of Canada, [<http://www.treaty-accord.gc.ca>].

international obligation to send a Canadian citizen to Rwanda for prosecution. Mr. Rutaganda is a Canadian Citizen, and Canada protests his extradition to Rwanda, therefore the extradition is not acceptable under international law. The US does have an extradition treaty with Rwanda;⁵⁹ however, pursuant to Article 12(1), Canada would have to agree to Mr. Rutaganda's extradition.

B) As a child soldier Mr. Rutaganda lacked criminal culpability:

According to international human rights law, Mr. Rutaganda was a child soldier at the time when he was in the *Interhamwe* militia group. Mr. Rutaganda was 14 when he was recruited into the *Interhamwe* militia group, and 15 when he allegedly participated in Boutaire High School massacre in Rwanda, June 1994. The protections for child soldiers entrenched in international law should apply to him.

Article 38, (1989) of the *Convention on the Rights of the Child* proclaims that “[s]tate parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.”⁶⁰ Amendments to the CRC increased the age for military recruitment to 18. Based on the amendments⁶¹ to Article 38 of the *Convention on the Rights of the Child* and Article 6(2)(c) of the *Geneva Convention Protocol II*, Mr. Rutaganda should be protected by the increased age limit for military recruitment.⁶² The amendments to

⁵⁹ *Agreement Between the Government of the United States of America and the Government of the Republic of Rwanda Regarding the Surrender of Persons to International Tribunals*, 4 March 2003, Office of the Assistant for Treaty Affairs, *Treaties in Force*, United States Department of State, January 1 2009, p. 232.

⁶⁰ *Convention on the Rights of the Child*, 20 November 1989, art. 39, UN General Assembly Document (U.N.T.S.) A/RES/44/25 [CRC].

⁶¹ *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts*, UNGA Res. 54/263, Annex I, UN GAOR, 54th Sess., Supp. No. 49, UN Doc. A/54/49, Vol. III (2000) 7 (entered into force 12 February 2002) [CRC Protocol].

⁶² *Ibid.*

restraints on recruitment indicate a trend on the part of the international community to treat children differently under the law regarding their actions as child soldiers.

The Cape Town Principles established 18 as the minimum age for military recruitment. Recruitment can include both compulsory and voluntary recruitment. These principles represent a shift in international law for the acceptable age of soldiers.⁶³ Under Article 8.2.26 of the Rome Statute of the International Criminal Court, adopted in July 1998 and entered into force 1 July 2002, states that “[c]onscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities” is a war crime.⁶⁴ The *Rome Statute* is the enabling statute of the International Criminal Court. It is clear, therefore, that Mr. Rutaganda was child soldier during his time in the *Interhamwe* militia and should be treated as such under the law.

Mr. Rutaganda is protected from punishment under international law as a former child soldier:

Mr. Rutaganda is protected from punishment because Article 24(1) of the *ICCPR* indicates that every child should have the right to protections required by his status as a minor on the part of the State.⁶⁵ According to the Geneva Convention (1949), Protocol 1 (1977), Article 77 dealing with the protection of children, subsection 3 states that “[i]f, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of 15 years take a direct part in

⁶³ *Cape Town Principles and Best Practices*, Adopted at the symposium on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa, 27-30 April 1997, Cape Town, South Africa [*Cape Town Principles*].

⁶⁴ UN General Assembly, *Rome Statute of the International Criminal Court (last amended January, 2002)* 17 July 1998, A/CONF. 183/9.

⁶⁵ *ICCPR*, *supra* note 37 at art. 24(1).

hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.”⁶⁶

Instead of punishment Mr. Rutaganda should be afforded State efforts to promote his rehabilitation. According to the *Convention on the Rights of the Child* Article 39: “State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of... armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”⁶⁷ This Article does not exclude child soldiers from those children who must be afforded protection and recovery under the *Convention on the Rights of the Child*. Thus, Mr. Rutaganda should remain free from punishment in an effort to uphold international law promoting the physical and psychological recovery of all people who have suffered the atrocities of war as children.

Mr. Rutaganda should not be detained or punished under the law because Rwanda has enacted policy that pardons former child soldiers. The June 2003 constitution reaffirmed Rwanda’s adherence to international treaties, including the UN Convention on the Rights of the Child.⁶⁸ Rwanda’s president, Paul Kagame, ordered the release of all “genocide minors”⁶⁹ in January 2003. During the same month the government released some 1,100 detainees who had

⁶⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 77 [*GC Protocol I*].

⁶⁷ *CRC*, *supra* note 60 at art. 39.

⁶⁸ *The Constitution of the Republic of Rwanda, 2003*, Articles 28 and 47.

⁶⁹ Rwanda, *Child Soldiers Global Report 2008*.

been children in 1994.⁷⁰ A further 1,900 were released in July 2005 and 78 more in March 2007. This policy decision by the Rwandan government represents a significant movement away from detaining and punishing child soldiers and this policy should apply to Mr. Rutaganda.

Mr. Rutaganda lacked criminal culpability as a former child soldier:

Special treatment should be afforded to youth offenders because juveniles are less mature and thus less responsible for the crimes they commit.⁷¹ Many international bodies take the stance that a child who has committed atrocities whilst acting as a soldier should not be held to an adult standard of culpability.⁷² Since Mr. Rutaganda was a child who was acting under the control of a paramilitary group when he allegedly participated in Boutaire High School massacre, he lacked criminal culpability. As a child soldier, Mr. Rutaganda falls into the above description of a youth offender. Mr. Rutaganda should not be held responsible for any alleged actions that he may have been forced to do as a child soldier. When an individual lacks *mens rea*, because they are coerced into an action by force by another party, they cannot be said to have criminal intent, and therefore lack criminal culpability.

⁷⁰ Ministry of Justice, Imbonerahamwe igaragaza ibisabwa n'intangazo ryaturutse muri Perezidansi ya Repubulika/Chart showing what was required by the Communiqué of the President of the Republic, March 2003.

⁷¹ Carrie S. Fried and N. Dickson Reppucci, "Criminal decision Making: The Development of Adolescent Judgment, Criminal Responsibility, and Culpability" *Law and Human Behaviour*, Vol. 25, No. 1. Special issues on Children, Families, and the Law (Feb., 2001), [*Law and Human Behaviour*] p.46.

⁷² Grover, Sonja (2008) "Child Soldiers' as 'Non-Combatants': The Inapplicability of the Refugee Convention Exclusion Clause'. *The International Journal of Human Rights*, 12:1 53-64 at 55).

The 1977 *Cape Town Principles* purport that a child soldier is ‘any person under 18 years of age who is part of any kind of irregular armed force in any capacity’.⁷³ This definition is consistent with the contents of the *Optional Protocol to the Convention on the Rights of the Child* which effectively increased the age of a child to 18 years from the previously held 15 years⁷⁴. The special protections provided in Article 77 of the *Additional Protocol relating to the Protection of Victims of International Armed Conflict*, are awarded due to the age of the children. The responsibility of a State is to ensure that they take all *feasible* measures to guarantee that children under the age of 15 do not take direct part in armed conflict⁷⁵.

C) The courts of Rwanda are not capable of providing Mr. Rutaganda with a fair trial:

Extradition would deprive Mr. Rutaganda of his rights under the *Canadian Charter of Rights and Freedoms*.⁷⁶ All Canadian citizens are protected by the *Charter* and Mr. Rutaganda is a Canadian citizen. The Rwandan justice system does not respect the rule of law or adhere to due process of law. Canada must not extradite Mr. Rutaganda because this would be in direct contravention of his *Charter* rights to and life, liberty, and security of the person, and his right to a fair trial.

⁷³ *Cape Town Principles*, *supra* note 63.

⁷⁴ Vandewiele, T. ‘Optional Protocol: The Involvement of Children in Armed Conflicts’ (2006), p. 3.

⁷⁵ U.N. GA. Res 263 session 54, Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography on 25 May 2000, Art. 2.

⁷⁶ Being Part I of the *Constitution Act*, 1982, [*Charter*].

Although international law stipulates that a citizen of one State may be prosecuted under the laws of a different State where an offence was committed,⁷⁷ an exception is provided if the legal system in the prosecuting State does not satisfy international standards of human and civil rights. Rwanda, following the genocide of 1994, endured an “overthrow” of the existing government by the opposition⁷⁸. This contributed to difficulties in the court system relating to efficiency and procedural fairness.⁷⁹

As of the year 2000, approximately 120,000 people accused of participating in the genocide were in detention and in some cases had been detained for as much as 7 years; which is a clear violation of international law.⁸⁰ In his article on the Rwandan justice system, Jeremy Sarkin states that very few trials have been carried out on offenders and that the system did not appear to meet the need created by the crimes which wait to be punished.⁸¹ A reasonable apprehension of bias is also common since the government of Rwanda (including the judiciary) is run by the Tutsi and may skew decisions to create ‘victor’s justice’ and ignore due process altogether in search of a guilty verdict.⁸² This bias is clearly reflected in the case of Byuma

⁷⁷ John H. Currie, Craig Forcese and Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory*, Chapter 7: State Jurisdiction over Persons, Property and Transactions, (Toronto: Irwin Law Inc., 2007) at 437.

⁷⁸ Jeremy Sarkin, “The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the *Gacaca* Courts in Dealing with Genocide” (2001) *Journal of African Law* 45, 2 [Sarkin] at p.146.

⁷⁹ *Ibid.* at 144.

⁸⁰ *Ibid.* at 143.

⁸¹ *Ibid.*

⁸² M. Drumbl, “Rule and Law Amid Lawlessness: Counselling the Accused in Rwanda’s Domestic Genocide Trials”, (Summer 1998) *Columbia Human Rights Law Review*.

Francois-Xavier. Mr. Francois-Xavier was tried and convicted by judges who had a reasonable apprehension of bias. Although Mr. Francois-Xavier was convicted and is serving time in jail, investigations into bias still have yet to be completed.⁸³

Mr. Rutaganda is likely to suffer in a Rwandan jail. The February 2001 report done by the United States Department of State noted that security forces beat suspects and there were also reports of torture of those in detainment.⁸⁴ Amnesty International supplements this point with their 2000 Report which stated that some detention centers still engage in gross overcrowding, poor hygiene, insufficient food, torture and otherwise degrading and inhumane treatment.⁸⁵ Since the end of the genocide, only 3,343 cases have been dealt with owing mostly to the small number of trained judges and corruption amidst the judiciary.⁸⁶

Rwandan courts are not equipped to give Mr. Rutaganda a fair trial. A report by ‘Human Rights Watch’ on Rwanda’s conventional court system found that basic fair trial rights are not assured. Aspects of procedural fairness are lacking such as: the presumption of innocence, the right of equal access to justice, the right to present witnesses in one’s own defence, the right to humane conditions of detention, and the right to freedom from torture.⁸⁷

⁸³ Domitilla Mukantaganzwa, Executive Secretary, National Service of Gacaca Courts. “Byuma Francois-Xavier’s Case”, Republic of Rwanda, Kigali, 12th June 2007.

⁸⁴ The United States Department of State in its 2000 Country Reports on Human Rights Practices, released by the Bureau of Democracy, Human Rights and Labour in February 2001, US Dept. of State.

⁸⁵ *Sarkin*, supra note 78, at 156.

⁸⁶ *Ibid.*

⁸⁷ *Human Rights Watch*, “Law and Reality – Progress in Judicial Reform in Rwanda” page 7.

The right to a fair trial also includes the right to a trial within a reasonable amount of time. Factors to consider include the length of the delay and prejudice to the accused. Mr. Rutaganda will not receive a trial within a reasonable amount of time in Rwanda.

By mid-2002, conventional courts had judged 7,181 persons accused of genocide. After 2002, the rate of prosecutions slowed as prosecutors shifted their efforts to preparing cases for transfer to gacaca jurisdictions. Then the courts halted work for months as they took account of organizational changes and other aspects of the extensive judicial reforms of 2004.⁸⁸

If he is extradited, Mr. Rutaganda could be detained in a Rwandan prison for several years awaiting trial. The conditions of Rwandan prisons breach many basic human rights.⁸⁹ If extradited, Mr. Rutaganda will likely experience abhorrent conditions in the Rwandan prison system and this represents a substantial prejudice to Mr. Rutaganda's security of the person.

Conclusion to Issue Two

The rendition of Emanuel Rutaganda from the United States to Rwanda for trial would violate international law because Canada does not have an extradition treaty with Rwanda. Mr. Rutaganda was a child at the time of the offence, and therefore not criminally culpable; and there is no reasonable assurance that Mr. Rutaganda will be granted a fair trial in Rwanda.

Respectfully Submitted,
Agents for Canada, 2010-11A

⁸⁸ *Ibid.* at 21.

⁸⁹ *Sarkin, supra* note 78 156.