

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#: 2010-11R

TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
QUESTIONS PRESENTED	vi
JURISDICTIONAL STATEMENT	vii
STATEMENT OF FACTS	viii
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. THE UNITED STATES DID NOT BREACH ITS OBLIGATIONS UNDER INTERNATIONAL LAW BY LURING EMANUAL RUTAGANDA INTO THE UNITED STATES AND APPREHENDING HIM	2
A. Luring Rutaganda did not violate Canada’s territorial sovereignty.....	2
B. The United States did not breach its obligation under the <i>Treaty on Extradition between the United States and Canada</i>	6
C. Luring Rutaganda did not violate the January 11, 1988 <i>Exchange of Letters Between Canada and the United States on Transborder Abduction</i>	9
D. Luring Rutaganda neither violated the <i>International Covenant on Civil and Political Rights</i> nor customary international law.....	11
II. THE EXTRADITION OF RUTAGANDA FROM THE UNITED STATES TO RWANDA WOULD NOT VIOLATE INTERNATIONAL LAW	16
A. The extradition of Rutaganda from the United States to Rwanda would not violate international law, regardless of the absence of an extradition treaty between either the United States or Canada with Rwanda	16
B. Rutaganda did not lack criminal culpability and, in extraditing him, the United States would not violate international law	19
C. The Courts of Rwanda are capable of providing Rutaganda a fair trial	20
CONCLUSION	22

TABLE OF AUTHORITIES

TREATIES, CONVENTIONS & DECLARATIONS

<i>Agreement Between the United States of America and the Government of the Republic of Rwanda Regarding the Surrender of Persons to International Tribunals</i> , Treaties in Force, United States Department of State Online: < http://www.state.gov/documents/organization/123747.pdf >, (January 1 2009).....	15, 16
<i>Charter of the United Nations</i>	2, 9
<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> , opened for signature 10 December 1984, 1465 UNTS	12
<i>Convention on the Prevention and Punishment of the Crime of Genocide</i> , 9 December 1948, 78 UNTS 277.....	12
<i>Declaration on Principles of International Law Concerning Friendly Relations and Cooperation</i> , UNGA Res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217.	4
<i>Draft Declaration of Rights and Duties of States</i> , UNGAOR, 4 th Sess., Res. 375 (IV), 6 December 1949.....	16
<i>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</i> , 11 January 1988, 27 I.L.M. 422.	8, 9
<i>Increased ICPO-Interpol Support for the investigation and prosecution of genocide, war crimes and crimes against humanity</i> , Interpol – General Assembly, 73 rd Session – Cancun, 5-8 October 2004, Resolution No AG-2004-RES-17.	5, 17
<i>International Covenant on Civil and Political Rights</i> , 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368.....	10, 20
<i>Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts</i> , UNGA Res. 54/263, Annex I, UN GAOR, 54 th Sess., Supp. No. 49, UN Doc. A/54/49, Vol. III (2000) 7.....	19
<i>Protocol Amending the Treaty on Extradition Between Canada and the United States of America</i> , 11 January, 1988, Treaty Doc 101-17, CTS 1991 No. 37 I.L.M.....	8
<i>Statute of the International Court of Justice</i> , 26 June 1945, Can.T.S. 1945 No. 7.....	vii
<i>Treaty on Extradition between the United States and Canada</i> , 3 December 1971, T.I.A.S. No. 8237, 27 U.S.T. 983.....	5, 7, 16

<i>Universal Declaration of Human Rights</i> , UNGA Res. 217A (III), U.N. Doc A/810 (1948).	10
<i>United Nations, Statute of the Special Court for Sierra Leone</i> , Article 7. (14 August 2000). Online: http://www/sc-sl.org	18
<i>Vienna Convention on the Law of Treaties</i> , 23 May 1969, 1155 U.N.T.S. 331, Can. T.S. 1980 No. 37.....	9, 15, 19
<i>Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights</i> , UN Doc. A/36/40 (1981).	10

JURISPRUDENCE

<i>A.G. Israel v. Eichmann</i> (1961), 36 I.L.R. 5 (Dist. Ct. Jerusalem).....	7, 13
<i>Arrest Warrant of 11 April (Congo v Belgium)</i> (Unreported, International Court of Justice, 14 February 2002), (Judge Koroma), (Judges Higgins, Kooijmans and Buergenthal), (Judge van den Wyngaert), (Judge Al-Khasawneh).....	12
<i>Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)</i> [1970] ICJ Rep 3, 33 (President Bustamante y Rivero, Judges Fitzmaurice, Tanka, Jessup, Morelli, Padilla Nervo, Gros, Ammoun, Petrán, Onyeama and Lachs).....	11
<i>Hossein Alikhani v. United States</i> (2005), Inter-Am. Ct. H.R. (Ser. L) Case 4618/02, Report No. 63/05, <i>Annual Report of the Inter-American Court of Human Rights: 2005</i> , OEA/Ser.L/V/II.124 Doc. 5 (2005).....	4
<i>Ker. v. Illinois</i> , [1886] USSC 239; 119 U.S. 436, 7 S. Ct. 225, 30 L.Ed. 421.	6
<i>Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)</i> , Merits, Judgment. I.C.J. Reports 1986.	2
<i>Öcalan v. Turkey</i> (ECHR Grand Chamber), Appl. No. 00046221/99, Merits, Judgement of 12 March 2003).....	10
<i>Prosecutor v Blaskic (Trial Chamber Judgment)</i> , Case No IT-95-14-T (12 May 1999).....	11
<i>Prosecutor v. Dragan Nikolic</i> , Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, Appeals Chamber, 5 June 2003.....	14
<i>Prosecutor v. Slavko Dokmanovic</i> , No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanovic, (22 October 1997), (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II).....	3, 5, 6

<i>Re Hartnett and the Queen; Re Hudson and the Queen</i> 14 CCC (2d) 69, 1 OR (2d) 206 (Ont.(Can.) (HCJ) 1973).....	8
<i>Re Schmidt</i> [1995] 1 App. Cas. 339 (Eng. H.L. 1994).....	12
<i>The Case of the S.S. “Lotus” (France v. Turkey)</i> , (1927), P.C.I.J. (Ser. A) No. 10.....	2
<i>United States v. Alvarez-Machain</i> , [1992] USSC 85; 504 U.S. 655, 669[1992] USSC 85; 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992).	6, 7, 8, 13
<i>United States v. Reed</i> 639 F.2d 896 (2d Cir. 1981).....	6, 14
<i>United States v. Toscanino</i> 500 F.2d 267 (2d Cir. 1974).....	13
<i>United States v. Wilson</i> , 721 F.2d 967 (4 th Cir. 1983).	4, 8
<i>United States v. Wilson</i> , 732 F.2d 404, <i>cert. denied</i> , 469 U.S. 1009 (1984).....	8
<i>United States v. Yunis</i> 681 F.Supp. 904 (D.D.C. 1998).....	13, 14
Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango and Julienne Mukabutera: see (Unreported, Cour d’Assises de l’Arrondissement Administratif de Bruxelles-Capital, President Maes, Judges Louveaux and Massart, 8 June 2001).....	12

BOOKS, REPORTS AND OTHER NON-PERIODIC MATERIALS

‘ <i>About INTERPOL</i> ’, online: INTERPOL < http://www.interpol.int/public/icpo/default.asp >.....	16
Amnesty International, <i>Extradition Decision Raises Hopes in the Struggle against Impunity</i> (Press Release, 5 February 2001).....	13
‘Child soldiers: Criminals or victims? (22 December 2000)’, Amnesty International, online: < http://www.amnesty.org/en/library/info/IO50/002/2000 >.....	18
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).	viii, ix, 16
European Commission of Human Rights, Series A, No. 111 (1986); (1987) 9 EHRR 297.....	4
<i>Extradition to the United States of America</i> , 2 BvR 1506/03 – <i>Karlsruhe</i> , (Order of 5 November 2003) at para. 4 (Second Senate of the Federal Constitutional Court), online: Bundesverfassungsgericht < http://www.bverfg.de/en/press/bvg97-03en.html >.	3
Fiona McKay, <i>Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes against Humanity, Torture and Genocide</i> (1999).....	11

H. Mosler, ‘The International Society as a Legal Community’ (1974) 140 <i>Recueil de Cours: Academie de Droit International</i> 17.....	11
International Law Association Committee on International Human Rights Law and Practice, <i>Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences</i> (2000).....	11
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 the Genocide” (2001) 45:2 <i>J. Afr. L.</i> 143.....	19, 20, 21
J.L. Brierly, <i>The Law of Nations: An Introduction to the Law of Peace</i> , 6 th ed. (Oxford: Clarendon Press, 1963).....	13
John H. Currie, Craig Forcese & Valerie Oosterveld, <i>International Law: Doctrine, Practice, and Theory</i> , (Toronto: Irwin Law Inc., 2007).....	7, 13
Lauri Hannikainen, <i>Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status</i> (1988).....	11
M. Cherif Bassiouni, <i>International Extradition: United States Law and Practice</i> , 4 th ed. (2002)..	7
Malvina Halberstam, “In Defense of the Supreme Court Decision in Alvarez-Machain” (1992) 86 <i>Am. J. Int’l L.</i> 736.....	13
Michael Scharf (1998) “ <i>The Prosecutor v Slavko Dokmanovic: Irregular Rendition and the ICTY</i> ” 11 <i>Leiden J of Int’l L</i> 369.....	4
Nehal Bhuta, ‘Justice without Borders? Prosecuting General Pinochet’ (1999) 23 <i>Mel U.L. Rev.</i> 499.....	12
Restatement (Third) of Foreign Relations Law, 432 (1987), rep. n.3.....	13
Robert J. Currie, “Abducted Fugitives before the International Criminal Court: Problems and Prospects” (2007) 18 <i>Crim. L.F.</i> 349.	13
Stephen Macedo (ed), <i>Princeton Principles on Universal Jurisdiction</i> (2001) 28.....	12
Steve Peers, “The Exchange of Personal Data between Europol and the USA” (2002) 15.....	9

QUESTIONS PRESENTED

- I. Whether the “luring” of Canadian citizen Emanuel Rutaganda from Canada violated Canada’s territorial sovereignty, the U.S.-Canadian 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 Rutaganda guaranteed by the International Covenant on Civil and Political Rights and customary international law.

- II. 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 governments of Canada (“the Applicant” or “Canada”) and the United States of America (“the Respondent” or “United States”), have submitted their differences regarding the *Rutaganda* dispute to the International Court of Justice in accordance with Articles 40(1) and 36(1) of the *Statute of the International Court of Justice*.¹ The parties have agreed to the contents of the *Compromis* and any clarifications. The parties agree to accept the judgement of this Court as final and binding.

¹ *Statute of the International Court of Justice*, 26 June 1945, Can.T.S. 1945 No. 7.

STATEMENT OF FACTS

In 2001 the government of Rwanda issued an indictment for Emanuel Rutaganda's involvement in the notorious Boudaire high school massacre, a brutal atrocity committed during the 1994 genocide.² According to the indictment, in June 1994, Rutaganda and a dozen other members of the *Interhamwe* militia set on fire a two-story high school building sheltering hundreds of Tutsi children and fired their weapons at all who attempted to exit the burning building. Some 275 Tutsi children were killed in the fire. Rutaganda is one of six identified *Interhamwe* militia members who were allegedly involved in the massacre. He has been charged with 275 counts of murder by the Rwandan District Court in Boudaire.

Since 2001, the Rwandan government has repeatedly sought Rutaganda's surrender by Canada for prosecution, but the Canadian government has persistently refused these requests. In response, in January 2002, Interpol issued a Red Notice seeking Rutaganda's arrest from any country in the world.³

Rutaganda was recruited into the *Interhamwe* militia group at the age of 14. He was a soldier in the *Interhamwe* between April-August 1994, during the Rwandan genocide.⁴ His participation in the Boudaire high school massacre occurred when he was 15 years old. Rutaganda moved back to Canada when the Tutsis took power and has not been subject to any criminal proceedings since.⁵ Rutaganda was born on April 10, 1978, and has both Canadian and Rwandan citizenship.

² 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*] at para. 4.

³ *Ibid.* at para. 5.

⁴ *Ibid.* at para. 2.

⁵ *Ibid.* at para. 3.

In February 2009, to implement the *Genocide Accountability Act* of 2007, the United States (“U.S.”) government established the Inter-Agency working Group for Human Rights Violators. On July 21, 2009, the U.S. Immigration and Customs Enforcement (“ICE”) notified the Inter-Agency Working Group that Rutaganda’s mother had traveled into Detroit, Michigan for a specialized medical procedure. The Inter-Agency Working Group developed a plan called ‘Operation Motown Express’, approved by the President, in order to apprehend Rutaganda and transfer him to Rwanda. In accordance with the plan, at 12:30 PM on July 22 ICE agents sent an email from the Detroit medical clinic to Rutaganda’s BlackBerry falsely stating that his mother’s health was quickly deteriorating and that she sought her son.

Travelling illegally on a borrowed passport, Rutaganda entered the United States. Upon his arrival at the clinic Rutaganda was arrested and taken into custody by ICE agents. An order of removal was thereafter issued for Rutaganda based on his illegal entry into the United States. Canada was provided timely notification of the situation as required by the *2004 Canada-U.S. Consular Notification Agreement*. The United States, through a series of immigration and judicial decisions including by the Federal Court of Appeals, affirmed that Rutaganda could be removed to Rwanda. Canada submitted Amicus briefs on behalf of Rutaganda’s release at each stage of the proceedings. On September 15, 2009, the U.S. Supreme Court denied Rutaganda’s petition for certiorari.⁶

Canada and the U.S. have agreed to refer the case to the International Court of Justice (“ICJ”) for adjudication.

⁶ *Ibid.*

SUMMARY OF ARGUMENT

The United States did not breach its obligations under international law by luring Emanuel Rutaganda into the United States and apprehending him. Luring Rutaganda did not violate Canada's territorial sovereignty because the United States did not enter or use force on Canada, and because Rutaganda exited Canada voluntarily. The United States did not violate the *Extradition Treaty* because it is not an exclusive list of ways that the United States could acquire jurisdiction over individuals, and because no extradition occurred here. The United States did not violate the January 11, 1988 *Exchange of Letters between Canada and the United States* because the *Letters* are not a binding agreement. Even if they were, the *Letters* do not apply because they discuss the discouragement of abductions by private bounty hunters and are not intended to affect state policing activities. Luring of Rutaganda was also in accordance with the *International Covenant on Civil and Political Rights* and customary International law because his arrest was valid due to his illegal entrance into the United States. Interpol had issued a Red Notice order for his arrest in any country, an obligation by which the United States had to abide. Moreover, the universality principle speaks of the importance of achieving accountability for universally condemned offenses.

The United States has an agreement in force with Rwanda agreeing to surrender Rwandans to international tribunals. Rutaganda was 15 at the time he committed crimes against humanity and such an age is appropriate for culpability in Rwanda. Furthermore, Rutaganda will have a fair trial because he is requested by the Rwandan District Court which consists of competent judges. It is Canada and not the United States who violated international law and repeatedly ignored its obligations to the 187 nation members of the international police.

ARGUMENT

I. THE UNITED STATES DID NOT BREACH ITS OBLIGATIONS UNDER INTERNATIONAL LAW BY LURING EMANUAL RUTAGANDA INTO THE UNITED STATES AND APPREHENDING HIM.

A. Luring Rutaganda did not violate Canada's territorial sovereignty.

The United States did not violate Canada's territorial sovereignty because it neither entered Canada nor interfered with Canada's affairs through use of direct or indirect force. Rather, Rutaganda entered the United States voluntarily, knowingly assuming the associated risks. Further, the United States acted in accordance with the Interpol Initiative.

The United States did not breach its responsibilities under the duty of non-interference because it did not interfere with Canada's affairs.⁷ The International Court of Justice ('ICJ') defined 'force', as used in Article 2(4) of the *Charter of the United Nations*,⁸ as direct military action, or indirect action through support for terrorist or armed activities within another state.⁹ This definition of force is inapplicable to the circumstances of Rutaganda's case; admittedly the email sent may be construed as an action on behalf of the U.S., but it lacked 'force' as defined and applied by the ICJ in the *Nicaragua* case.¹⁰ Therefore, the provisions of the Charter of the UN do not apply to Rutaganda's situation because no such 'force' was used and the United States did not breach its obligations under the *UN Charter*.

The United States did not enter Canada and never forced Rutaganda to cross the border. Its only possible interfering action was through the electronic medium of an email sent to Rutaganda's BlackBerry. This email did not permeate the border because it remains, in the abstract, on the internet. Therefore, this email did not violate Canada's territorial sovereignty.

⁷ *The Case of the S.S. "Lotus" (France v. Turkey)*, (1927), P.C.I.J. (Ser. A) No. 10.

⁸ *Charter of the United Nations*, art. 2(1) [*UN Charter*].

⁹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment (27 June 1986), I.C.J. Reports, 14 at para. 203 [*Nicaragua Case*].

¹⁰ *Ibid.*

In *Prosecutor v. Slavko Dokmanovic*, an extradition case involving luring, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia held that luring the accused to achieve his arrest violated neither international law nor the sovereignty of the host state.¹¹ This court also distinguished between “luring” of “forcible abductions” of individuals, the former being more acceptable because it is less violent, occurs without any physical violation of the state’s territory, and the individual ultimately enters the recipient state willingly.¹²

Rutaganda was not abducted from Canada; he left voluntarily, aware of and assuming the risks associated with his departure. The decision to use a friend’s passport shows that Rutaganda likely knew the implications and risks associated with his departure from Canada, including that he could be picked up from any location at any time because of Interpol’s Red Notice and Rwanda’s indictment against him. Further, Rutaganda surely was aware of and assumed the risks of illegal entry into the United States. It was under the knowledge and acceptance of each of these risks that Rutaganda decided to visit his mother in the United States.

While he may have had a strong motivation to go, Rutaganda left voluntarily and assumed the relevant risks. Unanimously rejecting a similar case involving luring, the Second Senate of the Federal Constitutional Court declared that:

[T]he complainant entered federal territory on account of an autonomous decision and motivated by his own interests. Admittedly, he was deceived by means of trickery. However, he was not subjected to direct force aimed at bending his will, and he was also not threatened with the use of force, and the trickery did not facilitate a subsequent forceful abduction.¹³

¹¹ *Prosecutor v. Slavko Dokmanovic*, No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanovic, (22 October 1997) at para. 57 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) [*Dokmanovic*].

¹² *Ibid* at paras. 66 and 77.

¹³ *Extradition to the United States of America*, 2 BvR 1506/03 - *Karlsruhe*, (Order of 5 November 2003) at para. 4 (Second Senate of the Federal Constitutional Court), online: Bundesverfassungsgericht <<http://www.bverfg.de/en/press/bvg97-03en.html>>

The United States' misrepresentation never concealed any of the inherent risks nor left Rutaganda with the impression that his entry into the United States would be safe. Rutaganda's actions were not the result of an abduction, but of his own voluntary decision to illegally enter the United States and assume the associated risks.¹⁴ Further, any misunderstandings created by the deceptive email do not render the United States' jurisdiction over Rutaganda invalid.¹⁵

The finding in *Dokmanovic* was made despite the fact that, without the consent of the sheltering state, an enforcement agent had actually entered the territory of that state. By contrast, in Rutaganda's case no person or thing from the United States ever actually crossed the border into Canada. As such, there was no use of force or obvious violation of Canada's territory.¹⁶ Further, Canada's attitude in believing that its territorial sovereignty has been violated is most likely irrelevant.¹⁷ It logically follows that if the luring in *Dokmanovic* was held not to violate territorial sovereignty when an agent physically came into contact with the accused, then neither should Canada's sovereignty be considered breached since no real contact was actually made. Therefore, the luring of Rutaganda was not a violation of Canada's sovereignty.

The duty of non-intervention includes abstinence from direct and indirect intervention.¹⁸ Indirect intervention generally applies only to intervention through third parties. The warning to deter from indirect intervention is not applicable here because the United States acted in direct connection with Rutaganda and because the United States did not intervene in Canada's affairs.

¹⁴ *Hosseini Alikhani v. United States* (2005), Inter-Am. Ct. H.R. (Ser. L) Case 4618/02, Report No. 63/05, *Annual Report of the Inter-American Court of Human Rights: 2005*, OEA/Ser.L/V/II.124 Doc. 5 (2005).

¹⁵ *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983) at p. 792 [Wilson].

¹⁶ Michael Scharf (1998) "*The Prosecutor v Slavko Dokmanovic: Irregular Rendition and the ICTY*" 11Leiden J of Int'l L 369, 374.

¹⁷ European Commission of Human Rights, Series A, No. 111 (1986); (1987) 9 EHRR 297.

¹⁸ *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation*, GA Res. 2625, UN GAOR, 1970, Supp. No. 28, UN Doc. A/5217 at 121 [*Friendly Relations Declaration*].

The *Interpol Initiative* dictates that member countries (including Canada, the United States and Rwanda) should cooperate in working towards the prosecution of genocide criminals.¹⁹ By refusing Rwanda's multiple requests to surrender Rutaganda, Canada failed its international obligations. The United States was also obligated under the *Interpol Initiative* to support Rwanda's prosecution of genocide criminals and it used "Operation Motown" to assist Rwanda pursuant to these commitments. Therefore, the United States was following its obligations under the Interpol Initiative when it lured Rutaganda into its jurisdiction.

The United States did not violate Canada's territorial sovereignty because it never entered Canada. Even if it had, entrance was found acceptable in *Dokmanovic*.²⁰ Additionally, no force, either direct or indirect, was used against Canada. Rather, Rutaganda voluntarily entered into the United States and knowingly assumed the associated risks. Further, the United States was acting in accordance with the *Interpol Initiative*, as was its obligation by international law.

B. The United States did not breach its obligation under the *Treaty on Extradition between the United States and Canada*.

The United States did not violate the *Treaty on Extradition between the United States and Canada*²¹ because Rutaganda's situation was not an extradition. Rather, Rutaganda voluntarily entered the United States before the need for a formal extradition request arose.

The *Extradition Treaty* stipulates circumstances in which both countries have agreed to extradite certain individuals and it enumerates times in which the failure to extradite constitutes a breach. However, the *Treaty* is not, and was not intended to be, an exclusive list of every way

¹⁹ *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*].

²⁰ *Dokmanovic*, *supra* note 11, at para. 57.

²¹ *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*] or [*Treaty*].

through which the countries could gain jurisdiction over an individual.²² Extradition treaties exist to ease the surrender of people to the requesting country when that country has no other way of enforcing their jurisdiction; they are not the only means through which jurisdiction can be gained.²³ For example, citizens regularly chose to travel between countries. On such occasions, the recipient country gains jurisdiction over the individual without having to rely on an extradition treaty. Rutaganda voluntarily entered the United States thereby bringing himself under U.S. jurisdiction before any need for the United States to request his extradition arose.

Circumstances that breach the *Treaty's* provisions are limited to the enumerated instances. The *Extradition Treaty* does not contain any articles that relate to abduction, luring, or voluntary border crossing; its focus is on situations when a country needs to request extradition in order to gain jurisdiction over that individual. No part of the *Treaty* relates to Rutaganda's circumstances or existed to govern the behaviour of the United States in this situation. Likewise, in *Dokmanovic*, a case in which luring was upheld, no extradition treaty existed to govern the behaviour of the parties.²⁴ The absence of applicable treaty provisions makes the *Dokmanovic* ruling especially pertinent to Rutaganda's case. The United States did not breach the *Extradition Treaty* because the *Treaty* does not contain any obligations applicable to the circumstances.

In *United States v. Alvarez-Machain*, a case in which an individual was brought into the United States through forcible abduction, the United States Supreme Court ruled that if an extradition treaty existed which did not prohibit abductions the rule of *Ker v. Illinois*,²⁵ known in

²² *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S.Ct. 2188 (1992) at para. 13 [*Alvarez-Machain*].

²³ See e.g., *United States v. Reed* 639 F.2d 896 (2d cir. 1981) [*Reed*].

²⁴ *Dokmanovic*, *supra* note 11, at para. 57.

²⁵ *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225.

the international community as ‘*mala captus bene detentus*’,²⁶ would apply so that the receiving country may nonetheless exercise jurisdiction.²⁷ *Mala captus bene detentus* is an international law principle stating that nations have jurisdiction over all individuals in their land regardless of the means of entrance of that individual.²⁸ In *A.G. Israel v. Eichmann*, a case of forcible abduction, the Supreme Court, upheld this principle, affirming that the individual was subject to Israeli jurisdiction regardless of the method of his entry into Israel.²⁹ *Mala captus bene detentus* should likewise apply to Rutaganda’s situation and Rutaganda should be subject to U.S. jurisdiction, regardless of the luring used to encourage his entry into the United States.

As in *Alvarez-Machain*, both the *Extradition Treaty* between Canada and the United States and the history of negotiations and practice under it lack any suggestion that prohibit luring or forcible abductions. This is significant because the *Treaty* was written after the decision of *Ker* and provisions relating to luring should have been expressly included if agreed upon.³⁰ Further, the United States Supreme Court found no support in international law to imply a term within extradition treaties prohibiting international abductions because this inference requires too large a leap.³¹ Therefore the United States did not breach the *Extradition Treaty* because there is no implied term against luring.

Throughout the international community luring has been an acceptable means for gaining jurisdiction over an individual. In *Re Hartnett and the Queen* and *Re Hudson and the Queen* a

²⁶ M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, 4th ed. (2002), Chapter V, p. 250.

²⁷ *Alvarez-Machain*, *supra* note 22.

²⁸ John H. Currie, Craig Forcese & Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory* (Toronto: (Toronto: Irwin Law Inc., 2007) [Currie, Forcese & Oosterveld].

²⁹ *A.G. Israel v. Eichmann* (1961), 36 I.L.R. 5 (Dist. Ct. Jerusalem) [*Eichmann*].

³⁰ *Extradition Treaty*.

³¹ *Alvarez-Machain*, *supra* note 22.

Canadian court upheld jurisdiction over individuals who were deceptively lured into Canada.³² Likewise, *U.S. v. Wilson* affirmed that luring is a viable option for gaining jurisdiction over an accused.³³ Indeed, lured individuals have only been subjected to a “nonviolent trick” and any misunderstandings thus created are not enough to deprive the acquiring state of jurisdiction.³⁴

The *Extradition Treaty* is not applicable to Rutaganda’s case because the *Treaty* does not apply to voluntary border crossings by individuals. The United States did not breach its obligations under the *Treaty* because terms prohibiting luring cannot be implied. Further, the *mala captus bene detentus* is internationally upheld despite cases of forcible abduction. For these reasons, the United States acted justly and appropriately in light of the *Extradition Treaty*.

C. Luring Rutaganda did not violate the January 11, 1988 *Exchange of Letters Between Canada and the United States on Transborder Abduction*.

The *Exchange of Letters* (“*Letters*”) declared that transborder abduction by private bounty hunters is an extraditable offense.³⁵ Through the *Letters* both Canada and the United States agreed to discourage such abductions.³⁶ However, the *Letters* are not a binding agreement and do not alter the legal obligations of either country. Even if they were binding, the *Letters* do not apply to Rutaganda’s situation because they apply to abductions by private bounty hunters, whereas Rutaganda was never abducted and all luring was state sponsored.

The *Letters* are not a binding agreement. The United States explicitly stated that the *Letters* “constitute an understanding between [the] two governments which is not intended to

³² *Re Hartnett and the Queen; Re Hudson and the Queen* 14 CCC (2d) 69, 1 OR (2d) 206 (Ont.(Can.) (Hcj) 1973).

³³ *Wilson*, *supra* note 15. See also *United States v. Wilson*, 732 F.2d 404, *cert. denied*, 469 U.S. 1009 (1984).

³⁴ *Wilson*, *supra* note 15, at p. 792.

³⁵ *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*].

³⁶ *Protocol Amending the Treaty on Extradition Between Canada and the United States of America*, 11 January, 1988, Treaty Doc 101-17, CTS 1991 No. 37 at pg. 3.

create or otherwise alter legal obligations for either Government.”³⁷ Contractual agreements may not be read to imply certain provisions when the agreement expressly states the contrary. Further, because letters of exchange are not a “transparent or coherent way to draft treaties” about civil liberties, it is critical that an Exchange of Letters contain an express intent to be binding.³⁸ Here, the *Letters* were merely a conversation about discouraging transborder abductions by bounty hunters. Therefore, even though exchanges of letters have sometimes been recognized as treaties,³⁹ the *Letters* do not contain binding legal principles because within them the United States expressly notified Canada to the contrary.⁴⁰

An international agreement or treaty that has not been registered with the Secretariat of the United Nations may not be invoked by any party before any of the organs of the United Nations.⁴¹ Both Canada and the United States are members of the United Nations and therefore, even if the *Letters* were intended to be a binding agreement, they still cannot be used against the United States because they have not yet been registered with the United Nations Secretariat.

Finally, the *Letters* are only concerned with abductions by bounty hunters. Rutaganda was not abducted from Canada: he came into the United States of his own volition. Even if he had been abducted from Canada and the *Letters* are held to be binding, state-sponsored policing activities were neither the focus nor encompassed within the intention of the *Letters*. If held to be binding, the Letters must be construed as a contractual agreement and therefore must apply strictly to only that which the drafters had in mind. The writers of these *Letters* were focused on reducing the frequency of transborder abductions by private bounty-hunters, and did not intend

³⁷ *Exchange of Letters, supra*, note 35 at p. 3-4.

³⁸ Steve Peers, “The Exchange of Personal Data between Europol and the USA” (2002) 15 *Statewatch* at para. 4.

³⁹ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980) at art. 2 [VCT].

⁴⁰ *Exchange of Letters, supra* note 35.

⁴¹ *UN Charter, supra* note 8 at art. 102.

to interfere with policing activities. Consequently, because the luring of Rutaganda was state sponsored, the circumstances are not within the scope of the agreement and the *Letters* cannot be construed as being applicable to this event.

The United States did not violate the *Exchange of Letters* because they are not a binding agreement and do not create any legal obligations. Moreover, because the *Letters* have not been registered with the United Nations Secretariat they cannot be used against the United States. Finally, even if the *Letters* were binding, they do not apply here because Rutaganda was not abducted, and even if he were, the *Letters* were intended to discourage abductions by private bounty hunters, not state sponsored policing activities.

D. Luring Rutaganda neither violated the *International Covenant on Civil and Political Rights* nor customary international law.

Rutaganda's arrest did not violate the *International Covenant on Civil and Political Rights* ("ICCPR") or the *Universal Declaration of Human Rights*⁴² because it was not arbitrary.⁴³ Rutaganda's arrest was valid because it was warranted for two reasons: he had entered the United States illegally and because Interpol had issued a Red Notice for his arrest.⁴⁴ As required by the ICCPR, Rutaganda was arrested "...in accordance with such procedure as are established by law".⁴⁵ Further, the UN Human Rights Committee's declaration that transborder abductions constitute arbitrary detention is not applicable because Rutaganda was not abducted from

⁴² *Universal Declaration of Human Rights*, GA Res. 217A (III), UN GAOR, 1948, UN Doc A/810, at 71, art. 9 [*Declaration of Human Rights*].

⁴³ *International Covenant on Civil and Political Rights*, 19 December 1966, 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*].

⁴⁴ *Öcalan v. Turkey* (ECHR Grand Chamber), Appl. No. 00046221/99, Merits, Judgement of 12 March 2003).

⁴⁵ *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.

Canada.⁴⁶ Rutaganda's arrest was not a forcible abduction because it was within the lawful authority of the United States' agents to arrest individuals suspected of having violated U.S. laws, and because Interpol's Red Notice granted such authority to the United States.

The *jus cogens* principle upholds the importance of prosecuting international crimes. *Jus cogens* is a set of norms to which every state must abide based on internationally shared principles focused on protecting the overriding interests and values and of the international community.⁴⁷ These norms are the necessary foundation to an "international public order".⁴⁸ *Erga omnes* refers to obligations, such as those under *jus cogens*, which are owed towards everybody else.⁴⁹ The prosecution of individuals involved in crimes such as genocide and crimes against humanity has been widely supported by these principles.⁵⁰

Similarly, the universal jurisdiction principle states that any state may (and sometimes must) exercise criminal jurisdiction over people whose crimes were very destructive to international order, irrespective of where the crime occurred and the nationality of the victim or the actor.⁵¹ The authority of any state to exercise universal jurisdiction by investigating and prosecuting suspected criminals within their territory on behalf of the international community

⁴⁶ *Ibid.*

⁴⁷ Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988) 5.

⁴⁸ H. Mosler, 'The International Society as a Legal Community' (1974) 140 *Recueil de Cours: Academie de Droit International* 17, at 33.

⁴⁹ *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* [1970] ICJ Rep 3, 33 (President Bustamante y Rivero, Judges Fitzmaurice, Tanka, Jessup, Morelli, Padilla Nervo, Gros, Ammoun, Petren, Onyeama and Lachs).

⁵⁰ *Ibid.* See e.g. *Prosecutor v Blaskic (Trial Chamber Judgment)*, Case No IT-95-14-T (12 May 1999).

⁵¹ International Law Association Committee on International Human Rights Law and Practice, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* (2000). See also Fiona McKay, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes against Humanity, Torture and Genocide* (1999).

may arise either under a treaty obligation⁵² or where the crimes are serious and threatening to the international order.⁵³ Western Europe has entertained many such proceedings, demonstrating the ability to rely on this principle to pursue criminal accountability, particularly where neither the harbouring state nor the international community were willing to act.⁵⁴

Rutaganda's participation in the Rwanda genocide involved acts that were so destructive to the international order that any state should rightfully be able to exercise its jurisdiction over him.⁵⁵ Canada's repeated refusal to extradite Rutaganda to Rwanda made it clear that some other country would have to take action under the principle of universal jurisdiction in order to bring Rutaganda to justice. Given this international principle, the United States was free to exercise jurisdiction over Rutaganda once he was within U.S. jurisdiction.

Criminal suspects are often extra-territorially lured or abducted in order to be prosecuted or extradited.⁵⁶ *Re Schmidt* is a British case in which the House of Lords upheld the extradition of an individual to a third country for criminal prosecution, despite the serious coercion first used to lure him into England.⁵⁷ National systems also frequently uphold jurisdiction even if the suspect was lured into their territory, recognizing that luring neither abuses the individual's

⁵² See e.g. the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 with changes at 24 ILM 535 (entered into force 26 June 1987).

⁵³ Stephen Macedo (ed), *Princeton Principles on Universal Jurisdiction* (2001) 28 (principle 1.2); *Arrest Warrant of 11 April (Congo v Belgium)* (Unreported, International Court of Justice, 14 February 2002) [9] (Judge Koroma), [61]–[64] (Judges Higgins, Kooijmans and Buergenthal), [40]–[62] (Judge van den Wyngaert), [7] (Judge Al-Khasawneh).

⁵⁴ See generally Nehal Bhuta, 'Justice without Borders? Prosecuting General Pinochet' (1999) 23 *Mel U.L. Rev.* 499. See also Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango and Julienne Mukabutera: see (Unreported, Cour d'Assises de l'Arrondissement Administratif de Bruxelles-Capital, President Maes, Judges Louveaux and Massart, 8 June 2001). And see Amnesty International, *Extradition Decision Raises Hopes in the Struggle against Impunity* (Press Release, 5 February 2001).

⁵⁵ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277.

⁵⁶ *Supra*, note 54.

⁵⁷ *Re Schmidt* [1995] 1 App. Cas. 339 (Eng. H.L. 1994).

rights nor due process.⁵⁸ Moreover, the principle of *mala captus bene detentus* is widely upheld. For example, in *Alvarez-Machain* the United States Supreme Court upheld their jurisdiction to criminally prosecute individuals brought into the country via abduction by U.S. agents.⁵⁹ France has conducted similar abductions, including that of an Algerian criminal conspirator from Munich.⁶⁰ Israel had a similar finding in *AG Israel v. Eichmann*.⁶¹ Customary international law forms from “general practice[s] accepted as law”⁶² which must first be uniformly followed over a broad period of time and be believed by states to be mandatory practices (*opinio juris*).⁶³ Customary international law could not have developed a principle opposing luring because the decisions upholding jurisdiction over abductions and luring are too numerous.⁶⁴

A recognized exception to the *mala captus bene detentus* principle is found in *Toscanino*, which requires that “cruel, inhumane, [or] outrageous conduct” or egregious abuses of physical human rights occur in order to warrant dismissal of jurisdiction over the individual brought about through irregular transborder conduct.⁶⁵ In other words, the government acquiring jurisdiction must have breached the individual’s constitutional rights through deliberate, unnecessary and unreasonable conduct.⁶⁶ Rutaganda’s case is far from the *Toscanino* exception because Rutaganda voluntarily entered the United States and was arrested for valid reasons. As in *U.S. v. Reed*, another case involving luring in which jurisdiction was upheld, Rutaganda’s Constitutional

⁵⁸ Malvina Halberstam, “In Defense of the Supreme Court Decision in *Alvarez-Machain*” (1992) 86 Am. J. Int’l L. 736 at 741.

⁵⁹ *Alvarez-Machain*, *supra* note 22.

⁶⁰ Restatement (Third) of Foreign Relations Law, 432 (1987), rep. n.3.

⁶¹ *Eichmann*, *supra* note 29.

⁶² J. L. Brierly, *The Law of Nations: An Introduction to the Law of Peace*, 6th ed. (Oxford: Clarendon Press, 1963) at 59-60.

⁶³ Currie, *supra* note 28 at 121.

⁶⁴ Robert J. Currie, “Abducted Fugitives before the International Criminal Court: Problems and Prospects” (2007) 18 Crim. L.F. 349 at 358.

⁶⁵ *United States v. Yunis* 681 F.Supp. 904 (D.D.C. 1998) at 920 [*Yunis*].

⁶⁶ *United States v. Toscanino* 500 F.2d 267 (2d Cir. 1974) at 275.

rights were not violated because there was no violation of his due process rights and his arrest was based upon two valid reasons: illegal entry into the country and the Interpol arrest warrant.⁶⁷ Therefore, the United States' actions did not reach the level of "outrageousness" required to warrant dismissal of its jurisdiction over Rutaganda.⁶⁸

In deciding *Prosecutor v. Dragan Nikolic*, a case of forcible abduction, the Appeals Chamber of the Stabilisation Force (SFOR) in Bosnia and Herzegovina held that, even given an illegal breach of territorial sovereignty or human rights, the Tribunal's jurisdiction should be upheld in cases of forcible extra-territorial abductions of individuals accused of 'universally condemned offenses'.⁶⁹ The court stressed that achieving accountability for universally condemned offenses is a necessary pre-condition to achieving international justice, and the damage caused to international justice by failing to apprehend these fugitives significantly outweighs any harm thereby caused to territorial sovereignty.⁷⁰ Unless the accused was "very seriously treated", possibly even subjected to "inhuman, cruel or degrading treatment, or torture", courts should uphold their jurisdiction.⁷¹ This decision reflects the appropriate balancing of the fundamental rights of the accused versus the international community's need for achieving the justice of individuals charged of core international crimes that seriously violate international humanitarian law.⁷² United States jurisdiction over Rutaganda should be upheld because Rutaganda's case involved no violation of territorial sovereignty or human rights and, given the crimes for which Rutaganda is charged, is far from meeting the standard of *Nikolic*.

⁶⁷ *Reed*, *supra* note 23.

⁶⁸ *Yunis*, *supra* note 66, at 915.

⁶⁹ *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, Appeals Chamber, 5 June 2003, para. 26 [*Nikolic*].

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, at para. 114.

⁷² *Ibid.*, at para 30.

Moreover, the situation demanded action by the United States due to the lapse of a lengthy period of time since Interpol issued a Red Notice for Rutaganda's arrest and Canada's neglect of its duties under the *Interpol Initiative* to surrender genocide offenders. The United States lured Rutaganda into its jurisdiction in accordance with its own duties to bring Rutaganda, an international genocide offender, to justice.

II. THE EXTRADITION OF RUTAGANDA FROM THE UNITED STATES TO RWANDA WOULD NOT VIOLATE INTERNATIONAL LAW.

A. The extradition of Rutaganda from the United States to Rwanda would not violate international law, regardless of the absence of an extradition treaty between either the United States or Canada with Rwanda.

Treaties are binding international legal instruments and are governed by the *Vienna Convention on the Law of Treaties* ("VCT"). Article 26 of the VCT states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."⁷³ An extradition treaty, as per Article 26 of the VCT places an obligation to extradite. However, there is no legal instrument stating that extradition is forbidden in the absence of an extradition treaty. To interpret otherwise would be to fall victim to a logical fallacy. As per international custom, where no extradition treaty exists, nations voluntarily extradite; and where a party does not wish to voluntarily extradite, then state parties enter into strategic negotiations.

The lack of an extradition treaty with Rwanda only applies to Canada. The United States in March of 2003 signed the *Agreement Between the United States of America and the Government of the Republic of Rwanda Regarding the Surrender of Persons to International Tribunals*.⁷⁴ Subsection 2(b) of this instrument states that persons of one Party present in the

⁷³ VCT, *supra*, note 39.

⁷⁴ Treaties in Force, United States Department of State Online: <<http://www.state.gov/documents/organization/123747.pdf>> at 232 (January 1 2009).

territory of the other shall not, absent the express consent of the first Party,

Be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to any international tribunal, unless otherwise obligated to do so by an international agreement to which both the United States and Rwanda are parties.⁷⁵

Rwanda is not a party to the *Extradition Treaty* between Canada and the United States. Given this agreement, the United States must abide by it and extradite Rutaganda to Rwanda. The United States does not wish to extradite Rutaganda only based on this bilateral agreement but rather under the principle of universality and as a member of the international community following Interpol's request. Moreover, Article 12 of the *Extradition Treaty* does not prevent the United States from extraditing Rutaganda to Rwanda because Rutaganda was not first extradited to the United States but entered that jurisdiction voluntarily.⁷⁶

Article 13 of the *Draft Declaration of Rights and Duties of States* adopted by the International Law Commission in 1949 states that “[e]very State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.”⁷⁷

In addition to the agreement between the United States and Rwanda regarding the surrender of persons, another source of international law is the agreement of 188 member nations of Interpol,⁷⁸ the largest police agency of the world which issued a Red Notice ordering the arrest of Rutaganda from any country in the world in whose territory he should *happen to be found* [emphasis added].⁷⁹ This obligation was placed on all signing members. Canada, Rwanda and the United States are all members and became members on October 1949, September 1974 and

⁷⁵ *Ibid.*

⁷⁶ *Extradition Treaty*, *supra* note 21, at art. 12.

⁷⁷ UNGAOR, 4th Sess., Res. 375 (IV) of 6 December 1949.

⁷⁸ *About INTERPOL*, online: INTERPOL <<http://www.interpol.int/public/icpo/default.asp>>.

⁷⁹ *Compromis*, *supra* note 2, at 3.

September 1923 respectively⁸⁰. Canada, who had agreed to co-operate with other nations and organizations in preventing genocide, war crimes and crimes against humanity and to co-operate in the investigation and the prosecution of those *suspected* of such crimes, repeatedly ignored the Red Notice order and violated its international obligation to at least 187 member nations of the International Police.⁸¹ Unlike Canada, the United States, a founding member of Interpol, abided by its international obligation in its attempt to extradite Rutaganda. In addition, when the United States found Rutaganda in its territory, the United States continued to abide by international law by respecting the *2004 Canada-U.S. Consular Notification Agreement* and immediately notified Canada of the situation. The United States had the opportunity to extradite Rutaganda without notifying Canada of the fact that Rutaganda had illegally crossed the border with false documentation. However, the United States respected its agreement with Canada, informed Canada of the situation, and it is for its respect for the *2004 Canada-U.S. Consular Notification Agreement* that the United States finds itself before the International Court of Justice defending its choice to adhere to orders of the international police.

On October 7, 2004, The General Assembly of Interpol passed a resolution known as the Increased ICPO-Interpol support for the investigation and prosecution of genocide, war crimes and crimes against humanity and stated that Interpol:

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 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 crimes.⁸²

In seeking to extradite Rutaganda, the United States acted as a member of the international

⁸⁰ *Supra*, note 78 at <<http://www.interpol.int/Public/Icpo/Members/dates.pdf>>.

⁸¹ *Interpol Initiative, supra*, note 19.

⁸² *Ibid.*

community and abided by international law. It is Canada who violated international law by repeatedly ignoring Interpol orders to extradite Rutaganda to stand trial in Rwanda—a sovereign nation that has abolished the death penalty and has an adequate justice system.

B. Rutaganda did not lack criminal culpability and, in extraditing him, the United States would not violate international law.

The United States would not violate international law in extraditing Rutaganda. Despite some inconsistency within the international community as to the age a soldier can be culpable for his actions, Rutaganda is considered culpable in the country in which he committed crimes against humanity as well as in the country in which he would be tried. Amnesty International's view is that child soldier's of any age should be prosecuted by state international tribunals if above the age of criminal culpability as set down in that state's domestic law.⁸³

Children under 15 years of age are presumed, under international law such as the *Statute of the Special Court for Sierra Leone*, not to have the maturity to comprehend the nature and the consequences of their actions⁸⁴. Rutaganda, at the time of the Boudaire Massacre was 15 years old, and according to the statute, was able to comprehend the nature of his consequences and can therefore be found culpable. Furthermore, many soldiers in the recent past, including many of the soldiers who fought in World War I and many of those who fought in South Africa's anti-apartheid struggle were under 18 years of age who were not considered child soldiers but rather brave young men.

The statutes of the International Tribunal of Rwanda do not preclude the prosecution of children and set no minimum age for criminal culpability. Furthermore, children 15 and over are permitted by international law to be 'voluntary' child soldiers in state armed forces as per the

⁸³ 'Child soldiers: Criminals or victims? (22 December 2000)', Amnesty International, online: <<http://www.amnesty.org/en/library/info/IO50/002/2000>>.

⁸⁴ United Nations, Statute of the Special Court for Sierra Leone, Article 7. (14 August 2000). Online: <http://www/sc-sl.org>.

Additional Protocols I and II of the *1949 Geneva Conventions* (1977).⁸⁵

The preamble to the *VCT* states 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.⁸⁶ Under Rwandan Law, Rutaganda can be culpable. This decision, based on Rwandan social and cultural practices should be respected. Accordingly, Rwandan standards of culpability should be applied to those who have committed crimes against humanity in Rwanda and against Rwandans. The United States respects Rwandan sovereignty and international law and does not attempt to impose its own standards on the Rwandan judicial system with respect to what age is appropriate for culpability.

Rutaganda is not being extradited to be punished, rather, he is being extradited so that he can stand trial, the outcome of which is yet to be determined through a fair trial.

C. The Courts of Rwanda are capable of providing Rutaganda a fair trial.

Rwanda is more than capable of providing Rutaganda a fair trial. In addition, improvements continue to take place at a rapid pace. Essential structures such as the Supreme Court and the Supreme Council of Magistrates have been put in place and court buildings have been repaired. New judicial personnel have been trained and by May of 1999, 104 judges had been trained with a total of 1800 personnel working in the judicial system.⁸⁷ Many judges were killed during the genocide and Rwanda has taken measures to remedy this situation. The number of judges involved in the genocide trials has continued to rise and as of August 2000, 104 judges

⁸⁵ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, online: Office of the United Nations Commissioner on Human Rights <<http://www2.ohchr.org/english/law/crc-conflict.htm>> (entered into force on 12 February 2002).

⁸⁶ *VCT*, *supra*, note 40.

⁸⁷ 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 the Genocide" (2001) 45:2 J. Afr. L. 143 at 156.

were appointed at the Specialized Chambers compared to the 76 in November of 1998.⁸⁸

Rwanda has also created the International Criminal Tribunal for Rwanda (ICTR) to prosecute persons responsible for the genocide. Other measures include the gacaca courts which are simply at the bottom of the judicial pyramid and deal mostly with the least severe type of crimes known as Category 4 crimes.⁸⁹

There is a backlog of cases in Rwanda; more than the amount in Western and European nations. There are also instances where prisoners await trial for long periods of time. There are also concerns with the quality of justice in Rwanda. Particularly, there are some legitimate concerns over the impartiality of judges and their respective training. However, most of these cases of delay and concern over impartiality, and most cited violations of Article 14 of the *ICCPR*⁹⁰ which sets out the requirements of a fair trial, concern the traditional gacaca courts dealing with Category 4 cases. Rutaganda has not been requested by the traditional gacaca courts, but rather through the District Court of South Province of Rwanda. This means that Rutaganda would most likely face trial in the legitimate District Court of South Province of Rwanda. It is also possible for him to be tried by the International Criminal Tribunal for Rwanda as the cases can be heard by the ICTR.⁹¹ Consequently, Rutaganda will have his case heard within a reasonable time and before adequately trained and impartial judges.

Many disturbing facts are known about the history of Rwanda's legal system which include the Genocide and the subsequent mistreatment of detainees. However, the justice system has been changing at a very rapid pace and the Rwandan justice system today is better than what it was just a few months ago. The justice system between 1996 and 2000 dealt with 3,343 cases

⁸⁸ *Ibid.* at 158.

⁸⁹ *Ibid.*

⁹⁰ *ICCPR*, *supra*, note 44.

⁹¹ *Online: Statute of the Tribunal* <<http://www.un.org/ictt/statute.html>>.

and it went from handing down the death penalty in 20 per cent of these cases⁹² to abolishing the death penalty in July of 2007. Such radical philosophical change demonstrates that the system is not static: it is improving and with respect to Rutaganda in particular, the international community and the 188 member nations of the Interpol should comply by the issued Red Notice and be satisfied that despite concerns with the traditional community gacaca courts, Rutaganda will receive a fair trial whether he is tried by the Rwandan National Court or the globally recognized International Tribunal for Rwanda.

CONCLUSION

THEREFORE, the United States respectfully submits that this Honourable Court adjudge and declare that:

- I. The United States did not breach its obligations under international law by luring Rutaganda into the United States and apprehending him there;
- II. Extradition of Rutaganda as per Interpol's Red Notice would not violated international law.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

Counsel for the Respondent, the Government of the United States (Team# 2010-11R).

⁹² *Supra*, note 87 at 157.