

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#: 2010-13A

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QUESTIONS PRESENTED

- I. Whether the luring of Mr. Rutaganda to the United States violate Canada's territorial sovereignty.

- II. Whether the luring violated the *Canada-United States Extradition Treaty*, the *1988 Exchange of Letters Between Canada and the United States on Transborder Abduction*, and Mr. Rutaganda's internationally protected human rights.

- III. Whether the deportation of Mr. Rutaganda was a disguised extradition that violated his internationally protected human rights.

- IV. Should the rendition of Mr. Rutaganda to Rwanda for trial be barred, because he was a child soldier who lacked criminal culpability, or because he would be accorded a fair trial.

JURISDICTIONAL STATEMENT

Canada (“the Applicant” or “Canada”) and the United States of America (“the Respondent” or “United States”), have submitted their differences regarding Emanuel Rutaganda to the International Court of Justice pursuant to article 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. Each party will accept the judgment 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

1. Background

Emanuel Rutaganda was born in Montreal, Quebec in 1978. He is a Canadian citizen by birth and a Rwandan citizen by virtue of his parents' Rwandan nationality. His parents, Pierre and Marie Rutaganda, were in Canada pursuing post-secondary education at McGill University from 1975-1979. Following the completion of their respective degrees, Pierre and Marie Rutaganda returned to Rwanda with their son in 1979.

Mr. Rutaganda's father passed away in a helicopter accident in 1993. Shortly after, at the age of fourteen, Mr. Rutaganda was recruited into the *Interhamwe*, a Rwandan militia group loosely affiliated with the Hutu army. His experience with the *Interhamwe* began in April and ended in August of 1994. Mr. Rutaganda, along with six other members of the *Interhamwe*, was allegedly involved in the Boudaire massacre that took place in June 1994.

2. Return to Canada

Mr. Rutaganda and his mother fled to Canada in August 1994 and were able to establish a life in Windsor, Ontario. Mr. Rutaganda married a Canadian named Lucette Campbell, with whom he has had three children, currently aged seven, five and three years old. Since his return to Canada, has not been served so much as a traffic citation.

In 2001, the Tutsi-controlled Rwandan government issued an indictment for Mr. Rutaganda's alleged involvement in the Boudaire incident. Canada denied the Rwandan government's requests on the basis that Mr. Rutaganda was a child soldier and he would not be given a fair trial by Rwandan courts. Despite Canada's refusal, the Rwandan

government requested that INTERPOL release a Red Notice seeking Emanuel Rutaganda's arrest.

3. Operation Motown Express

In an effort to implement the *Genocide Accountability Act*, the United States government established the "Inter-Agency Working Group for Human Rights Violators" (the Working Group). Following the discussion of Mr. Rutaganda on an episode of the NBC TV show "The Wanted", and in a number of American newspapers, the Working Group began to focus on apprehending Mr. Rutaganda.

On July 21st, 2009, Mr. Rutaganda's mother travelled from Canada to Detroit, Michigan to undergo a specialized medical procedure. After being notified of this event by the US Immigration and Customs Enforcement (ICE), the Working Group saw an opportunity to apprehend Mr. Rutaganda. The Working Group devised *Operation Motown Express* which was authorized by the President on July 22nd. The plan was to lure Mr. Rutaganda from Canada into the United States.

4. The Apprehension

Operation Motown Express was immediately initiated through a concerted effort with the Detroit Clinic. On the instructions of the ICE, the clinic sent a deceptive email to Mr. Rutaganda's Black Berry. The message falsely notified Mr. Rutaganda that that his mother's health was quickly deteriorating and that she requested his presence. In an attempt to see his mother in her final hours, Mr. Rutaganda borrowed a passport from a friend and entered the United States through the Windsor-Detroit tunnel. Upon arrival at the clinic, he was immediately arrested and taken into custody by ICE agents. Having induced Mr. Rutaganda's entry into the United States, an order for his removal due to an illegal entry was promptly effectuated. Following a series of immigration and judicial

decisions, American authorities decided that Rutaganda could be deported to Rwanda. Canada's efforts to send amicus briefs on Rutaganda's behalf during the proceedings proved to be futile and the United States has remained resolute in their decision to conclude *Operation Motown Express*.

5. The Aftermath

The Canadian government has vigorously protested Rutaganda's luring and apprehension through its Embassy in Washington. Canada objected to these acts as a breach of its territorial sovereignty, the US-Canada Extradition Treaty and the 1988 Exchange of Letters on Transborder Abduction, as well as the rights of a Canadian citizen under international law not to be subjected to arbitrary arrest. In addition, the government of Canada argued that the transfer of Mr. Rutaganda to Rwanda would violate international law.

The United States ignored Canada's concerns until Prime Minister Steven Harper threatened to withdraw Canada's troops from Afghanistan. In the interest of "maintaining close relations between the two countries," the United States entered into negotiations with Canada, which resulted in an agreement to refer the issues to the International Court of Justice.

SUMMARY OF ARGUMENT

State-sponsored abduction violates territorial sovereignty. The luring and apprehension of Mr. Rutaganda from Canada amounted to abduction by fraudulent persuasion. This is contrary to international law. By luring Mr. Rutaganda from Canada the United States breached its good faith obligations towards Canada.

The transfer of fugitives between Canada and the United States must accord with the procedures established in the *Extradition Treaty* and the *Exchange of Letters*. By luring Mr. Rutaganda with the intention of sending him to Rwanda to face trial, the United States breached its specific obligation to work within these instruments. Additionally, the United States did not have a proper legal basis for either luring or detaining Mr. Rutaganda. Consequently both his apprehension and detention were arbitrary and violated his internationally protected human rights.

The deportation of Mr. Rutaganda to Rwanda to face trial is a disguised extradition. The United States does not extradite in the absence of a treaty. By circumventing the extradition process the United States is acting illegally and depriving Mr. Rutaganda of his procedural rights. In any event, the deportation of Mr. Rutaganda to Rwanda, rather than Canada, also contravenes United States immigration law.

The United States is further barred from rendering Mr. Rutaganda to Rwanda as Mr. Rutaganda was a child at the time of the incident and child soldiers lack criminal culpability. Furthermore, the international community seriously doubts Rwanda's ability to provide Mr. Rutaganda with a fair trial as required by international law.

ARGUMENT

I. THE LURING OF EMANUAL RUTAGANDA VIOLATED CANADA'S TERRITORIAL SOVEREIGNTY.

Territorial sovereignty is the foundational principle of international law. Maintaining the integrity of this principle is necessary to ensure international peace and security. Furthermore, the preservation of amicable relations between the United States and Canada depends upon a mutual respect for territorial sovereignty.² The principle of territorial sovereignty empowers Canada to exert exclusive and inviolable control over activities within its borders. Accordingly, the United States is under a duty to refrain from intervening in matters that fall under the domestic jurisdiction of Canada.³ Apprehending alleged criminals is a matter falling within the exclusive authority of Canada. The United States violated Canada's territorial sovereignty when they lured Mr. Rutaganda.

A. Luring breaches the international obligation to cooperate and maintain friendly relations between nations.

Good faith is a principle at international law, which requires that states cooperate and maintain friendly relations.⁴ Good faith commitments reinforce and maintain strong

² *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, GA Res. 2625 (XXV), UN GAOR, 25th Sess., UN Doc. A/8082, 121 at Preamble [*Declaration*]; *Charter of the Organization of American States*, 30 April 1948, O.A.S.T.S. A-41, art 19.

³ *Declaration*, *supra* note 2 at art. 1.

⁴ International Law Commission, *Draft Declaration on Rights and Duties of States*, GA Res. 375 (IV), UN GAOR, 4th Sess., A/CN.4/W.5 (1949), pt. 2 at art. 1 [*Draft Declaration*].

relations in the international community, thus protecting international order and state sovereignty. The United States violated the principle of good faith by luring Mr. Rutaganda from Canada, with the full knowledge that states consider luring a violation of their territorial sovereignty.⁵ Despite this knowledge, the United States did not consult Canada authorities regarding *Operation Motown Express*.

B. Luring is akin to abduction, and abduction violates territorial sovereignty.

i. Abduction is a violation of territorial sovereignty.

Following the *Eichmann* case, the international community expressed outrage at Israel's abduction of Adolf Eichmann from Argentina; a blatant breach of Argentina's territorial sovereignty.⁶ In the wake of the abduction, the UN Security Council passed a resolution requesting that Israel make reparations to Argentina for the breach.⁷ The practice of transborder abduction is also strongly condemned in the reasoning of Justice Stevens' dissent in *Alvarez-Machain*.⁸ Stevens J. states that permitting such conduct will have a detrimental effect upon "every nation that has an interest in preserving the Rule of

⁵ U.S., United States Department of Justice, *United States Attorneys Manual* art. 9-15.630, online: United States Attorneys Online, http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html; *United States of America v. Humberto Alvarez-Machain*, 31 I.L.M. 922 (S. Ct. 1992) (Brief of the Government of Canada as *Amicus Curiae* in Support of Respondent).

⁶ *A.G. Israel v. Eichmann* (1961), 36 I.L.R. 5 (Dist. Ct. Jerusalem); *Question Relating to the Case of Adolf Eichmann*, SC Res. 138, UN SCOR, 1960, UN Doc. S/4336, at 4 [*Eichmann Question*].

⁷ *Ibid.*

⁸ *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S. Ct. 2188 (1992).

Law”.⁹ Moreover, Canada has consistently and publically taken the position that transborder abductions violate international law.¹⁰

i. The luring of Mr. Rutaganda constituted abduction.

Although Mr. Rutaganda was not physically apprehended in Canada the tactics of the United States ICE agents can be analogized to a state-sponsored abduction. Abduction is “the leading away of someone by force or fraudulent persuasion”.¹¹ Just as detention can occur without physical restraint, abduction can occur without physical capture. Mr. Rutaganda was deliberately misled by ICE agents to believe that his mother was dying, and that his presence was urgently required.¹² The purpose of the deception was to compel him to enter the United States. This lie had such a powerful emotional influence upon Mr. Rutaganda that he was left with no real option but to visit his mother at the Detroit Clinic. The luring of Mr. Rutaganda was clearly a fraudulent method of bringing him to the United States, and as such constituted abduction.¹³

⁹ *Ibid.*

¹⁰ *United States of America v. Humberto Alvarez-Machain*, 31 I.L.M. 922 (S. Ct. 1992) (Brief of the Government of Canada as *Amicus Curiae* in Support of Respondent) [*Amicus Brief*].

¹¹ *Black’s Law Dictionary*, 9th ed., s.v. “abduction”.

¹² See *Compromis* at para. 9.

¹³ See *Compromis* at para. 10.

C. Fraudulent transborder communications occur in every state through which they pass.

For crimes with multijurisdictional effects, of the crime is considered to occur within all affected states equally. This principle has been incorporated in the penal codes of a numerous of states and is accepted as international custom.¹⁴ Specifically, both Canada and the United States, recognize that crimes perpetrated by mail occur equally within each jurisdiction that letter passed.¹⁵ Luring Mr. Rutaganda through a fraudulent email is analogous to a crime perpetrated by mail. Accordingly, the wrongful act legally occurred within both Canada and the United States. As a state act occurring, without permission, within Canada, the luring of Mr. Rutaganda constituted a violation Canada's territorial sovereignty.

II. THE LURING VIOLATED THE U.S. – CANADA EXTRADITION TREATY, THE EXCHANGE OF LETTERS BETWEEN CANADA AND THE UNITED STATES, AND EMANUAL RUTAGANDA'S HUMAN RIGHTS

A. The luring violated the *United States – Canada Extradition Treaty*.

Luring Mr Rutaganda circumvents the agreement made under the *U.S.-Canada Extradition Treaty*.¹⁶ The *Extradition Treaty* has been entered into, *inter alia*, to address situations such as Mr. Rutaganda, and to limit the incidents of abduction. To legitimately

¹⁴ Art. 113-2 C. pén. (France); The Criminal Law, *Penal Code of the Federal Republic of Germany*, Art. 9(1) StGB (Germany); J. M. Canals & H. Dahl, "Standard Penal Code for Latin America" (1990) 17 Am. J. Crim. L. 263, art. 14 [translated by author].

¹⁵ *Criminal Code*, R.S.C. 1985, c. C-46, s. 476(e); U.S.C. 18 § 3237(a).

¹⁶ *Extradition Treaty between the United States of American and Canada*, Canada and United States, 3 December 1971, 27 U.S.T. 983, T.I.A.S. 8237 [*Extradition Treaty*].

gain custody of Mr. Rutaganda under the *Extradition Treaty*, the United States would first have to charge him with a crime under their domestic criminal laws. Canada would then exercise its discretion and determine whether or not to extradite Mr. Rutaganda.¹⁷ There are no alternative options available for the United States. The present breach of the *Extradition Treaty* is a breach of Canada's international rights.¹⁸

- i. *The luring violates the obligation to follow the Extradition Treaty in good faith.*

Resorting to a transparent and devious ploy to avoid provisions of the *Extradition Treaty* contravenes a vital principle regarding the implementation of treaties. According to the *Vienna Convention on the Law of Treaties (Vienna Convention)*, a treaty should be interpreted and applied in good faith, and in accordance with the ordinary meaning of the terms contained within the treaty.¹⁹ Although the United States is not a party to the *Vienna Convention*, the *Vienna Convention* is accepted as being an expression of customary international law. Under international law, good faith specifically requires the application of a treaty once it has been ratified, and restraint from the frustration of its object and purpose.²⁰

¹⁷*Extradition Treaty, supra* note 16 at art. 1.

¹⁸ *Amicus Brief, supra* note 10 at 923.

¹⁹ *Vienna Convention on the Law of Treaties*, 23 May 1969, 331 U.N.T.S. 1155, art. 31, Can. T.S. 1980 No. 37 (entered into force 27 January 1980).

²⁰ Guy Goodwin-Gill, "State Responsibility and the 'Good Faith' Obligation in International Law" in Malgosia Fitzmaurice & Dan Sarooshi, eds., *Issues of State Responsibility before International Judicial Institutions* (Oxford: Hart Publishing, 2004) 75 at 88 [*State Responsibility*].

- ii. *States cannot justify a breach of international law by relying on their domestic laws.*

The United States' good-faith obligations at international law precludes them from invoking provisions in their domestic laws as a justification for contravening their international duties.²¹ Consequently the Working Group's mandate to apprehend criminals charged with genocide cannot be invoked to breach treaty obligations owed to Canada. Under international law, Mr. Rutaganda cannot be denied benefits prescribed by treaty that regulate extradition between Canada and the United States. The United States is obligated to fulfil the requirements of the agreement without any deviation.²²

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

Although the precise provisions of the *Exchange of Letters* have not been contravened, the deliberate acts of the United States contravene the object and purpose of the exchange. The *Exchange of Letters* specifically prohibits the transborder abduction of individuals by civilian agents or bounty hunters.²³ In drafting this *Exchange of Letters*, the governments were largely responding to the controversy following the *Jaffe v. Smith* decision.²⁴ Jaffe was a Canadian citizen charged with unlawful land sale practices in the state of Florida. When Jaffe failed to appear for his pre-trial conference

²¹ *Draft Declaration, supra* note 4.

²² *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, art. 2(2).

²³ *January 11, 1988 Exchange of Letters Between Canada and the United States on Transborder Abduction*, United States and Canada, 11 January 1988.

²⁴ *Jaffe v. Smith*, 825 F.2d 304 (1987).

and his trial in Florida, he was abducted from Toronto by two bounty hunters.²⁵ While the *Exchange of Letters* prevents incidents involving bounty hunters from occurring in the future, neither the United States nor Canada anticipated that it would be necessary to include state actors within this document. The drafters never conceived that states would commit such egregious breaches of fundamental principles of international law, and risk jeopardizing the amicable relations between Canada and the United States. Had the government thought it necessary to include state actors, this detail would have been incorporated in the *Exchange of Letters*.

Operation Motown Express was specifically designed to bring Mr. Rutaganda into the United States. This apprehension severely undermines the purpose of the *Exchange of Letters*, and also contravenes the good faith duty to maintain the object and purpose of an international agreement.²⁶

C. The luring violated human rights protected by the ICCPR.

The procedure through which the United States apprehended Mr. Rutaganda, was a violation of international human rights law. The *ICCPR* provides that any deprivation of Mr. Rutaganda's liberty must be carried out in accordance with the procedures established by law.²⁷ The requirement to follow acceptable legal procedures prohibits arbitrary imprisonment. Mr. Rutaganda is being held based on his illegal entrance into the

²⁵ *Ibid*, at 305.

²⁶ State Responsibility, *supra* note 20.

²⁷ *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) [*ICCPR*].

country, which was orchestrated by United States agents. The absence of legitimate legal basis to detain Mr. Rutaganda amounts to an arbitrary restriction of his liberty.

There are additional grounds to conclude Mr. Rutaganda's apprehension and detention was arbitrary. There was no legal basis for luring Mr. Rutaganda from Canada. The mandate of the United States' *Genocide Accountability Act* is to apprehend criminals that have been charged with committing acts of genocide.²⁸ It was under the mandate of this act that Mr. Rutaganda was apprehended. Mr. Rutaganda has never been charged with genocide or any other crimes against humanity.²⁹ Therefore, the United States had no legal basis for luring Mr. Rutaganda from Canada. His subsequent arrest and detention were arbitrary and in violation of article 9(1) of the *ICCPR*.

III. THE RENDITION OF EMANUAL RUTAGANDA TO RWANDA WOULD VIOLATE INTERNATIONAL LAW.

There are two lawful means by which a state can remove unwanted individuals from their territory. A state must either deport an unwanted alien through immigration procedures, or use extradition law to send a wanted fugitive to a requesting state for criminal prosecution.³⁰ The procedural guarantees an individual receives depends on the method of removal. After detaining Mr. Rutaganda, the United States was obligated to remove him in a manner consistent with their domestic laws.³¹ The United States failed

²⁸ *Genocide Accountability Act*, U.S.C. 18 § 1091 (2007).

²⁹ See *Compromis* at para. 4.

³⁰ *Mohamed and Another v President of the Republic of South Africa and Others*, [2001] ZACC 18; (2001) 3 SA 893 (S. Afr. Const. Ct.) at para. 29 [*Mohamed*].

³¹ *ICCPR*, *supra* note 27 at art. 9(1).

to treat Mr. Rutaganda in a manner consistent with established legal process and consequently his rendition to Rwanda would violate international law.

A. Rendering Mr. Rutaganda to Rwanda for trial would constitute a disguised extradition.

The use of an immigration violation to justify the deportation of Mr. Rutaganada to Rwanda is an unlawful attempt by the United States to use immigration proceedings to circumvent the formal extradition process. A disguised extradition occurs when state deports an individual in order to effectuate an extradition. Disguised extradition breaches the rights of the deported individuals by denying them the specific procedural rights guaranteed by the extradition process.

States may deport individuals to jurisdictions where they will face prosecution. Where an individual is detained for equally compelling immigration and extradition reasons a state may exercise discretion in choosing the removal process. Many states recognize deportation as the more expedient process, and formal extradition burdensome. However, where the primary purpose of removal is to send a fugitive to face trial, and immigration concerns are merely incidental, extradition procedures are appropriate and required. It would be an affront to international law to justify breaches of human rights on the basis of expediency.

Respected courts have recognized the wrongfulness of disguised extradition, and have emphasized the importance of determining the true purpose for removal in determining the legitimacy of using the immigration process. In *Soblen*, the English Court of Appeal affirmed that if the purpose of the rendering state was to deport an individual because his presence was “not conducive to the common good”, then the deportation would be lawful; however, if the purpose was to surrender a fugitive criminal

to a requesting state, then the deportation would be unlawful.³² The South African Constitutional Court similarly stated that the distinction between extradition and deportation goes to the purpose of the rendition.³³ It indicated that if the purpose was to deliver a person for trial, the rendition is likely an extradition. In addition, Canadian courts have affirmed that deportation can amount to a ‘disguised extradition’ if the claimant can show bad faith on the part of the rendering government.³⁴

The United States made it clear that the purpose behind Mr. Rutaganda’s pending rendition is extradition. The United States freely admits that the sole object of *Operation Motown Express* as approved by President Obama was to apprehend Mr. Rutaganda in order to send him to trial in Rwanda.³⁵ Moreover, the United States purposefully lured Mr. Rutaganda into their jurisdiction. The act of luring Mr. Rutaganda prevents the United States from treating Mr. Rutaganda as an illegal immigrant. Mr. Rutaganda would never have entered the country but for the actions of the ICE agents. The United States cannot rely on a removal process designed to protect the United States from unwanted aliens to justify Mr. Rutaganda’s detention and rendition. By relying on a removal process designed to protect the United States from unwanted aliens to justify Mr. Rutaganda’s detention and rendition to Rwanda for trial, the United States is performing a disguised extradition.

³² *R. v. Governor of Brixton Prison Ex. p. Soblen*, [1963] 2 Q.B. 243, 1963 WL 21015.

³³ *Mohamed*, *supra* note 30 at para. 29.

³⁴ *Rebmann v. Canada (Solicitor General)*, 2005 FC 310, [2005] 3 F.C.R. 285, 128 C.R.R. (2d) 276 at para. 10.

³⁵ See *Compromis* at para 8.

B. The extradition of Mr. Rutaganda in the absence of a treaty violates international law.

The extradition of Mr. Rutaganda to Rwanda would violate his internationally protected human rights. Article 9 of the *ICCPR* states that, “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”. The United States does not have an extradition treaty with Rwanda. Under the United States legislation, the United States may only extradite on the basis of an existing treaty unless a crime has been perpetrated against US nationals.³⁶ None of Mr. Rutaganda’s alleged victims held American citizenship and therefore the only exception to the treaty requirement does not apply. To render Mr. Rutaganda to Rwanda through a disguised extradition would be to deprive Mr. Rutaganda of his liberty without the proper legal procedures he is entitled to under article 9.

The *Universal Declaration of Human Rights* also protects Mr. Rutaganda from being extradited in the absence of a treaty. Article 7 states that “All are equal before the law and are entitled without any discrimination to equal protection of the law”.³⁷ Rendering Mr. Rutaganda through immigration law would deprive him of the benefits of extradition procedures that are available to other individuals rendered for trial. Immigration and extradition laws accord individuals with different procedural rights. While immigration procedures simply require the determination of whether an individual has permission to remain within a state, extradition requires that courts consider

³⁶ *Scope and Limitation of Chapter*, U.S.C. 18 § 3181 (2007).

³⁷ *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc A/810 (1948) 71 at art. 7 [*UDHR*].

compliance with treaty provisions and ensure the existence of substantive elements such as dual criminality, extraditable offences, specialty and non-inquiry before permitting state to state extradition. The ‘disguised extradition’ would effectively deny Mr. Rutaganda the greater protections afforded to persons facing extradition and thereby place the United States in violation of their article 7 obligations.

C. In the alternative, the United States did not properly apply its domestic immigration laws and is therefore in breach of its international obligations.

According to the United States’ immigration law, an individual subject to deportation has the right to designate the country to which he wants to be removed.³⁸ This right is subject to the designated country’s willingness to accept the deportee, and to the Attorney General’s discretion to disregard a designation that is prejudicial to United States interests.³⁹ Canada would have gladly accepted Mr. Rutaganda. The deportation is therefore only contingent upon whether or not the Office of the Attorney General could validly exercise its discretion to ignore the designation by claiming that deporting Mr. Rutaganda to Canada is prejudicial to the interests of the United States.

Sending Mr. Rutaganda, a Canadian citizen, to Canada would not prejudice the interests of the United States. Mr. Rutaganda does not pose a security risk to the United States. He is a family man and small business owner who has lived quietly in Canada for the past fifteen years. There is no evidence that he has any animosity for the United States. Mr. Rutaganda entered the United States from Canada. A valid deportation would return him to Canada.

³⁸ 8 U.S.C. § 1231 (b)(2)(a) (2000).

³⁹ 8 U.S.C. at § 1231 (b)(2)(b) (2000).

IV. THE RENDITION OF MR. RUTAGANDA WOULD VIOLATE INTERNATIONAL LAW BECAUSE AS A CHILD SOLDIER, HE LACKED CRIMINAL CULPABILITY.

A. International law treats child soldiers as victims entitled to rehabilitation.

The international community has a vested interest in protecting child soldiers. At a tender age, these children are often torn away from their communities and stripped of their humanity and personal agency. Armed groups often recruit these innocent children through abduction or coerce them to join their ranks by threats of brutal violence against their families. They are often drugged to be desensitized to violence.⁴⁰ These stark realities have prompted the international community to take decisive action.

International human rights law has recognized the vulnerability of children and the need to protect them from the atrocities of armed conflicts. The *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Optional Protocol)* has entrenched the rights of child soldiers in international law. Under the *Optional Protocol*, which the United States has both signed and ratified, the minimum age to participate in hostilities is eighteen and armed groups cannot recruit members under that same age.⁴¹ Mr. Rutaganda was only 14 when he was recruited by the *Interhamwe* and 15 when he took part in direct hostilities.

⁴⁰ Mark Lorey, “*Child Soldiers: Care and Protection of Children in Emergencies, A field Guide*,” online: Save the Children <<http://www.savethechildren.org>>.

⁴¹ *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, GA Res. 54/263, UN GAOR, 2001, UN Doc. A/RES/54/263, 2 at art. 1. Art. 4 [Optional Protocol].

International law has criminalized the use of child soldiers and actively prosecutes perpetrators of this offence.⁴² It also recognizes that child soldiers are not culpable for the offences they have committed under the command of the armed group. The *International Criminal Court* does not try individuals under the age of eighteen.⁴³ Also, the Prosecutor of the Special Court of Sierra Leone, created to address one of worst conflicts in terms of the use of child soldiers, has stated that he would not try child soldiers.⁴⁴

In addition, the long-term psychological damage that is incurred by child soldiers has been well documented.⁴⁵ As a result, there has been a strong focus on the rehabilitation of these individuals. The Office of the Special Representative of the Secretary General for Children and Armed Conflict demonstrated that the United Nations has recognized the considerable challenges in healing and reintegrating children into their communities in the aftermath of conflict, and has labelled them as instruments of brutality rather than perpetrators.⁴⁶ An obligation to ensure the rehabilitation and social

⁴² *Prosecutor v. Joseph Kony*, ICC-02/04-01/05, Indictment, (6 October 2005) (International Criminal Court) online: ICC <<http://www.icc-cpi.int/>>.

⁴³ *Rome Statute of the International Criminal Court*, 17 July 1988, 2187 U.N.T.S. 3, art. 26.

⁴⁴ “Special Court Prosecutor says he will not Prosecute Children” *Special Court for Sierra Leone: Public Affairs Office* (2 November 2002), online: Special Court for Sierra Leone: Public Affairs Office <<http://www.sc-sl.org/LinkClick.aspx?fileticket=XRwCUe%2BaVhw%3D&tabid=196>>.

⁴⁵ “Recruiting or Using Child Soldiers,” online: Office of the Special Representative of the Secretary-General for Children and Armed Conflict <<http://www.un.org/children/conflict/english/childsoldiers.html>>.

⁴⁶ *Ibid.*

reintegration of child soldiers was included in the *Optional Protocol* and now colours their treatment in general.⁴⁷ Prosecuting child soldiers is contradictory to their rehabilitation and an inappropriate use of the criminal law.

B. The United States has an international obligation to promote the rehabilitation of child soldiers.

The United States has an obligation to ensure that Mr. Rutaganda's rights under the *Optional Protocol* be respected. Rendering him to Rwanda would contravene this obligation as he would be prosecuted for an offence for which he is not criminally culpable. In addition, Mr. Rutaganda has been successfully reintegrated into Canadian society. He married Lucette Campbell, a Canadian, with whom he has three children. He owns a prosperous business, and after 15 years of residence in Windsor, has never so much as received a traffic citation.⁴⁸ To render him to Rwanda would undo his successful rehabilitation.

V. THE RENDITION OF MR. RUTAGANDA TO RWANDA WOULD CONTRAVENE THE UNITED STATES' INTERNATIONAL OBLIGATIONS TO ENSURE HIS RIGHT TO A FAIR TRIAL.

A. International human rights law guarantees the right to a fair trial.

The importance of a fair trial is clearly demonstrated by the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*,⁴⁹ the *UDHR*,⁵⁰ the

⁴⁷ *Optional Protocol*, *supra* note 41 at art. 7.

⁴⁸ See *Compromis* at para. 3.

⁴⁹ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987).

⁵⁰ *UDHR*, *supra* note 37 at art. 10.

ICCPR,⁵¹ and regional human rights instruments.⁵² The Human Rights Committee (HRC) adopted the General Comment Number 29, which specifies that the fundamental requirement in the *ICCPR* of a fair trial is nonderogable.⁵³

B. International law does not allow for rendition to a country where an individual will not receive a fair trial.

International treaty obligations and customary international law do not allow for the rendition of an individual that will not receive a fair trial. Article 2 of the *ICCPR* obliges states to respect and ensure the rights of all “individuals within its territory and subject to its jurisdiction”.⁵⁴ This article requires states to take measures that enable individuals to enjoy or exercise the rights guaranteed in the *ICCPR*, which includes the right to a fair trial.⁵⁵ In *Ng v. Canada*, the HRC stated that a state that extradites a person

⁵¹ *ICCPR*, *supra* note 27 at art. 14

⁵² *European Convention on Human Rights*, 4 November 1950, CETS No 005, art. 6; *African Charter on Human and Peoples’ Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, art. 7, 21 I.L.M. 58 (1982); *American Convention on Human Rights*, 22 November 1969, O.A.S.T.S. No. 36, art. 8, 1144 U.N.T.S. 123.

⁵³ UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, CCPR/C/21/Rev.1/Add.11 at para. 11.

⁵⁴ *ICCPR*, *supra* note 27 at art. 2(1).

⁵⁵ Thomas Buergenthal, "To Respect and to Ensure: State Obligations and Permissible Derogations," in in Louis Henkin, ed., *The International Bill of Rights*, (New York: Columbia UP, 1981) at 77.

when there is a “real risk” that the person’s rights under the *ICCPR* will be violated in the other jurisdiction, would itself be in violation of the *ICCPR*.⁵⁶

Fair trial as a necessary component of extradition is also a mandatory requirement of customary international law. The United Nations Model Treaty on Extradition obliges states to refuse extradition if the individual being extradited would not receive the minimum guarantees in criminal proceeding contained in article 14 of the *ICCPR*.⁵⁷ It is consistent state practice to ensure that another states’ criminal justice system offers a fair trial before proceeding with extradition.⁵⁸ This is corroborated by the influential decision of the European Court of Human Rights (ECHR) in *Soering v. United Kingdom*. The ECHR unanimously held that in circumstances where the individual has suffered or risks suffering a flagrant denial of a right in the requesting country, the requested state will be in violation of the *European Convention on Human Rights* by extradited the individual.⁵⁹ Since Mr. Rutaganda will not receive a fair trial in Rwanda, the United States would be breaching its international obligations by rendering him to Rwanda.

⁵⁶ Human Rights Committee, *Report of the Human Rights Committee*, HRC Comm. No. 469/1991, UN GAOR, 49th Sess., Supp. No. 40, Vol. II, Annex IX(CC), UN Doc. A/49/40 (1994) 189.

⁵⁷ *Model Treaty on Extradition*, GA Res. 45/116, UN GAOR, 1990, Supp. No. 49A, UN Doc. A/45/49, 211 at art. 3(f).

⁵⁸ *Regina (Al-Fawwaz) v. Governor of Brixton Prison and another*, [2001] UKHL 69, [2002] 1 A.C. 556 (H.L.); see also *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *U.S.-Hong Kong Extradition Treaty*, United States and Hong Kong, 2 September 1997, Exec. Rept. 105-2.

⁵⁹ *Soering v. United Kingdom* (1989), 11 E.C.H.R. (Ser. A) 161, 11 E.H.R.R. 439 at para. 45.

C. Mr. Rutaganda will not receive a fair trial in Rwanda.

The international community has consistently affirmed that the Rwandan courts are not able to provide a fair trial in cases pertaining to the genocide, and many extradition requests have been denied on this basis. The International Criminal Tribunal of Rwanda (ICTR) has repeatedly refused transfers to Rwanda for want of fair trial.⁶⁰ Several domestic courts have also followed these decisions and denied extradition to Rwanda for similar reasons.⁶¹

Most recently, in *Brown*, the English High Court rejected a request for extradition to Rwanda and outlined the deficiencies in the Rwandan justice system that rendered the trials unfair. The court cited two main concerns: the availability of defence witnesses, and the independence and impartiality of the High Court of Rwanda. Previous cases, and an important report by *Human Rights Watch (HRW)*, noted that many potential witnesses for the defence refused to testify out of a fear that they would be accused of harbouring genocidal ideology, which is a crime in Rwanda.⁶² The court also expressed reservations about the ability of the Rwandan government to provide a viable witness protection

⁶⁰ *Prosecutor v. Yussaf Munyakazi*, ICTR-97-36A-T, Trial Day 19 (15 October 2009) (International Criminal Tribunal for Rwanda, Trial Chamber), online: <<http://www.ictr.org>>; and *Gaspard Kanyarukiga*, Decision on Request to Admit Additional Evidence (1 August 2008) (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <<http://www.ictr.org>>.

⁶¹ *Brown v. Government of Rwanda and the Secretary of State for the Home Development*, [2009] EWHC 770 at para. 47 (Admin) [*Brown*].

⁶² Human Rights Watch, "*Law and Reality: Independence of the Judiciary*" (24 July 2008), online: Human Rights Watch <<http://www.hrw.org/en/node/62097/section/9>>.

program which is necessary to encourage witnesses to testify.⁶³ With regards to the lack of impartiality of the Rwandan courts, the court placed considerable emphasis on *Bizimungu* where Rwanda's former President had been prosecuted on charges that were politically motivated.⁶⁴

International and domestic courts, along with very reputable international organizations such as the *HWR* have consistently found that Rwandan courts are not able to provide the fundamental human right to a fair trial. By sending Mr. Rutaganda to Rwanda, the United States would be subjecting him to a jurisdiction that cannot properly safeguard and ensure that he would receive a fair trial, and in doing so, would breach their international human rights.

CONCLUSION

- I. Whether the luring of Mr. Rutaganda to the United States violate Canada's territorial sovereignty.
- II. Whether the luring violated the *Canada-United States Extradition Treaty*, the *1988 Exchange of Letters Between Canada and the United States on Transborder Abduction*, and Mr. Rutaganda's internationally protected human rights.
- III. Whether the deportation of Mr. Rutaganda was a disguised extradition that violated his internationally protected human rights.
- IV. Should the rendition of Mr. Rutaganda to Rwanda for trial be barred, because he was a child soldier who lacked criminal culpability, or because he would be accorded a fair trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

Counsel for the Respondent, the Government of the United States (Team #2010-13A).

⁶³ *Brown, supra* note 61 at para. 49.

⁶⁴ *Ibid.* at para. 104.