

**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#: 2010-13R

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QUESTIONS PRESENTED

- I. Whether the actions taken by the United States to apprehend Emanuel Rutaganda respected Canada's territorial sovereignty, the *Canada-US Extradition Treaty*, and the *1988 Exchange of Letters Between Canada and the United States on Transborder Abduction*.

- II. Whether Emanuel Rutaganda's internationally recognized human rights were respected by the United States at all times.

- III. Whether the rendition of Emanuel Rutaganda to Rwanda should proceed forthwith so that he can be brought to trial in satisfaction of the international obligation to fight impunity.

JURISDICTIONAL STATEMENT

Canada (“the Applicant”) 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. Emanuel Rutaganda

Emanuel Rutaganda was born in Montreal, Quebec in 1978. Although he is a Canadian citizen by birth, he also has Rwandan citizenship since both of his parents were Rwandan nationals of Hutu ethnicity. His parents, Pierre and Marie Rutaganada, were in Canada to pursue their post-secondary education at McGill University from 1975-1979. Following the completion of their respective programs in 1979, Pierre and Marie Rutaganda returned to Rwanda with their son.

2. The Boutaire Massacre

Following the death of his father – who died in a helicopter crash while serving as a Colonel in the Rwandan army - Rutaganda was recruited into a Rwandan militia group known as the *Interhamwe*. This organization is loosely affiliated with the Hutu army. Emanuel was fourteen years old at the time of his recruitment. His service with the *Interhamwe* coincided with the Rwandan Genocide, which lasted from April to August of 1994. During the course of his service, Rutaganda was allegedly involved in the Boutaire High School Massacre, one of the worst atrocities committed during the 1994 genocide. Seven *Interhamwe* members went to a detention centre for Tutsi children, positioned themselves at the exits, set fire to the building and shot any child that tried to escape. 275 Tutsi children were killed. Rutaganda, along with six other identified members of the *Interhamwe* are alleged to be the perpetrators.

3. Escape to Canada

Emanuel and Marie Rutaganda escaped to Canada shortly after the collapse of the Hutu government, in August 1994. Far from the massacres in Rwanda, the Rutagandas

were able to establish themselves in Windsor, Ontario as successful business owners. In 2000, Rutaganda married a Canadian named Lucette Campbell, and they had three young children.

In 2001, criminal proceedings were finally brought against Rutuganda when the Rwandan government issued an indictment against him on account of his alleged involvement in the Boudaire High School Massacre. Since 2001, the Rwandan government has repeatedly requested that Canada extradite Rutuganda, and Canada has continually denied the Rwandan government's requests. In 2002, INTERPOL released a Red Notice seeking Emanuel Rutuganda's arrest.

4. Operation Motown Express

The United States government has established the "Inter-Agency Working Group of Human Rights Violators" (the "Working Group") to give effect to the *Genocide Accountability Act*.² The membership of the Working Group, which is dedicated to fighting impunity for perpetrators of heinous crimes, includes the Deputy Counsel of the National Security Council, the State Department at large for War Crime Issues, the Section Chief of the Department of Homeland Security, Immigration and Customs Enforcement's Human Rights Violators and War Crimes Units, the Director of the Department of Justice Office of Special Investigations and the Director of the Department of Justice Office of International Affairs. Under the ambit of this initiative, American authorities became interested in Rutuganda in 2009 following an episode of the television series "The Wanted". The show portrayed Rutuganda as a genocide perpetrator living

² *Genocide Accountability Act*, U.S.C. 18 § 1091 (2007).

with impunity just across the border from the United States. A number of newspaper columns and editorials regarding Rutaganda soon followed.

In July 2009, the American public became outraged at the fact that Rutuganda, an alleged perpetrator of such a horrible crime, was living freely in Windsor. As Canada refused to abide by its international obligation to bring him to justice, the United States decided to act on its own initiative. When Immigration and Customs Enforcement (ICE) learnt on July 21, 2009 that Marie Rutaganda was in Detroit for a medical procedure, they notified the Working Group. *Operation Motown Express*, a strategy designed to lure Rutaganda to the United States was developed by the Working Group and approved by the President on July 22, 2009.

5. The Apprehension

At 12:30 PM on July 22, 2009 the ICE agents sent an email to Rutaganda's Blackberry from the Detroit Clinic, stating that his mother's health was quickly deteriorating, and that she would soon perish. In reality, Marie's surgery was a success and her doctors predicted she would make a full recovery.

Emanuel Rutaganda borrowed a passport from a friend and used it to cross the border into the United States. Rutaganda immediately proceeded to the clinic in Detroit to visit his mother. Upon entering the clinic, he was arrested and taken into custody by ICE officials.

Based upon Rutaganda's illegal entry into the United States, an order of removal was issued. Canada received timely and proper notification of this decision, as required by the 2004 *Canada-US Consular Notification Agreement*.³ Rutaganda was allowed

³ Bureau of International Information Programs, U.S. Department of State, News Release,

every opportunity to appeal the decision to render him to Rwanda, where he holds citizenship. This included both immigration and judicial proceedings, up to the U.S. Supreme Court (which denied his petition for *certiorari*). The decision of the ICE to render him to Rwanda was upheld.

6. The Aftermath

The Canadian government initially protested Rutaganda's luring and apprehension through diplomatic channels. Subsequently, the Prime Minister threatened the full and immediate withdrawal of Canada's troops from Afghanistan unless the United States agreed to have the case heard in the International Court of Justice for adjudication. In order to maintain friendly relations with its neighbour, the United States agreed to the submission.

“Bush, Martin Stress Importance of Canadian-U.S. Relations; Speak with reporters following breakfast meeting in Monterrey, Mexico” (13 January 2004), online: <<http://www.america.gov/st/washfile-english/2004/January/20040113135315ssor0.6695215.html>> [*Consular Agreement*].

SUMMARY OF ARGUMENT

The apprehension of Emanuel Rutaganda was required by, and consistent with international law. The international obligation to end impunity necessitated the apprehension of Rutaganda. *Operation Motown Express* was specifically designed to respect Canadian territorial sovereignty by avoiding state actions in Canadian territory. Furthermore, Rutaganda left Canada freely and willingly.

Neither the *Canada-United States Extradition Treaty (Extradition Treaty)* nor the *1988 Exchange of Letters Between Canada and the United States on Transborder Abduction (Exchange of Letters)* apply to Rutaganda's apprehension or detention. The United States could not prosecute Rutaganda and therefore could not request his extradition from Canada. The *Exchange of Letters* does not extend to state-sponsored luring. Additionally, the apprehension respected Rutaganda's human rights as Rutaganda was provided every procedural right accorded to him by law. The international community recognizes that the use of luring in the fight against impunity is consistent with international law.

The United States does not require an extradition treaty to render Rutaganda to Rwanda through immigration deportation. Deportation is consistent with customary international law and is widely used in the fight against impunity. International law recognizes that child soldiers can be prosecuted for their crimes. The fact that Rutaganda was a child at the time of the Boudaire Massacre does not bar his rendition to Rwanda.

Rutaganda would receive a fair trial in Rwanda in accordance with international law as per the *ICCPR* and the *Beijing Rules*. Rwanda's acceptance into the Commonwealth, and the winding down of the ICTY demonstrate the international community's confidence in Rwanda's judicial system.

ARGUMENT

I. THE UNITED STATES HAS ACTED IN ACCORDANCE WITH ITS INTERNATIONAL OBLIGATION TO FIGHT IMPUNITY.

Both the apprehension and anticipated rendition of Emanuel Rutaganda to Rwanda are consistent with the United States' international obligation to fight impunity for atrocious crimes. During the Rwandan Genocide, between 500,000 and 800,000 men, women and children were brutally massacred, most of them Tutsi targeted for no other reason than their ethnicity.⁴ Rutaganda is accused of playing a part in the Genocide through the ethnically motivated murder of 275 Tutsi children. Canada has consistently refused either to try Rutaganda for his role in the massacre or to send him to a jurisdiction that will. The international community recognizes the need to fight this type of impunity in order to provide justice for the victims of internationally condemned crimes - such as the Boudaire Massacre - and to deter those who would commit future atrocities.

The duty to fight impunity has deep roots in international law. In the aftermath of the Second World War the international community convened the Nuremberg and Tokyo trials to ensure that the Nazi and Japanese perpetrators of atrocities would not escape justice.⁵ By the middle of the twentieth century, the importance of eliminating impunity was recognized by the U.N. Security Council in its resolution concerning the apprehension of Adolf Eichmann, which stated that the Council was "mindful ... of the concern of people in all countries that Eichmann should be brought to appropriate justice

⁴ International Panel of Eminent Personalities, *Rwanda: the Preventable Genocide*, (Kigali: Organisation of African Unity, 2000).

⁵ *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 59 U.S. Stat. 1544, 82 U.N.T.S. 279; *Charter of the International Military Tribunal for the Far East*, 19 January 1946.

for the crimes of which he is accused”.⁶ The U.N. *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, adopted by the General Assembly in 1968, is further proof of the international community’s determination not to allow perpetrators of atrocities to go unpunished.⁷

More recently, the importance of the duty to eliminate impunity was expressed in the preamble to the *Rome Statute*,⁸ and various resolutions of the U.N. Commission on Human Rights.⁹ It has been recognized by the international community that a primary concern of the completion strategies of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) is to ensure that the conclusion of these bodies’ mandates will not result in impunity for the perpetrators of atrocities in the Balkans and in Rwanda who have not yet been tried or who are still at large.¹⁰ The United States was justified in its apprehension of Rutaganda and acted in a manner consistent with its international obligations and the moral imperative to end impunity.

⁶ *Question Relating to the Case of Adolf Eichmann*, SC Res. 138, UN SCOR, 15th Sess., UN Doc. S/4349 (1960).

⁷ *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 26 November 1968, 745 U.N.T.S. 73 (entered into force 26 November 1968).

⁸ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3 (entered into force 1 July 2002).

⁹ *Resolution on Impunity*, HRR Res. 2005/81, UN CHROR, 61st Sess., UN Doc. E/CN.4/RES/2005/81.

¹⁰ UN SCOR, 63d Year, 6041st Mtg., UN Doc. S/PV.6041 (2008).

II. THE TACTICS USED BY THE UNITED STATES TO APPREHEND EMANUAL RUTAGANDA WERE LEGAL AND APPROPRIATE.

A. The Inter-Agency Working Group respected Canada's territorial sovereignty.

1. No actions were taken in Canadian territory.

The United States specifically designed *Operation Motown Express* (*Operation*) to avoid a breach of Canada's territorial sovereignty. Territorial sovereignty is breached when one state acts without permission in the territory of another state. The apprehension of Rutaganda was effected from, and completed in, the United States: the planning of the *Operation* occurred in the United States; the e-mail was sent from the United States; and Rutaganda's apprehension occurred in the United States. No agents of the United States ever crossed the Canadian border.¹¹ If the *Operation* had any effect in Canada it was completely incidental and incapable of constituting a breach of sovereignty.

International law accepts that a state first exerts control over a fugitive in the jurisdiction in which his or her actual apprehension occurs. The apprehension of an individual would only breach territorial sovereignty if it occurred within the territory of the complaining state. In the *Decision on the Motion for Release by the Accused Slavko Dokmanović*, the ICTY considered the legality of Slavko Dokmanović's apprehension from Croatia. The Tribunal found that although an investigator from the Office of the Prosecutor visited Dokmanović within the Federal Republic of Yugoslavia (FRY) and tricked him into travelling to Croatia, "there was no actual physical violation of FRY

¹¹ See *Compromis*.

territory in gaining custody of Dokmanović. The arrest occurred in Croatian territory”.¹² Similarly, in *Prosecutor v. Dragan Nikolić*, the ICTY found that the state did not actually exert control over Nikolić until he was arrested in Bosnia and Herzegovina, despite his abduction from the FRY by unknown individuals. The court found that since the official apprehension of Nikolić occurred within Bosnia and Herzegovina, there was no breach of sovereignty.¹³

2. *In addition, enticing an individual to leave his or her state does not violate territorial sovereignty if an individual leaves that state of his or her own volition.*

Respected courts have concluded that it is not a violation of territorial sovereignty to persuade an individual to leave a foreign jurisdiction if the individual leaves willingly. In *Liangsiriprasert v. US*, the British Judicial Committee of the Privy Council ruled that the luring of drug dealers from Thailand to Hong Kong by the United States did not violate the territorial sovereignty of Thailand because the alleged drug dealers left Thailand, and entered Hong Kong, willingly. Similarly, in *Dokmanović* the ICTY found that luring Dokmanović to Croatia did not amount to fraudulent coercion as he had left the FRY willingly.¹⁴

Rutaganda made a personal decision to enter the United States. The fact that he was motivated to do so by an inaccurate email does not vitiate the voluntariness of his

¹² *Prosecutor v. Mile Mrksić*, IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanović (22 October 1997) at para. 77 (International Criminal Tribunal for the Former Yugoslavia) [*Dokmanović*].

¹³ *Prosecutor v. Dragan Nikolić*, IT-94-2-S, Sentencing Judgement (18 December 2003) at para. 26 (International Criminal Tribunal for the Former Yugoslavia).

¹⁴ *Dokmanović*, *supra* note 12 at fn 73.

actions. Since he acted of his own free will there was no violation of Canada's territorial sovereignty.

B. The tactics of the Inter-Agency Working Group did not violate the *Canada-United States Extradition Treaty*.

1. *The Extradition Treaty does not apply as the United States cannot prosecute Emanuel Rutaganda.*

The *Canada – United States Extradition Treaty* conforms to internationally recognized standards for extradition treaties: the treaty provides that extradition can only occur if the principle of dual criminality is satisfied and if the requesting state is willing *and* able to prosecute the individual.¹⁵ The United States is unable to prosecute Rutaganda for the murder of foreign nationals in Rwanda. Since the United States does not have the jurisdiction to try Rutaganda, the United States could not request his extradition from Canada. The *Extradition Treaty* does not apply to the present circumstances and could therefore not be breached by the United States.

C. The 1988 Exchange of Letters Between Canada and the United States on Transborder Abduction does not apply to Rutaganda.

1. *The Exchange of Letters is a non-binding clarification of the existing extradition treaty.*

Neither Canada nor the United States intended the *Exchange of Letters* to create or alter binding legal obligations.¹⁶ Non-binding arrangements are often characterized by

¹⁵ *Model Treaty on Extradition*, GA Res. 45/116, UN GAOR, 45th Sess., UN Doc. A/Res/45/116 (1990) art. 2(1); *Extradition Treaty between the United States of American and Canada*, Canada and United United States, 3 December 1971, 27 U.S.T. 983, arts. 1 & 2(1), T.I.A.S. 8237.

¹⁶ *January 11, 1988 Exchange of Letters Between Canada and the United States on Transborder Abduction*, United States and Canada, 11 January 1988 [*Exchange of Letters*].

the use of certain language. It is Canada's policy that "the provisions of such an instrument should be cast as expressions of intent rather than as obligations".¹⁷ The United States urges "that terms such as 'should' or 'intend to' or 'expect to' be utilized in a non-binding document".¹⁸ This is exactly the language used in the *Exchange of Letters*.

Canada has a number of exchanges of letters with the United States that it regards as binding agreements. The letters that it considered binding are titled, 'Exchange of Letters constituting an Agreement' rather than an 'Exchange of Letters constituting an Understanding', as this agreement is officially titled.

2. *In the alternative, the Exchange of Letters does not apply as Rutaganda was not forcibly abducted nor was his apprehension undertaken by private parties.*

The *Exchange of Letters* was specifically drafted in response to the abduction of Sidney Jaffe, and their utility is limited to situations presenting similar facts. In 1981, Sidney Jaffe was abducted from his home in Canada by a bail bondsman and a professional bounty hunter, taken to Florida, and convicted of breaching Florida's *Land Sales Act*.¹⁹ The Government of Canada protested Jaffe's abduction, and sought both his return to Canada and the extradition of his abductors. When a protocol amending the *Extradition Treaty* was signed in 1988, the letters were exchanged to clarify that the *Jaffe* situation should never be repeated.

¹⁷ Canada, Department of Foreign Affairs and International Trade, *Policy on Tabling of Treaties in Parliament, Annex C: International Instruments that are not binding under Public International Law (Memoranda of Understanding)* (2008), online: Canada Treaty Information <<http://www.treaty-accord.gc.ca/Tabling.asp>>.

¹⁸ U.S., Office of Treaty Affairs, *Guidance on Non-Binding Documents*, online: U.S. Department of State <<http://www.state.gov/s/l/treaty/guidance/>>.

¹⁹ *Kear. Hilton*, 699 F.2d 181 (4th Cir. 1983).

The *Exchange of Letters* are clearly limited to situations analogous to the Jaffe abduction. Rutaganda was not abducted from Canada, and his apprehension was executed by state agents, not private “bounty hunters”. They were never intended to cover state-sanctioned apprehensions and therefore do not apply to Rutaganda’s situation.

D. The apprehension of Emanuel Rutaganda respected his internationally protected human rights.

1. The United States respected Rutaganda’s human rights protected by the ICCPR.

The apprehension of Rutaganda complied with applicable legal procedure. Article 9 of the *International Covenant on Civil and Political Rights (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”.²⁰ The ICTY has found that the state-sponsored luring of an individual will not breach this right if the laws and procedures of the luring state are properly followed.²¹

The practice of luring wanted fugitives to the United States has been endorsed by both the US Attorney General’s Manual and in domestic court decisions.²² President Obama explicitly approved Rutaganda’s apprehension through the *Operation*. Rutaganda used a friend’s passport to enter the United States. He was arrested on legitimate

²⁰ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 9, Can. T.S. 1976 No. 47 (entered into force 23 March 1976) [*ICCPR*].

²¹ *Dokmanović*, *supra* note 12 at para. 60.

²² U.S., United States Department of Justice, *United States Attorney’s Manual* art. 9-15.225, online: United States Attorneys Online <http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html> art. 9-15.630 [*US Attorney’s Manual*]; *United States v. Yunis*, 924 F.2d 1086, 288 U.S.App.D.C. 129; *United States v. Wilson*, 732 F.2d 404; *United States Ex Rel Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975) [*Rel Lujan*].

immigration grounds and provided with ample opportunity to contest his detention. Canada was provided with timely notification of the situation as per the *Canada-US Consular Notification Agreement*.²³ Both the apprehension and detention of Rutaganda complied with applicable domestic law and therefore did not violate Rutaganda's human rights.

2. *The international community does not consider luring a violation of human rights.*

Internationally, courts including the ICTY, the British House of Lords, and the Supreme Court of Canada often assume jurisdiction over cases where the defendant is brought into the jurisdiction through a state-sponsored lure. The courts defend their ability to try these defendants on the basis that since the luring did not violate the defendant's human rights the luring is not grounds to limit jurisdiction.²⁴

Many courts emphasize that the more horrendous the crime a defendant is accused of, the higher the standard to prove a breach of his rights. In the United States, a defendant must prove that a state-sponsored lure amounted to a breach of the *Toscanino* standard of a "deliberate, unnecessary and unreasonable" invasion of the accused's rights, before a court will consider his apprehension unlawful.²⁵ The rule in *Toscanino* provides a high level of deference to state actions. Currently, the standard has only been met in

²³ *Consular Agreement*, *supra* note 3.

²⁴ *R. v. Hartnett* (1973), 1 O.R. (2d) 206, 14 C.C.C. (2d) 69; *Re Schmidt* (1994), [1995] 1 A.C. 339 (H.L.); *The Prosecutor v. Dragan Nikolić*, Case No IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 114 [*Nikolić*]; *Dokmenović*, *supra* note 12.

²⁵ *United States v. Toscanino*, 500 F.2d 267 (2d Cir.1974).

cases of “torture, brutality, and similar outrageous conduct”.²⁶ The ICTY established a similar standard in *Nikolić*, where it found that in order to rely on an abuse of process doctrine to challenge the legitimacy of criminal proceedings, the rights of the accused must have been egregiously violated. The Tribunal clarified that a state would commit an egregious breach of a defendant’s rights “where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal”.²⁷ The treatment of Rutaganda did not breach his rights, and certainly did not outweigh the critical importance of respecting his indictment and enabling Rwanda to put him on trial.

III. THE RENDITION OF EMANUAL RUTAGANDA FROM THE UNITED STATES TO RWANDA IS REQUIRED BY INTERNATIONAL LAW.

A. The rendition of Rutaganda to Rwanda is supported by valid immigration law which operates outside the extradition process.

1. Rutaganda’s rights under United States immigration law were fully respected.

Rutaganda purposefully entered the United States illegally by using a friend’s Canadian passport in contravention of United States immigration laws.²⁸ Under those laws, an alien that is apprehended somewhere other than a point of entry may designate the country to which he wants to be removed.²⁹ The Attorney General retains the discretion to disregard the designation if it would be prejudicial to the interests of the

²⁶ *Rel Lujan, supra* note 22.

²⁷ *Nikolić, supra* note 24.

²⁸ 8 U.S.C. §1185(a)(3) (2009).

²⁹ 8 U.S.C. §1231(b)(2)(A)(i) (2009).

United States.³⁰ The removal of Rutaganda to Canada would cause the United States to breach its international obligation to end impunity as Rutaganda would never face trial for his alleged role in the Boudouiri Massacre. Forcing the United States to breach international law would be prejudicial to its interests. The United States refuses to be complicit with Canada's failure to bring Rutaganda to justice. The Attorney General must disregard Rutaganda's designation of Canada³¹ and remove Rutaganda to any other country where he holds citizenship.³² As Rutaganda holds Rwandan citizenship and removing him there would be in accordance with the United States' international obligations, Rwanda is the appropriate destination for his removal under United States immigration law. Additionally, the United States respected all of Rutaganda's rights at domestic and international law, including immigration and judicial proceedings up to the United States Supreme Court.³³ Since the rendition of Rutaganda to Rwanda is a valid immigration procedure and not an extradition, his removal without an extradition treaty between Rwanda and the United States would not violate international law.

2. In addition, the use of immigration procedures in the global fight against impunity is consistent with customary international law.

The fight against impunity necessitates the elimination of safe havens for criminal fugitives. The use of immigration procedures to bar entry to fugitives, or to apprehend them if they have illegally entered a state, is both effective and respectful of the rights of

³⁰ 8 U.S.C. § 1231(b)(2)(C)(iv) (2009).

³¹ 8 U.S.C. § 1231(b)(2)(C)(iv) (2009).

³² 8 U.S.C. § 1231(b)(2)(D) (2009).

³³ See *Compromis* at para. 10.

the accused. Canada and the United States employ this technique and recognise its legality in international law.³⁴

3. *Furthermore, the absence of an extradition treaty cannot be used as a bar to the rendition of Rutaganda to Rwanda.*

The respect of Rutaganda's internationally protected human rights is not dependent on the existence of an extradition treaty between Canada and Rwanda. Article 9 of the ICCPR states that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as established by law".³⁵ An extradition is a clear deprivation of liberty and must therefore be in accordance with an extradition treaty, if any exists, and domestic law. Canada did not have an extradition treaty with Rwanda at the time that the latter requested that Rutaganda be sent to it. However, according to Canada's *Extradition Act*, Canada can extradite a requested individual on the basis of a specific agreement with the requesting state.³⁶ Therefore, Canada could have extradited Rutaganda to Rwanda. However, the ability of Canada to extradite Rutaganda to Rwanda does not affect the ability of the United States to deport him on the basis of valid immigration laws. Therefore, the rendition of Rutaganda to Rwanda is in accordance with international law even though Rwanda did not have an extradition treaty with Canada at the time of the Rwandan extradition request.

³⁴ *US Attorney's Manual*, *supra* note 22 at 9-15.610; Canada, Canada Border Services Agency, *Canada's Program on Crimes Against Humanity and War Crimes: Tenth Annual Report*, (Ottawa: Canada Border Services Agency, 2007), online: Canada Border Services Agency, < <http://www.cbsa-asfc.gc.ca/security-securite/wc-cg/wc-cg2007-eng.html>>.

³⁵ *ICCPR*, *supra* note 20 at art. 9.

³⁶ *Extradition Act*, S.C. 1999, c. 18, s.10(1).

B. Child soldiers can be held criminally liable for their actions.

Customary international law has long prohibited the use of children under the age of 15 in armed conflicts.³⁷ The international community has recognized that all actions affecting children should be consistent with the ‘best interest of the child’.³⁸ The *Optional Protocol to the Convention on the Rights of the Child (Optional Protocol)* obliges signatory states to ensure that children, recognized as individuals under the age of 18, do not participate in direct hostilities.³⁹ At the age of 14, Rutaganda was recruited by the *Interhamwe* militia and he participated in direct hostilities at the age of 15.⁴⁰ He would be considered a child soldier under the *Optional Protocol*. However, being labelled a child soldier does not negate Rutaganda’s criminal liability.

1. International law recognizes that child soldiers can be prosecuted.

International law mandates that all decisions pertaining to a child shall be made in his or her best interests.⁴¹ Where a child is accused of a criminal offence, it may be in the child’s best interests to be prosecuted. Prosecution done in a manner that respects the child’s vulnerability and recognizes the child’s capacity as a human being to accept

³⁷ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, Can. T.S. 1991 No. 2 (entered into force 7 December 1978) art. 77.2.

³⁸ *Ibid*; *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, CAN T.S. 1992 No. 3 (entered into force 2 September 1990) [CRC].

³⁹ *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, GA Res. A/RES/54/263, UN GAOR, 54th Sess., UN Doc. A/54/RES/263 (2000) art. 1.

⁴⁰ See *Compromis clarifications*.

⁴¹ *CRC*, *supra* note 38 at art. 3.1.

responsibility for his or her actions. This allows for reconciliation with the community, which is in the child's best interests. This principle also applies to children accused of committing crimes when they were child soldiers. In 2007, UNICEF organized the 'Free Children from War' conference, where states, inter-governmental organizations and non-governmental organizations discussed strategies to prevent the recruitment or use of children by armed forces. The conference resulted in the *Paris Commitments to protect children from unlawful recruitment or use by armed forces or armed groups* which are now signed by seventy-six states.⁴² The 10th commitment ensures that child soldiers who are detained on criminal charges are treated in accordance with relevant international law standards. This commitment is a clear acknowledgment that child soldiers can be held criminally liable.⁴³ The U.N. Security Council recognized in the *Statute of the Special Court for Sierra Leone* that perpetrators of violent crimes under the age of 18 could be prosecuted by the Court.⁴⁴ In addition, Rwanda has been prosecuting child soldiers involved in the genocide.⁴⁵ In its observation of Rwanda, the committee of the *Convention on the Rights of the Child* did not find this practice to be an area of concern.⁴⁶

⁴² Dan Thomas, *Paris conference makes historic commitment to liberate children from war*, online: UNICEF <http://www.unicef.org/protection/index_38242.html>.

⁴³ *Paris Commitments to protect children from unlawful recruitment or use by armed forces or armed group*, UNICEF, online: UNICEF <http://www.un.org/children/conflict/_documents/pariscommitments/ParisCommitments_EN.pdf>.

⁴⁴ *Statute of the Special Court for Sierra Leone*, 16 January 2002, 2178 UNTS 138, art. 7.1.

⁴⁵ See e.g. *Ministère Public v. Nzabonimpa*, (Dec. 28, 1998, 1^{ière} instance, Giseni), RMP 69.430/S4/KD, RP/R1/98.

⁴⁶ Committee on the Rights of the Child, *Consideration of Reports submitted by States Parties Under Article 44 of the Convention, Concluding observations: Rwanda*, 36th

These expressions of the international community demonstrate that child soldiers can be held criminally liable according to customary international law.

2. *Rutaganda joined the Interahamwe of his own volition and did not suffer the kind of trauma that would negate his criminal culpability.*

Rutaganda joined the *Interhamwe* when he was 14 years old. There is no evidence that his recruitment was involuntary, nor that he suffered any abuse as a member of the *Interhamwe*. He was the son of well-educated Hutu parents. His father was a colonel in the Rwandan army.⁴⁷ His ability to leave Rwanda and return to Canada with his mother soon after the fall of the Hutu government is an indication of his autonomy in relation to the *Interhamwe*.⁴⁸ Rutaganda was an adolescent who took advantage of the chaos of the genocide to commit atrocities. His motivations were complex, and the simple assertion that he was an empty receptacle for the hatred of his commanders would be inaccurate. Rutaganda retained and exercised his agency over the violence he committed. Consequently, he can be held criminally culpable for his actions.

C. The rendition of Rutaganda to Rwanda does not violate international law as he will receive a fair trial in accordance with international standards.

1. *Rutaganda will receive a fair trial in accordance with the ICCPR.*

A fair trial is an essential human right protected by the *ICCPR*. Rwandan law ensures that the standards for a fair trial contained in articles 14 and 15 are met.⁴⁹ For each standard there is a corresponding Rwandan law. The Constitution itself includes the

Sess., UN Doc. CRC/C/15/Add.234 (2004).

⁴⁷ See *Compromis* at para. 2.

⁴⁸ *Ibid.* at para. 3.

⁴⁹ *ICCPR*, *supra* note 20 at art. 14-15.

following rights: the right to a fair and public hearing;⁵⁰ the right to be presumed innocent until proven guilty;⁵¹ the right to be charged;⁵² the right to be treated equally under the law;⁵³ and the right not to be held guilty of an offence that did not constitute a crime at the time of commission.⁵⁴ Such rights will ensure that Rutaganda will receive a fair trial in accordance with international standards as expressed by the ICCPR.

2. *European states that refuse extradition to Rwanda mistakenly believe that Rwanda must comply with Western standards of a fair trial.*

Some European states have refused extradition to Rwanda based on the allegation that Rwanda could not ensure the protection of the witnesses testifying on behalf of the accused.⁵⁵ They support this allegation using decisions from the ICTR.⁵⁶ Upon a request from the Prosecutor, the Tribunal may transfer a case for prosecution in a national court.⁵⁷ This transfer is conditional on the Tribunal being satisfied that the accused will

⁵⁰ *Ibid.* at art 14; *Constitution of the Republic of Rwanda* (O.G. N° Special of 4 June 2003, p.119), art. 19 [*Constitution of Rwanda*].

⁵¹ *ICCPR*, *supra* note 20 at art. 14.2; *Constitution of Rwanda*, *supra* note 50 at art. 19.

⁵² *ICCPR*, *supra* note 20 at art. 14.3(a); *Constitution of Rwanda*, *supra* note 50 at art. 18.

⁵³ *ICCPR*, *supra* note 20 at art. 14.3; *Constitution of Rwanda*, *supra* note 50 at art. 16.

⁵⁴ *ICCPR*, *supra* note 20 at art. 15.1; *Constitution of Rwanda*, *supra* note 50 at art. 18.

⁵⁵ See e.g. *Brown, Munyaneza, Nteziryayo, and Ugirashebuja v. The Government of Rwanda and the Secretary of State for the Home Department*, [2009] EWHC 770 (Admin).

⁵⁶ See e.g. *Prosecutor v. Yussuf Munyakazi*, ICTR-97-36-R11bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda (28 May 2008) (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <<http://www.ictr.org>> [*Munyakazi*].

⁵⁷ ICTR Rule of Procedures and Evidence, Rule 11bis, online: ICTR <<http://www.ictr.org/ENGLISH/rules/080314/080314.pdf>>.

receive a fair trial in the courts of the receiving state.⁵⁸ The Tribunal has refused requests made by the Prosecutor to transfer a number of indictees to domestic courts in Rwanda, as it was not satisfied that the witnesses for the indictees would not be persecuted.⁵⁹ However, the high threshold for the Tribunal to find a fair trial is not equivalent to the standard of a fair trial required for extradition at international law.

All states must respect, protect and promote human rights, including the right to a fair trial. In the context of extradition, requested states are under an obligation to reject an extradition request if it emerges that there is a risk of a *flagrant denial of justice*.⁶⁰ This standard respects the human rights of the individuals requested. It also shows deference to the requesting state, which might be facing severe economic difficulties and cannot mirror all protections afforded by wealthy states. In recent years, Rwanda has made many changes to its laws, criminal procedures and prison conditions in recognition of the importance of ensuring fair trials. In May 2009, the Supreme Court of Sweden recognized that an accused could be extradited to Rwanda as it is successfully complying with international standards of a fair trial.⁶¹ The Court also stated that domestic courts could not rely solely on the decisions of the Tribunal about the fairness of trials in Rwanda.⁶² A court can find that an accused will not face a flagrant denial of his right to a fair trial, which is the standard required for extradition, without being satisfied that he

⁵⁸ *Ibid.*

⁵⁹ See e.g. *Munyakazi*, *supra* note 56.

⁶⁰ See e.g. *Soering v. the United Kingdom* (1989), 11 E.C.H.R. (Ser. A) 439.

⁶¹ *Framställning om utlämning till Republiken Rwanda av SA* (26 May 2009), Sweden Case n° Ö1082-09, (Högsta Domstolen).

⁶² *Ibid.*

will have the Western standard for a fair trial as required by the ICTR. More specifically, the Court stated that “the nature of the problem as regards the evidence of witnesses, on which the ICTR based its decisions, is of a type which is not unknown even in States in which the maintenance of the right to a fair trial cannot be called into question”.⁶³ Rwanda fully complies with international standards. Rwanda has the right and duty to prosecute Rutaganda and the other six accused perpetrators of the Boudaire Massacre. It is the responsibility of the international community to assist them in this task.

3. The criminal laws and procedures of Rwanda comply with the international standards of juvenile justice set out in the Beijing Rules.

Rutaganda was 15 years old, and thus below the age of majority in Rwanda, when he allegedly murdered 275 Tutsi children. He was therefore a juvenile, as defined by the *Beijing Rules*.⁶⁴ The international standards pertaining to juvenile justice are set out in the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (“*The Beijing Rules*”) which were adopted by the General Assembly in 1985. According to the *Beijing Rules*, the aim of juvenile justice is to emphasize the well-being of the juvenile and to ensure that the treatment of juvenile offenders is proportionate to the circumstances of both the offender and the offence.⁶⁵ Rwandan law provides that if an offence is committed by an individual between the ages of 14 and 18, the penal consequences, which are imposed only if necessary, will be (a) ten to twenty years if the

⁶³ *Ibid.*

⁶⁴ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (“*The Beijing Rules*”), G.A. Res. 40/33, annex, UN GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/40/53 (1985) 207 art. 2.2(c).

⁶⁵ *Ibid.* at art. 5.1.

original sentence is life imprisonment and (b) less than half of the fine or penal sentence than if he had been 18 or older.⁶⁶ These provisions suggest that Rwanda will treat Rutaganda in proportion to his level of culpability as a juvenile, as required by the *Beijing Rules*.

4. The winding down of the ICTR and Rwanda's acceptance into the Commonwealth demonstrate the international community's confidence in the Rwandan judicial system.

The ICTR was created on 8 November, 1994 by the U.N. Security Council in order to prosecute the perpetrators of the Rwandan genocide.⁶⁷ As part of its completion strategy, the ICTR plans on transferring its remaining cases to Rwanda.⁶⁸ The U.N. Security Council's commitment to wind-down the Tribunal by transferring the cases to Rwanda demonstrates the growing confidence of the international community in the Rwandan judicial system.

Another indication of the support received by Rwanda from the international community is its acceptance as the newest member of the Commonwealth.⁶⁹ Canada was a strong supporter of Rwanda and lobbied other members of the Commonwealth to

⁶⁶ *Decret-Loi No 21/77 Code Penal du 18 août 1977*, J.O., 1978, n° 13 bis 1, art. 77.

⁶⁷ UN SCOR, 1994, 3453rd Mtg., UN Doc. S/RES/955.

⁶⁸ UN Security Council, *Letter dated 14 May 2009 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council: Report on the completion strategy of the International Criminal Tribunal for Rwanda (as at 4 May 2009)*, UN Doc. S/2009/247 para. 29.

⁶⁹ Commonwealth Secretariat, *Who we are: The Commonwealth*, online: Commonwealth <http://www.thecommonwealth.org/Internal/191086/191247/the_commonwealth/>.

accept of Rwanda into its membership.⁷⁰ As an extradition agreement exists between members of the Commonwealth, Canada effectively bound itself to the Rwandan judicial system.⁷¹ Canada cannot openly bind itself to another state through a mutual agreement of extradition, and then claim that that state cannot ensure a fair trial.

CONCLUSION

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

- I. The actions taken by the United States to apprehend Emanuel Rutaganda respected Canada's territorial sovereignty, the *Canada-US Extradition Treaty*, and the *1988 Exchange of Letters Between Canada and the United States on Transborder Abduction*.
- II. Emanuel Rutaganda's internationally recognized human rights were respected by the United States at all times.
- III. The rendition of Emanuel Rutaganda to Rwanda should proceed forthwith so that he can be brought to trial in satisfaction of the international obligation to fight impunity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

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

⁷⁰ Chris Cobb, "Canada backs Rwanda's Commonwealth bid" *The Ottawa Citizen* (23 November 2009) online: The Ottawa Citizen <<http://www.ottawacitizen.com>>.

⁷¹ *The London Scheme for Extradition within the Commonwealth, incorporating the amendments agreed at Kingstown in November 2002*, online: Commonwealth Secretariat <http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B56F55E5D-1882-4421-9CC1-71634DF17331%7D_London_Scheme.pdf>.