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#: 2010-14A

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STATEMENT OF FACTS

Emanuel Rutaganda is a Canadian citizen by birth and also holds Rwandan citizenship by virtue of his parents who were both Rwandan nationals of Hutu ethnicity. Currently Rutaganda resides in Canada with his wife and three young children.

In 1993, 14-year old Rutaganda was living in Rwanda with his parents when his father, a Colonel in the Rwandan army, died in a helicopter accident. That same year Rutaganda was recruited into the Interhamwe militia group, a paramilitary organization loosely associated with the Rwandan army. Rutaganda stayed in the Interhamwe until the end of the Rwandan genocide in August of 1994 when, with the fall of the Hutu government, Rutaganda and his mother were able to flee to Canada.

In 2001, the Tutsi-dominated government of Rwanda issued an indictment for Rutaganda and other members of the Interhamwe militia for their alleged involvement in an incident during the Rwandan genocide where 275 people lost their lives. Since 2001, the Rwandan government has attempted to return Rutaganda to Rwanda for prosecution, yet the Canadian government has persistently denied requests for his surrender. The Canadian government views Rutaganda and all child soldiers as victims not criminals, and does not believe that the Rwandan government is equipped to provide Rutaganda with a fair trial. Additionally, Canada has no extradition treaty with Rwanda.

In February of 2009, to facilitate implementation of the Genocide Accountability Act of 2009, the United States government formed the "Inter-Agency Working Group for Human Rights Violators," composed of a number of different agencies including the Section Chief of the Department of Homeland Security Immigration and Customs Enforcement's Human Rights Violators and War Crimes Unit.

On July 7, 2009, a television program entitled, "The Wanted," about Emanuel Rutaganda aired in the United States, which brought Rutaganda's freedom to the attention of the American public. The Inter-Agency Working Group began to focus attention on Rutaganda's case.

On July 21, 2009, the United States Immigration and Customs Enforcement (ICE) alerted the Inter Agency Working group that Rutaganda's mother had traveled into the US for a specialized medical procedure at a Detroit, Michigan clinic's renowned Cardiac Center. The Inter-Agency Working Group took this as a potential opportunity to apprehend Rutaganda by tricking him into entering the United States. This plan was dubbed "Operation Motown Express," and was signed off on by President Obama, then quickly put into place to execute Rutaganda's apprehension. With the cooperation of the Detroit Clinic, ICE agents sent Rutaganda an email, disguising themselves as clinic personnel, misleading him to believe that his mother's help was quickly deteriorating and that she was asking for him, and stating directly that he should come to Detroit right away if he wanted to see his mother before she died. In reality, Rutaganda's mother had a successful surgery and was slated for a full recovery. In reaction to this deception, Rutaganda borrowed a passport from a Canadian friend and entered the United States later that day. He proceeded directly to the Detroit Clinic, where, upon requesting to see his mother, he was immediately arrested and taken into custody by ICE agents.

Following his arrest, the United States issued an order of removal for Rutaganda based on his illegal entry into the country. After a series of immigration and judicial decisions, during which Canada submitted amicus briefs for Rutaganda's release at each stage, the United States affirmed that Rutaganda could be removed to Rwanda. On September 15, 2009, the United States Supreme Court denied Rutaganda's petition for certiorari. Currently the United States has agreed to stay the transfer of Rutaganda to Rwanda pending the outcome of this case.

QUESTIONS PRESENTED

(1) Whether the "luring" of Canadian citizen Emanual Rutaganda from Canada violated

a. Canada's territorial sovereignty, the U.S.-Canada Extradition Treaty or the January 11, 1988 Exchange of Letters Between Canada and the United States on Transborder Abduction;

b. The internationally protected human rights of Emanual Rutaganda guaranteed by the International Covenant on Civil and Political Rights and customary international law;

(2) Whether the rendition of Emanual Rutaganda from the United States to Rwanda for trial would violate international law because

a. 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.

b. As a child soldier Rutaganda lacked criminal culpability;

c. The courts of Rwanda are not capable of providing Rutaganda a fair trial.

JURISDICTIONAL STATEMENT

The Parties to this matter, Canada and the United States, agree to submit their dispute the International Court of Justice. Pursuant to Articles 36(1) and 40(1), and by agreement of the parties[1], the Court has jurisdiction to hear and adjudicate this dispute.[2]

[1] *See* Compromis ¶ 13.

[2] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055.

INDEX OF AUTHORITIES

INTERNATIONAL TREATIES, CONVENTIONS, AND STATUTES

African Charter on Human and Peoples' Rights, art. 7, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

African Charter on the Rights and Welfare of the Child art. 22, July 11, 1999, OAU Doc. CAB/LEG/24.9/49 (1990).

Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85.

International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, 999 U.N.T.S. 171.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222.

The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, art. 11, Feb. 6, 2007, *available at* http://www.un.org/children/conflict/english/parisprinciples.html.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art.77, June 8, 1977, 1125 U.N.T.S. 3.

Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 90.

DOMESTIC LAW

Brown v. Rwanda, 2009 WL 908144, High Court of Justice Divisional Court (2009).

Extradition Act, 1999 S.C., ch. 18 (Can.).

In Re Ntakirutimana, No. Civ. L-98-43, 1998 WL 655708, (S.D.Tex.1998).

United States v. Karake, 443 F.Supp.2d 8 (D.D.C. 2006).

REPORTS AND ARTICLES

Amnesty International, *Amnesty International Report 2007 - Rwanda* , May 23 2007, *available at* http://www.unhcr.org/refworld/docid/46558edf20.html.

Amnesty International, *Suspects Must Not be Transferred to Rwandan Courts for Trial Until it is Demonstrated That Trials Will Comply With International Standards of Justice*, AI Index: AFR 47/013/2007 (2007) *available at* http://www.amnestyusa.org/document.php?lang=e&id=ENGAFR470132007.

Collin Haba, *Rwanda: Universal Jurisdiction and International Justice, Will Genocide Suspects Face a Day in Court?*, THE NEW TIMES, June 4, 2009, *available at* http://allafrica.com/stories/200906040363.html.

Human Rights Watch, *Law and Reality: Progress and Judicial Reform in Rwanda*, July 2008, http://www.hrw.org/en/node/62097section/6.

Human Rights Watch, *There will be no Trial: Police Killings of Detainees and the Imposition of Collective Punishments*, Vol. 19, No. 10 (A), July 2007, 25-26; 34-37.

Redress & African Rights, *Extraditing Genocide Suspects from Europe to Rwanda*, July 2008, *available at* http://www.redress.org/documents/Extradition_Report_Final_Version_Sept_08.pdf.

United States Department of State, 2006 Country Reports on Human Rights Practices: Rwanda, March 6, 2007, *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/81364.htm.

SUMMARY OF ARGUMENT

The Unites States' luring of Emanual Rutaganda into its territory violated international law. The luring constituted a kidnapping and therefore violated both Canada's territorial sovereignty and the U.S.-Canada Extradition Treaty, including the Exchange of Letters, as the United States did not follow the proper procedures for transfers. Additionally, the United States violated Rutaganda's human rights by not following the procedures of the ICCPR by making an extradition request and by using deception.

Extradition of Rutaganda from the United States to Rwanda would violate International Law. In the absence of an extradition treaty with Rwanda, neither the United States nor Canada may transfer Rutaganda to Rwanda for a criminal trial. Even if the Parties did have extradition treaties with Rwanda, Rutaganda cannot be held criminally culpable as a child soldier and a victim of a war crime. Additionally, Rutaganda will not receive a fair trial in Rwanda, as the Rwandan judicial system fail to meet international standards.

I. THE LURING OF EMANUAL RUTAGANDA FROM CANADA VIOLATED INTERNATIONAL LAW

A. The Luring of Rutaganda Was a Violation of Canadian Territorial Sovereignty

1. A Violation of Territorial Sovereignty Does Not Require Physical Intrusion

Article 2 Section 4 of the Charter of the United Nations, to which both the US and Canada are signatories, states, "All members shall refrain in their international relations from the threat or use of force against the territorial integrity . . . of any state, or in any other manner inconsistent with the Purposes of the United Nations."[3] The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States provides an agreed interpretation of Article 2(4). According to this declaration, the use of force is not limited to military acts. "No state . . . has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."[4] Additionally, in *X, Belgian Citizen v. Swiss Justice and Police Department*[5], the Swiss Federal Court in Lausanne held that "a violation of sovereignty did not necessarily require that the violating person acted on the territory of the violated state"[6], and that "it would be unlawful to extradite a person from Switzerland to another state when the person was tricked into coming into Switzerland."[7] It is

[3] Charter of the United Nations Art. 2(4).

[4] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625 (XXV), ¶ 1, U.N. Doc. A/8082 (Oct. 24, 1970).

[5] X, Belgian Citizen v. Swiss Justice and Police Department, 1983 Europaische Grundrechte-Zeitschrift 435 (1983)

[6] Stephan Wilske & Teresa Schiller, Jurisdiction Over Persons Abduction in Violation of International Law in the Aftermath of United States v. Alvarez-Machain, 5 U. Chi. L. Sch. Roundtable 205, 228 (1998).

[7] Note, International Criminal Tribunal For the Former Yugoslavia's Response to the Problem of Transnational Abduction, 42 Stan. J. Int'l L. 343 (2006).

therefore not necessary for a State or its agents to physically enter another State, to nonetheless violate its territorial sovereignty.

"As territorial sovereignty serves, inter alia, to protect the residents from physical persecution of other states, this protection must be extended when persecution no longer needs to physically enter foreign territory."[8] In *Schmidt I*, the British Court of Appeals held, "what is objectionable about fraud, actual or constructive, is that it robs the victim of the power of autonomous decision and action as surely as does physical force."[9] In that case an individual had, similarly, been lured across State boundaries in order to be apprehended and prosecuted.[10] The luring of Emanuel Rutaganda out of Canada for the purpose of apprehending him did not require US agents to physically violate Canada's borders. Nevertheless, "Operation Motown Express" infringed on Rutaganda's individual rights and Canada's territorial rights in much the same way that a forceful abduction would have.

"Luring" is as offensive to territorial sovereignty as kidnapping because it equally undermines the purposes for its recognition, as promulgated by the UN Charter,[11] "to bring about by peaceful means, and in conformity with the principles of justice and international law, . . . settlement of international disputes or situations which might lead to a breach of the peace."[12] Luring a foreign national across territorial boundaries by trickery and deceit is not in conformity

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[8] Stephan Wilske and Theresa Schiller, International Jurisdiction in Cyberspace: Which States May Regulate the Internet?, 50 Fed. Comm. L.J. 119, 173 (1997).

[9] Schmidt I, (1995) I App. Cas. 339, 359 (Q.B.) (Eng.).

[10] *Id.*

[11] Charter of the United Nations Art. 1(1).

[12] *Id.*

with the principles of justice and international law. Luring should therefore be considered by this Court to be within the definition of transborder abduction (or kidnapping), as the term is used within the various sources of international law.

2. Kidnapping is a Violation of a State's Sovereignty

Kidnappings are violations of State sovereignty and are incompatible with the Charter of the United Nations, which prohibits the "use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations."[13] In four separate Resolutions[14], The United Nations General Assembly has denounced "any form of interference, overt or covert, direct or indirect, by one State or group of States . . . in the internal or external affairs of other States."[15] And in a 1960 resolution concerning the extraterritorial abduction of Adolf Eichmann, the UN Security Council recognized that kidnapping is a violation of a state's territorial sovereignty[16], finding that such acts, "which affect the sovereignty of a Member State and therefore cause international friction, may if repeated endanger international peace and security."[17]

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[13] *See supra* note 1.

[14] *See* Non-Interference in the Internal Affairs of States, G.A. Res. 31/91, ¶ 3, U.N. Doc. A/RES/31/91 (Dec. 14, 1976); Declaration on the Strengthening of International Security, G.A. Res. 2734 (XXV), ¶ 2, U.N. Doc A/7922 (Dec. 16, 1970); supra note 2; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX), ¶ 1, U.N. Doc. A/RES/20/2131 (Dec. 21, 1965).

[15] Non-Interference in the Internal Affairs of States, supra note 12, ¶ 3.

[16] S.C. Res. 138, ¶ 1, U.N. Doc. S/4349 (June 23, 1960).

[17] Supra note 14, ¶ 1.

In the *Colombian-Peruvian Asylum Case*[18], this court held that a grant of asylum constituted a derogation of the sovereignty of the territorial state. Specifically, this Court held,

> In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State.[19]

In that case, the Government of Columbia sought to unilaterally grant asylum to Peruvian national Victor Raul Haya De la Torre, whom the Peruvian Government sought to prosecute.[20] In the instant case, there may is an equally strong argument for finding that the luring of an individual is a violation of territorial sovereignty and international law, because luring occurs against the individual's wishes, whereas in asylum cases, the individual must wish to leave.

The US' intervention in this matter constituted a covert interference in Canada's internal affairs that was completely against the wishes of the Canadian government, and a definite violation of Canada's territorial sovereignty.

B. The luring of Rutaganda was a violation of the U.S.-Canada Extradition Treaty, including the Exchange of Letters.

1. The Extradition Treaty Provides the Proper Procedure for the Transfer of Suspects

"Extradition developed as a formal process to recover fugitives as sovereign entities grew to respect the territorial integrity of other nations."[21] Modern extradition practices are usually

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[18] Colombian-Peruvian Asylum Case (Colum. v. Peru), 1950 I.C.J. 266 (Nov. 20).

[19] *Id*. at 274-75.

[20] *See id*.

[21] Note, Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and other Quasi-Legal Options, 26 J. Legis. 315, 316 (2000).

anchored by bilateral treaties[22], such as the U.S.-Canada Extradition Treaty[23]. The UN views the establishment of these formal processes as integral for the maintenance of peace and order, and the effective international control of crime.[24]

Within the U.S.-Canada agreement specifically, the two countries agreed to a general obligation to extradite, and procedure for doing so, subject to a number of qualifications and exceptions.[25] The treaty dictates that an extradition request must first be made through diplomatic channel.[26] That request must be accompanied by a warrant and supporting evidence when involving an individual who has not yet been convicted.[27] The treaty stipulates that the determination on whether to extradite the individual in question shall be made in accordance with the law of the "requested" state[28], and also outlines a number of explicit situations in which extradition is not required.[29]

The US government failed to make even a request for the extradition of Emanuel Rutaganda. In addition to thereby preventing Canada from exercising its right to refuse, the US

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[22] *Id*.

[23] Treaty on Extradition Between the United States and Canada, U.S.-Ca., Dec. 3, 1971, 18 U.S.T. 1559.

[24] Model Treaty on Extradition, G.A. Res. 45/116, ¶ 3, U.N. Doc. A/RES/45/116 (Dec. 14, 1990).

[25] *See* Extradition Treaty *supra* note 24.

[26] *See* Extradition Treaty *supra* note 24 at Art. 9(1).

[27] *See id*. at art. 9(2), 9(3).

[28] *See id*. at art. 8.

[29] *See id*. at art. 5-7.

also circumvented an important procedure, that the requested State be provided with a warrant and with evidence, so that they may ensure the due process rights of the individual are not being violated. Because there was a valid extradition treaty in place with explicit procedural mandates, the US's luring of Rutaganda is thereby a violation.

2. <u>The US' Failure to Follow any of the Procedures of the Treaty is a Violation of the Treaty</u>

Customary International Law dictates that treaties, validly entered into, create a legal obligation among the signatory states, to not engage in acts which are contrary to the object and purpose of the treaty.[30] The Vienna Convention on the Law of Treaties (VCLT), which the US is not a party to, is a codification of many customary international law norms.[31] Article 26 is a codification of the customary law norm known as "pacta sunt servanda." It states, "Every treaty in force is binding on the parties to it and must be performed in good faith."[32] In the *Nuclear Tests Case*[33], this Court held that, "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith."[34] Former President of this Court, Judge Mohammed Bedjaoui noted in a keynote address, a number of legal principles governing good-faith negotiations, as applied to the Nuclear Non-Proliferation Treaty.[35] Specifically, Judge Bedjaoui stated that, principles of good faith include, "refraining

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[30] *See* Restatement (Third) of Foreign Relations Law, IN NT (1987).

[31] Vienna Convention on the Law of Treaties, Preamble, May 23, 1969, 1155 U.N.T.S. 331.

[32] *See* VCLT *supra* note 33 at Art. 26.

[33] Nuclear Tests Case (Au. v. Fr.) 1974 I.C.J. 253.

[34] *Id*. at 268.

from acts incompatible with the object and purpose of the [treaty], and prohibition of abuse of process such as fraud and deceit."[36] The Court should not hesitate to apply these same requirements of good faith to the U.S.-Canada Extradition Treaty.[37]

The US' failure to follow any of the procedures outlined in the treaty, combined with their use of deception to circumvent the treaty procedures, indicates that the US was not acting in good faith. Furthermore, the object and purpose of the treaty was to "make more effective the cooperation of the two countries."[38] The US' unilateral act was entirely contrary to that stated object, and constitutes a material breach of the treaty.[39]

3. The Exchange of Letters Further Expresses the Parties' Intent to Maintain Territorial Sovereignty

The 1988 letters[40] between the US and Canada on the matter of transborder abductions demonstrate that the parties intended to facilitate extraditions while strictly maintaining their territorial sovereignty. It is expressly acknowledged by both the US and Canada in these letters, that the kidnapping of individuals by bounty hunters is in fact illegal and an extraditable

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[35] Treaty on the Non-Proliferation of Nuclear Weapons, Apr. 22, 1970, 21 U.S.T. 483, T.I.A.S. No. 6839.

[36] *See* John Burroughs, Good Faith: A Fundamental Principle of International Law 1 May Conference Features Judge Mohammed Bedjaoui, http://www.ipb.org/Good%20Faith.pdf (last visited Jan 27, 2009).

[37] *See* Extradition Treaty *supra* note 24.
[38] *See* Extradition Treaty *supra* note 24 at IN NT.

[39] *See* VCLT *supra* note 33 at Art. 60(3)(b).

[40] Dec. 3 1971, 27 U.S.T. 983, T.I.A.S. No 8327, as amended by exchange of notes June 28 and July 9, 1974.

offense.[41] The UN Charter codifies the illegality of this act, stating, "all members shall refrain from the . . . use of force against the territorial integrity . . . of any state."[42]

C. The United States violated Rutaganda's human rights under the ICCPR and Customary International Law

1. The United States' Failure to Follow Article 9 of the ICCPR Violates International Law

Article 9 of the International Covenant on Civil and Political Rights[43], which the US has ratified, states that, "No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."[44] With regard to the arrest of a foreign national, the procedures that are established by law are the extradition treaties entered into among states. The legal procedures established by extradition treaties are created to enable States to protect their nationals from unfair prosecution or detention abroad. This form of protection is itself an expression of territorial sovereignty by the State. Because the US did not follow any procedure established by law in the luring and apprehension of Rutaganda, they have violated Article 9 of the ICCPR,[45] as well as the human rights it protects.

2. Arrest Outside of Due Process Standards is Prohibited by Customary International Law

Rights of due process are embedded in Customary International Law.[46] One of the most

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[41] *See* U.S.-Canada Treaty *supra* note 42.

[42] *See* UN Charter *supra* note 3 at Art. 2(4).

[43] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), ¶ 9, U.N. Doc. A/6316 (Dec. 16, 1966).

[44] *See* ICCPR *supra* note 45.

[45] *See* ICCPR *supra* note 45.

[46] *See* Jordan Paust, International Law as Law of the United States: Trends and Prospects, 2 Chinese J. Int'l L. 615 (2002).

fundamental due process protections recognized in customary international law is freedom from arbitrary arrest.[47] Article 9 of the Universal Declaration of Human Rights[48] further emphasizes this right, stating that "no one shall be subjected to arbitrary arrest, detention, or exile."[49]

The customary requirement that individuals shall be free from arbitrary arrest means that the US was required by international law to obtain an arrest warrant through the proper channels, and producing said evidence to Canada before making any attempt to have Rutaganda extradited or lured into the country. Because they did not, Rutaganda's internationally protected human rights have been violated.

II. The Rendition of Emanual Rutaganda from the United States to Rwanda for Trial Violates International Law.

A. Neither the United States Nor Canada has an Extradition Treaty with Rwanda, which prevents both states from extraditing Rutaganda.

Unless there is a bilateral treaty between two State parties, extradition is not required.[50] Neither the United States nor Canada has an extradition treaty with Rwanda; therefore, neither country is required to extradite Rutaganda.

1. <u>In the absence of a treaty or a statute, the laws of the United States do not permit extradition to a foreign country.</u>

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[47] *See* Universal Declaration of Human Rights, G.A. Res. 217A, at 71, ¶ 9, U.N. CAOR, 3d Sess., 1sr plen. Mth., U.N. Doc. A/810 (Dec. 12, 1948).

[48] *See supra* note 49 at Art. 9.

[49] *See supra* note 49.

[50] Redress & African Rights, *Extraditing Genocide Suspects from Europe to Rwanda*, July 2008, *available at* http://www.redress.org/documents/Extradition_Report_Final_Version_Sept_08.pdf [hereinafter Redress].

International law requires States to "grant extradition in accordance with their laws and treaties."[51] In the United States, extradition may be granted pursuant to a treaty or a statute. There is no relevant statute permitting extradition to Rwanda. A United States federal court has permitted the transfer of genocide suspects to the International Criminal Tribunal for Rwanda (the "Tribunal"), but that decision relied on the Surrender Agreement between the United States and the Tribunal, together with Public Law 104-106, which applies only to the Tribunal, not to Rwanda.[52]

2. In the absence of an extradition agreement, the laws of Canada do not permit extradition to a foreign country.

Canadian law requires an extradition agreement with the requesting country in order to transfer fugitives.[53] The rule against extraditing fugitives in the absence of an agreement is inflexible, even overriding deportation orders. For example, Leon Mugesera, a Rwandan Hutu who fled to Canada in 1992 after giving an inflammatory anti-Tutsi speech, was ordered to be deported by the Canadian courts after investigation revealed his role in instigating the 1994 Rwandan genocide. Despite the deportation order and an extradition request from Rwanda, the Canadian government refused to transfer Mugesera.[54] The Mugesera case reveals Canada's strict

[51] Convention on the Prevention and Punishment of the Crime of Genocide, art. 7, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

[52] In re Ntakirutimana, No. Civ. L-98-43, 1998 WL 655708, (S.D.Tex. 1998).

[53] *See* Extradition Act, 1999 S.C., ch. 18 (Can.).

[54] Collin Haba, *Rwanda: Universal Jurisdiction and International Justice, Will Genocide Suspects Face a Day in Court?*, THE NEW TIMES, June 4, 2009, *available at* http://allafrica.com/stories/200906040363.html.

interpretation of the Extradition Act and its unwillingness to make an exception in the absence of an extradition agreement.

B. As a Child Soldier, Emanuel Rutaganda Cannot be Held Criminally Culpable.

1. International law recognizes child soldiers as innocent victims of armed conflict, not as perpetrators.

International law refuses to recognize criminal culpability of children involved in armed conflict. Children recruited or used in armed conflict are considered as innocent victims who must be afforded special protection.[55] The framework for the protection of children in armed conflict is set out in the Additional Protocol I to the Geneva Conventions ("Protocol I").[56] The African Charter on the Rights and Welfare of the Child (the "African Charter"), which defines a child as any individual under the age of eighteen, states: "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration,"[57] which the Interhamwe militia did not consider here.[58] Rutaganda was a victim and should be treated as a victim, not a perpetrator. To hold Rutaganda criminally culpable for his alleged actions as a child soldier directly contradicts fundamental international law.

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[55] *See* The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, art. 11, Feb. 6, 2007, *available at* http://www.un.org/children/conflict/english/parisprinciples.html [hereinafter The Paris Commitments].

[56] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art.77, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

[57] Organization of African Unity, African Charter on the Rights and Welfare of the Child art. 2, 4, July 11, 1999, OAU Doc. CAB/LEG/24.9/49 (1990) [hereinafter ACRWC].

[58] *See* Correction.

2. As a victim of a war crime, Rutaganda should not be prosecuted.

States must "take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities."[59] It is a war crime to recruit children under the age of fifteen, or use them to participate actively in hostilities.[60] Rutaganda, who was recruited into the Interhamwe militia at age fourteen,[61] is the victim of a war crime.

The Interhamwe militia's use of Rutaganda in the Boutaire massacre violates international law because armed groups that are distinct from armed forces of a state should not recruit or use children under age eighteen in hostilities.[62] The African Charter, which has been ratified by thirty-seven African nations, including Rwanda, condemns the recruitment or use of any child under the age of eighteen in an armed conflict.[63] Rutaganda, aged fifteen at the time, was a victim of the Interhamwe militia's criminal conduct, and must be treated as one.

It is the prosecutor's duty to determine whether a prosecution is in the interest of justice.[64] After an initial investigation, the prosecutor must take into account "the circumstances, including the gravity of the crime, *the interests of victims* and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime."[65] The prosecutor is obliged to consider

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[59] Convention on the Rights of the Child, art. 38, Nov. 20, 1989, 1577 U.N.T.S. 3; Protocol I

[60] Rome Statute of the International Criminal Court, art. 26, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[61] Correction.

[62] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 4, May 25, 2000, 2173 U.N.T.S. 222.

[63] ACRWC, *supra* note 59, art. 22.

[64] Rome Statute, *supra* note 62, art. 53.

[65] *Id*. (emphasis added).

Rutaganda's status as a victim, and his role in the alleged crime. The evidence suggests that Rutaganda could not have played a major role, as he was a new and young member amongst a dozen other Interhamwe militia involved.[66] It is not in the interest of justice to further prosecute a victim of war crimes.

3. The goal in international law of social rehabilitation and restoration for children will not be served in Rutaganda's case.

The international community supports a framework of restorative justice and social rehabilitation for child soldiers accused of international war crimes.[67] The Paris Commitments, an initiative endorsed by eighty-four countries, considers child soldiers under the age of eighteen primarily as victims, not perpetrators, in the context of juvenile justice.[68] The international community recognizes that states bear the responsibility of reintegrating child soldiers into civilian life.[69] Rutaganda, married with three children and the owner of a successful business,[70] has successfully reintegrated into society. Sending Rutaganda back to Rwanda will not serve the purpose of restorative justice or social rehabilitation.

C. The Courts of Rwanda are Incapable of Providing Emanuel Rutaganda a Fair Trial.

1. Rutaganda will be presumed guilty, not innocent.

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[66] *See* Compromis ¶4.

[67] *See* The Paris Commitments, *supra* note 57.

[68] *Id*.

[69] *Id*.

[70] *See* Compromis ¶3.

International fair trial standards ensure that everyone charged with a criminal offense has the right to a fair and impartial trial, including to be presumed innocent until proven guilty.[71] Rwanda violates this law because suspects accused of genocide crimes are often presumed guilty until proven innocent.[72] In a 2006 case of defendant Nyirimanzi, who was charged with complicity in genocide, three judges of the High Court shifted the burden of proof to the defendant in upholding the lower court's finding of guilt.[73] In more tragic cases, suspects who are presumed guilty do not have an opportunity to prove their innocence.[74]

Guilt by association is a widespread sentiment in Rwanda as that prejudicial viewpoint is publicly endorsed by high officials, which also violates international law.[75] In 2006, the president of the High Court said, in an address to legal professionals at The Hague: "the architects of the genocide literally made every one a direct or indirect participant."[76] Under

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[71] International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; African Charter on Human and Peoples' Rights, art. 7, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter ACHPR]; ACHPR art. 3.

[72] *See* Human Rights Watch, *Law and Reality: Progress and Judicial Reform in Rwanda*, 1, 70-71, July 2008, *available at* http://www.hrw.org/sites/default/files/reports/rwanda0708_1.pdf [hereinafter HRW, *Law and Reality*].

[73] *Id*. (*citing* High Court, Kigali,RPA/Gen/0016/05/HC/KIG, July 7, 2006).

[74] *See* Human Rights Watch, *There will be no Trial: Police Killings of Detainees and the Imposition of Collective Punishments*, Vol. 19, No. 10 (A), July 2007, 25-26; 34-37.

[75] *See* HRW, *Law and Reality supra* note 74, at 71.

[76] *Id*. at 70 (citing *Reality and challenges of legal and judicial reconstruction in Rwanda*, THE NEW TIMES, Dec. 31, 2006).

Rwandan Organic Law, indirect participants, or accomplices, are equally culpable and subject to the same punishment as the principal perpetrators.[77] Courts share this prejudice.[78]

2. Rutaganda will be deprived of the right to present a defense by witnesses.

International law provides that everyone charged with a criminal offense has the right to a defense, including the right to obtain and examine witnesses on his behalf under the same conditions as witnesses against him.[79] In Rwanda, documented incidents demonstrate that witnesses are afraid to testify on behalf of suspects accused of genocide or associated crimes.[80] A former prosecutor explained: "People are scared to defend any accused. When certain people are accused, you can see the shock on others' faces, but then they shut their mouths because they're afraid."[81]

Observers acknowledge that the more well-known the case, the more difficult it is to secure defense witnesses.[82] Given the issuing of an Interpol Red Notice with Rutaganda's photograph, and the airing of Rutaganda's story on NBC television,[83] the case has attracted

[77] Organic Law of June 19, 2004: Establishing the Organization, Competence and Functioning of Gacaca Courts. Article 53.

[78] *See* HRW, *Law and Reality, supra* note 74, at 71 (*citing* High Court, Kigali, RPA/Gen/0016/05/HC/KIG, July 7, 2006).

[79] *See* ICCPR *supra* note 73 at art. 14(3)(e); ACHPR art. 7(c).

[80] *See* HRW, *Law and Reality*, *supra* note 74, at 74 (*citing* Human Rights Watch interview, former prosecutor, Kigali, May 28, 2005).

[81] *Id*.

[82] *Id*. at 75.

[83] *See* Compromis ¶5, 7.

international attention. Witness fear will be an insurmountable obstacle in securing testimony, and will deprive Rutaganda of his right to a defense.

Witness fear is instigated by official threats and community pressure. Human Rights Watch investigations reveal that police officers, security agents, and other officials seek to influence the testimony of witnesses through intimidation, mistreatment, detention or threat of prosecution.[84] Given the judicial attitude of guilt by association,[85] many people with valuable testimony are reluctant to take the risk of opening themselves to accusations of propagating "genocide ideology."[86]

Witness fear is well-founded. Investigations reveal that among people who have testified for the defense, one witness has disappeared, two fled Rwanda after having been threatened, and four were arrested shortly after testifying.[87] For example, Ibuka, the association of genocide survivors, expelled nine members for testifying in a genocide trial at the Tribunal on behalf of the defense.[88] As a consequence of the expulsion, the defense witnesses were deprived of benefits meant for survivors of the genocide, such as health care or school fees, and one person said she was threatened with expulsion from her home.[89] Rwandan authorities are not only

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[84] See HRW, *Law and Reality* at 75.

[85] *See* HRW, *Law and Reality*, *supra* note 74, at 71.

[86] *Id*. at 76-77.

[87] *Id*. at 77 (*citing* Human Rights Watch, electronic communication, 28 Aug. 2007; Human Rights Watch interviews, Nov. 9, 11, 12, 13,15, 16 ,2007).

[88] *Id*. at 77.

[89] *Id*.

engaged in witness intimidation, but also thwart attempts to ensure the right of the defense to present witnesses.[90]

3. <u>Suspects in Rwanda are detained in custody for an inordinate length of time.</u>

International law provides individuals with the right to a trial within a reasonable time,[91] during which period suspects should not be detained in custody, especially if it is a lengthy period.[92] Suspects in Rwanda are often detained in custody without a trial for more than ten years.[93] For example, Dominique Makeli, a former journalist for Radio Rwanda, was detained without a trial for fourteen years before being acquitted in October 2008.[94] Similarly, two Catholic nuns remained in detention without a trail for more than twelve years before being acquitted in July 2007 for lack of evidence.[95] These are not isolated cases, as approximately 48,000 detainees currently await trial in Rwanda for alleged participation in the genocide.[96] Any suspect transferred to Rwanda is likely to be in custody for a grossly unreasonable amount of time. Rutaganda will be deprived of the right to liberty if he is transferred to Rwanda's severely overloaded justice system.

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[90] *Id*. at 75-76.

[91] *See* ICCPR *supra* note 73 at art. 9(3); ACHPR art. 7.

[92] *See* ICCPR *supra* note 73 at art. 9(3).

[93] *See* Amnesty International, *Amnesty International Report 2007 - Rwanda*, May 23, 2007, *available at* http://www.unhcr.org/refworld/docid/46558edf20.html [hereinafter Amnesty Int'l Report 2007].

[94] *Id*.; Reporters Sans Frontieres, *Dominique Makeli libéré après 14 ans de prison*, Oct. 16, 2008, http://www.rsf.org/Dominique-Makeli-libere-apres-14.html.

[95] *See* Amnesty Int'l Report 2007 *supra* note 49.

[96] *Id*.

4. There is a risk that Rutaganda will be tortured or subject to cruel or inhumane treatment if transferred to Rwanda.

International law protects individuals from cruel, inhumane, or degrading treatment or punishment.[97] Individuals deprived of their liberty must be treated with humanity and respect.[98] The Convention Against Torture forbids any state from transferring individuals to another state where there are substantial grounds for believing that individuals are subject to torture.[99]

There is sufficient evidence to conclude that the Rwandan government engages in torture. There are numerous incidents of police brutality against detainees, often resulting in death.[100] The 2006 U.S. State Department Report on Rwanda states that "local media reported allegations of torture by the LDF (Local Defense Fund) and a local NGO (non-governmental organization) providing assistance to victims of torture reported that it received between 180 and 240 clients during the year."[101] In the six months from November 2006 through May 2007 police officers shot and killed at least 20 detainees, most of whom had just been arrested.[102] In December 2005, military police shot and killed at least five prisoners at Mulindi prison.[103]

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[97] *See* ICCPR *supra* note 73 at art. 7.

[98] *See* ICCPR *supra* note 73 at art. 10(1).

[99] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85.

[100] *See* HRW, *Law and Reality*, *supra* note 74, at 82-85.

[101] *See* United States Department of State, *2006 Country Reports on Human Rights Practices: Rwanda*, March 6, 2007, available at http://www.state.gov/g/drl/rls/hrrpt/2006/81364.htm [hereinafter 2006 U.S. Dep't of State Report].

[102] HRW, *Law and Reality*, *supra* note 74, at 82.

[103] *Id*.

A 2006 case in the United States District Court for the District of Columbia is particularly revealing.[104] The Court granted defendants' motion to suppress their confessions, finding that: "defendants' statements were extracted only after countless hours of repetitive questioning over a period of many months, during which time they were subjected to periods of solitary confinement, positional torture, and repeated physical abuse."[105] Torture by state agents is likely to continue because police officers are rarely punished for their actions.[106] Rutaganda would be subject to cruel, inhumane and degrading punishment as a prisoner in Rwanda.[107] Prison conditions are extremely harsh, with some prisons using underground cells.[108] Rwandan prisons also violate international law by housing detainees awaiting trial with convicted prisoners, and subjecting them to the same treatment, including forced shaving of their heads.[109]

CONCLUSION

THEREFORE, the Canada respectfully requests this Court find: 1) that the luring of Emanuel Rutaganda from Canada to the United States violated Canada's territorial sovereignty, the U.S.-Canada Extradition treaty, the January 11, 1988 Exchange Letters Between Canada and the United States on Transborder Abduction, or the human rights of Ruganda; and 2) that the Parties

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[104] *See* United States v. Karake 443 F.Supp.2d 8 (D.D.C. 2006).

[105] *Id*.

[106] *See Id*. at 82-83.

[107] Amnesty Int'l Report 2007 *supra* note 101.

[108] *See id*.; *See* 2006 U.S. Dep't of State Report *supra* note 109.

[109] HRW, *Law and Reality*, *supra* note 74, at 72 (citing *Human Rights Watch*, field observation notes of visits to prisons in Butare, Gikongoro, Gitarama, and Kigali in 2005 through 2007; electronic communication, former detainee, Oct. 30, 2007.)

may not transfer Emmanuel Rutaganda to Rwanda because there is no extradition between the Parties and Rwanda; as a child soldier, Rutaganda can not be held criminally culpable; and, Rwanda is incapable of providing Rutaganda with a fair trial.