

**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#: 2010-15R

TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

JURISDICTIONAL STATEMENT vi

QUESTIONS PRESENTED vii

I. Whether the “luring” of Mr. Rutaganda for purposes of apprehension and arrest on U.S. soil violated (a) Canada’s territorial sovereignty; (b) the International Covenant on Civil and Political Rights as well as Mr. Rutaganda’s international human rights; and (c) The U.S.-Canada Extradition Treaty and the January 11, 1988 Exchange of Letters Between Canada and the U.S. on Transborder Abduction? vii

II. Whether the rendition of Mr. Rutaganda from the U.S. to Rwanda to stand trial for 275 counts of murder that occurred during the Rwandan Genocide would violate international law because (a) neither the U.S. nor Canada have an extradition treaty with Rwanda; (b) as a child soldier Rutaganda lacked criminal culpability; and (c) the courts of Rwanda are not capable of providing Rutaganda a fair trial?..... vii

STATEMENT OF FACTS..... viii

SUMMARY OF ARGUMENT 1

ARGUMENT..... 2

I. MR. RUTAGANDA’S ARREST WAS NOT IN VIOLATION OF CANADA’S SOVEREIGNTY, EXISTING TREATIES, CUSTOMARY INTERNATIONAL LAW, OR MR. RUTAGANDA’S HUMAN RIGHTS...... 2

A. Canada’s territorial sovereignty was not violated because the U.S. did not enter Canada to apprehend or arrest Mr. Rutaganda...... 2

B. Mr. Rutaganda’s internationally protected human rights were not violated under either the I.C.C.P.R. or customary international law...... 3

1. Luring as a form of rendition is distinguished from more egregious forms of rendition, such as forcible abduction or kidnapping. 3

2. Luring does not violate the I.C.C.P.R. and customary international law because it is a less egregious form of rendition when compared to forcible abduction or kidnapping. 4

C.	The apprehension and arrest of Mr. Rutaganda does not violate the U.S.-Canada Extradition Treaty or the January 11, 1988 Exchange of Letters Between Canada and the U.S. on Transborder Abduction.....	6
II.	SURRENDERING EMANUAL RUTAGANDA TO RWANDA FOR TRIAL, IS CONSISTENT WITH INTERNATIONAL LAW AND THEREFORE PROPER.....	10
A.	The absence of U.S.-Rwanda or Canada-Rwanda extradition treaties does not preclude the U.S. from surrendering Mr. Rutaganda to Rwanda.....	10
1.	The U.S. may invoke the principle of comity.....	11
2.	Moreover, the U.S. is required to extradite Mr. Rutaganda under the principle of <i>aut dedere aut judicare</i>	12
B.	Trying Mr. Rutaganda in Rwandan courts for the war crimes he committed as a “child soldier” is consistent with international law and emerging trends.....	12
1.	International law permits the Rwandan courts to exercise jurisdiction over Mr. Rutaganda because of the particularly heinous and genocidal nature of the Boudaire Massacre.	12
2.	Modern approaches to criminal justice principles regarding adolescents support the exercise of jurisdiction by Rwandan courts over Rutaganda for the atrocities he committed as a child soldier.	14
3.	While international humanitarian law may have an interest in providing amnesty to former child soldiers, it should not promote that interest at the expense of the humanitarian rights of the victims of genocide and other atrocities of war, including those atrocities committed by child soldiers.	16
C.	The courts of Rwanda are capable of providing Mr. Rutaganda a fair trial.	17
1.	Rwanda has amended its Constitution and adopted international treaties in order to further protect its citizens’ rights, and remains the proper forum for Rutaganda’s trials.....	17
	CONCLUSION AND PRAYER FOR RELIEF.....	18

INDEX OF AUTHORITIES

I. International Treaties, Conventions, and Statutes

Additional Protocol to the Geneva Conventions of 12 August 1949, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Prosecution of Victims of International Armed Conflicts, December 7, 1978, 1125 U.N.T.S. 3.

African Youth Charter, Art. 11, 17, 26 (ratified 06/14/07).

Agreement between the Government of the United States of America and the Government of the Republic of Rwanda Regarding the Surrender of Persons to International Tribunals, State Dept. No. 03-104, 2003 WL 22309220 (entered into force July 11, 2003).

CONSTITUTION OF THE REUBLIC OF RWANDA (O.G.N° SPECIAL OF 4 JUNE 2003, P.119).

International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171.

Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, 37 I.L.M. 1002, 2187 UNTS 90.

Treaty on Extradition Between the United States of America and Canada, U.S.-Can., July 9, 1974, 27 U.S.T. 983, T.I.A.S. 8237.

Universal Declaration of Human Rights art. 3, General Assembly Resolution 217A (III), U.N. Doc. A/810, at 71 (1948).

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

II. Other International Instruments

Compromis

Clarification

Exchange of Letters Constituting an Understanding between the Government of Canada and the Government of the United States of America Concerning the Protocol Amending the Treaty on Extradition, U.S.-Can., Jan. 11, 1988, 27 I.L.M. 422 (1988).

III. International Cases and Decisions

Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. 3 (Feb. 14).

Case of Sergio Ruben Lopez Burgos, U.N. GAOR, 36th Sess., No. 40, U.N. Doc. A/36/40 (1981).

Prosecutor v. Mrksic, Miroslav Radic, Veselin Sljivancanin and Slavko Dokmanovic, Decision on the Motion for Release by the Accused Slavko Dokmanovic, Case No. IT-95-13a-PT, T.Ch. II, 22 October 1997.

In re Surrender of Elizaphan Ntakirutimana, No. L-98-43, 1998 U.S. Dist. LEXIS 22173, at *100 (S.D. Tex. Aug. 6, 1998).

Zdzislaw Galicki, Report of the 56th Session of the ILC, *The Obligation to Extradite or Prosecute* (“aut dedere aut judicare”), 312-13, 315 n.8, U.N. GAOR, 59th Sess., Supp. No. 10, U.N. Doc. A/59/10 (2001).

IV. Domestic Cases, Statutes, and Regulations

1. Canada

R v. Whitfield, (1970) 9 C.R.N.S. 59 (S.C.C.)

Criminal Code, R.S. 1985 (1st Supp.) c. C-46, s. 57.

2. United States

Ker v. Illinois, 119 U.S. 436 (1886).

Frisbie v. Collins, 342 U.S. 519 (1952).

United States v. Alvarez-Machain, 504 U.S. 655 (1992).

United States v. Toscanino, 500 F.2d 267 (2nd Cir. 1974), *reh’g denied*, 504 F.2d 1380 (2nd Cir. 1974), *on remand*, 398 F. Supp. 916.

U.S. const. Amend. IV.

18 U.S.C. § 1544 (2002)

V. Articles, Books, and Treatises

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987)

U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-15.630 (1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/.

Am. Jur. 2d, International Law § 7.

M. Cherif Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 Vand. J. Transnat'l L. 25 (1973-1974).

Silvia Borelli, *Terrorism and Human Rights: Treatment of Terrorist Suspects and Limits on International Co-Operation*, Leiden Journal of International Law, Vol. 16, Issue 4, pp. 803-820 (December 2003).

Herbert B. Chermiside, Jr., J.D., Annotation, *Jurisdiction of federal court to try criminal defendant who alleges that he was brought within the United States jurisdiction illegally or as a result of fraud or mistake*, 28 A.L.R. Fed. 685 (1976).

Robert J. Currie, *Abducted Fugitives Before the International Criminal Court: Problems and Prospects*, 18 Crim. L.F. 349 (2007).

Melanie J. Laflin, *Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-Legal Options*, 26 J. Legis. 315 (2000).

Edmund S. McAlister, *NOTE: The Hydraulic Pressure of Vengeance: United States v. Alvarez-Machain and the Case for a Justifiable Abduction*, 43 DePaul L. Rev. 449, 504 (1994).

VI. Miscellaneous

Reply Brief for the United States, *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (No. 91-712).

Brief of the Government of Canada as Amicus Curiae In Support of Respondent at app. D, *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (No. 91-712).

Mark Drumbl, *Child Soldiers: Agency, Enlistment, and the Collectivization of Innocence*, Washington & Lee Public Legal Studies Research Paper Series, Working Paper No. 2009-07 (June 23, 2009).

JURISDICTIONAL STATEMENT

The Government of Canada (Applicant) and the Government of the United States of America (Respondent) submit the present dispute to this Court, dated October 24, 2009, in accordance with Article 40(1) of the Statute of the International Court of Justice.¹ The parties have stipulated to the contents of the Compromis and have accepted the compulsory jurisdiction of the court pursuant to Article 36(1) of the Court's Statute.² The parties shall accept any judgment of the court as final and binding upon them and shall execute it in its entirety and in good faith.

¹ Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 993.

² *Id.*

QUESTIONS PRESENTED

- I.** Whether the “luring” of Mr. Rutaganda for purposes of apprehension and arrest on U.S. soil violated (a) Canada’s territorial sovereignty; (b) the International Covenant on Civil and Political Rights as well as Mr. Rutaganda’s international human rights; and (c) The U.S.-Canada Extradition Treaty and the January 11, 1988 Exchange of Letters Between Canada and the U.S. on Transborder Abduction?
- II.** Whether the rendition of Mr. Rutaganda from the U.S. to Rwanda to stand trial for 275 counts of murder that occurred during the Rwandan Genocide would violate international law because (a) neither the U.S. nor Canada have an extradition treaty with Rwanda; (b) as a child soldier Rutaganda lacked criminal culpability; and (c) the courts of Rwanda are not capable of providing Rutaganda a fair trial?

STATEMENT OF FACTS

1. Emanuel Rutaganda’s Background Information

A dual citizen of Canada and Rwanda, Emanuel Rutaganda (“Mr. Rutaganda”) was born on September 10, 1978 in Montreal, Quebec.³ Born to parents who are Rwandan nationals of Hutu ethnicity, Mr. Rutaganda’s family moved to Kigali, Rwanda when Mr. Rutaganda was an infant, and Mr. Rutaganda’s father became a Colonel in the Rwandan army.⁴ After his father’s death in 1993, Mr. Rutaganda was recruited into the *Interhamwe* militia group, a paramilitary organization loosely associated with the Hutu army.⁵ Mr. Rutaganda served in the *Interhamwe* during the Rwandan Genocide, from April through August of 1994.⁶

2. Rwandan Genocide and the Boutaire High School Massacre

Mr. Rutaganda engaged in acts of persecution related to the Rwandan Genocide during his service in the *Interhamwe* militia.⁷ In May of 2004, members of the *Interhamwe* militia group established a “detention center” out of an old school.⁸ One month later, a small group of 7 *Interhamwe* members, including Mr. Rutaganda, participated in what later became known as the “Boutaire High School Massacre.”⁹ During the Boutaire High School Massacre, *Interhamwe*

³ *Compromis*, ¶ 2; *Clarification*.

⁴ *Compromis*, ¶ 2.

⁵ *Id.*

⁶ *Id.*

⁷ *Compromis*, ¶¶ 4-5.

⁸ *Id.* at ¶ 4.

⁹ *Id.*

militia members set the school on fire and shot anyone who attempted to escape the building.¹⁰ As a result, 275 Tutsi woman and children were murdered.¹¹

Shortly after the fall of the Hutu government in August of 1994, Mr. Rutaganda and his mother moved back to Canada where, through financial support from Hutu exiles, they established a business.¹² Mr. Rutaganda currently resides in Canada with his wife and three children.¹³

3. The U.S. and Canadian Response to the Boutaire High School Massacre

In 2001, the Rwandan government indicted the seven former *Interhamwe* militia members who committed the Boutaire High School Massacre, including Mr. Rutaganda, and asked the Canadian government to extradite him in order to stand trial for 275 counts of murder.¹⁴ Canadian officials refused to extradite Mr. Rutaganda and also refused to prosecute him in its domestic courts.¹⁵ After Canadian officials again refused the extradition request, INTERPOL issued a Red Notice on Mr. Rutaganda.¹⁶ ER. The Canadian government still

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at ¶ 3.

¹³ *Id.*

¹⁴ *Id.* at ¶ 4.

¹⁵ *Id.* at ¶ 5.

¹⁶ *Id.*

refused to cooperate or prosecute Mr. Rutaganda, allowing him instead to live freely in Canada.¹⁷

On July 7, 2009, Americans became aware of Mr. Rutaganda's evasion of the Rwandan government through the airing of an NBC show called "The Wanted," which reported on various fugitives from the law.¹⁸ Inspired by the collective American outrage regarding the particular segment on Mr. Rutaganda, the US Inter-Agency Working Group for Human Rights Violators devised a plan, greenlighted by US President Obama, to lure Mr. Rutaganda into the US.¹⁹

On July 22, 2009, I.C.E. agents sent an email from the Detroit clinic, where Mr. Rutaganda's mother was undergoing a routine operation, telling Mr. Rutaganda that his mother's health was quickly deteriorating and that she wished to see her son.²⁰ Upon receiving the news, Mr. Rutaganda borrowed a passport from a Canadian friend and entered the U.S. by fraudulently misrepresenting his identity to border patrol agents.²¹ Shortly after reaching the Detroit Clinic, Mr. Rutaganda was arrested and taken into custody of the I.C.E. agents, and an order for removal was issued based on his illegal entry into the U.S.²² Pursuant to the U.S.-Canada Notification Agreement, the U.S. notified Canadian authorities of Mr. Rutaganda's arrest in a timely fashion.²³

¹⁷ *Id.*

¹⁸ *Id.* at ¶ 7.

¹⁹ *Id.* at ¶¶ 6-9.

²⁰ *Id.* at ¶ 9.

²¹ *Id.* at ¶ 10.

²² *Id.*

²³ *Id.*

4. Procedural Posture

Through a series of immigration and judicial decisions, the U.S. District Court and the Federal Court of Appeals affirmed that Mr. Rutaganda could be removed to Rwanda.²⁴ On September 15, 2009, the U.S. Supreme Court denied Mr. Rutaganda's petition *for certiorari*.²⁵

In response to the decision to extradite to Rwanda, the Government of Canada vigorously protested the luring and apprehension of Mr. Rutaganda, claiming that the U.S. violated Canada's territorial sovereignty, its treaty obligations to Canada, and the rights of its citizens under international law not to be subject to arbitrary arrest.²⁶ Moreover, Canada's Prime Minister threatened to withdraw troops from Afghanistan in 2010 unless the U.S. agreed to subject the case of Mr. Rutaganda to the International Court of Justice for adjudication.²⁷

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at ¶ 11.

²⁷ *Id.* at ¶ 12.

SUMMARY OF ARGUMENT

Canada's territorial sovereignty was not violated because the U.S. did not enter Canada to abduct and arrest Mr. Rutaganda. Further, Mr. Rutaganda's international human rights were not violated when he was lured into the U.S. and subsequently arrested. While the International Covenant on Civil and Political Rights (I.C.C.P.R.), international tribunals, and customary international law recognize forcible abduction and kidnapping as forms of arbitrary arrest is in violation of a person's international human rights, luring is not viewed as forcible abduction or kidnapping, and domestic and international tribunals have found that luring does not violate international laws. Finally, the U.S. has not violated its obligations under the U.S.-Canada Extradition Treaty or the 1988 Exchange of Letters on Transborder Abduction.

Rendition of Mr. Rutaganda to Rwanda to stand trial in the Rwandan courts, furthermore, is the best viable opportunity to ensure justice for all parties involved: Mr. Rutaganda, the genocide victims of the Boudaire Massacre, and the international community as a whole. Under principles of comity, and alternatively, *aut dedere aut judicare*, rendition does not violate any international law or custom and may in fact be required. Furthermore, despite the traditional paradigm of the "innocent, helpless child soldier," Mr. Rutaganda's actions were so egregious as to not only demonstrate his own agency and self-control, but to place him within a narrow category of war crimes cases on which international law permits trial.

For these reasons, Respondents ask this Court to find the luring of Mr. Rutaganda into the US did not violate either international law principles or Canada's territorial sovereignty, and that rendering Mr. Rutaganda to the Rwandan courts for trial is proper.

ARGUMENT

I. MR. RUTAGANDA’S ARREST WAS NOT IN VIOLATION OF CANADA’S SOVEREIGNTY, EXISTING TREATIES, CUSTOMARY INTERNATIONAL LAW, OR MR. RUTAGANDA’S HUMAN RIGHTS.

A. Canada’s territorial sovereignty was not violated because the U.S. did not enter Canada to apprehend or arrest Mr. Rutaganda.

Canada’s territorial sovereignty was not violated because Mr. Rutaganda entered the U.S. on his own volition and was arrested on U.S. territory.²⁸ Under international law, a state has “lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there.”²⁹ Territorial sovereignty is violated when the agents of a state enter the territory of another state for the purpose of abducting one of its residents.³⁰

Mr. Rutaganda’s arrest does not violate Canada’s territorial sovereignty under customary international law. According to the Canadian and the U.S. justice systems, the actual seizure of a suspect for the purpose of detaining the suspect constitutes arrest.³¹ Mr. Rutaganda gained entrance to the U.S. through the Windsor-Detroit tunnel by falsely representing himself,³² which

²⁸ *Compromis*, ¶ 10.

²⁹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 206 (1987).

³⁰ Melanie J. Laflin, *Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-Legal Options*, 26 J. Legis. 315, 325 (2000) (hereinafter, *Laflin*).

³¹ See e.g. *R v. Whitfield*, (1970) 9 C.R.N.S. 59 (S.C.C.); U.S. const. Amend. IV.

³² *Compromis*, ¶ 10.

is a crime under U.S. and Canadian laws.³³ Upon entering the Detroit clinic, Mr. Rutaganda was arrested and taken into custody.³⁴ Thus, Mr. Rutaganda was seized and placed under arrest on American soil,³⁵ and Canada's territorial sovereignty was not violated.

B. Mr. Rutaganda's internationally protected human rights were not violated under either the I.C.C.P.R. or customary international law.

1. Luring as a form of rendition is distinguished from more egregious forms of rendition, such as forcible abduction or kidnapping.

The luring of Mr. Rutaganda to the Detroit Clinic through "Operation Motown Express" distinguishable from forcible abduction or kidnapping, and thus is not a form of irregular rendition. "Irregular rendition" is defined as "forcible abduction of an individual from one country by agents of another country, principally without the knowledge or consent of the former."³⁶ In contrast, "luring" involves the use of a subterfuge, or trickery, to entice a person to come to a certain location for purposes of arrest.³⁷ Luring is less offensive and less intrusive than forcible abduction, and usually does not constitute a violation of territorial sovereignty because it does not involve intrusion upon a state for purposes of removing a person from within its borders.³⁸

³³ 18 U.S.C. § 1544 (2002); *Criminal Code*, R.S. 1985 (1st Supp.) c. C-46, s. 57.

³⁴ *Compromis*, ¶ 10.

³⁵ *Id.*

³⁶ *Laflin*, *supra* note 30, at 315.

³⁷ *Id.* at 315.

³⁸ *Id.* at 316.

2. Luring does not violate the I.C.C.P.R. and customary international law because it is a less egregious form of rendition when compared to forcible abduction or kidnapping.

Forcible abduction and kidnapping will tend to violate international human rights law.³⁹ Article 9(1) of the I.C.C.P.R. provides that “everyone has the right to liberty and security of person,” and includes a provision condemning arbitrary arrest or detention.⁴⁰ According to the Human Rights Committee established by the I.C.C.P.R., forcible transnational abduction constitutes an arbitrary arrest under the I.C.C.P.R.⁴¹ Luring does not violate Article 9(1) of the I.C.C.P.R. or customary international law because it is not a form of forcible abduction.

Forcible abduction or kidnapping of persons “implies per se the violation of several fundamental rights protected by international law,”⁴² such as the I.C.C.P.R. In *Case of Sergio Ruben Lopez Burgos* (“Lopez Burgos”), the U.N. Human Rights Committee found a violation of article 9(1) of the I.C.C.P.R. where a Uruguayan refugee from Argentina was forcibly abducted

³⁹ Robert J. Currie, *Abducted Fugitives Before the International Criminal Court: Problems and Prospects*, 18 *Crim. L.F.* 349, 354 (2007) (hereinafter, *Currie*).

⁴⁰ International Covenant on Civil and Political Rights art. 9, 16 Dec. 1966, 999 U.N.T.S. 171 (hereinafter, I.C.C.P.R.).

⁴¹ *Prosecutor v. Mrksic, Miroslav Radic, Veselin Sljivancanin and Slavko Dokmanovic*, Decision on the Motion for Release by the Accused Slavko Dokmanovic, Case No. IT-95-13a-PT, T.Ch. II, 22 October 1997, at para. 66 (hereinafter, *Dokmanovic*).

⁴² Silvia Borelli, *Terrorism and Human Rights: Treatment of Terrorist Suspects and Limits on International Co-Operation*, *Leiden Journal of International Law*, Vol. 16, Issue 4, pp. 803-820, 806 (December 2003) (hereinafter, *Borelli*).

by Uruguayan agents.⁴³ As a result, the Committee in *Lopez Burgos* ruled that Uruguay was obliged to release Lopez Burgos.⁴⁴

In contrast, cases involving luring of a criminal suspect have found that luring does not violate the I.C.C.P.R. In *Prosecutor v. Mrksic and others*, known as the “Dokmanovic Case,” Mr. Dokmanovic was lured from his home in the Federal Republic of Yugoslavia (“F.R.Y.”) into Eastern Slavonia under false pretenses and was arrested upon arrival.⁴⁵ Mr. Dokmanovic raised the claims that his “kidnapping” violated the sovereignty of the F.R.Y.⁴⁶

The International Criminal Tribunal for the Former Yugoslavia (“I.C.T.Y.”) dismissed Mr. Dokmanovic’s claims, ruling that there was a distinction between “luring” and “forcible abduction”; luring was not offensive to international law because there was “no actual physical violation of F.R.Y. territory;” and that Mr. Dokmanovic had willingly entered Eastern Slavonia.⁴⁷ In its analysis of Article 9(1) of the I.C.C.P.R., the I.C.T.Y. looked to other cases that were taken to the Human Rights Committee regarding forcible abduction.⁴⁸ Finding that those cases discussed violations of the I.C.C.P.R. in relation to forcible kidnapping, which is

⁴³ *Id.*; U.N. GAOR, 36th Sess., No. 40, U.N. Doc. A/36/40 (1981).

⁴⁴ *Id.*

⁴⁵ *Dokmanovic*, *supra* note 41, at para. 11.

⁴⁶ *Id.* at para. 18.

⁴⁷ *Currie*, *supra* note 39, at 363; *Dokmanovic*, *supra* note 41, at paras. 33, 77.

⁴⁸ *Dokmanovic*, *supra* note 41, at para. 66. n. 89.

considered manifestly arbitrary,⁴⁹ the I.C.T.Y. distinguished the cases from Mr. Dokmanovic's case because there was no forcible kidnapping involved.

Like in the Dokmanovic case, Mr. Rutaganda entered the U.S. freely and willingly when he borrowed a passport from a friend and went to Detroit.⁵⁰ Mr. Rutaganda was not arrested until he arrived at the Detroit Clinic.⁵¹ Mr. Rutaganda's apprehension and arrest cannot be described as a forcible abduction or kidnapping because he was not physically removed from Canada by U.S. agents, and thus his arrest was not arbitrary.

C. The apprehension and arrest of Mr. Rutaganda does not violate the U.S.-Canada Extradition Treaty or the January 11, 1988 Exchange of Letters Between Canada and the U.S. on Transborder Abduction

The Vienna Convention on the Law of Treaties states that parties to a treaty must perform the treaty in good faith and consistent with the treaty's object and purpose.⁵² Extradition is a "legal device whereby a state requests from another the surrender of a person accused or convicted of a crime."⁵³ Extradition is based on the international principles of reciprocity and comity.⁵⁴

⁴⁹ *Dokmanovic*, *supra* note 41, at para. 67.

⁵⁰ *Compromis*, ¶ 10.

⁵¹ *Id.*

⁵² Vienna Convention on the Law of Treaties, arts. 18, 26, and 31, May 23, 1969, 1155 U.N.T.S. 331 (hereinafter, Vienna Convention).

⁵³ M. Cherif Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 Vand. J. Transnat'l L. 25, 25 (1973-1974).

⁵⁴ *Laflin*, *supra* note 30, at 316.

The U.S. Supreme Court has held that “the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court’s jurisdiction by reason of a ‘forcible abduction.’”⁵⁵ This concept is known as the Ker-Frisbie Doctrine, and essentially states that regardless of the unlawful nature of a person’s apprehension, courts may not preclude the person’s prosecution.⁵⁶ The Ker-Frisbie Doctrine has certain exceptions, such as a treaty violation or a method of apprehension and arrest that “shocks the conscience.”⁵⁷

In *United States v. Alvarez-Machain*, the U.S. Supreme Court held that, “absent an express treaty provision to the contrary, abduction of a foreign citizen in a foreign country by agents of the United States does not deprive the U.S. court of jurisdiction over the defendant.”⁵⁸ The Court arrived at this conclusion by finding that the abduction of Dr. Alvarez-Machain did not violate the terms of the U.S.-Mexico Extradition Treaty because the treaty did not contain specific terms that limited the parties to extradition under its terms.⁵⁹ Thus, the treaty was not the only means through which the U.S. could obtain jurisdiction over Dr. Alvarez-Machain.

Like the U.S.-Mexico Extradition Treaty, the U.S.-Canada Extradition Treaty (“Treaty”) is silent as to whether the treaty is the only avenue through which the U.S. and Canada can

⁵⁵ *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); see *Ker v. Illinois*, 119 U.S. 436 (1886).

⁵⁶ Reply Brief for the United States, *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (No. 91-712).

⁵⁷ See e.g. Herbert B. Chermiside, Jr., J.D., Annotation, *Jurisdiction of federal court to try criminal defendant who alleges that he was brought within the United States jurisdiction illegally or as a result of fraud or mistake*, 28 A.L.R. Fed. 685 (1976).

⁵⁸ Edmund S. McAlister, *NOTE: The Hydraulic Pressure of Vengeance: United States v. Alvarez-Machain and the Case for a Justifiable Abduction*, 43 DePaul L. Rev. 449, 504 (1994) (hereinafter, *McAlister*); 504 U.S. 655 (1992).

⁵⁹ *McAlister*, *supra* note 58, at 510.

apprehend and arrest criminals. The purpose of the Treaty is “to make more effective the cooperation of the two countries in the repression of crime by making provisions for the reciprocal extradition of offenders.”⁶⁰ However, this does not mean that the exclusive channel for obtaining custody over criminals is through the treaty.

Moreover, the luring of Mr. Rutaganda into the U.S. does not violate the express terms of the 1988 Exchange of Letters on Transborder Abduction (“Letters”). The purpose of the Letters was to make “the transborder abduction of persons found in Canada to the United States of America by civilian agents of bail bonding companies, so-called ‘bounty hunters’” an extraditable offence.⁶¹ Mr. Rutaganda’s apprehension was not the work of “bounty hunters,” but was part of a lawful endeavor conceived of and approved by the highest levels of the executive branch.⁶²

The Inter-Agency Working Group for Human Rights Violators (“Working Group”) and President Obama were acting within the scope of their lawful authority to pursue and arrest Mr. Rutaganda through “Operation Motown Express.” According to the *United States Attorneys’ Manual* (“Manual”), a lure involves “using a subterfuge to entice a criminal defendant to leave a foreign country” so that he or she can be arrested by the U.S.⁶³ Recognizing the potential for

⁶⁰ Treaty on Extradition Between the United States of America and Canada, U.S.-Can., July 9, 1974, 27 U.S.T. 983, T.I.A.S. 8237.

⁶¹ Exchange of Letters Constituting an Understanding between the Government of Canada and the Government of the United States of America Concerning the Protocol Amending the Treaty on Extradition, U.S.-Can., Jan. 11, 1988, 27 I.L.M. 422 (1988).

⁶² *Compromis*, ¶¶ 8-9.

⁶³ U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-15.630 (1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/.

negative reaction from the international community, the Manual states that a “prosecutor must consult with the Office of International Affairs before undertaking a lure to the United States.”⁶⁴ Although the Manual is not designed to create legal rights or enforceable law,⁶⁵ it is nonetheless a guideline for Department of Justice policies and procedures.⁶⁶ Thus, “Operation Motown Express,” formulated by the Working Group, which includes the Director of the Office of International Affairs, was conceived of and approved by the highest levels of the executive branch.

Moreover, the apprehension and arrest of Mr. Rutaganda does not “shock the conscience.” Thus, courts have held that an exception to the Ker-Frisbie Doctrine exists where a person is brought within the “territorial jurisdiction of a federal court by means of illegal pretrial activities of government agents which are outrageous to an extreme degree.” Thus, in *United States v. Toscanino*, the Second Circuit held that the Ker-Frisbie Doctrine’s due process requirement that a defendant receive a fair trial should also include the manner in which the accused is brought to trial, and should not reward lawlessness and police brutality.⁶⁷ In *Toscanino*, an Italian citizen convicted for conspiracy to import narcotics to the U.S. was kidnapped from his home in Uruguay, taken to Brazil, brutally tortured for 17 days, and brought

⁶⁴ *Id.*

⁶⁵ *Id.* at 1-1.100 (2009).

⁶⁶ *Id.*

⁶⁷ See *United States v. Toscanino*, 500 F.2d 267 (2nd Cir. 1974), *reh’g denied*, 504 F.2d 1380 (2nd Cir. 1974), *on remand*, 398 F. Supp. 916.

to the U.S. to face trial.⁶⁸ The court, not wanting to award such abuse, stated that the government should as a matter of fairness be obliged to return him to his home in Uruguay.⁶⁹

Mr. Rutaganda's apprehension and arrest is distinguishable from the *Toscanino* case. Mr. Rutaganda was picked up at the Detroit Clinic and arrested for illegally entering the U.S.⁷⁰ Pursuant to U.S. law, an order of removal was issued for Rutaganda, and Canada was provided with timely notification of the situation.⁷¹ Lastly, Mr. Rutaganda "had his day in court" through a series of immigration and judicial decisions regarding his removal to Rwanda.⁷² To the contrary, Mr. Rutaganda's apprehension and arrest was carried out legally and lawfully.

II. SURRENDERING EMANUAL RUTAGANDA TO RWANDA FOR TRIAL, IS CONSISTENT WITH INTERNATIONAL LAW AND THEREFORE PROPER.

A. The absence of U.S.-Rwanda or Canada-Rwanda extradition treaties does not preclude the U.S. from surrendering Mr. Rutaganda to Rwanda.

An extradition treaty is not the only means of obtaining an offender's presence.⁷³ While the Vienna Convention on the Law of Treaties⁷⁴ indicates a State is not bound to a specific act until it is explicitly provided for in a treaty,⁷⁵ it also implies that in the absence of international

⁶⁸ *Id.*; *Laflin*, *supra* note 30, at 325.

⁶⁹ *Id.*

⁷⁰ *Compromis*, ¶ 10.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See, Brief of the Government of Canada as Amicus Curiae In Support of Respondent at app. D, *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (No. 91-712).

⁷⁴ Vienna Convention, *supra* note 52.

⁷⁵ *Id.*

agreements to the contrary, a State is not forbidden to act in a particular manner. This is further supported by US caselaw.⁷⁶ Thus, in the absence of an extradition treaty, a State may still choose to surrender or extradite an individual to a requesting state. A State may also act under the principle of comity of nations. Finally, the principle of *aut dedere aut judicare*, related to fugitive war criminals, may require the US to extradite, regardless of any treaty.⁷⁷ Therefore, under the circumstances before this Court, the U.S. not only has the option of surrendering Mr. Rutaganda to Rwanda in the interests of comity; it is required to do so under the principle of *aut dedere aut judicare*.

1. The U.S. may invoke the principle of comity.

Comity is the reciprocal courtesy one member of the family of nations owes to the others based on presupposition of friendship and the prevalence of equity and justice.⁷⁸ In addition to their membership together in the international community, the good relations between the US and Rwanda are evidenced by agreements the two States share, such as the have entered into many treaties with one another, including the Agreement Regarding the Surrender of Persons to International Tribunals.⁷⁹ Under the Surrender Agreement, the US and Rwanda agree only to

⁷⁶ See, *In re Surrender of Elizaphan Ntakirutimana*, No. L-98-43, 1998 U.S. Dist. LEXIS 22173, at *100 (S.D. Tex. Aug. 6, 1998).

⁷⁷ Zdzislaw Galicki, Report of the 56th Session of the ILC, *The Obligation to Extradite or Prosecute* (“aut dedere aut judicare”), 312-13, 315 n.8, U.N. GAOR, 59th Sess., Supp. No. 10, U.N. Doc. A/59/10 (2001) (hereinafter, *Galicki*).

⁷⁸ See, Am. Jur. 2d, International Law § 7.

⁷⁹ Agreement between the Government of the United States of America and the Government of the Republic of Rwanda Regarding the Surrender of Persons to International Tribunals, State Dept. No. 03-104, 2003 WL 22309220 (entered into force July 11, 2003) (hereinafter, “Surrender Agreement”).

surrender each other's nationals to international tribunals with the permission of the other State.⁸⁰ The parties also reaffirm "the importance of bringing to justice those who commit genocide..."⁸¹ This mutual interest further indicates that rendition of Mr. Rutaganda to the Rwandan courts in the interests of comity between the two nations is proper.

2. Moreover, the U.S. is required to extradite Mr. Rutaganda under the principle of *aut dedere aut judicare*.

Under the principle of *aut dedere aut judicare*, international law requires that in the instance of a fugitive offender who commits genocide, crimes against humanity, crimes against the United Nations, or war crimes, the State to which the offender flees must either prosecute the offender or extradite him to the requesting State.⁸² This requirement is applied to any and all States, regardless of the existence or absence of a treaty.⁸³ Since the US is not seeking to prosecute Mr. Rutaganda itself, it is bound by international custom under the principle of *aut dedere aut judicare* to extradite Mr. Rutaganda to Rwanda, the requesting State.

Thus, even in the absence of an extradition treaty, it is proper for the US to render Mr. Rutaganda to Rwanda.

B. Trying Mr. Rutaganda in Rwandan courts for the war crimes he committed as a "child soldier" is consistent with international law and emerging trends.

1. International law permits the Rwandan courts to exercise jurisdiction over Mr. Rutaganda because of the particularly heinous and genocidal nature of the Boudouli Massacre.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Galicki, supra note 77.*

⁸³ *Id.*

Despite the recalcitrant international custom of viewing all child soldiers as “victims” and therefore exempt from any criminal culpability, there are limited cases evincing particularly heinous circumstances under which international criminal law reserves the right to exert jurisdiction over the minor.⁸⁴ Similar to the criminal laws of many states, including Canada and the US, international law indicates a minor may be held criminally culpable for committing egregious war crimes, such as genocide. In fact, international courts have already begun prosecuting some former child soldiers who display these special circumstances.⁸⁵

Despite his former “child soldier” stigma, Rutaganda’s participation in the notorious Boudaire massacre⁸⁶ is so egregious that it falls under this limited circumstance of attributing criminal culpability to a minor. In the Boudaire High School Massacre, Rutaganda, along with a small handful of others, blocked the exit doors to the Boudaire High School, and set the building on fire with all of the children inside it.⁸⁷ He remained blocking the exit door, while the children inside burned to death, ignoring their screams of agony and cries for help, and instead shot and killed any child who tried to escape, and killed 275 Tutsi children.⁸⁸ The circumstances of Rutaganda’s involvement in the Boudaire Massacre, deemed one of the “worst atrocities

⁸⁴ Mark Drumbl, *Child Soldiers: Agency, Enlistment, and the Collectivization of Innocence*, Washington & Lee Public Legal Studies Research Paper Series, Working Paper No. 2009-07 (June 23, 2009) (hereinafter, *Drumbl*).

⁸⁵ See Kate Heartfield, “Disagreeing with me about Omar Khadr,” *Ottawa Citizen*, March 19, 2009. <http://communities.canada.com/ottawacitizen/blogs/worldnextdoor/archive/2009/03/19/disagreeing-with-me-about-omar-khadr.aspx>

⁸⁶ *Compromis*, ¶ 4.

⁸⁷ *Id.*

⁸⁸ *Id.*

committed during the 1994 genocide,”⁸⁹ is thus sufficiently egregious for application of the limited war crimes exception under international law, and Rutaganda should be held accountable for his actions.

2. Modern approaches to criminal justice principles regarding adolescents support the exercise of jurisdiction by Rwandan courts over Rutaganda for the atrocities he committed as a child soldier.

While the traditional international position regarding not only child soldiers, but all minors (ie, all children under fifteen or, in some States, eighteen)⁹⁰, is that minors lack decision-making “agency” over their actions and therefore cannot be held responsible for them,⁹¹ the modern trend favors permitting courts to exercise jurisdiction over minors and make determinations of culpability on an individualized, case-by-case basis.⁹²

Emerging research indicates the traditional viewpoint, which was greatly influenced by international humanitarian organizations rather than international criminal law principles,⁹³ is overly broad, paternalistic, and ironically contrary to both the child’s best interests and the interests of his/her community.⁹⁴ The child is not given the opportunity to learn universally accepted notions of what is right and wrong, or appreciate the consequences of his/her actions.⁹⁵

⁸⁹ *Id.*

⁹⁰ Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, 37 I.L.M. 1002, 2187 UNTS 90, art. 26 (hereinafter, Rome Statute).

⁹¹ Additional Protocol to the Geneva Conventions of 12 August 1949, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Prosecution of Victims of International Armed Conflicts, December 7, 1978, 1125 U.N.T.S. 3.

⁹² *Drumbl, supra note 84.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

This in turn leads to a failure to properly reintegrate into the community because it is difficult to gain acceptance from the community members who feel slighted by the justice system.⁹⁶

The modern approach, by contrast, recognizes that the ten year old female child soldier who was forced to become a sex slave is distinguishable from the fifteen year old male child soldier volunteer who zealously participated in the mutilation and torture of countless people.⁹⁷ While only cases with the most compelling circumstances are prosecuted, all minors' right to standing in international courts is acknowledged.⁹⁸

Rutaganda should be held accountable for his actions as a child soldier because the circumstances of his case demonstrate he possessed "volitional agency" when he participated in the Boudaire Massacre. First, Rutaganda was not an eight or nine year old child, coerced into actions he didn't understand; he was a fifteen year old child, whose parents both had college-level educational degrees.⁹⁹ Though unfortunate circumstances, Rutaganda's father's death in 1993 likely forced Rutaganda to take on more responsibility, including the care of his mother, which indicates a greater maturity level.¹⁰⁰ The fact that Rutaganda did not immediately emigrate to Canada when the Rwandan genocide began (but rather waited until the fall of the

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See, African Youth Charter, Art. 11, 17, 26 (ratified 06/14/07) (<http://www.africaunion.org/root/UA/Conferences/Mai/HRST/Charter%20english.pdf>)

⁹⁹ *Compromis*, ¶ 2.

¹⁰⁰ *Id.*

Hutu regime), despite facts which indicate doing so was a viable option,¹⁰¹ indicates Rutaganda's awareness that his actions were legally and morally wrong. Finally, Rutaganda was one of only a dozen Interhamwe members who chose to commit the genocide at the Boutaire high school.¹⁰² Thus, his deliberate decision to participate in the Boutaire Massacre demonstrates Rutaganda did have volitional agency over his actions while he was a member of the Interhamwe group and supports the claim that he should be held accountable.

3. While international humanitarian law may have an interest in providing amnesty to former child soldiers, it should not promote that interest at the expense of the humanitarian rights of the victims of genocide and other atrocities of war, including those atrocities committed by child soldiers.

The interest in holding war criminals accountable is prevalent throughout all international law and custom.¹⁰³ Relief to victims of war atrocities is provided for in most international law, including the Universal Declaration of Human Rights, which states that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."¹⁰⁴ In fact, this humanitarian interest is so strong, it even outweighs a state's jurisdictional sovereignty,¹⁰⁵ both requiring the extradition of fugitive war criminals, and providing other States universal jurisdiction to bring a fugitive to

¹⁰¹ *Id.* at ¶ 3.

¹⁰² *Id.* at ¶ 4.

¹⁰³ See, e.g., International Covenant on Civil and Political Rights art. 9, 16 Dec. 1966, 999 U.N.T.S. 171; Universal Declaration of Human Rights art. 3, General Assembly Resolution 217A (III), U.N. Doc. A/810, at 71 (1948) (hereinafter, Universal Declaration).

¹⁰⁴ *Id.*

¹⁰⁵ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 I.C.J. 3 (Feb. 14).

justice.¹⁰⁶ Allowing for criminal culpability in deserving cases thus promotes the international goal of justice, achieving accountability for universally condemned offenses.

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

The Rwandan government has taken many steps to rectify these grievances and thus become a progressive nation in the protection of its citizens' human rights. Under this context and considering the alternatives, the Rwandan courts provide the most viable source of justice for Mr. Rutaganda, the State of Rwanda, and the international community as a whole.

1. Rwanda has amended its Constitution and adopted international treaties in order to further protect its citizens' rights, and remains the proper forum for Rutaganda's trials

After the 1994 Genocide, Rwanda embarked on legal reform process, where it amended laws relating to the code of criminal procedure,¹⁰⁷ functioning of the courts,¹⁰⁸ and judicial accountability.¹⁰⁹ In 2007, Rwanda abolished the death penalty in order to demonstrate to the international community its commitment to the protection of human rights.¹¹⁰ Rwanda is also a party to the I.C.C.P.R, the African Charter, and the American Convention on Human Rights.

Contrasted to the Gacaca trials, Rwandan courts are equipped with greater resources, longer established procedures and safeguards, and certified judges rather than members of the community. Further, the Rwandan courts are the most convenient forum for trial because Mr.

¹⁰⁶ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

¹⁰⁷ CONSTITUTION OF THE REUBLIC OF RWANDA (O.G.N° SPECIAL OF 4 JUNE 2003, P.119)

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

Rutaganda and all of his victims are Rwandan nationals,¹¹¹ and likely all the evidence and witnesses are there.

CONCLUSION AND PRAYER FOR RELIEF

For these reasons, the Government of the United States respectfully requests this Court to find that 1) the “luring” of Mr. Rutaganda into US territory did not violate the US-Canada Extradition treaty, its amending letters, or Canada’s territorial sovereignty, nor did it violate Mr. Rutaganda’s rights; and 2) Rendering Mr. Rutaganda to Rwanda in the absence of an extradition treaty is proper under principles of comity or *aut dedere aut judicare* because the Rwandan courts are capable of providing a fair trial, and because Mr. Rutaganda possessed volitional agency even as a “child soldier” when he committed the particularly egregious acts of genocide during the Boutaire Massacre.

Respectfully submitted,

Agents for Respondent

¹¹¹ *Compromis*, ¶ 4.