

IN THE INTERNATIONAL CRIMINAL COURT
LA COUR PÉNALE INTERNATIONALE
AT HAGUE, NETHERLANDS

Case No. /2006

IN THE MATTER OF

THE PROSECUTOR

versus

THE SOLDIERS OF FATAR

MEMORIAL SUBMITTED ON BEHALF OF THE PROSECUTION



NATIONAL LAW UNIVERSITY
JODHPUR (INDIA)

Team No:

Agents for the Prosecution

TABLE OF CONTENTS

TABLE OF CONTENTS	i
LIST OF ABBREVIATIONS	iii
INDEX OF AUTHORITIES	v
Articles.....	v
Books & Treatises.....	ix
Judicial Decisions.....	x
Documents & Conventions.....	xi
STATEMENT OF JURISDICTION	xiv
QUESTIONS PRESENTED	xv
STATEMENT OF FACTS.....	1
SUMMARY OF PLEADINGS	4

PLEADINGS.....	5
-----------------------	----------

I THE OBJECTIONS RAISED BY THE GOVERNMENT OF RAZACHSTAN WITH REGARDS TO THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT ARE JUSTIFIED.	5
I.1 The claim of jurisdiction under Art. 19 of the Rome Statute.	5
I.1.1 <i>The ICC subject matter Jurisdiction does not extend in the present matter:</i>	7
I.1.2 <i>The ICC cannot exercise Universal Jurisdiction:</i>	7
I.2 The claim of jurisdiction under Art 18 of the Rome Statute	8
II THE OBJECTIONS RAISED BY THE GOVERNMENT OF RAZACHSTAN OUST THE ADMISSIBILITY BEFORE THE INTERNATIONAL CRIMINAL COURT.	8
II.1 The Principle of Complementarity establishes the primacy of the Domestic Criminal Courts of Razachstan over the ICC.....	9
II.2 The respect for the Sovereignty of a State is the basic premise on which the Rome Statute stands	10
II.2.1 <i>Violation of Jus Cogens norms and Sovereign immunity:</i>	11

MEMORIAL ON BEHALF OF THE PROSECUTION

II.3 The presumption raised as regards the genuine unwillingness and inability of Razachstan to prosecute the 27 soldiers of the Peace Keeping force is unsubstantiated. 11

 II.3.1 *Razachstan is genuinely willing to carry on the investigation or prosecution:* . 12

 II.3.2 *Razachstan is genuinely able to carry on the investigation or prosecution of the 27 accused persons:* 14

 II.3.3 *The case is not of sufficient gravity so as to be tried by the ICC:* 14

 II.3.4 *The Principle of due process in International Criminal Law:* 15

PRAYER FOR RELIEF..... 15

LIST OF ABBREVIATIONS & ACRONYMS

1.	¶	para
2.	&	And
3.	Art.	Article
4.	B.U. Int'l L. J	Boston University International Law Journal
5.	Clev. St. L. Rev.	Cleveland State Law Review
6.	Colum. Hum Rts. L. Rev.	Columbia Human Rights Law Review
7.	Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
8.	Cornell Int'l L. J.	Cornell International Law Journal
9.	Duke L. J	Duke Law Journal
10.	ed	Edition
11.	eds.	Editors
12.	EHRR	European Human Rights Review
13.	Emory Int'l L. Rev.	Emory International Law Review
14.	Envtl. L. J	Environmental Law Journal
15.	Eur. Comm'n on H R	European Convention on Human Rights
16.	Eur. J. Int'l L.	European Journal of International Law
17.	Eur. J. of Crime, Crim. L. and Crim. Just	European Journal of Crime, Criminal Law and Criminal Justice
18.	Fla. J. Int'l L.	Florida Journal of International Law
19.	Geo L. J	Georgetown Law Journal
20.	I.C.J.	International Court of Justice

MEMORIAL ON BEHALF OF THE PROSECUTION

21.	ICC	International Criminal Court
22.	ICTR	International Criminal Tribunal for Rwanda
23.	ICTY	International Criminal Tribunal for the Former Yugoslavia
24.	J Int'l Eco L.	Journal of International Economics Law
25.	J. Int'l Crim. Just.	Journal Of International Criminal Justice
26.	Mich. J. Int'l L.	Michigan Journal Of International Law
27.	p.	Page
28.	U.C. Davis J. Int'l L. & Pol'y	University of California Davis Journal of International Law and Policy
29.	U.K	United Kingdom
30.	U.N.	United Nations
31.	V. J. INT'l L.	Virginia Journal of International Law
32.	Vol	Volume

INDEX OF AUTHORITIES

[ARTICLES]

1. **Bassiouni, Cherif M.** Universal jurisdiction for international crimes: historical perspectives and contemporary practice, 42 VA. J. INT'L L. 81, 115-35 (2001)
[Cited as: **Cherif**]
2. **Bergsmo, Morten** The Jurisdictional regime of the International Criminal Court (Part II, Articles 11-19), 6/4 Eur. J. of Crime, Crim. L. and Crim. Just. 29, 43 (1998)
[Cited as: **Morten Bergsmo**]
3. **Casey / Rivkin** The Limits of legitimacy- The Rome Statute's unlawful application to non-state members, V. J. INT'L L. 214 (2003).
[Cited as: **Casey**]
4. **Cryer, Robert** International Criminal Law vs state sovereignty: another round?, 16 Eur. J. Int'l. L 979 (2005)
[Cited as: **Robert Cryer**]
5. **Defrancia, Cristian** Due process in International Criminal Courts: Why procedure matters?, 87 Va.L.Rev. 1381 at 1401 (2001)
[Cited as: **Defrancia**]

MEMORIAL ON BEHALF OF THE PROSECUTION

6. **Doherty, Katherine L./ McCormack, Timothy L.H.** Complementarity As A catalyst for comprehensive domestic penal Legislation, 5 U.C. Davis J. Int'l L. & Pol'y 147 (1999)

[Cited as: **Katherine Doherty**]
7. **Ehlermann / Lockhart** Standard of review in WTO Law, 7 J Int'l Eco L. 491 (2004)

[Cited as: **Ehlermann**]
8. **Ellis, Mark S.** The International Criminal Court and its implication for domestic law and national capacity building, 15 Fla. J. Int'l L. 215, 237 (2002)

[Cited as: **Mark Ellis**]
9. **Gurulé, Jimmy** United States opposition to the 1998 Rome Statute establishing an International Criminal Court: Is the court's jurisdiction truly complementary to national criminal jurisdictions, 35 Cornell Int'l L.J. 1 (2001)

[Cited as: **Jimmy Gurulé**]
10. **Jensen, Rod** Complementing complementarity- The principle of complementarity in the Rome Statute of International Criminal Court available at <http://www.westlaw.com> (last visited Aug. 30, 2006)

[Cited as: **Jensen Rod**]
11. **Kleffner, Jann K.** The impact of complementarity on national implementation of substantive International Criminal Law, 1 J. Int'l Crim. Just. 86, 92 (2003)

MEMORIAL ON BEHALF OF THE PROSECUTION

[Cited as: **Jann Kleffner**]

12. **Lee, R** The International Criminal Court: The making of the Rome Statute, issues, negotiations & results 132, (1999) available at <http://www.westlaw.com> (last visited Sep. 3, 2006).

[Cited as **R. Lee**]

13. **Markovic, Sasha** The modern version of the shot heard round the world: America's flawed revolution against the International Criminal Court and the rest of the world, 51 Clev. St. L. Rev. 263 (2004)

[Cited as: **Sasha Markovic**]

14. **Pejic, Jelena** Creating a permanent International Criminal Court: The obstacles to independence and effectiveness, 29 Colum. Hum Rts. L.Rev. 291 (1998)

[Cited as: **Jelena Pejic**]

15. **Perkins, John A.** The changing foundations of international law: From state consent to state responsibility, 15 B.U. Int'l L.J.433 (1997)

[Cited as: **John Perkins**]

16. **Perrez, Franz Xaver** The relationship between permanent sovereignty and the obligation not to cause transboundary environmental damage, 26 Env'tl. L. 1187 (1996)

[Cited as: **Franz Xaver**]

MEMORIAL ON BEHALF OF THE PROSECUTION

17. **Sadat, Nadia Leila / Carden, Richard S.** The new International Criminal Court: An uneasy revolution, 88 Geo. L. J. 381
[Cited as: **Sadat & Carden**]
18. **Shany, Yuval** Toward a general margin of appreciation doctrine in international law? 16 Eur. J. Int'l L. 907 (2005)
[Cited as: **Yuval Shany**]
19. **Smidt, MAJ Michael L/ Yamashita/ Medina/ Beyond** Command responsibility in contemporary military operations, 164 Mil. L. Rev. 155, 160-63 (2000)
[Cited as: **MAJ Michael L. Smidt**]
20. **Triffterer, O.** Commentary on the Rome Statute of the International Criminal Court
available at <http://www.westlaw.com>
(last visited Aug. 30, 2006)
[Cited as: **Triffterer**]
21. **Van der Vyer, Johan D.** Personal and territorial jurisdiction of International Criminal Court, 14 Emory Int'l L. Rev. 1, 67-68 (2000)
[Cited as: **Johan D**]
22. **Weisburd, Mark A.** The emptiness of the concept of jus cogens, As illustrated by the war in Bosnia-Herzegovnia, 17 Mich. J. Int'l L. 1 (1995)
[Cited as: **Weisburd**]
23. **Wessel, Jared** Judicial policy-making at the International Criminal Court: An institutional guide to analysing international adjudication, 44

MEMORIAL ON BEHALF OF THE PROSECUTION

Colum. J. Transnat'l L. 377 (2006)

[Cited as: **Jared Wessel**]

24. **Williams S.A** Article 17: Issues of admissibility; available at <http://www.westlaw.com> (last visited Aug. 30, 2006)
[Cited as: **Williams**]
25. **Young, Gwen K.** Amnesty and Accountability, 35 U.C. Davis L. Rev. 427 (2002)
[Cited as: **Young**]
26. **Zeidy, Mohamed M.El.** The principle of complementarity: A new machinery to implement International Criminal Law, 23 Mich. J. Int'l L. 869 (2002)
[Cited as: **Zeidy**]

[BOOKS & TREATISES]

1. **Akehurst** Peter Malaanczuk (ed), Modern Introduction to International Law, 111, (7th ed, 1997)
2. **Bantekas, Ilias / Nash, Sushan** International Criminal Law, Cavendish Publishing Limited, (2nd ed., 2003)
[Cited as: **Ilias Bantekas**]
3. **Brownlie, Ian** Principles of Public International Law, 301, (5th ed., 1999)

MEMORIAL ON BEHALF OF THE PROSECUTION

[Cited as: **Brownlie**]

4. **Cassese, A** International Criminal Law (2003), p. 302
[Cited as **A. Cassese**]
5. **Oppenheim, L.** Robert Jennings & Arthur Watts (eds)
Oppenheim's International Law, vol. 2,
458, (9th ed., 2003)
[Cited as: **Oppenheim**]
6. **Werle, Gerhard** Principles of International Criminal Law,
(2005), p. 62
[Cited as: **Gerhard Werle**]

[JUDICIAL DECISIONS]

1. *Bosnia and Herzegovina v. Yugo.* (Serbia and Montenegro)
(Case concerning the application of the convention on the prevention and punishment of the crime of genocide) 1993 I.C.J. 325
2. *Greece v. United Kingdom* 1958-59 Y.B. Eur. Conv. on H.R. 174

MEMORIAL ON BEHALF OF THE PROSECUTION

3. *Hirsh v. State of Israel* 377 (S.D.N.Y. 1997)
4. *Ireland v UK* 2 EHRR 25, p 91-92 (1978)
5. *James v UK* 8 EHRR (1986) 123
6. *Nicaragua v. U.S* (Case concerning Military and Paramilitary Activities in and against Nicaragua) 1986 I.C.J. 14, 107 (June 27)
7. *Panevezys-Saldutiskis Railway Case* PCIJ Series A/B No. 76
8. *Princz v. Federal Republic of Germany* 26 F.3d. 1166
9. *Sampson v. Federal Republic of Germany* No. 96 C 6242, 1997 WL 583069 (N.D. Ill. 1997)
10. *Smith v. Socialist People's Libyan Arab Jamahiriya* 101 F.3d 239 (2d Cir. 1997)
11. *United States of America v. Laurence John Layton* (1981) 509 F. Supp. 212

[DOCUMENTS & CONVENTIONS]

1. Convention on the High Seas, 1958 1958 1 U.S.T. 2312, 450 U.N.T.S. 82 available at

MEMORIAL ON BEHALF OF THE PROSECUTION

- <http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas>
(last visited Aug. 20, 2006)
2. European Convention on Human Rights, 1948 available at <www.hri.org/docs/ECHR50.html>
(last visited Aug. 20, 2006)
3. The Geneva Convention, 1949 available at
<<http://www.unhchr.ch/html/menu3/b/91.htm>>
(last visited Aug. 25, 2006)
4. Genocide Convention, 1948 Convention on the prevention and punishment of the crime of genocide, 1948 available at
<www.preventgenocide.org/law/convention/text.htm>
(last visited Aug. 30, 2006)
5. The Rome Statute, 2002 of the International Criminal Court A/CONF.183/9 of 17 July 1998 available at
<www.iccpi.int/library/about/officialjournal/>
(last visited Sept 10, 2006)
6. Rules of Procedure and Evidence, 2002 Official Records ICC-ASP/1/3 of September 2002 available at
<www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf>
(last visited Sept 4, 2006)
7. U.N. Doc. A/CONF.183/C.1/L.59 (Jul. 10, 1998). available at
<<http://www.springerlink.com/content/t1516740204306n5/>>
(last visited Aug. 21, 2006)
8. United Nations Convention on the Law of the Sea, 1982. U.N.Doc. A/CONF.62/122 (1982). available at
<www.globelaw.com/LawSea/lscnts.htm>
(last visited Aug. 22, 2006)

MEMORIAL ON BEHALF OF THE PROSECUTION

9. Vienna Convention on Law of Treaties, 1969 available at
<<http://www.lectlaw.com/inll/89.htm>>
(last visited Aug. 22, 2006)

STATEMENT OF JURISDICTION

The Prosecutor for the International Criminal Court is not challenging Razachstan's petition seeking to have ICC reverse its original decision to investigate and prosecute the case and return the matter to the national courts of Razachstan.

The State of Razachstan most humbly submits that the domestic courts of Razachstan have the requisite competence to try the accused persons and are willing and able to prosecute the accused soldiers, hence it is most humbly submitted that this Honorable Court does not have the jurisdiction to try the present case.

All of which is urged in detail in the pleadings section and is submitted most respectfully.

QUESTIONS PRESENTED

I: Whether the objections raised by the Government of Razachstan as regards the Jurisdiction of the International Criminal Court are justified?

I.1 Whether the objections under Art 19 of the Rome Statute are justified?

I.2 Whether the objections under Art 18 of the Rome Statute are justified?

II: Whether the objection of Razachstan in relation to the admissibility of the present matter is plausible?

II.1 Whether the principle of complementarity forms a reasonable justification to oust the jurisdiction of the International Criminal Court?

II.2 Whether the notion of sovereignty of States can be looked into in the regime of ICC under the Rome Statute?

II.3 Whether the expression unwillingness and inability of the state genuinely to prosecute as used in Article 17 1(a) is applicable in the present case?

II.4 Whether the case is of sufficient gravity to be tried by the ICC?

STATEMENT OF FACTS

[PARTIES INVOLVED]

- Razachstan** A South East Asian Country which has been occupied by Qurac for the past nine years and has been facing war for the past three years.
- Qurac** The country that has occupied Razachstan for the past 9 years.
- Fatar** A country neighboring Qurac that had sent its soldiers as a part of the UN peacekeeping force to Razachstan.
- Marijanis caste** Residents of Razachstan who are considered the “*lowest of low*” caste. There has been continuous violence against these caste both prior and during the occupation of Razachstan.
- Marijani Liberation Front (MLF)** A pro Marijani organization that has opposed the petition filed by Razachstan for transfer of the case from ICC to Razachastan.

[EVENTS LEADING TO THE DISPUTE]

- February 2002** The brutal and oppressive nature of the Quraci occupation of Razachastan became publicly known. The United Nations under a Security Council Chapter VII resolution sent its peacekeepers to lead an International coalition of troops to maintain peace during the negotiations for withdrawal of the Quraci troops.
- November 12, 2003** Fatari regiments of 27 soldiers breaks away from the UN peacekeeping force and occupies a province called Buchari.
- December 5, 2004** UN forces liberate the principle base of Quraci operations.

MEMORIAL ON BEHALF OF THE PROSECUTION

- December 12, 2004** Quraci forces surrender and cease fire.
- December 31, 2004** A provincial government is established in Razachstan under U.N accord
- January 1, 2005** Statute of ICC entered into force pursuant to Razachstan having signed the Rome Statute prior to its occupation.
- February 2005** A survey mission by UN coalition forces in the Buchari province reveals that the Fatari soldiers had killed 9 men, raped and mutilated 17 women and tortured others.
- April 2005** After much discussion and deliberation on who should try the accused persons, the Fatari soldiers were handed over to ICC
- May 2005** Democratic elections were held in Razachstan. After an initial investigation, the ICC based upon the jurisdiction of crimes against humanity in an international conflict in the territory of signatory state, formed charges under the provisions of Crimes against Humanity and War Crimes. The provincial government has filed a petition before ICC challenging the jurisdiction of ICC.

MEMORIAL ON BEHALF OF THE PROSECUTION

July 2005

The Democratic government that was elected and was in favour of trying the accused persons before the national courts held meetings with the ICC officials for immediate return of the Fatar soldiers. The Prime Minister has promised that if found guilty the accused will not be executed.

The MLF has appeared before the ICC challenging the petition on the ground that the Marijanis have been strongly discriminated and as such they would not be able to get justice before the national courts.

The representatives of Fatar government and the soldiers of Fatar have also challenged the Razachstan petition. The soldiers fear that they could be denied a fair trial. Fatar has accepted the jurisdiction of ICC on ground of possibility of a fair trial.

SUMMARY OF PLEADINGS

WHETHER THE ICC HAS JURISDICTION TO TRY THE PRESENT MATTER:

The present matter falls outside the domain of the jurisdiction of International Criminal Court and as such its jurisdiction is not warranted. The alleged crimes have been committed on the soil of Razachstan and by virtue of that it has the right to try the accused persons. The Rome Statute has clearly given sovereign nations an upper hand over the International Criminal Court in the matter of jurisdiction. Hence it is most humbly submitted that the Honorable International Criminal Court does not have the jurisdiction to prosecute the accused in the present case.

WHETHER THE CASE IS ADMISSIBLE UNDER THE ROME STATUTE:

Under the principle of complementarity enshrined under the Rome Statute the ICC assumes jurisdiction in a matter where a member state is either genuinely unwilling or unable to carry out an investigation or prosecution. Razachstan has shown its willingness at the very initial stage when it has objected to the very fact when ICC tried to stake its claim over the accused persons. The conditions that have been enshrined under Art 17 (2) of the Rome Statute are not fulfilled for creating any doubt over the genuine willingness of Razachstan.

Razachstan's inability to prosecute the accused soldiers cannot be questioned in the present matter. The prosecutor has also not objected to the petition that has been filed after due verification as per the Rome Statute. Further The Marijani caste has been subject to more atrocities in the past and as such the offences that the accused persons have been charged with does not warrant something that portrays heinous crimes against that caste. Hence it cannot be argued that the matter involves sufficient gravity to be tried by the ICC.

PLEADINGS

I THE OBJECTIONS RAISED BY THE GOVERNMENT OF RAZACHSTAN WITH REGARDS TO THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT ARE JUSTIFIED.

1. Under International Law, the term *jurisdiction* refers to the aspect of a state's sovereignty comprising the sum of its judicial, legislative and administrative competences. [*Brownlie*] A state exercises its criminal jurisdiction over an act by virtue of the principles of territoriality, active personality, passive personality, as well as the protective and the universality principles.[*United States of America v. Laurence John Layton*] The territorial linkage principle implies that a state has jurisdiction over any crime committed on its territory. [*Oppenheim*] The active personality (or nationality) principle allows a state to exercise jurisdiction over its nationals traveling abroad.[*Akehurst*] The passive personality principle allows trial of an offender by the nationality of the victim [*Panevezys-Saldutiskis Railway Case* p. 16] and the protective principle allows jurisdiction against acts prejudicial to a state. [*Akehurst*] As per the Rome Statute, the ICC is supposed to claim jurisdiction primarily on the basis of the principle of territoriality, nationality (active personality) and universality of jurisdiction. [*Casey* p. 214]

2. An international court has the power to determine whether it has jurisdiction in a particular case, even if there is no express provision giving it the power to do so. Razachstan has raised a question over the jurisdiction of the ICC over the present matter. In cases referred by states or the Prosecutor *proprio motu*, the Prosecutor has to notify states parties and those states that would normally exercise jurisdiction over the crimes concerned.

I.1 The claim of jurisdiction under Art. 19 of the Rome Statute.

3. The application of Art. 19 arises under the condition where in there is a referral from the Security Council. The other circumstances could be where the states do not start an investigation in response to the Prosecutor's notification.[*Sadat & Carden* p. 420] The

MEMORIAL ON BEHALF OF THE PROSECUTION

jurisdiction of the ICC can be challenged within the ambit of Art. 19 if any of the conditions attached to the same are satisfied. [Art. 19 (2) of Rome Statute] In the present case Razachstan has satisfied the conditions embedded under Art. 12 of the Rome Statute and the non-investigation or non-prosecution of the alleged accused persons cannot be questioned under the mandate of the Rome Statute once the ICC has initially decided to exercise its jurisdiction. [Art. 18 of Rome Statute]

4. The Rome Statute has itself acknowledges supremacy of domestic jurisdiction. Firstly, paragraph 6 of the preamble recalls the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes. Such a duty presupposes a duty to establish jurisdiction. [*Jann Kleffner* p. 92] Secondly, such a duty appears to be confirmed if one interprets the Statute in the light of subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation [Article 31(3) (b) of the 1969 Vienna Convention on the Law of Treaties]. Thirdly, a teleological interpretation of the Statute equally supports that conclusion. The Statute's Preamble affirms that the most serious crimes of concern to the international community as a whole must not go unpunished and expresses the view that 'their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, [Rome Statute, Preamble para 4], thereby underlining the realistic assertion that not all crimes committed can in practice be prosecuted by the ICC and that measures on the national level are necessary to achieve effective prosecution.

5. If the state on the territory of which the conduct in question occurs accepts the Court's jurisdiction then ICC could exercise its jurisdiction. In the present matter the particular state being Razachstan has vehemently opposed the jurisdiction of ICC from the very beginning [Compromis ¶ 8] and as such the jurisdiction of ICC cannot be invoked. Customary International Law today recognizes that the states in which a crime under International law is committed has a duty to prosecute. [*Gerhard Werle* p. 62] This duty also exists under the treaty law of genocide and war crimes in international armed conflicts. [Genocide Convention, Art. IV See also Genocide Convention III; See also Art. 129; See also Geneva Convention IV, Art. 146; See also A. *Cassese*] The grave breeches

MEMORIAL ON BEHALF OF THE PROSECUTION

provisions of the Geneva Conventions obligate every state party to prosecute certain serious violations.

6. The territoriality principle operates when all the elements of an offence have taken place on the territory of the prosecuting state.[*Ilias Bantekas*] The principle of subjective territoriality asserts that when an element of an offence either commences or in any other way takes place on their territory, they may validly assert jurisdiction over the offence. According to the '*doctrine of ubiquity*' an offence may be considered to have been committed in a place where the consequences or the effects of the offence become manifest. [*Ilias Bantekas*] It is submitted that since the crimes were committed on the territory of Razachasthan and the consequences of the crimes were also borne by the people of Razachasthan, the domestic criminal courts in Razachasthan should try the matter.

I.1.1 The ICC subject matter Jurisdiction does not extend in the present matter:

7. The subject matter jurisdiction of the ICC is an accepted fact as per the charges that have been levied against the accused persons [Compromis ¶ 9]. Art. 5 of the Rome Statute provide that the aforesaid jurisdiction has to be interpreted and looked in light of Art. 12, 17 and 19 of the Rome Statute. Therefore, the subject matter jurisdiction is subject to the territorial jurisdiction of a State vide Art. 12 of the Rome Statute. As such when the signatory state is having the willingness and ability to try the accused persons before its national courts the same must be given due respect. [*MAJ Michael L. Smidt*]

I.1.2 The ICC cannot exercise Universal Jurisdiction:

8. It is most humbly submitted that the ICC cannot exercise universal jurisdiction. This is primarily because of two reasons, firstly, the Rome Statute does not sanction such an exercise of jurisdiction and secondly, such a form of jurisdiction if at all existent has been exercised till date only by states. The first proposition becomes clear from a perusal of the Rome Statute which demonstrates clear absence of such jurisdiction. In fact the *travaux préparatoires*, reveal the apparent intention of the parties to not grant the ICC any universal jurisdiction. [*R Lee*] During the negotiations, several states had put up equal number of proposals for determining the jurisdiction of the ICC ranging from automatic

MEMORIAL ON BEHALF OF THE PROSECUTION

jurisdiction on certain principles (by South Korea) to universal jurisdiction (by Germany). As a gesture of compromise, the Bureau of the Committee of the Whole put forth a proposal that set aside the German proposal [U.N. Doc. A/CONF.183/C.1/L.59 (Jul. 10, 1998)] and therefore automatic universal jurisdiction for the ICC was dead in the water.

For the second proposition it would be necessary to look at the evolution of the concept of universal jurisdiction. Prior to the twentieth century, universal jurisdiction existed for two international crimes: piracy and slavery. [*Cherif*] Customary universal jurisdiction over piracy was codified under Art. 19 of the Convention on the High Seas and was further supplemented by Art. 105 of the United Nations Convention on the Law of the Sea, 1982.

I.2 The claim of jurisdiction under Art 18 of the Rome Statute

9. As per the mandate of Art. 18 the Prosecutor has to inform the State concerned about prosecution by the ICC. In the present case when Razachstan came to know about the fact that ICC is willing to try the accused persons, the provisional government had objected to the same. [Compromis ¶ 8]. Therefore the government of Razachsthan had shown its intent to try them first by objecting and then by filing the petition before the ICC.

10. In the present matter the Prosecutor has reviewed his initial decision and has thereby come to a conclusion that he does not wish to challenge the petition filed by Razachstan. Due to the deferral of the State's investigation [Art. 18 (2) of the Rome Statute] it was not able to carry on the investigation part. The Prosecutor has off late acknowledged the merit in the arguments and objections that have been raised by Razachstan and as such decided not to proceed further. [Art. 18 (3) & Art 53 of the Rome Statute] The Prosecutor thereby has realized after the initial investigation that there is no sufficient basis for investigation and as such since the Prosecutor is not interested in the case the national courts of Razachstan become an appropriate forum before which the accused soldiers could be tried in furtherance of the ends of justice.

II THE OBJECTIONS RAISED BY THE GOVERNMENT OF RAZACHSTAN OUST THE ADMISSIBILITY BEFORE THE INTERNATIONAL CRIMINAL COURT.

MEMORIAL ON BEHALF OF THE PROSECUTION

11. The objection that surfaces out of the contention of Razachstan with regards to the admissibility of the present case is on the premise of availability of domestic courts in Razachasthan and owing to the fact that the crimes have been committed on its territory. As a result the state of Razachasthan has the first right to try the alleged offenders. The provisions that have been laid down in the Rome Statute [UN doc. A/CONF. 183/9 (17 July 1998), reprinted (1998) 37 ILM 1002] clearly signify that it is Razachstan that has jurisdiction in the present matter as it's the municipal courts are competent to prosecute the accused.

II.1 The Principle of Complementarity establishes the primacy of the Domestic Criminal Courts of Razachstan over the ICC

12. The principle of complementarity has been described as the *cornerstone* of the Rome Statute without which the realization of a permanent ICC would not have been possible. [Williams See also Triffterer] The word *complementarity* would be used to describe a situation where two processes would be working in tandem and not to the derogation of either. Applying this definition the ICC complements national criminal jurisdictions by providing a permanent international institution capable of investigating and prosecuting the most serious crimes of international concern when States are unwilling or unable to do so. [Jensen Rod]

13. The Rome Statute enshrines the principle of complementarity that gives the states the first opportunity to investigate and prosecute the case in its domestic jurisdiction. [Young] The adjudicative jurisdiction of the ICC is residual. [Sadat & Carden] It has been accepted that ICC is a court of the last resort. The basic principle is that the ICC will complement rather than replace national courts. It creates a presumption that the Prosecutor will be precluded from taking any action when a state has a functioning judicial system. [Jelena Pejic] National courts have the first right and obligation to prosecute perpetrators of international crimes; and because the jurisdiction of the ICC is complementary to national courts, the jurisdiction of the ICC can only be invoked if the national courts are unwilling or unable to prosecute. [Rome Statute Art. 17 (1) (a) See also Johan D]

MEMORIAL ON BEHALF OF THE PROSECUTION

14. The issue of admissibility under the Rome Statute shall fall in case any of the requirements enlisted under Art. 17 are answered in the affirmative. Art. 17 (1) (a) read along with para 10 of the preamble and Art 1 of the Rome Statute enshrine the aforesaid principle as an integral part of the ICC. Art. 17 provide that a case is *inadmissible*, meaning the Court is barred from considering it, if any of four circumstances that have been enshrined therein are fulfilled. [Rome Statute Art. 17] Under the Statute, the words *unwilling* and *unable* carry a special meaning. [Jimmy Gurule]

II.2 The respect for the Sovereignty of a State is the basic premise on which the Rome Statute stands

15. The basic notion of State Sovereignty is said to be blurred in the present context of International Law. The notion of State sovereignty has to be looked from varying prospectives. The voice for existence of State Sovereignty may not find credence in case of state's control over the natural resources [Franz Xaver] but still the same cannot be held tenable in all cases. The preamble to the Rome Statute itself recognizes the existence of State Sovereignty. [Para 6 of the Preamble to the Rome Statute] The Rome Statute therefore improvises on the notion of State Sovereignty as a concept that still prevails. There are circumstances wherein the rights of states can be limited. The Rome Statute recognizes the Sovereignty of States by way of encouraging investigation and prosecution by the State of nationality rather than through the ICC. The Rome Statute accomplishes this by directing the Prosecutor to notify all States having jurisdiction over a crime for every case referred to the ICC or initiated by the ICC Prosecutor. [Sasha Markovic]

16. The present International Court of Justice has also recognized the defining role of international law in determining the content and the limits of state sovereignty. [John Perkins] In defining the principle of nonintervention, which it declared to be binding customary international law, the Court held: “*The principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States.*” [Nicaragua v. U.S] International Criminal Law recognizes States authority over the aspect of jurisdiction, this reveals the fact that the State Sovereignty is respected by it. [Robert Cryer]

II.2.1 Violation of Jus Cogens norms and Sovereign immunity:

17. The legal term *jus cogens* refers to norms so fundamental to the exercise of international law that individual states cannot, as a matter of international law, contravene them.[*Carter*]. The rule of *jus cogens* has been firmly established in International law, especially after the Nicaragua case. [*Nicaragua v. US.*] Jus cogens norms are also known as peremptory norms and they enjoy the highest status within international law. [*Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)*].

18. It has been accepted that a state will lose its sovereignty when it violates human rights. The present case differs in this regard that it itself is not the perpetrator of the crime rather the crime has been committed against the state of Razachasthan. The War Crimes Tribunal for Yugoslavia confirmed that under international law a state waives its sovereign immunity when it violates jus cogen norms. [*Weisburd*] Since Razachstan itself has suffered from the grievous crimes as such it cannot be said that it has lost its sovereign right to proceed against those who have perpetrated these crimes. It has been held that violation of jus cogens norms do not constitute an implied waiver of immunity. [*Smith v. Socialist People's Libyan Arab Jamahiriya*; See also *Hirsh v. State of Israel*; See also *Sampson v. Federal Republic of Germany*] Judge Ginsburg in *Princz* case [*Princz v. Federal Republic of Germany*] held that a violation of jus cogens norms constitute an implied waiver of sovereign immunity. In the light of this no reliance can be placed on the fact that since the crimes committed are against jus cogens norms as such the International Criminal Court on behalf of the world community is a favorable place to try the accused persons.

II.3 The presumption raised as regards the genuine unwillingness and inability of Razachstan to prosecute the 27 soldiers of the Peace Keeping force is unsubstantiated

19. The core of the admissibility test is whether a State with jurisdiction has the willingness and ability to investigate and prosecute. If the Court concludes that such a national forum is available, it must show deference to the requisite national jurisdiction. [*Morten Bergsmo*] Thus, complementarity mandates that the Court can assume jurisdiction only when the state has failed to prosecute or investigate the case at hand in a satisfactory manner. Consequently, the adequacy of the state's conduct is the crux of the complementarity regime. [*Jared Wessel*]

MEMORIAL ON BEHALF OF THE PROSECUTION

20. The standards flow from the notions of unwillingness [Art. 17(2) of the Rome Statute, Rule 51 of the Rules of Procedure and Evidence] and inability [Art. 17(3) of the Rome Statute]. Unwillingness means that the proceedings were undertaken for the purpose of shielding an individual from criminal prosecution, there was undue delay or that there was no independent and impartial trial. [Rome Statute, Art. 17(2)] Inability, on the other hand, is defined in more objective terms as a situation in which, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the necessary evidence and testimony or otherwise unable to carry out its proceedings. [*Katherine Doherty*]
21. The Complementarity principle loses its effect when the state is genuinely unable to carry out an investigation or prosecution. The word genuinely as used in Art. 17 appears to require some good faith element on behalf of the State, it is proper under the Rome Statute for a State to open an investigation for the sole purpose of depriving the ICC of its jurisdiction, so long as the State does not exhibit unwillingness in doing so (or its inability is not apparent). [*Sadat & Carden* p. 420] A mere presumption that *the State on the territory of which crimes have been alleged to have been committed, then that country would be harsh against the perpetrators of those crimes and will forego the due process of law* is absurd and completely unfounded. It seems both logical and appropriate for States, rather than the ICC, to prosecute cases where they are willing and able to do so. Certainly, States have better developed systems of criminal justice, and will not have the difficulties that the ICC is bound to face in terms of gathering evidence, conducting investigations, and arresting suspects. [*Sadat & Carden* p. 410]

II.3.1 Razachstan is genuinely willing to carry on the investigation or prosecution:

22. Since the test of unwillingness as elaborated under Art. 17(2), is in effect a test of good faith of national authorities, the Statute provides a set of combined criteria to assure the effectiveness of this test. [*Zeidy* p. 490] In the present context Razachstan has already shown its desire to try the aforesaid accused soldiers who have committed the crimes. This intent is further boosted from the fact that the person (the prime minister of Razachasthan) who was the forerunner in mooted this idea has been democratically elected by the people of that State [Compromis ¶ 10] and thus the majority of the

MEMORIAL ON BEHALF OF THE PROSECUTION

population is also in favour of the accused being tried in the municipal criminal courts of Razachasthan. The provisions that are mentioned in Art. 17(2) relating to the unwillingness of a State nowhere stand justified in relation to Razachstan.

23. There is no question of shielding the offenders arising in the present context as Fatar (the country of which the accused are nationals of) has already submitted to the jurisdiction of this Honorable Court. Razachstan is in no position to shield the offenders as it itself intends to try the accused persons for alleged crimes that they have committed. Further there has been no delay and as such no contrary presumptions can be made out.
24. The Prime Minister of Razachstan has promised that no death penalty shall be awarded if the accused persons are found guilty of the offences alleged against them. [Compromis ¶ 10] This again points out to the willingness of Razachstan to prosecute the soldiers. In this regard recourse may be taken via the *Doctrine of Margin of Appreciation* that has been evolved in the European Courts on Human Rights in connection with Art. 15 of the European Convention on Human Rights. [Earnest Young p. 1248] It is said that this doctrine stands on a similar footing as compared with the Complementarity doctrine. [Yuval Shany p. 907]
25. This doctrine provides for derogations from Convention obligations “*in time of war or other public emergency.*” [Greece v. United Kingdom] This doctrine establishes a methodology for scrutiny by international courts of the decisions of national authorities. There have been two principles that have been identified in this context of judicial deference and normative flexibility. [Ehlermann p. 493] While in the former the national courts are to be allowed a certain degree of deference and respect in the manner of executing their international obligations. [Ireland v UK] The latter deals with the fact that the international norms subject to the doctrine have been characterized as open ended. [James v UK]
26. There can be no questions raised over the fact that Razachstan has not initiated any sort of investigation or prosecution against the accused persons because within the mandate of the Rome Statute the state has to stop its investigation once the Prosecutor on behalf of the ICC decides that it will look into the matter.

MEMORIAL ON BEHALF OF THE PROSECUTION

II.3.2 Razachstan is genuinely able to carry on the investigation or prosecution of the 27 accused persons:

27. The ICC may assert its jurisdiction only when it identifies a gap in State jurisdictions, a gap created by the lack of repression. [Zeidy p. 903] It is to be seen that in the light of the Rome Statute inability needs to be deliberated. The Statute has put forward the conditions wherein inability may arise. [Rome Statute Art. 17 (3)] Thus, inability is determined generally through a two-part test: (1) collapse and (2) its consequences. [Mark Ellis] The followers of the Court agree that inability applies where the lack of applicable domestic laws covering the crime in question renders the national system unavailable. [Jann Kleffner] In the present matter it has to be seen that there are no circumstances leading to the fact that Razachstan does not have a proper legislation to deal with the alleged crimes. There has been sufficient time period that has gone by and as such it cannot be said that the municipal courts have not been developed properly to handle trials that are generally part of all municipal penal legislations in one way or the other.

28. Razachstan had moved the petition challenging the ICC jurisdiction in late May, 2005. [Compromis ¶ 10] The Prime Minister had sought the intervention of ICC in some time around July 2005. [Compromis ¶ 10] Furthermore the prosecutor has not challenged this petition that has been filed by Razachstan [Compromis the exercise ¶ 2 p. 4]. This points out to the fact that the State of Razachstan has attained the standard of ability in the eyes of the prosecutor to try the alleged accused persons in their national courts.

II.3.3 The case is not of sufficient gravity so as to be tried by the ICC:

29. The case can be admissible before the ICC, if the case has sufficient gravity in it. [Rome Statute Art. 17 (1) (d)] In the present case the offences that have been committed by the 27 soldiers although heinous in nature but are not so grave so as to warrant the interference of the ICC. In addition to this the Marijini caste has been subject to more grave atrocities in the past [Compromis ¶ 1] and as such the present situation does not require the ICC to intervene, instead the national courts are sufficient to try these offences.

II.3.4 The Principle of due process in International Criminal Law:

30. The task of interpreting basic protections outlined in the Statutes and Rules of the ICC will necessarily involve a balance of competing interests. Giving useful effect to the provisions of this court's Statute and Rules, however, should not in any way derogate from the basic *due process rights* accorded to the accused. It is well established that a fair trial process requires that the basic requirements have to be complied with. [*Defrancia* p.1381]. The assurance that has been provided by the Prime Minister of Razachstan stands in total conformity with the various Human Rights norms and debates that emphasize upon the doing away of death penalty. As such proper adherence has been accorded to the due process norms that have been laid down in the International Law regime.
31. The principles with regard to due process under the International Law have to be seen in light of the various provisions that have been provided under the Statute. [Rome Statute Art 17. (2) (a), (b) & (c)] No contrary assumption can be made with regard to the fact that since the offence has been committed on the territory of Razachstan as such it will be biased in its approach.

PRAYER FOR RELIEF

In the light of the arguments presented above it is most respectfully requested that the International Criminal Court adjudge and declare:

- (a) That this matter does not fall within the Court's jurisdiction.
- (b) That this matter is not admissible before the Court in accordance with Article 17 of the Rome Statute.
- (c) That the accused persons be handed over to Razachstan so that they could be tried before their national courts.

Date: Nov. 10, 2006

All of which is respectfully submitted

Place: The Hague

Agents for the Prosecution