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TRIAL CHAMBER I

Before: International Criminal Court Moot Competition
Pace Law School

SITUATION IN THE STATE OF RAZACHSTAN
IN THE CASE OF
THE PROSECUTOR
***v.* THE FATARI SOLDIERS**

Memorial on Behalf of Defense

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III. STATEMENT OF FACTS

1. The Southeast-Asian country of Razachstan engaged in a war with neighboring Qurac beginning in 2002 in order to fight off Qurac's nine-year occupation. (F. at 1). Throughout its occupation, Quraci forces brutally oppressed the Razachstani people. (F. at 1). This was especially true for Marijanis. The Marijanis are still one of the lowest castes in Razachstani society, and they are considered the "lowest of the low" in Razachstan. (F. at 1). While Qurac occupied Razachstan, the violent crimes endured by Marijanis tripled to 1,500,000 from its usual annual figure of 500,000. (F. at 1).

2. Despite strong international condemnation, the significant impact of the Quraci occupation was not publically known until February 2002. (F. at 2). At that time, the United Nations took action under a Chapter VII Security Council resolution and sent a coalition of peacekeepers into Razachstan to supervise negotiations for the withdrawal of Quraci troops. (F. at 2). The coalition forces were comprised of soldiers from over 20 countries, including Fatar, a neighboring nation to Qurac and Razachstan. (F. at 2).

3. During the peacekeeping mission, 27 of the Fatari soldiers broke away from the coalition forces and entered the Buchari province of Razachstan, an area solely populated by Marijanis. (F. at 2). The group attributed its departure from the UN coalition to general displeasure with the execution of the UN mission. (F. at 2).

4. Meanwhile, on December 5, 2004, the UN coalition liberated Razachstan's Nadir province, which was Qurac's base of operations in Razachstan. (F. at 4). As a result, Quraci Commander, General Faraz Kushari, ordered a ceasefire and surrender for all Quraci forces. (F. at 4). On December 31, 2004, a Razachstani provisional government was put in place, pursuant to the UN negotiated accord, until a democracy could be established. (F. at 5).

5. Although efforts to put a democracy in place within Razachstan had begun, and the Rome Statute entered into force for Razachstan on January 1, 2005, since Razachstan signed the treaty during Quraci occupation, UN forces remained in the country to monitor the situation. (F. at 6-7). While on a survey mission in the province of Buchari in February 2005, UN monitoring forces found the 27 Fatari soldiers in a Marijani village. (F. at 7). Villagers stated that the Fatari soldiers had been in their town for over a year and that, during that time, they killed 9 men, raped and mutilated 17 women, and tortured several villagers. (F. at 7).

6. Upon receiving this information, some members of the Razachstani provisional government wanted to summarily execute the Fatari troops without granting them a trial to decide whether they were, in fact, guilty. (F. at 8). Government leaders were angered that troops initially sent in with the UN mission, designed to supposedly liberate the country, could have carried out the alleged atrocities. (F. at 8). Khalid Faraz, one of the government leaders and incumbent for Prime Minister, stated that he too was angry and wanted the soldiers tried in Razachstan; other leaders did not find the crimes so atrocious to justify execution of the accused. (F. at 8). The lack of concern regarding the gravity of crimes was attributed to the Marijani ethnicity of the alleged victims, since they were traditionally second-class Razachstanis. (F. at 8).

7. Despite several attempts to involve the Fatari government, Razachstani authorities decided that the nation had no intention of claiming jurisdiction over the soldiers. (F. at 8). As Razachstan decided where to refer the case, UN coalition representatives suggested that they consider the ICC, since Razachstan itself would not be able to properly try the accused for "quite some time." (F. at 8). After subsequent negotiation, the Fatari soldiers were referred to the ICC in April of 2005. (F. at 8). The Prosecutor initiated investigations and, after one month, he was confident that the situation could proceed to the case phase. (F. at 8). Thus, he filed an indictment during May, charging the soldiers with crimes against humanity of murder and war crime of: willful killing, at tacking civilians, excessive incidental death, injury or damage, and murder. (F. at 9).

8. Democratic elections were not held in Razachstan until May of 2005. (F. at 1). Later during that month, representatives of the government filed a petition before the ICC to challenge jurisdiction of the case. (F. at 10).

9. In the first half of July 2005, the newly elected Prime Minister, Khalid Faraz, met with ICC prosecutors to request the return of the Fatari soldiers to Razachstan for trial. (F. at 10). He stated that the country could now try the accused for the war crimes charges in a Razachstani criminal court. (F. at 10). To convince the ICC prosecutor to succumb to his request, Faraz promised him that the soldiers would not be executed if they were given a guilty verdict with regard to the war crimes charges. (F. at 10).

10. After hearing the Prime Minster's announcement, Marijani Liberation Front representatives challenged his requests to remove the case from the ICC on the basis that the victims were so discriminated against in their own country that it would be impossible for them

to receive justice in its courts. (F. at 11). Fatari government representatives and representatives for the Fatari soldiers similarly appeared before the ICC to challenge Razachstan's petition. (F. at 12). Although the Fatari government was initially opposed to the case proceeding at the ICC, it openly recognized that if the case was pursued at the ICC and not in Razachstan, its troops would receive a fair trial and punishment. (F. at 12). The soldiers maintained that a fair and impartial trial was impossible in Razachstani courts, just as it would be in Fatari as a result of substantial international pressure to exemplify the soldiers. (F. at 12). They also indicated that the court system in Razachstan did not meet international standards and that apart from the non-application of the death penalty, other shortcomings of the judicial system were still in place just as firmly as they had been during the Quraci occupation. (F. at 12).

11. The case has since begun at the International Criminal Court, and the parties are submitting arguments before the Court with respect to Razachstan's request for a re-grant of jurisdiction to its court system. Representatives for the Accused humbly request that the Court retain the case in order to ensure that the interests of justice and fundamental principles of human rights to are best respected.

IV. PLEADINGS

12. The Defense respectfully requests that the Chamber first recognize that it has jurisdiction that has been appropriately triggered, and second, that the Fatari Soldiers' case is admissible under the Statute. Both the Statute and the Rules empower the Court to decide the appropriate forum for the case. (Art. 19(1); Rule 133). In fact, a determination with respect to competence is a "necessary component in the exercise of judicial function" under international law. (*Tadic* at 18). This inquiry will involve an assessment of articles 17, 18 and 19 as they are implicated under the article 19 challenge.

A. THE INTERNATIONAL CRIMINAL COURT HAS JURISDICTION TO APPROPRIATELY HEAR THIS CASE IN COMPLIANCE WITH THE STATUTE AND THE RULES.

13. The Defense requests the Court expressly establish its jurisdiction over the Fatari Soldiers' case. The Court should consider guidelines laid out by Rule 162 of the Rules of Procedure and Evidence, which regulates the Exercise of Jurisdiction. (Rule 162). Its inquiry should also involve a preliminary finding on jurisdiction under articles 5, 11, 12 and 25 as well

as the trigger mechanism invoked under article 13. (Arts. 5, 11-13). All requirements have been met in this case.

1. The loci, personal, subject matter and temporal jurisdiction requirements of the International Criminal Court are satisfied in this case.

14. In the controversy before the Chamber, all elements of jurisdiction have been satisfied. Since there have been no challenges submitted to loci, personal, or subject matter jurisdiction, the Court may swiftly find jurisdiction requirements met in this case.

15. It is a well-established principle in international law that jurisdiction exists where the controversy took place on the soil of a state that has submitted itself to the competence of an international tribunal. (S.S. Lotus at 19*)*. Since the alleged crimes took place in Razachstan, which is a State Party to the Rome Statute, the requirements of article 12(2)(a) are satisfied. Subject matter and personal jurisdiction requirements have also been met because the Fatari soldiers have been charged with article 25 individual responsibility for crimes against humanity and various war crimes. (F. at 9). All of these charges are grave crimes of international law within the subject matter jurisdiction of the International Criminal Court. (Art. 5).

16. Finally, article 11's temporal jurisdiction before the Tribunal is sufficient to proceed. The Rome Statute entered into force in Razachstan on January 1, 2005. (F. at 6). Therefore, the ICC shall have temporal jurisdiction over all crimes committed by the Fatari soldiers after January 1, 2005 up until the close of the case.[1] While this excludes acts committed in Buchari by Fatari troops between November 12, 2003 and January 2005, jurisdiction is sufficient to both indict and try the accused. As has been permitted in cases before the ICTR, an indictment may be restricted to acts within a limited temporal jurisdiction. (Ngeze at 3; Nahimana at 27). Since the ICC prosecutor successfully investigated this case while restricted by temporal jurisdiction and was nonetheless able to both identify the individual acts of the accused and determine appropriate charges for those individuals, the facts available under the limited temporal jurisdiction are sufficient to allow the case to proceed before the ICC.

[1] Although the Defense will not argue the possibility at this time, the Court may find that article 11 allows temporal jurisdiction to begin upon the date that Razachstan ratified the Statute during its occupation if it were determined to be a sovereign at that time. If this date predates the date that the Statute entered into force generally, it may equate to an extended temporal jurisdiction, since the Statute and Rules are ambiguous with respect to whether States can consent to prosecution before July 1, 2002. (Bourgon at 549-50, recognizing the possibility of state consent to ICC jurisdiction in this scenario without a violation of the principle of legality).

2. The ICC's jurisdiction has been appropriately triggered via a voluntary State Referral satisfying articles 13 and 14 of the Statute.

17. Since the method of jurisdictional trigger has a significant impact on considerations of admissibility in this case, the Defense requests that the ICC expressly find its jurisdiction triggered in accordance with article 13 of the Statute. Allowable triggers include referrals of a situation by the Security Council, a State Party, or through the initiation of a case under the Prosecutor's *propio motu* power. (Art. 13). In this case, the triggering mechanism evoked is a voluntary self-referral by a State Party.

18. The state of Razachstan referred the situation to the Court when it handed over the Fatari soldiers. As the custodial, territorial and passive personality state, Razachstan had a clear interest in the controversy and on its own initiative referred the case to the Court. Razachstan's referral to the ICC is unchallenged. While it is unlikely that the Statute's drafters contemplated voluntary self-referrals, there is no reason the procedure should be barred, since it furthers the object and purpose of the ICC, which is to increase prosecution for grave crimes of international law. (Arsanjani at 387). As a result, Razachstan's initial decision should be granted substantial deference.

19. However, the Defense notes that the procedure may be challenged on the grounds that it derogates from the preambular duty of a State party to "exercise its jurisdiction over those responsible for international crimes." (Preamble para. 6). The Court should reconcile this affirmative duty on States with the accompanying right of States to refer situations to the Court. If the object and purpose of the Rome Statute remains paramount to the duties of the Court, a prohibition imposed on a territorial state's right to choose between its own jurisdiction and the ICC's would effectively bar the State from meeting its obligations to end impunity. As with Uganda's self-referral, Razachstan "acted to ensure that justice would be achieved" by submitting itself to ICC jurisdiction. (Akhavan at 404). Where a State is given the choice between its own system, whose effectiveness may be in doubt, and that of the ICC, that state must be free to make an educated decision on the best forum for the case. Denying this right would bar States from fulfilling their duty to ensure prosecution of international crimes.

20. The ICC's current caseload supports the procedural mechanism, since three of the four situations before the Court were self-referrals. Although "self-referral[s] [are] not necessarily the most straightforward option," they have helped to create a caseload in a political climate where

"three out of five permanent members of the Security Council do not support the Court." (Gaeta at 951-52). Also, there have been no challenges to self-referrals before the respective Pre-Trial Chambers. The Court has similarly declined to raise such an objection *sua sponte*, and thus has impliedly given at least preliminary approval to this form of State Referrals. In the absence of expressed hesitation by the Court, the Prosecutor, or State Parties, there is no valid reason to doubt the appropriateness of Razachstan's self-referral.

21. At the time of Razachstan's self-referral, it affirmatively decided that it was unequivocally unable to try the Fatari soldiers. The State therefore adhered to its preambular duty to exercise as much criminal jurisdiction over the case as it could by referring the situation to the ICC; in doing so, Razachstan acted in full compliance with its obligations under the treaty.

B. THE CASE IS ADMISSIBLE BEFORE THE INTERNATIONAL CRIMINAL COURT BASED ON ITS COMPLIANCE WITH THE STATUTE AND PRINCIPLES OF COMPLEMENTARITY AS EMBODIED IN ARTICLES 17 AND 19.

22. As allowed by Rule 58(3), the Defense submits its request that the Court deny deferral in favor of retaining jurisdiction on both procedural and substantive grounds.[2] The Defense does not contest that complementarity must be "taken into account" wherever "the respective roles of the Court and national authorities can or do coincide." (1996 PrepComm Report at para. 154). However, the Court should find the case admissible since complementarity interests are outweighed by the Court's duty to vigorously prosecute grave breaches of international law.

1. The International Criminal Court should dismiss the challenge to admissibility as procedurally inappropriate as a consequence of Razachstan's waiver of complementarity.

23. The Court should find Razachstan's challenge to admissibility to be procedurally impermissible based on its waiver of the right to complementarity. When a State Party refers a case, rather than exercise its own viable jurisdiction, it should be estopped from later challenging jurisdiction or admissibility, absent a substantial change in circumstance. Therefore, Razachstan waived its right to evoke article 17, 18 or 19 when it affirmatively declined to exercise jurisdiction in the case by referring the situation to the ICC in April 2005. (F. at 8).

[2] The Defense submits that it is able to file its reply on the grounds of Rule 58(3). Moreover, the Defense has requisite standing to appear before the Chamber since article 63(1) requires that the trial does not proceed *in absentia* but in the presence of the accused.

24. Based on a realistic understanding of its own capacities after dramatic conflict within its borders, the State of Razachstan openly relinquished its jurisdiction. The nation had been embroiled in violent conflict for three years, and only four months had passed since the ceasefire agreement was signed. (F. at 1, 4). At the time of it's referral, Razachstan made no attempt to investigate or prosecute because Razachstani authorities determined that its national courts could not handle the case. On its own initiative, Razachstan found the case admissible before the ICC.

25. The Court should consider Razachstan's decision to encourage ICC jurisdiction as a wavier of its right to prosecute as a territorial state based on drafting history behind the Statute. The question of waiver first arose during the discussions of the 1995 AdHoc Committee and was left in a footnote until the final Rome Conference where it was not dealt with; many delegations believed the issue to be more appropriately adopted in the Rules. (PrepComm Decisions at 11, n. 17; Zutfen Report at 42, n. 53 ; 1998 PrepComm Report at 40, n. 38.; AdHoc Report at 47). Some delegations believed, in fact, that the concept of waiver was implicit in the language of the Statute. (El Zeidy II at 100-101). Assuming it was left open to be dealt with by the Court itself, the text of Rule 58(2) regulating article 19 proceedings would support the Court's ability to "decide on the procedure to be followed" and "take appropriate measures" for the proper conduct of proceedings before it. (Rule 58(2)). The exclusion of a specific provision on waiver, therefore, is not conclusive of its application or non-application to the instant proceedings; if drafters intended to forbid waivers, the States parties would have expressly foreclosed waivers after spending time discussing them. Instead, non-inclusion of an express provision on waiver leaves the issue open-ended. Therefore, the Chamber may find a waiver in this case.

26. By first agreeing to allow the Court to proceed with the case and then allowing the Prosecutor to investigate, the State essentially consented to an entry of judicial decision against its own courts; "by implication," this amounts to a "waive[r] [of] their right to attack" the Prosecutor's initial decision. (International Encyclopedia at 8-20). When Razachstan handed over jurisdiction, the State implicitly admitted that it was either unwilling or unable to try the case. In either situation, it currently has no procedural right to evoke a request for deferral or dismissal to its own courts.

27. An exception to this rule would be in a situation where a state could prove that a substantial change in circumstance had occurred. Requiring such a showing would be in keeping with provisions of the Rome Statute, such as article 18(7), which requires a challenging state to

demonstrate "additional significant facts or significant change of circumstances" in the event that it wishes to file a second challenge to admissibility. (Art. 18(7)). The State must bear the burden of presenting evidence to support its challenge, however, since the ICC is not meant to serve as an "appellate body to review decisions of domestic courts". (Holmes at 673). If Razachstan wishes to reverse its own decision, it must provide the ICC with objective evidence does not force the Court to inquire into its tactical and policy decisions. Adhering to this requirement would serve the purpose of safeguarding the Court's resources and time by preventing frivolous and unsupported challenges to admissibility, which unnecessarily delay trial, by allowing only meritorious challenges to proceed.

28. Where the State does not meet its burden, the Court should not permit the interests of that State to outweigh the fundamental, non-derogable human rights of the accused and the victims of a case. This is especially true as a situation becomes a case, and even more so when a case begins to be heard on the merits. The accused must be granted their fundamental right to adequately prepare their defense, and when a case is dismissed or deferred after they have spent months or years preparing their case with attention to the designated forum, their rights will most certainly be sacrificed, as they are forced to refocus entire defense strategies under time constraints.

29. In this case, Razachstan has not met its evidentiary burden; none of the alleged facts before this Chamber establish a change of circumstance. The case was initially filed after the hostilities had taken place, four months after the ceasefire agreement. There has not been enough time since the accords were signed to achieve meaningful peace and security. In addition, there is no evidence before the ICC to demonstrate that the newly elected government, which was less than one month into its post at the time it raised new information to support its jurisdictional challenge, was in any better a situation to assess or effectuate change in Razachstan than the provisional government that initially waived jurisdiction. In fact, at least some of the provisional government leaders are newly elected officials. Finally, there has been no evidence of meaningful peace and reconciliation or any sort of resolution to ethnic conflict and social tensions. Without any evidence of a substantial and dramatic shift inside Razachstan, the ICC cannot be assured that safe and transparent conditions exist and must act conservatively and retain jurisdiction.

2. Since no affirmative investigation or trial has yet taken place in Razachstan, the language of article 17 prohibits the ICC from deferring the case.

30**.** Even if the Court finds no waiver to apply in this case, it should dismiss Razachstan's petition for deferral based on the language of article 17. In light of article 31 of the Vienna Convention, the ICC Statute must be interpreted to reflect the "ordinary meaning" of its language. (Vienna Convention art. 31). Since article 17 of the Rome Statute requires an investigation or prosecution to be either complete or ongoing at the time a challenge is submitted, and there is no evidence of either in Razachstan, the petition for deferral under article 19 must be denied.

31. Article 19 proceedings require an evaluation of article 17's complementarity principle. Under article 17, a case shall be considered inadmissible where "the case is being investigated or prosecuted" unless the state is "unwilling or unable" to do so. (Art. 17)**.** There are, therefore, two elements to an article 17 inquiry. First, the Court is required to determine whether proceedings have begun. If they have, then its second inquiry is whether the national courts meet unwilling and unable requirements. Thus, where no State has initiated investigations, "there is no need to examine the factors of unwillingness or inability" and the case should be considered admissible. (Arsanjani at 390-91).

32. Policy reasons behind the Statute similarly require present or past action by the State. The language of article 17 is closely tied to its corollary principle of *ne bis in idem,* which is codified in article 20 of the Statute. (El Zeidy I at 931). Therefore, if there is no danger of either multiple prosecutions of the accused or abuse of the ICC's limited resources where justice has already been done elsewhere, the mechanisms in place to prevent against such occurrences are inapplicable. Both articles of the Statute serve as safeguarding mechanisms for upholding primacy in national court systems where an investigation is underway or has already taken place; they were not designed to block prosecution by the ICC or another state in scenarios of state inaction. The Office of the Prosecutor has similarly recognized that where state inaction leads interested parties to withhold extraterritorial jurisdiction, there need not be a question of "unwillingness" or "inability." (OTP Policy Paper at 5).

33. If a state takes no action, it implicitly admits that it is either unwilling or unable to do so. It's decision must not be reconsidered at its whim; restrictions have been imposed to safeguard Court resources and judicial efficiency. The language of the Statute is precise, and the Court

must adhere to its ordinary meaning, as required by the Vienna Convention. The Court is only required to examine the policy and history behind the statute where the language is unclear or ambiguous. (Vienna Convention art. 31). Here, no such inquiry is necessary, since the language is unambiguous and precise. There is no need for the Court to waste resources by evaluating the State's judiciary absent a showing justifying that reassessment.

34. Furthermore, even if the Court were to proceed with an evaluation of the State's willingness and ability, it would be highly speculative and unreliable. Such an inquiry likely contravenes the drafter's intent to conserve Court resources by imposing procedural restrictions on challenges to admissibility, since there would be no tangible data for the Court to form its decision on deferral. The drafters provided particular criteria to form the basis of an evaluation where domestic investigations or proceedings are ongoing. Where there are insufficient facts for the Court to evaluate with respect to unwillingness and inability, the Court's inquiry into admissibility issues must end. To best adhere to its object and purpose, the Court should directly adhere to the explicit language of article 17 and admit the case.

3. The Court must decline the request for deferral because the facts demonstrate that Razachstan is unwilling and unable to try the case.

35. Finally, the Defense respectfully requests that the Chamber dismiss the motion for deferral on the grounds that the State of Razachstan is unwilling or unable to prosecute. Even if the Court were to find the challenge to admissibility procedurally appropriate, the petition lacks merit. First, Razachstan has not provided facts to sufficiently establish its willingness to prosecute within the guidelines provided by the Rome Statute. Second, the State has not adequately met its burden of proving its ability to try the case, given the ongoing collapse of Razachstan's judiciary and the resultant inability to access necessary evidence and testimony in the case.

i. The Chamber must dismiss the petition because Razachstan is unwilling to prosecute the case.

36. The principle of unwilling requires the Court to evaluate whether the State is likely to initiate proceedings with the intent to (1) shield the accused from criminal responsibility; (2) bring about unjustified delay in the proceedings in such a way that would be inconsistent with measures to bring about justice; and (3) a lack of impartiality or independence in the

proceedings. (Art. 17). While the ICC must be careful to respect the primacy of national courts by refraining from a qualitative evaluation of the national court system, Rule 51 of the Rules of Procedure and Evidence enables the Court to pass judgment on whether "internationally recognized norms and standards for independent and impartial prosecution and representations" will be met if the case is tried in national courts. (Rule 51). Therefore, the Chamber is empowered to evaluate information before it with respect to Razachstan's judicial system and its ability to protect the fundamental human rights of individuals involved during the trial. Essentially, the test requires an inquiry into the "good faith" of national authorities through "a set of combined criteria." (El Zeidy I at 900).

37. First, in order to evaluate whether Razachstan's alleged desire to try the case is a result of shielding, the State should be required to demonstrate the normal procedural and substantive proceedings to prove that the Fatari soldiers will be tried absent an "obvious departure from the normal legal procedures" of the state. (Holmes at 675). To the contrary, the Prime Minster's assurances regarding the death penalty are most likely outside of normal legislative procedures. Presumably, the executive would normally be unable to make such substantially legislative decisions. Although his assurance, taken in isolation, may not alone convince the Court that the trial would not be genuine, it should be sufficient to raise the Court's suspicions that procedures are abnormal and potentially improper.

38. Second, with respect to a consideration of independence and impartiality in the proceedings, the Court's suspicions should similarly be heightened. It seems that Razachstan's criminal justice system is far from meeting international criminal justice standards needed to satisfy the victims, advocates for the soldiers, and the Fatari government that a fair and impartial trial is possible in the country. (F. at 12). There is no evidence, for example, that "principles of due process recognized by international law" will be upheld in accordance with article 17(2). (Art. 17(2)). Moreover, there is no evidence that international standards are met with respect to detention center and prison conditions in Razachstan, presumption of innocence of the accused, access to council, etc.

39. Furthermore, given the attack on Razachstani sovereignty implicated by "liberators" committing crimes in the country, the Razachstani government would likely earn substantial political and public support upon the imprisonment of the Fatari soldiers, regardless of their guilt or innocence. In fact, the risk of Razachstani action outside of "principles of due process

recognized in international law" is evidenced by the initial desire of Razachstan's provisional government to summarily execute the soldiers. (Art. 17(2); F. at 8). Razachstan may decide to use the Fatari soldiers as an opportunity to demonstrate Razachstani authority and power as an independent nation. The Court should remain wary of this potential intent, especially since at least some of the leaders of the provisional government that initially called for immediate execution of the men are likely to be in a position to influence the trial.

40. While providing international support for the development of democracy in Razachstan is undoubtedly critical, the ICC is not limited in the methods it may employ to achieve that goal. Short of an extreme measure such as deferral, the Court has several more appropriate options it may employ to support Razachstan's nationhood. For example, it could work with the State through its outreach department to further reconciliation efforts throughout the trial rather than place the soldiers at unwarranted peril through deferral.

41. Third, considerations of unjustified delay must also give the Court cause for concern. Razachstan has delayed the filing factual support for its petition for several months after being notified that proceedings would begin at the ICC. New information shared with the Court right before trial without adequate justification for delay may serve as evidence of unwillingness under article 17(2)(b). The provisions of article 17 mirror article 19(5)'s duty upon a State to file a petition as early as possible. That same requirement is extended to all proceedings before the Court via article 86's requirement for States to act without delay. Absent a showing to satisfy the Court that Razachstan's withholding of facts for several months is a justified delay under article 17(2)(b), the Court must find a presumption against Razachstan's willingness to bring the accused to justice.

42. Article 17(2) of the Statute protects the international community from being bound to un-transparent decisions of states by presuming that such actions reflect a State's lack of genuine, willful desire to prosecute. Since the standard has yet to be ruled upon, any precedent the ICC creates in this case will set the bar for state practice during the future of the ICC. Allowing Razachstan to reverse its earlier decision without taking any action runs the risk of creating an "automatic deferral" system, which would certainly be "ripe with the potential for abuse." (Summers at 75). Specifically, it would allow States to "immunize" their nationals from prosecution simply by declaring that they would be taking action. (*Id.* at 76). Similar claims of shielding have been raised with respect to the situation in Sudan, where the Prosecutor has found

the State unwilling to prosecute. (Inquiry on Darfur at 6). As a result of this potential negative caselaw, the Court must adhere firmly to the Statute's purpose of promoting international prosecutions and dismiss Razachstan's petition.

ii. The Chamber must dismiss the petition because Razachstan is unable to try international criminal cases in its domestic courts.

43. Razachstan is neither able to sufficiently guarantee the stability of its judicial system, nor can it assure the connected adequacy of conditions and safeguards that would meet minimum international human rights standards to satisfy the Court. Therefore, the Chamber must deny the request for deferral.

44. To guide its inquiry, the Court is instructed by article 17(3) in its objective evaluation of inability. The text requires that the Court consider whether there has been a "total or substantial collapse" cause the national judicial system to be unable to adequately prosecute. The effects of such a collapse may include, but are not limited to, a judiciary's inability to obtain custody of the accused, necessary testimony or evidence. (Art. 17(3)).

45. At this time, Razachstan's government is newly elected and is still in a post-conflict period of transition. Although there is no evidence of a recent article 17(3) "partial or substantial collapse" of the judiciary since the filing of Razachstan's petition, the country has barely begun to repair itself. Given the years of conflict that have paralyzed Razachstan's judicial system, it is unlikely that the country will have access to well-trained experts required to analyze biological evidence involved in the case. Moreover, with no resolution of Marijani oppression, it is similarly unlikely that victims and witnesses be willing to place themselves in danger within their country by testifying during a domestic trial. At a minimum, then, at least some evidence and most, if not all, witnesses will not be accessible to Razachstani courts.

46. Granting Razachstan more time to prepare itself for this particular trial is also unlikely to change the circumstance of its judiciary, which was very recently classified by "shortcomings" that were "firmly in place." (F. at 12). Certainly, the state of "collapse" during the conflict is ongoing; the rebuilding effort that is now necessary will take years, not months. As was the case in the Democratic Republic of the Congo, there is no evidence of Razachstan having a "reasonable prospect for reviving or establishing a functioning judicial system within a reasonable time." (Arsanjani at 398). Razachstan is currently unable to provide the resources necessary to adequately investigate and try the case as is required under article 17(3), and

obliging it to provide such conditions is, in itself, an affront on the country's sovereignty given the inevitable revocation of jurisdiction under article 18(3), which is likely to take place within a mere matter of months if the Court defers.

47. Evidence already exists that should put the Court on notice that revocation may be necessary. With respect to the charges in the indictment, there has been no indication that the death penalty will not apply to crimes against humanity. The Prime Minister only verbally committed the state with respect to war crimes. (F. at 10). While his promise may be legally binding for the country, there is no guarantee he will be able to enforce his promise once the accused are transferred to Razachstan, especially given the immediate zeal that existed in the provisional government to execute the accused without granting them a trial. (F. at 8). Absent an affirmative showing demonstrating Razachstan's ability to fully try the case, the ICC must exercise the highest degree of caution. The death penalty is abhorrent in international law, and any risk of its application could seriously undermine the future of the Court.

48. Moreover, other conditions must also be taken into account. While the Court's inquiry must remain objective, it must still consider the availability of safeguards related to the judiciary. Also, the accused have a basic human right to a presumption of innocence under both article 66 of the Statute of the ICC and international law in general. (UDHR art. 11; ICCPR art. 14(2), ICTY Statute art 21(3), ICTR Statute art. 20(3)). In addition to capital sentence concerns, the Court must be convinced that equality of arms between the parties shall be granted to as to ensure the evaluation of all evidence available in the case. Where the accused are not adequately able to prepare a defense, their trial is likely to be outside of the framework established in article 17(3). Since conclusive judgment regarding Razachstan's ability to try the case is impossible absent tangible proceedings, the ICC must act conservatively and admit the case.

49. Furthermore, the International Criminal Court must act with caution so early in its own history. Although it may be tempting to grant States deference and assume good intentions, Razachstan has not demonstrated that it is worthy of the first deferral by the ICC. A deferral must only be employed if there is certainty that the State meets minimal requirements to effectuate justice. Moreover, in the event of a later revocation of deferral under article 18(3), the Office of the Prosecutor will most certainly become the object of undue pressure from many State Parties to the Statute, as claims of rogue prosecutorial discretion and unbalanced Court practices are raised. It is thus in the interests of the Court to act with caution. The fundamental

rights of the accused to a fair trial are non-derogable and must be safeguarded with vigilance; acting against that interest by granting even a temporary deferral could contravene the object and purpose of the Court itself.

50. If the Court acts in such a way that allows States greater freedom and flexibility than that which the drafters of the statute intended, it will seriously question the overall effectiveness of the Court and the future of international criminal prosecutions. This is especially true where, as would be probable in this case, deferral will likely be revoked at a later date when the national court system proves to be ineffectual. Although State's interests must be respected by the Court, so too must the rights of the accused; the closer a case gets to trial on the merits, the more likely the rights of the accused to a timely and efficient trial will outweigh a State's interest in deferral. Therefore, the Defense submits that the ICC must deny the request for deferral at this time.

V. PRAYER FOR RELIEF

51. The Defense respectfully requests that the International Criminal Court:

(a) Exercise jurisdiction over the Fatari soldiers;

(b) Find the case admissible before the Court; and,

(c) Deny Razachstan's petition for deferral.

CERTIFICATION

We hereby certify that the memorials for Santa Clara University School of Law are the products solely of the undersigned and that the undersigned have not receive any faculty or other assistance, other than that allowed for in the Rules, in connection with the preparation of these memorials.

X Jacqueline Binger Date: 9/12/06

X Sharron Fang Date: 9/12/06

X Jessica Tillson Date: 9/12/06