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Pace Law School

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

Memorial on Behalf of the Office of the Prosecutor

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QUESTIONS PRESENTED

- I. Whether the decision to cease prosecution of this case based on Razachstan's changes in circumstances is properly within the purview of prosecutorial discretion granted by the Rome Statute, or in the alternative, whether this case must be deferred pursuant to article 18 of the Rome Statute.
- II. Whether article 17 of the Rome Statute, regarding admissibility, and the interests of justice require deferral of this case to Razachstan, a State which has undergone significant changes in circumstances making it willing and now able to genuinely investigate and prosecute the Accused.

SUMMARY OF PLEADINGS

- IA. Under the Rome Statute of the International Criminal Court, the Office of the Prosecutor may exercises broad prosecutorial discretion to cease prosecution. This discretion is essential to the Prosecution's duty to protect and promote the principle of complementarity and is evinced in: articles 53(2), concerning ceasing prosecution based on insufficient basis; articles 18 and 19 which check prosecutorial discretion to assert jurisdiction, rather than discretion to defer to States; and article 54, regarding the duties and responsibilities of the Office of the Prosecutor. The exercise of discretion to cease prosecution where a case is inadmissible does not raise the concerns some drafters feared over the Prosecution's *proprio motu* power. Rather, discretion to defer enhances complementarity and safeguards states sovereignty.
- IB. In the alternative, should the Court find prosecutorial discretion insufficient to require deferral of this case, article 18 mandates referral where the Prosecution does not petition the Court for authorization to continue investigations. If the Court finds that article 18 provisions have been sufficiently triggered by Razachstan's late May challenge to the Court's jurisdiction, this case must be deferred as the Office of the Prosecutor will not apply for authorization pursuant to article 18(2).

- IIA. Deferral of this case in recognition of state primacy will promote the principle of complementarity. The Rome Statute's object and purpose to end impunity is best served when the Court respects state sovereignty and supports the rights and obligations of willing and able states to prosecute international crimes.
- IIB. Razachstan is both willing and able to genuinely investigate and prosecute the alleged crimes committed by the Fatari soldiers. This case is properly within the exception to admissibility provided in article 17(1)(a) where Razachstan has given assurances that the matter will be properly investigated and prosecuted, even if investigations or prosecutions have not yet ensued. Razachstan has always been willing within the meaning of the Statute as they have not demonstrated any bias in favor of shielding the Accused. The present ability of Razachstan's national judiciary makes this case no longer admissible. Further, the Accused's non-delegable rights of international law will be sufficiently protected by deferral.
- IIC. Deferral of this case serves the interests of justice. Allowing Razachstan to assume jurisdiction will help legitimize the State's new government and in turn, benefit the Victims. A trial in Razachstan facilitated by national representatives against the Marijanis' oppressors will signify a break from the past regime. Razachstani national courts will also be able to try the Fatari soldiers for greater potential crimes whereas the International Criminal Court is severely limited by temporal jurisdiction.
- IID. In the event of deferral, the Statute provides sufficient safeguards to ensure that justice is served. The Office of the Prosecutor may exercise meaningful oversight of the Razachstani trial and reassert jurisdiction if the courts prove unwilling or unable. Additionally, the Court may cooperate with Razachstan by transferring all evidence and documents discovered in investigations in order to expedite the Accused's trial.

STATEMENT OF FACTS

1. In February 2002, after six years of occupation, the international community reacted to the brutal and oppressive nature of the Quraci occupation of Razachstan, a South East Asian country. (F. at 1, 2). Under a Security Council Chapter 7 resolution, the United Nations sent its Peacekeepers to keep peace during negotiations for the withdrawal of Quraci troops. (F. at 2). The U.N. Peacekeepers lead an international collation of troops including a 27 soldier regiment from Fatar, Qurac's neighbor, who is a State Party to the Rome Statute. (F. at 2, 3; E. at 2).
2. In November 2003, the Fatari troops broke away from the U.N. Peacekeepers and marched into the Buchari Province which was inhabited almost exclusively by Marijanis. (F. at 3). The Marijani are at the bottom of the Razachstani social caste system and although they had been historically discriminated against, the Marijani suffered exponentially during the Quraci occupation, the victims of 1.5 million violent crimes annually. (F. at 1, 3). For over one year, the Fatari soldiers killed, raped, mutilated, and tortured members of a Marijani village. (F. at 7).
3. In December 2004, the U.N. coalition liberated the operation base of the Quraci forces in Razachstan, Qurac ordered a cease fire and surrendered, and the Razachstani provisional government was established. (F. at 4, 5). Under a U.N. negotiated accord, the provisional government was to govern until democratic elections were held. (F. at 5). In January 2005, the Rome Statute entered into force for Razachstan and in February 2005, the U.N. coalition discovered the Fatari soldiers in the Marijani village. (F. at 6, 7; E at 3).
4. Debate in the Razachstani provisional government ensued over the crimes committed by the Fatari soldiers. (F. at 8). Some members wanted the soldiers executed immediately whereas other members did not consider the soldiers' crimes so heinous as to warrant execution. (*Id.*). However, all members expressed the view that the soldiers should be held accountable. After continued debate, the Razachstani provisional government believed it would be quite some time before they could properly try the Fatari soldiers. (F. at 8). In April 2005, Razachstan turned the Fatari soldiers over to the International Criminal Court, initiating a State-referral. (*Id.*; E. at 1).
5. After an initial investigation, the International Criminal Court charged the Fatari soldiers with crimes against humanity and war crimes in May 2005. (F. at 9). That same month, Razachstan held democratic elections and representatives of the Razachstani government filed a petition challenging the Court's jurisdiction. (F. at 1, 9). In early July 2005, International

Criminal Court prosecutors met with the newly elected Razachstani Prime Minister Faraz who requested the return of the Fatari soldiers. (F. at 10).

6. Prime Minister Faraz advised the Prosecution that Razachstan's criminal court could now properly try the Fatari soldiers for war crimes and they would not be executed if they were found guilty. (*Id.*). The Victims, represented by the Marijani Liberation Front, and the Fatari soldiers appeared before the Court challenging the Razachstan's petition. (F. at 11, 12). The Victims argued that because the Marijanis are a discriminated against minority, they did not believe they would receive justice in a Razachstani court. (F. at 11). The Fatari soldiers contended that defendants' rights in Razachstan prior to occupation were below international standards and the soldiers expressed doubt whether the death penalty would not be imposed against them. (F. at 12). The Office of the Prosecutor is not challenging Razachstan's petition. (E. at 8).

PLEADINGS

7. The sovereign nation of Razachstan has brought the challenge currently before this Court relating to jurisdiction and admissibility of this case pursuant to article 19(2) of the Rome Statute. The Prosecution respectfully submits that it is within the Prosecution's discretion granted by the Rome Statute to have this matter returned to Razachstan.¹ The circumstances in Razachstan support that this case is no longer admissible and deferral would be in the interests of justice. As such, the Prosecution hereby files this memorial in support of Razachstan's petition, also satisfying the Prosecution's duty set forth in Rule 106 of the Rules of Procedure and Evidence to provide notice regarding a decision not to prosecute.

I. THIS CASE SHOULD BE DEFERRED TO THE NATIONAL COURTS OF RAZACHSTAN WHERE THE OFFICE OF THE PROSECUTOR HAS EXERCISED DISCRETION TO CEASE PROSECUTION.

8. The Office of the Prosecutor (hereinafter "OTP") is an independent and separate organ of the Court, responsible conducting investigations and prosecutions. (Art. 42(1)). As such, the OTP operates autonomously over decisions to proceed or foreclose with full investigations, and the manner in which to conduct investigations and prosecutions. (Bergsmo at 630). The continuing obligation of the OTP to protect complementarity exemplifies broad prosecutorial

¹ At the time this situation was referred to the International Criminal Court by Razachstan in April 2005, it was the Prosecution's understanding that jurisdiction was then proper. However, in light of the new information provided and the changes in circumstances, the principle of complementarity dictates that the Prosecution not pursue this case for the reasons stated.

discretion to cease prosecution consistent with the intended role of the OTP. In the instant case, the OTP exercises this discretion for deferment to Razachstan.

A. Decisions not to prosecute are properly within the discretion of the OTP.

9. As with domestic systems, “[a]t the core of any notion of prosecutorial discretion lies (*sic*) the power to decide whether or not to investigate and prosecute.” (Bergsmo at 702). The odious charges brought against the Fatari soldiers illustrate that the vast majority of crimes committed in the international context are extremely heinous. Unfortunately, the International Criminal Court (hereinafter “ICC” or “Court”) cannot pursue all heinous crimes. (*See* Danner at 521). The OTP must decide which cases should be prosecuted by the ICC based on the express criteria promulgated by the Statute and in light of its object and purpose set forth in the preamble to “put an end to impunity.” (Preamble, para. 5; *see* Vienna, art. 31).

1. Prosecutorial discretion to cease prosecution protects complementarity.

10. Complementarity, the “cornerstone” of the Rome Statute, must be considered by the OTP when deciding to prosecute. (*See* art. 53(2)(b); Williams at 384). Complementarity recognizes that States have the first right and responsibility to prosecute serious crimes of international concern. Under this principle, the ICC may exercise jurisdiction only where national systems are genuinely unwilling or unable to do so. (Art. 17; *see infra* section II(B)). To implement complementarity, the OTP must respect and adhere to the Statute’s admissibility criteria set forth in article 17. (El Zeidy at 897-98). Thus, the OTP’s objective is not to “compete” with States for jurisdiction, but to help end impunity by ensuring that the most serious international crimes do not go unpunished. (Informal Paper at 3). The OTP is empowered to raise the issue of admissibility, *sua sponte*, and in order for complementarity to be properly protected, this duty must be on-going and complementarity must be considered at every point the role of the Court and national authorities coincide. Thus, the Statute grants the OTP broad discretion to cease prosecution or defer cases throughout various stages of investigation and prosecution.

i. Article 53(2) grants the OTP discretion to determine whether prosecution against the Fatari soliders should cease.

11. In deciding to defer this case, the OTP is acting within the purview discretion granted explicitly in article 53 of the Statute. Article 53(2) allocates the responsibility of determining whether “there is not a sufficient basis for a prosecution” to the OTP. Upon investigation, the OTP may conclude not to prosecute based on certain criteria, including whether the case is inadmissible pursuant to article 17 or whether prosecution would not be in the interests of justice.

(Art. 53(2)(b), (c)). Pursuant to paragraph 3, the Court may “review a decision of the Prosecutor not to proceed,” but the Court cannot force the OTP to continue an investigation or prosecution. (Art. 53(3)(a), (b)). Moreover, article 53(4) permits the OTP to “*at any time*, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.” (Art. 53(4) (emphasis added)). The OTP’s responsibilities expressed in article 53 create an obligation to review and re-evaluate complementarity to ensure that the case is admissible and in the interests of justice. The terms of article 53 also demonstrate that the OTP has wide discretion to cease prosecution. Based on this continuing duty, re-evaluation of this case demonstrates that it is no longer admissible where a previously unable State is now able to genuinely investigate and prosecute crimes for which it has jurisdiction. Thus, ceasing prosecution and deferring this case is consistent with the OTP’s discretion.

ii. The procedural measures in articles 18 and 19 counterbalance prosecutorial discretion when the OTP pursues prosecution rather than deferral.

12. While the Statute provides mechanisms for challenging an affirmative assertion of ICC jurisdiction, these measures do not apply when the OTP chooses to cease prosecution. Articles 18 and 19 allow parties to challenge OTP prosecution as safeguards protecting state sovereignty. (Schabas I at 124). These mechanisms operate under the presumption that the OTP is seeking to pursue prosecution and do not apply to prosecutorial decisions *not* to prosecute. This is consistent with complementarity and the Statute’s presumption against ICC jurisdiction because there is no opportunity to offend state primacy when the OTP decides *not* to prosecute. Nowhere expressed in articles 18 or 19, may a party contest the decision of the OTP to defer a case. The lack of mechanisms to contest deferral decisions illustrates broad prosecutorial discretion to defer cases consistent with complementarity. These mechanisms are available throughout the stages of investigation and prosecution as well as under significant changes of circumstances; further demonstrating the continuing nature of the Statute’s complementarity regime emphasizing national jurisdiction over ICC jurisdiction. (*See* El Zeidy at 920). Thus, the OTP’s determination that the instant case should be deferred warrants recognition by the Court and articles 18 and 19 do not provide sufficient measures for parties to challenge this discretion.

iii. The duties imposed upon the OTP in article 54 support that prosecution may cease at any stage the OTP determines the case inadmissible.

13. When the OTP discovers new information during investigation implicating the viability of a case, the OTP may cease prosecution. A decision by the OTP to prosecute does not end the

investigation, but initiates the on-going duty to investigate the matter through trial. Even during the course of trial, the OTP will review and re-evaluate the evidence gathered during the investigation. The obligation imposed in article 54(1)(a), that the OTP investigate all facts and evidence, both incriminating and exonerating, reveals the necessity of prosecutorial discretion to cease prosecution. (*See* Danner at 519). Given this mandate and assuming *arguendo*, that the OTP discovered evidence exonerating the Fatari soldiers, surely the OTP would be required to cease prosecution regardless of the stage of the case. Likewise, when new information adducing evidence of inadmissibility arises, the OTP must cease prosecution before the ICC.

2. Exercising prosecutorial discretion to cease prosecution where the case is inadmissible is consistent with the role of the OTP contemplated by the drafters of the Statute.

14. A decision by the OTP to defer a case where a State asserts primacy is the embodiment of complementarity and a form of prosecutorial discretion not contested by the drafters of the Statute. The mandates of complementarity require that the Court find a case inadmissible when it is being appropriately addressed by a State. (Schabas I at 85). In light of this principle and considering the object and purpose of the Statute to put an end to impunity, the OTP should to actively encourage and remind States of their responsibilities to effectively exercise criminal jurisdiction over those responsible for international crimes. (*See* Informal Paper at 5; preamble, para. 6).

15. Although significant debate over the *ex officio* powers of the OTP to initiate investigations *proprio motu* ensued during drafting of the Statute (Art. 15; Williams at 384), the discretion of the OTP to cease prosecution does not raise similar concerns. Where drafters feared that the OTP's *proprio motu* power wielded potential for over-reaching at the expense of state sovereignty (Bergsmo at 359-363; Danner at 513), discretion to defer, on the other hand, enhances state sovereignty. In this case, the OTP's recognition of Razachstan's primacy and the discretion to defer are themselves safeguards to state sovereignty.

16. Acknowledging state primacy whenever applicable will also strengthen the OTP's influence within the international community. The experiences of the prosecutors for the ad hoc tribunals of the ICTY and ICTR provide persuasive evidence that the ICC OTP will depend heavily on state support to effectively discharge mandated duties. (Danner at 528-29, 531; Cogan at 135). During this early stage of development, it is particularly important for the Court to demonstrate its willingness to affirm the principle of complementarity by respecting state

primacy whenever possible. The OTP's decision to defer this case, therefore, promotes state sovereignty in a manner likely to acquire respect for the Court among States Parties while allowing the OTP to fulfill its duties.

B. In the alternative, should the Court not yield to the OTP's discretion to cease prosecution, deferral of this case to Razachstan is nevertheless mandatory pursuant to article 18.

17. If the Court finds that prosecutorial discretion is an insufficient mechanism for deferral, the OTP further submits that this case must be deferred pursuant to article 18. In the instant case, Razachstan has arguably triggered article 18² so that one of two things must occur: (1) the OTP must defer to the State, or (2) the OTP may apply to the Pre-Trial Chamber for authorization to continue investigating. (Art. 18(2)). The provision does not expressly require the OTP to take action within a specified time. As the OTP will not apply for authorization, this hearing is premature and deferral is mandatory. The privilege of determining the forum for prosecution is saved to States, based on their willingness and ability to prosecute, and the OTP pursuant to prosecutorial discretion. When these privileges converge and a dispute arises between the State and OTP, it is then the province of this Court to dictate the most appropriate forum consistent with complementarity. Additionally, article 18(3) requires review after six months or at any time if there are significant changes of circumstances to ensure that the Accused are properly tried. Thus, deferral of this case is appropriate as the OTP does not contest Razachstan's primacy.

II. DEFERRING THIS CASE TO RAZACHSTAN IS CONSISTENT WITH THE PRINCIPLE OF COMPLEMENTARITY AND BEST SERVES THE INTERESTS OF JUSTICE.

18. Through complementarity, the Statute anticipates that national courts will bear a greater portion of the burden to prosecute international crimes, with the ICC exercising jurisdiction only where national courts are unwilling or unable. (Art. 17; Broomhall at 115). To give effect to this principle, the Court should consistently heed the admissibility criteria set forth in article 17, reviewing it at every relevant juncture and considering the interests of justice. In the instant case, Razachstan has revealed that it is now able to genuinely investigate and prosecute the Fatari

² This case is arguably still subject to an article 18 determination if the Court finds the following: (1) the charging document issued against the Fatari soldiers in May 2005 suffices as the OTP's notice to initiate investigation as required under article 18(1) and rule 52; and (2) the "petition" filed by the representatives of the Razachstani government in late May 2005 was intended to act as a challenge to admissibility pursuant to article 18(2). (Compromis para 9 and 10; Article 18(1) and (2); Rule 52; Rule 53).

soldiers for the offenses allegedly committed against their nationals. Deferral under these circumstances would serve complementarity and the interests of justice.

A. Complementarity and the object and purpose of the Statute are best served by State prosecutions.

19. By prompting States Parties to carry out rigorous national proceedings, the principle of complementarity can magnify the effectiveness of the ICC beyond what it could achieve through its own prosecutions. (Informal Paper at 4). In his Ceremony for the Solemn Undertaking of the Chief Prosecutor, Mr. Luis Moreno-Ocampo stated:

As a consequence of complementarity, the number of cases that reach the Court should not be a measure [of] its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.

(Chief Prosecutor Ceremony). Encouraging other fora to advance the object and purpose of the Statute through consistent enforcement of international law will reduce the need for the ICC to exert its jurisdiction. (Informal Paper at 5). The ICC was created with the intent that it would be a Court of last resort and was not intended to replace domestic legal systems. “Indeed, the aspiration of its drafters will be fulfilled just as surely if national systems carry out legitimate investigations and prosecutions on their own.” (Clark at 389).

B. Given both Razachstan’s willingness and ability to genuinely investigate and prosecute this matter, exercising ICC jurisdiction over the Fatari soldiers would violate the principle of complementarity.

20. The principle of complementarity permits the ICC to exert jurisdiction under exceptional circumstances – where there is no prospect that the alleged perpetrators will be duly tried in national courts. (Schabas I at 67; El Zeidy at 892-93). Article 17 limits the Court’s jurisdiction in favor of national judicial systems but provides exceptions to State primacy. (Holmes I at 668). Article 17(1)(a) specifies that where a State with jurisdiction is investigating or prosecuting a case, the ICC must defer to national proceedings, “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.” Accordingly, the ICC prosecution of the Fatari soldiers must yield to Razachstan, a State with jurisdiction who is willing and able to investigate and prosecute.

1. Razachstan, a State with jurisdiction, need not have initiated or completed a full investigation to contest admissibility.

21. Razachstan’s adjudicatory jurisdiction by virtue of territoriality is uncontested. (*See* Schachter at 255). Yet, the Accused contest deferral by arguing that, *inter alia*, a completed or

ongoing investigation or prosecution is a prerequisite to deferral and Razachstan has not provided evidence that affirmative steps have been taken to this end. Reading article 17(1)(a) in the context of the Statute and in the light of its object and purpose (Vienna, art. 31) supports deferral where a State is willing and able to begin investigations or prosecutions *after* the deferral. Such deferrals ensure that the ICC will not become seized of cases where States were willing to assume responsibility to punish transgressors of international law.

22. First, it is impractical to mandate that all States with jurisdiction begin investigations or prosecutions prior to deferral. This is especially true when pertinent evidence and the defendants themselves remain at The Hague, making it difficult, if not impossible, to conduct meaningful investigations in distant countries. Second, although Razachstan has not provided affirmative proof that an investigation or prosecution is already underway, their efforts thus far evince a commitment to investigate and prosecute. Razachstan initially turned over the Accused when it realized it could not immediately try the soldiers properly. (*See* F. at 8). Razachstan notified the ICC after political progress was made and a re-evaluation of the courts revealed that the Accused could be properly tried. (F. at 10). Third, the Statute expressly provides safeguards in the event Razachstan does not fulfill this obligation, such as allowing the OTP to resume prosecution. (Art. 19(11); *see infra* Part II(D)). Finally, permitting a State to seek deferral before assuming investigations or prosecutions saves resources and promotes communication and cooperation between States and the ICC. Requiring simultaneous investigations could severely waste the limited resources of national judicial systems as well as discourage States from attempting to fulfilling their obligation to prosecute since investigations do not necessarily assure deferral.

2. Razachstan has always been willing genuinely to carry out an investigation and prosecution against the Fatari soldiers.

23. With no intention of shielding the Accused from accountability, Razachstan is “willing” within the meaning of article 17(2). The “willingness” exception elaborated in article 17(2) highlights that national courts have the primary responsibility to prosecute international crimes and essentially tests the good faith of national authorities. A State is “unwilling” within the meaning of article 17(2), if a national decision is made and proceedings are undertaken for the purpose of shielding the defendant from criminal responsibility. (Policy Paper at 4). Thus, a case is admissible and a State “unwilling” where national proceedings are “inconsistent with an intent” to prosecute or show a “purpose of shielding” *and* fall short of “principles of due process

recognized by international law.” (Art. 17(2)(a)-(c); Broomhall at 89). By these terms, bias in favor of prosecution is not a factor in determining “unwillingness.” (Heller at 6).

24. Razachstan’s consistent “willingness” is illustrated by the unanimity among the members of its provisional government to hold the Fatari troops appropriately accountable and the assurances given by democratically elected Prime Minister Faraz. (F. at 8, 10). Although the provisional government was divided with regard to potential punishment – whether or not the soldiers should be subject to execution – there was general accord among all members that the Fatari soldiers should be held accountable for their crimes against the Marijanis. (F. at 8). The Razachstanti government has never evinced bias in favor of the soldiers or intent to shield them.

25. Nor is there reason to believe that the current government would face procedural problems inconsistent with bringing the accused to justice, satisfying the “independent and impartial” criterion provided in article 17(2)(c). This provision was added to protect against situations where a State does not intend to shield the accused, but other individuals may attempt to cause a mistrial, taint evidence, or otherwise ensure that the accused is found *not* guilty. (Holmes II at 50-51; El Zeidy at 901-02). These concerns might be more germane if the Accused were Razachstani police or military, subject to their own courts or special disciplinary procedures rather than Fatari troops. In this case, there is no reason to believe that the general public or any Razachstani authorities would attempt to shield the Accused given the otherwise unwavering willingness to hold them accountable since they were first discovered.

3. Razachstan is now able genuinely to carry out an investigation and prosecution against the Fatari soldiers.

26. Razachstan is now “able” within the meaning of article 17(3) in light of the significant changes of circumstances bearing on the ability to investigate and prosecute the Accused. According to the language of the Article 17(3), the Court may find a State “unable” if a collapse or unavailability of the national judicial system prevents the State from obtaining the accused or necessary evidence and testimony, or otherwise carrying out its proceedings. This provision addresses situations where the lack of a central government or a state of chaos causes the collapse of a national system preventing the State from discharging its duty to prosecute international crimes. (Policy Paper at 4). Since Razachstan’s liberation in December 2004, the State as undergone significant changes, including holding democratic elections and the rehabilitation of the criminal court system. Considering Razachstan’s desire to assert jurisdiction over this case, Razachstan’s current situation should drive the Court’s analysis of admissibility.

27. While the OTP concedes that Razachstan was initially “unable” at the time of the State-referral in April 2005, the OTP respectfully submits that Razachstan is now able due to substantial changes in circumstances. The Statute’s express provision in article 18(7), allowing a State to challenge a ruling of admissibility where there have been significant changes in circumstances, illustrate that the drafters contemplated consideration of such changes. When a willing but unable State undergoes changes in circumstances and subsequently attempts to assert jurisdiction, the Court may be less suspicious than if the State had previously been unwilling.

28. The Razachstani government has already demonstrated great strides in holding democratic elections and establishing a permanent government within five months of the Quraci surrender. (F. at 1, 4 and 10). These political successes give little support to the Accused’s claims that the Court should assume Razachstan’s criminal court is ill-prepared to conduct this trial. Razachstan’s post-conflict setting alone does not denote that the physical infrastructure of its judicial system is still damaged or substantially collapsed, nor does it indicate a debilitating lack of judges, prosecutors, or other court personnel. (Heller at 9; *see also* Informal Paper at 8; El Zeidy at 903). On the contrary, the Razachstani government’s current status as a functioning democracy shows that it is exercising effective control over its territory. (Holmes II at 48-49). The Uganda matter, currently before this Court, is demonstrative that a State may have a functioning and able judiciary notwithstanding years of conflict. After referral of the situation regarding the Lord’s Resistance Army (hereinafter “LRA”), Uganda was deemed to have a competent judicial system. (Akhavan at 411). However, the case was admissible because Uganda was “unable” to prosecute leaders of the LRA due to political policies granting amnesty and an inability to arrest and investigate perpetrators hiding in Sudan. (Akhavan at 411-414).

29. This case is also notably different from another case currently before this Court where the Democratic Republic of the Congo (hereinafter “DRC”) was deemed “unable.” In the matter concerning the DRC, there is general recognition that the DRC lacks any internal structure of government. (Kaul at 398). Some scholars have opined that “even with massive outside help and even if it proves possible to settle the civil war, the national judicial system of the DRC will probably be unable to intervene and prosecute the gravest crimes that have occurred in the course of the last seven years.” (Kaul at 397). In contrast, Razachstan has a competent politic. Unlike the DRC, Razachstan’s democratic elections five months after liberation demonstrate that the infrastructure did not completely collapse from war.

30. Finally, the Victims contend that Prime Minister Faraz's statement regarding the Razachstani criminal court's ability to properly try the Fatari soldiers specifically for *war crimes* (F. at 10), equates to an assertion that the courts would be unable to try for crimes against humanity. This argument is not persuasive. The judicial mechanisms required for trying war crimes are the same for trying crimes against humanity. The changes to Razachstan's judicial system which now enable it to properly try the Accused, make Razachstan "able" within the meaning of article 17(3) sufficient for deferral.

4. Deferring this matter to Razachstan complies with the non-delegable rights of international law owed to the Accused.

31. Prime Minister Faraz, representative of the Razachstani government, made a verbal commitment that in the event this case is deferred and the Fatari soldiers are found guilty, the soldiers would not be subject to execution. (F. at 10). Notwithstanding this verbal commitment, Defendants contend that there are insufficient assurances that they would not be put to death. This claim is inconsistent with principles of customary international law which dictate that trust and good faith are inherent in international cooperation. Based on the assurances of Prime Minister Faraz, Razachstan is entitled to try the Accused subject to those commitments.

32. Prime Minister Faraz's verbal commitment amounts to a legal obligation binding on Razachstan sufficient to insure enforcement. The International Court of Justice, a sister institution, ruled in *Nuclear Tests*, that verbal declarations by the President of the French Republic were deemed acts of the French State, legally requiring France to follow a course of conduct consistent with those declarations. Prime Minister Faraz's verbal commitments impose the same obligation on the State of Razachstan and where no facts to the contrary are presented, this Court must grant Razachstan the opportunity to fulfill those obligations.

33. As a newly established government, Razachstan's reputation would be seriously undermined by imposing the death penalty notwithstanding the Prime Minister's assurance. (*See Soering v. United Kingdom*, para. 116 (reasoning that the U.S. government would use its influence to prevent execution where a U.S. county attorney assured the United Kingdom that he would not seek the death penalty, so as not to undermine the relationship between the U.S. and the United Kingdom)). Additionally, the government has already demonstrated good faith by initially turning the Accused over to the ICC for proper adjudication.

34. The Accused contend that Prime Minister Faraz's declaration does not protect them from execution for crimes against humanity. However, in line with the wisdom of the ICJ, the ICC

should recognize that “[o]ne of the basic principles governing the creation and performance of legal obligations . . . is the principle of good faith, [and that] trust and confidences are inherent in international co-operation.” (Nuclear Tests, para. 49). Likewise, an assurance that the soldiers would not be executed if convicted of crimes against humanity is in accordance with the commitment provided by Prime Minister Faraz.

C. Deferral of this case would best serve the interests of justice for Razachstan, the victims and the international community as a whole.

35. The appropriate relationship between national and international jurisdiction is governed by a delicate balance between national interests and the interests of the international community. (El Zeidy at 889). Article 53(2)(c) requires the OTP to consider “all the circumstances” in determining whether prosecution would be “in the interests of justice.” Thus, the OTP must “take into account the broader context within which international criminal justice operates” (Kaul at 416) and all circumstances consistent with the object and purpose of Statute. (Human Rights Watch at 2 n.2). However, even if the Court does not defer to the OTP’s decision of deferral, the Court should nevertheless consider the interests of justice when reviewing complementarity.

36. There are a number of advantages to holding trials in and by the State where alleged crimes are committed. For example, the location of the hybrid tribunal in Sierra Leone has been lauded for its many advantages, including reduction of costs, ease of facilities, collection and preservation of evidence, and interaction with witnesses. (Jalloh at 107). Locating a trial domestically gives the impacted community an opportunity to closely follow the trial and other activities of the tribunal. (Jalloh at 108). Local trials may also promote social balance in a transitional situation. (*See* Broomhall at 84). In contrast, the seat of the ICTY, established at The Hague in light of continuing ethnic tensions within the region, is far removed from the scene of atrocities and staffed by international judges and staff. (Dickinson at 302). It has been recognized that the ICTY’s lack of connection to local populations has been problematic – where the effected population is far removed from the trial, they may be ill-informed about the Court’s work and may become suspicious of its motives and results. (Dickinson at 302). Similar criticisms have been raised against the ICTR, which is situated in Tanzania. As illustrated by this Court’s predecessors, the ICC would substantially contribute to the international system of justice by encouraging regular and effective enforcement in domestic judicial systems. (Broomhall at 84).

1. Deferral would serve the interests of justice for Razachstan where it would help legitimize the new government and give the people a sense of independence.

37. It is poignant for Razachstan, a newly independent State, to assume jurisdiction over this case where the perpetrators allegedly committed a great affront to their national sovereignty. The perceived legitimacy of domestic judicial institutions in post-conflict situations is often subject to question. (Dickinson at 304). Thus, it is pressing for the Razachstani judicial system to be supported and separated from the former oppressive regime. Deferral by the ICC will strengthen the legitimacy of the new government which is attempting to establish its place in the international community; whereas, denying its primacy undercuts this pillar of legitimacy, particularly where the new government has taken great efforts to ensure a sufficient judicial system to properly try the perpetrators.

38. The work of the ICC at The Hague is physically remote from the South East Asian country of Razachstan as well as culturally distinct. Generally, the vast majority of the Razachstani public will be physically and culturally detached from its proceedings.³ The judges and personnel will not be drawn from the local Razachstani population, making domestic legal professionals less likely to apply, interpret and internalize the law developed in the case. (Dickinson at 305). It would likely be more meaningful to the people of Razachstan to see their own judges adjudicating and their own prosecutors prosecuting the crimes committed against their own people.

2. Deferral would serve the interests of justice for the Victims by allowing the new government to affirmatively act in their benefit.

39. Notwithstanding the victims' challenge to Razachstan's petition, deferral of this case would serve the interests of the victims both systemically and individually. It is uncontested that the Marijani, at the bottom of the caste system, were brutally attacked by the Razachstani prior to occupation. (F. at 1). Deferring the case to Razachstan permits the new government to publicize that persecution against the Marijani will no longer be tolerated. This message would likely be more effective coming from the internal leaders of the country than international ICC figures

³ Although article 3(3) and rule 101(1) provide that the Court may sit somewhere other than the seat at The Hague whenever it considers it desirable, moving the physical location of the hearing does not address the qualitative benefits to the Razachstani people to have this case heard in their domestic courts conducted by their nationals. Also, the working languages of the Court are French and English. (Article 50(2)). Although Rule 42 provides that "[t]he Court shall arrange for translation and interpretation services necessary to ensure the implementation of its obligations under the Statute and the Rules," these accommodations would not be as far-reaching and meaningful as proceedings conducted by people who speak one's natural tongue.

whose seat is located on the other side of the world. A public trial held in Razachstan by Razachstani nationals against Marijani oppressors would serve as a formal acknowledgement of past transgressions and a break from the past regime. (*See van Zyl at 659*). This form of national acknowledgment may serve as insurance against future abuses and have a strong long-term impact on Marijani political realities. (*See van Zyl at 659*). The case may also foster acceptance of the Marijani and help disseminate a positive norm of equality among the general population than if the case were tried by foreign international lawyers and judges. (*See Dickinson at 308*).

40. Justice for the Marijani also entails having their personal sufferings publicly recognized, uncovering which perpetrators were responsible for which crimes, and hearing explanations of why the crimes were committed. (Human Rights Watch at 19; van Zyl at 659). Confronting their oppressors and finding support within the Razachstani judicial system can help restore the Marijani dignity and heal the nation as a whole. Thus, Razachstan's prosecution of the perpetrators, even if not coterminous with the victims' interests or partially motivated by a desire to address the affront to national sovereignty, will effectually benefit the interests of the victims.

3. Deferral serves the best interests of justice for the international community because Razachstan's more expansive jurisdiction provides potential for greater justice.

41. The international community would also benefit from deferral of this case by reinforcing complementarity and providing wider temporal jurisdiction than that which could be provided in the ICC. Pursuant to article 11, the ICC's temporal jurisdiction is limited to crimes committed after the Statute's entry into force for Razachstan, 1 January 2005. (F. at 6; E. at 3). Thus, any offense that took place in the Buchari province from November 2003 until the Accused were discovered in January 2005 would be outside the ICC's jurisdiction and the ICC could only try the Fatari soldiers for any offense which might have occurred within a one month period between January and February 2005.

42. With respect to temporal jurisdiction, the charged crimes are discrete events, not continuous crimes. Although it is unclear on what dates the crimes were committed, we can presume that most damages occurred early on during the occupation; or at a minimum, during the first 15 months rather than the last month. The Accused posit that simply because the OTP was willing to proceed with prosecution when it believed the ICC was the only viable jurisdiction, the ICC is still the most appropriate forum. However, justice is best served if the Fatari soldiers are held to accountable for all alleged crimes occurring within the entire 16 months of occupation, as the Razachstani national court may do. It is in the interests of justice

that complementarity is preserved whenever possible. The mere fact that this case was admissible at one point should not dictate that the case must remain with the ICC. The international community as a whole benefits by having domestic trials implement the norms and values articulated by the jurisprudence of the ICC.

D. There are sufficient safeguards and recourse available to the Court and OTP to ensure that the object and purpose of the Statute is fulfilled, warranting deferral.

43. Recognizing that the Court is in a unique position because this matter has advanced to the stage of a case, the Statute provides sufficient safeguards to ensure that the Defendants do not escape with impunity and do not suffer undue delays resulting from deferral. These provisions allow the OTP to conduct meaningful monitoring of the case and permit intervention where necessary. First, pursuant to article 19(11), the OTP may request information from Razachstan regarding the proceedings and may resume investigation. Based on the OTP's request, as a State Party, Razachstan has a duty to cooperate under article 86 with good faith and without delay. (Hall at 418). Notwithstanding the prior deferral, article 19(11) does not put a time limit on the OTP to either request information or notify the State that an ICC investigation will resume. Second, article 53(4) allows the OTP to reconsider initiating an investigation or prosecution, at any time, based on new facts or information. Finally, if Razachstan proves willing and able but delays ensue, article 93(10) permits the Court to provide assistance to Razachstan in conducting their investigation and trial. Given the fact that the case has proceeded at the ICC thus far, a majority of the evidence has been compiled at The Hague. This information may be handed over to Razachstan to help facilitate a smooth transition of jurisdiction. These various safeguards allow the Court and OTP to monitor the national proceedings while not infringing upon State sovereignty, thus serving the interests of all parties and complementarity.

PRAYER FOR RELIEF

44. For the foregoing reasons, the Prosecution respectfully requests that the International Criminal Court defer this matter to the national courts of Razachstan for proper adjudication and declare as follows:

- 1) the OTP is within the discretion granted by the Rome Statute to cease prosecution where new information indicating that the case is no longer admissible has been discovered;
- 2) the principle of complementarity mandates deferral of this case based on significant changes in circumstances enabling Razachstan to genuinely investigate and prosecute the Accused and doing so is in the interests of justice.

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