

**Cour
Pénale
Internationale**

**International
Criminal
Court**

Original: English

No.: ICC-01/06

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 the Victims

Santa Clara University School of Law

Office of the Prosecutor
Ms. Sharron Fang

Counsel for Defense
Ms. Jessica Tillson

Legal Representation of Victims
Ms. Jacqueline Binger

TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
LIST OF AUTHORITIES.....	iv
STATEMENT OF FACTS.....	1
PLEADINGS.....	3
I. VICTIM PARTICIPATION IS ALLOWED AT AN ICC HEARING UNDER ARTICLE 19 OF THE ROME STATUTE.....	3
A. Article 19 of the Statute gives victims the right to participate in proceedings on jurisdiction and admissibility.....	3
B. The Marijani meet all the criteria of victims under rule 85 of the Rules of Procedure and Evidence.....	5
i. The Marijani are all natural persons.....	5
ii. The Marijani have individually suffered harm.....	5
iii. The crimes committed are within the jurisdiction of the Court.....	6
iv. The harm suffered by the victims was caused by the crimes that are within the jurisdiction of the Court.....	7
C. The Marijani Liberation Front is allowed to participate in the proceedings as the representative of the individually harmed victims.....	7
II. THE INTEREST OF THE VICTIMS IS BEST SERVED BY THE CASE REMAINING AT THE ICC.....	7
A. The case is admissible at the ICC because none of the elements of Article 17 are satisfied.....	8
i. There is no evidence that an investigation is ongoing in Razachstan.....	8
ii. Razachstan is unwilling genuinely to try the Accused for the crimes committed.....	8
iii. Razachstan is unable genuinely to try the Accused for the crimes committed.....	11
B. The Prosecution and the Court have a duty to look after the interest of the victims under Article 54 of the Statute and Rule 86 of the Rules of Procedure	13

PRAYER FOR RELIEF.....15
CERTIFICATION.....16

LIST OF AUTHORITIES

INTERNATIONAL CRIMINAL COURT DOCUMENTS

Rome Statute of the International Criminal Court, Nov. 10, 1998, U.N. Doc. No. A/CONF. 183/9 (July 17, 1998) [*hereinafter* Rome Statute].

Rules of Procedure and Evidence, ICC-ASP/1/3 (A)(2000) [*hereinafter* ICC Rules].

“Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, 17 January 2006, No. ICC-01/04-101 [*hereinafter* Decision].

OTHER INTERNATIONAL TREATIES AND DOCUMENTS

Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law, UN Doc. E/CN.4/1997/104 [*hereinafter* Victims Principles].

Declaration on Basic Principles of Justice for Victims of Crimes and Abuse of Power’ G.A. Res. 40/34 (29 November 1985) [*hereinafter* Victims Declaration].

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

Universal Declaration of Human Rights, U.N. G.A. Res. 217A(III) (Dec 10, 1948) [*hereinafter* UDHR].

International Covenant on Civil and Political Rights, art. 2(1), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., at art. 3, U.N. Doc. S/RES/955 (1994).

Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), amended by S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998).

International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, Rule 89, *available at* [http:// www.ictj.org/ENGLISH/rules/240404/240404.pdf](http://www.ictj.org/ENGLISH/rules/240404/240404.pdf).

International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev.36, *available at* [http:// www.un.org/icty/legaldoc-e/index.htm](http://www.un.org/icty/legaldoc-e/index.htm).

BOOKS AND WORKS IN COLLECTIONS

Roy S. Lee, *Chapter 6: Victims and Witnesses*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, 427 (Roy S. Lee, ed., 2001) [*hereinafter* Lee].

Gilbert Bitti and Håkan Friman, *Participation in the Proceedings*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, 456 (Roy S. Lee, ed., 2001) [*hereinafter* Bitti].

Christopher K. Hall, *Article 19*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 403 (Otto Triffterer, ed., 1999) [*hereinafter* Hall].

Sharon A. Williams, *Article 17*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 383 (Otto Triffterer, ed., 1999) [*hereinafter* Williams].

William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, (2d ed., 2004) [*hereinafter* Schabas].

ARTICLES

Human Rights Watch, *Iraq: Tribunal Must Work in Anful Trial – Saddam Hussein Faces Genocide Charges in Kurdish Case*, 18 August 2006 available at <http://hrw.org/english/docs/2006/08/18/iraq14027.htm> (last visited 9 Sept. 2006) [*hereinafter* HRW-Iraq].

British Broadcasting Corporation, *Q & A: Saddam Hussein on Trial*, August 22, 2006 available at http://news.bbc.co.uk/1/hi/world/middle_east/3850989/stm (last visited 10 Sept. 2006) [*hereinafter* BBC].

Sylvia de Bertodano, *Problems Arising From the Mixed Composition and Structure of the Cambodian Extraordinary Chambers*, 4 J. INT'L CRIM. JUST. 285 (2006) [*hereinafter* Bertodano].

Human Rights Watch, *Broken People: Caste Violence Against India's "Untouchables"*, March 1999 available at <http://www.hrw.org/reports/1999/india/> (last visited 10 Sept. 2006) [*hereinafter* HRW-Broken People].

Paul J. Magnarella, *The Background and Causes of Genocide in Rwanda*, 3 J. INT'L CRIM. JUST. 801 [*hereinafter* Magnarella].

Suzannah Linton, *Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers*, 4 J. INT'L CRIM. JUST. 327 (2006) [*hereinafter* Linton].

Report of the Group of Experts for Cambodia established pursuant to GA resolution 52/135, UN Doc. A/53/850-S/1999/231. Annex (18 February 1999), § 126 – 130 [hereinafter Group of Experts].

MISCELLANEOUS

Pace Law School, International Criminal Court Moot Problem Facts (2006) [*hereinafter F*].

STATEMENT OF FACTS

1. Razachstan is a country with a hierarchical social caste system. (F. at 1). The Marijani are considered second class citizens, the “lowest of the low”, and have been victims of hundreds of thousands of violent crimes annually in the past. (F. at 1). Prior to the Quraci occupation they experienced at least 500,000 violent crimes annually and during the Quraci occupation this number rose to 1,500,000 violent crimes annually. (F. at 1).

2. For the past nine years, Razachstan has been under the occupation of the nation of Qurac. (F. at 1). The occupation ended in May 2005 after the United Nations, under a Security Council Chapter 7 resolution, sent in Peacekeepers to lead an international coalition while negotiations to end the occupation were carried out. (F. at 1, 2). Soldiers from the nation of Fatar, a neighbor of Qurac, were among the Peacekeeping forces. (F. at 2).

3. On November 12, 2003, a Fatari regiment of twenty-seven soldiers broke away from the coalition because they were dissatisfied with the way the UN Peacekeepers had been conducting the mission in Razachstan. (F. at 3). They marched into the Buchari province of Razachstan which is inhabited almost entirely by Marijanis. (F. at 3).

4. The occupation of Razachstan by Qurac ended on December 12, 2004 when the Quraci Commander ordered all Quraci forces to cease fire and surrender. (F. at 4). The United Nations helped establish a provisional government in Razachstan that would last until democratic elections could be held. (F. at 5).

5. On January 1, 2005, the Statute of the International Criminal Court (ICC) entered into force for Razachstan. (F. at 6). Razachstan had signed the Statute prior to its occupation and it had been ratified empowering the Court to prosecute and punish persons who committed crimes within its jurisdiction in Razachstan. (F. at 6).

6. In February 2005, UN forces that had remained in Razachstan to monitor its transition period discovered twenty-seven Fatari troops occupying a Marijani village. (F. at 7). The villagers indicated that the twenty-seven soldiers had been occupying the village for over a year. (F. at 7). The villagers also informed the Peacekeepers that the Fatari soldiers had killed nine men, raped and mutilated seventeen women, and tortured several villagers. (F. at 7). Upon learning this, the UN forces arrested the Fatari troops. (F. at 7).

7. There were members of Razachstan’s provisional government that wanted to execute the Fatari troops immediately. (F. at 8). Khalid Faraz, a member of the provisional government and

candidate for Prime Minister, expressed his anger over the crimes and his desire to see them tried in Razachstan. (F. at 8). Other members of the Razachstan government did not see the crimes as so terrible as to warrant execution. (F. at 8). It was only the Marijani who were the victims of the crimes, so the crimes were not as heinous in their eyes. (F. at 8). The Fatari government could not be contacted and it was determined that Fatar had no intention of exerting jurisdiction over these soldiers. (F. at 8).

8. A UN representative recommended to the Razachstan provisional government that the soldiers be tried at the ICC because it would be quite some time before the Razachstan courts would be able to prosecute them. (F. at 8). The provisional government eventually turned the soldiers over to the ICC in April 2005. (F. at 8).

9. In May 2005, after an initial investigation into the situation, the Fatari soldiers were charged with crimes based upon the ICC's jurisdiction of crimes arising in an international conflict in the territory of a signatory state. (F. at 9). The soldiers were charged with:

- (i) Crimes against humanity of murder (article 7(1)(a))
- (ii) War crimes of willful killing (article 8(2)(a)(i))
- (iii) War crimes of attacking civilians (article 8(2)(b)(i) or 8(2)(e)(i))
- (iv) War crimes of excessive incidental death, injury or damage (article 8(2)(b)(iv))
- (v) War crimes of murder (article 8(2)(c)(i)-(1))

(F. at 9).

10. In late May 2005, representatives of the Razachstani government filed a petition with the ICC challenging the ICC's jurisdiction. (F. at 10). In early July 2005, Khalid Faraz, the newly elected Prime Minister, held meetings with ICC prosecutors requesting the immediate return of the Fatari soldiers for trial in Razachstan. (F. at 10). The Prime Minister indicated that Razachstan now had a criminal court capable of properly trying the soldiers for war crimes. (F. at 10). The Prime Minister also promised that, should the soldiers be found guilty of war crimes, they would not be executed. (F. at 10).

11. Immediately after Razachstan filed the petition challenging the ICC's jurisdiction, representatives of the Marijani Liberation Front (MLF), on behalf of the villagers, appeared before the Court challenging the Prime Minister's petition. (F. at 11). The MLF argued that because of the strong discrimination against Marijani in Razachstan, it would be impossible for

them to get justice in Razachstan. (F. at 11). They requested the case stay under the ICC’s jurisdiction. (F. at 11).

12. Representatives of the Fatari government and the accused soldiers also appeared before the Court to challenge the Razachstani petition. (F. at 12). The soldiers argued that it would be impossible for them to get a fair trial in Razachstan or Fatar because of the international pressure for Razachstan to “make an example of these soldiers.” (F. at 12). The soldier’s counsel also indicated that prior to the occupation, Razachstan’s judicial system did not meet international standards with regard to the rights of the defendants. (F. at 12). The counsel indicated that although the death penalty has been eliminated as a potential sentence in this case other shortcomings of the Razachstan judicial system remain in place. (F. at 12). The Fatari government, who was originally opposed to the ICC investigating and prosecuting, argued that the only way for the soldiers to receive a fair trial and punishment that was not cruel or unusual was for the case to be tried before the ICC. (F. at 12).

PLEADINGS

I. THE ROME STATUTE ALLOWS FOR VICTIM PARTICIPATION AT AN ARTICLE 19 HEARING

13. The Rome Statute of the International Criminal Court states in its Preamble that the States Parties to the Statute are mindful that “millions of children, women and men have been victims of unimaginable atrocities”. (Rome Statute preamble, para. 2). With this in mind, the States Parties worked to create a tribunal where the most serious crimes of concern to the international community could be punished. (Rome Statute preamble, para. 4). In creating this Court, they found it necessary, even essential, to go beyond the limits of previous international criminal tribunals and create a specific right of the victims to participate. (Bitti at 457; Lee at 427)

A. Article 19 of the Statute gives victims the right to participate in proceedings on jurisdiction and admissibility

14. There is a trend in criminal law toward restorative justice. (Schabas at 172). In this approach to criminal law the victim has a much more active role. There is a growing emphasis in international law on the importance of victims in criminal proceedings. (Schabas at 172). The Rome Statute of the International Criminal Court has followed this restorative approach to criminal law and created a more active role for the victims of the crimes within its jurisdiction; Article 19(3) of the Statute gives a specific right to the victims of a crime to participate in

proceedings dealing with jurisdiction and admissibility. Razachstan has challenged the jurisdiction of this Court and the admissibility of the case before it. Because this challenge falls under article 19, the victims of the crimes in question may submit observations on whether the court should return the case to Razachstan.

15. Under rule 59 of the Rules of Procedure and Evidence, any victim, or their legal representative, who has communicated with the Court in relation to the case being challenged shall be notified that a challenge to jurisdiction and/or admissibility has been made, provided with a summary of such challenge and shall be allowed to make representations to the competent Chamber. (ICC Rules 59(1), (3)). The victims submit that they have communicated with the Court in the past and therefore they were properly notified of these proceedings. The victims are now seeking to present their observations on the issues of jurisdiction and admissibility in this case as provided in article 19.

16. The additional requirements of article 68(3) do not apply in this case because the victims are allowed to participate under article 19. According to Pre-Trial Chamber I in the Situation in the Democratic Republic of the Congo (DRC), victims only need to show that their personal interests are affected when seeking to participate in proceedings other than those specifically provided for in the Statute. (Decision at 62). The current proceedings fall under article 19 of the Rome statute, which specifically gives victims the right to participate in the hearing. However, even if the heightened standards of article 68 applied here, the victims would meet all criteria of the article and accompanying rules, specifically the requirement of personal interest.

17. There would be an enormous impact on the interests of the victims if the case is sent back to Razachstan because they would lose the protections guaranteed to them by the Statute and the ability to participate in the proceedings other than as witnesses. The ICC has many more provisions for the protection of victim and witnesses put into danger due to their testimony or status as a victim as well as provisions for reparations to the victims. The victims are also allowed to participate in the proceedings at the ICC by submitting observations and representations and even, through their legal representative, making opening and closing statements and questioning witnesses. (ICC Rules 91). The courts of Razachstan are young, untested and unlikely to have the same safeguards and rights for victims. If the case is sent back to Razachstan, the victims are likely to face increased dangers due to their testimony. They are unlikely to be allowed to submit observations to the court or otherwise participate in the

proceedings other than as a witness. And, it is extremely unlikely that they will be able to claim reparations or compensation from the defendants or the Razachstan government. It is in the best interest of the victims to stay at the ICC because that is where they will have the greatest ability to participate in the proceedings and where they are most likely to receive protections for dangers they face due to their testimony.

B. The Marijani meet all the criteria of victims under rule 85 of the Rules of Procedure and Evidence

18. The Marijani themselves are allowed to participate in the proceedings because they fit the definition of victims under the Statue and the Rules of Procedure and Evidence. The evaluation of whether a person is a victim depends on the stage of the proceedings before the Court. The Pre-Trial Chamber in the Situation of the DRC found it necessary to distinguish between victims of the situation and victims of the case. (Decision at 66). By making this distinction, they set a different standard of review for determining whether a particular person is a victim depending on where in the proceedings the situation is. Prior to the indictment of defendants, the proceedings are still dealing with a situation and not a specific case. (Decision at 66). When the proceedings are still in the situation phase the court will use a different, less stringent, criteria for examining whether the persons fit the definition of victims than they will use if the proceedings have progressed to the case stage. (Decision at 66). Since the defendants in our case have been charged, the victims must meet the requirements of victims of the case and so are held to the higher standard.

19. Rule 85 sets out the four elements a person must satisfy to be considered a victim under the ICC. A victim is (a) a natural person; (b) who suffered harm; (c) the crime committed is within the jurisdiction of the court; and (d) the harm suffered by the person resulted from the commission of the crime within the jurisdiction of the court. (ICC Rules 85). Each of the Marijani represented here today fits each of these elements.

i. The Marijani are all natural persons

20. First, the victims represented here by counsel are not organizations or other legal persons; they are all natural persons.

ii. The Marijani have individually suffered harm

21. Second, they have individually suffered harm. No list of possible harms is given by the Statute or the Rules of the ICC. Because of this, Pre-Trial Chamber I for the Situation in the

DRC found that the Chamber responsible for determining victim status must interpret the term on a case-by-case basis consistent with internationally recognized human rights. (Decision at 81; Rome Statute art. 21(3)). The Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power is an internationally recognized document, having been adopted by the General Assembly of the United Nations. (Victims Declaration). This Declaration gives examples of internationally recognized types of harms that victims can suffer. It states, “‘Victims’ means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.” (Victim’s Declaration paragraph 1; also see Victims Principles). During the time the Fatari soldiers occupied their village each person represented here experienced one or more of the following harms: physical or mental injury due to rape, mutilation or torture; emotional injury due to rape, mutilation or torture or due to the murder, rape, mutilation or torture of a family member; substantial impairment of their fundamental rights due to the criminal actions of the Fatari soldiers which were in violation of international humanitarian law and the Rome Statute.

iii. The crimes committed are within the jurisdiction of the Court

22. Third, the crimes committed against the Marijani are within the subject matter jurisdiction of the Court under article 5 because they are of sufficient gravity. The crimes not yet charged of rape (Rome Statute 7(1)(g)), torture (Rome Statute 7(1)(f), and violation of personal dignity (Rome Statute 8(2)(c)(i)) also fall within the jurisdiction of the Court under article 5, and it can be assumed that once more investigation has occurred the indictments will be supplemented to reflect these additional crimes.

23. Furthermore, the crimes also occurred within the jurisdiction of the Court under articles 11 and 12 which regulate temporal and territorial jurisdiction. Under article 11, the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute generally and the entry into force of the Statute for the State. As soon as the Statute entered into force for Razachstan on 1 January 2005, the Court had jurisdiction over the Fatari soldiers under article 12(2)(a). The victims recognize that the time frame during which the court had territorial jurisdiction over the crimes is short. However, through the decisions to investigate and charge

the soldiers for their crimes, the Prosecution and the Court have already found the crimes over which there is jurisdiction sufficient to be admissible at the ICC.

iv. The harm suffered by the victims was caused by the crimes that are within the jurisdiction of the Court

24. Fourth, there is a causal link between the crimes committed and the harm suffered. Since this hearing is occurring during the case stage of the proceedings as opposed to the situation stage, the victims will be examined with more stringent criteria than that used by the court in Pre-Trial Chamber I for the Situation in the DRC. (Decision at 98, 99). The Court may choose to use either of two higher levels of examination: reasonable grounds to believe or substantial grounds to believe in their analysis of whether the crimes alleged caused the harm suffered. Either way, the Marijani victims satisfy the criteria. It is not necessary to engage in a process of corroboration of victim's statements *stricto sensu*, but sufficient to check whether the victim's account of the events is consistent with the official reports. (Decision at 101). If the court compares the accounts of each victim to the official report of the United Nations on the events in Razachstan they will find that the statements of the victims are consistent with the official reports. (Decision at 101).

C. The Marijani Liberation Front is allowed to participate in the proceedings as the representative of the individually harmed victims

25. The Marijani Liberation Front is allowed to participate in the proceedings because they are acting with the consent of the individual Marijani victims. Under rule 89(3), an application to participate in the proceedings may be made by a person acting with the consent of the victim. Pre-Trial Chamber I for the Situation in the DRC found that a person as referred to in rule 89 can be either a natural person or a legal person. (Decision at 104). The victims in that case are being represented by the International Federation for Human Rights, a human rights organization similar to the Marijani Liberation Front. Additionally, Rule 90 allows the victims to choose their own legal representation, even when consolidating together. In this case, they have chosen to seek legal representation through the Marijani Liberation Front instead of through the Registry.

II. THE INTEREST OF THE VICTIMS IS BEST SERVED BY THE CASE REMAINING AT THE ICC

26. One of the key duties of the Prosecution and the Court is to protect the interests of the victims. This duty would be derogated if the Court were to send the case back to Razachstan because Razachstan is unwilling and unable to prosecute the offences charged. Additionally,

there is no evidence that Razachstan has initiated an investigation into the crimes, making a claim that the case is inadmissible at the ICC premature and invalid.

A. The case is admissible at the ICC because none of the elements of Article 17 are satisfied

27. The admissibility of a case at the ICC is determined by article 17 of the Statute. Under this article, the Court shall only determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State had decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the court.

(Rome Statute art. 17)

Neither paragraph (b) or (c) applies to the case at hand. There is no argument that the accused have been tried for their crimes or that an investigation in to the crimes has been completed and a decision not to prosecute been made. For this Court to find this case inadmissible it would have to find that either paragraph (a) or (d) was met.

i. There is no evidence that an investigation is ongoing in Razachstan

28. Paragraph (a) does not apply to this case because it requires that a case be already under investigation or prosecution by a State that has jurisdiction over it. Razachstan clearly has jurisdiction over the crimes because they occurred on their soil. However, Razachstan has submitted no evidence showing that they are investigating or prosecuting the crimes.

ii. Razachstan is unwilling genuinely to try the Accused for the crimes committed

29. Even if this Court found that Razachstan was investigating the case, Razachstan is unwilling to genuinely carry out the investigation and prosecution.

30. According to the Statute, to find a state with jurisdiction unwilling to genuinely investigate or prosecute a case the Court must find that:

- (a) The proceedings were not or are being undertaken or the national decision was made for the purpose of shielding the persons concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person to justice.

(Rome Statute art. 17)

Although, there is no evidence that Razachstan is attempting to shield the accused or that there has been an unjustified delay in the proceedings, if the case is sent back to Razachstan, delays, both justified and unjustified, are certain to result because of the current state of the country. While there is no current evidence to show unwillingness under paragraphs (a) or (b), there is evidence that if the case is sent back the criteria in paragraph (c) would be met.

31. Any investigation that would possibly occur in Razachstan will not be impartial or independent. “Judicial independence and impartiality are essential elements in safeguarding human rights, arguably forming a part of the general principles of international law.” (Linton at 327). The Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights both state that everyone is entitled to a trial by a fair, impartial, and independent tribunal. (UDHR art. 10; ICCPR art. 14). There is no evidence that this basic international standard of due process is present in Razachstan.

32. The government of Razachstan is under enormous pressure, both internal and external, to ensure that the soldiers responsible for the crimes are punished. As soon as the soldiers were discovered and the crimes made known, members of the Razachstan provisional government called for their immediate execution without trial. This desire shows that, in the minds of many in Razachstan, the soldiers have already been adjudged to be guilty. Due to these statements by members of the government, there is also a strong likelihood that the trials of the soldiers would not be fair according to internationally recognized standards of due process. It is not necessary for the Court to find that the proceedings are a sham trial; instead, it is enough that there are persons whose conduct is geared to, for example, cause a mistrial or taint evidence. (Williams at 394). It is probable that those members of the Razachstan government who called for immediate execution of the soldiers will exert undue influence over the court charged with trying the case. The judges will not be independent because of the government interference they will experience.

33. The experience of other countries that have recently emerged from similar periods of violence and occupation shines much light on what is likely to occur in Razachstan. In

Cambodia, which has also recently emerged from almost four years of war and ten years of occupation, is lacking an independent judicial system. The rule of law is non-existent in Cambodia and the government exerts large amounts of influence over the courts. (Linton at 329; Group of Experts at 126-130). It is even feared that the Cambodian Extraordinary Chambers set up with the United Nations to try the Khmer Rouge leaders will end up bowing to the influence of the Cambodian government. There are serious doubts about the ability of this hybrid tribunal to act independently. (Bertodano at 287). Razachstan, having so recently emerged from war and occupation is in no better place than its Southeast Asian neighbor. Its courts have a high probability of falling under the control of the national government and losing the independence that is necessary for due process.

34. Razachstan is also experiencing pressure from outside sources. Fear has already expressed that because of the international pressure to bring the soldiers who committed the crimes to justice it would not be possible to have a fair trial in Razachstan. The government is being pressured to make sure someone is held accountable, but this pressure may lead to sentencing without a full and fair trial to find guilt. The real perpetrators of the crimes may escape punishment or even prosecution. If the government rushes through the trial and puts pressure on the national court to find someone guilty of the crimes, those punished might not be the real perpetrator and the Marijani will have to live with the knowledge and the fear that the real perpetrators are will at large. The interests of the Marijani will not be served if this is allowed to happen.

35. The trials are similarly unlikely to be impartial. Statements made by members of the government show that the Marijani are second-class citizens in Razachstan and crimes committed against them are not considered to be that serious, even though they are the exact crimes considered to be the most egregious under international law. The sentiments of these government officials and others with similar views will lead to a situation where the government will not find the acts of the soldiers so heinous as to warrant punishment. The members of the court are likely, given the caste status of the Marijani, to discount their testimony and favor the defendants. Additionally, because of the discrimination against Marijani in Razachstan, the crimes are not likely to be investigated thoroughly and those crimes which may be seen to be not as serious will go completely uncharged.

36. Other countries that have similar racial tensions and discrimination have seen the impact of it on their justice systems. In Rwanda, prior to the genocide of 1994, the country was organized according to a hierarchical social caste system. The discrimination against those in the lowest castes led to the implementation of different punishments for different castes and different punishments for crimes committed against those of a lower caste than those of a higher caste. (Magnarella at 805). In India, the Dalits are the lowest caste in their social hierarchy. They experience brutality at the hands of higher social ranks and the police alike. Although the national government has created laws and even a Constitution that guarantee equal protection for all people and eliminates the caste system, they have been ineffectual in stopping the violence. The police still refuse to take complaints by the Dalits or prosecute those responsible for crimes against the Dalits. (HRW-Broken People). The ICC should be instructed by the aforementioned experiences and exercise caution in this case. Because of Razachstan's social hierarchy and entrenched discrimination, the investigation of the crimes will not be as vigorous as necessary, the evidence will be tainted, and the Marijani will have little if any protection. The racial discrimination present in Razachstan against the Marijani ensures Razachstan's inability to hold an impartial trial of the Fatari soldiers.

iii. Razachstan is unable genuinely to try the Accused for the crimes committed

37. Razachstan is also unable to genuinely investigate and prosecute the alleged crimes. Razachstan has just emerged from a prolonged period of war and occupation; during this time the judicial system of the country completely collapsed. When the Fatari soldiers were discovered and their crimes made known, United Nations representatives recognized that Razachstan did not have the capability to investigate and prosecute the crimes and suggested the soldiers be turned over to the ICC. The fact that Razachstan heeded the representative's suggestion and turned the soldiers over to the ICC shows that the provisional government recognized this as well. The application of Razachstan to have the case returned to them for investigation and prosecution came only one month after this recognition of their inability to investigate and prosecute. Therefore, it is highly unlikely that Razachstan has a judicial system capable of trying the alleged crimes in a manner consistent with international standards of due process.

38. The statements of Razachstan's Prime Minister in early July that they now had a criminal court that could try the soldiers for war crimes supports the argument that they do not have the

ability to actually try the crimes that are alleged. The court was not present at the time the soldiers were turned over to the ICC nor when Razachstan made its challenge to the ICC's jurisdiction. A court that has not been tested at all is unlikely to have the ability to try the soldiers in accordance with international standards of due process. The experiences of other countries that have experienced similar collapses of their judicial systems due to war and occupation show that it is unlikely that Razachstan's criminal court will be able to properly try the soldiers. The ICC may again be instructed by Cambodia, which experienced a similar length occupation following mass atrocities and still does not have a judicial system that is able to fairly try accused. (Bertodano at 286). Even after thirteen years of self rule, Cambodia still requires the assistance of international judges and staff to try those accused of atrocities under the Khmer Rouge.

39. The criminal court that Razachstan's Prime Minister indicates is capable of trying the soldiers is also, according to his statement, not capable of trying them for all crimes accused. According to his statement, the criminal court is only capable of trying the soldiers for war crimes. The indictment against them at the ICC is for war crimes as well as crimes against humanity. Additionally, as mentioned above (see *supra* page 12) there are crimes in the facts that have not yet been charged. Some of these crimes fall under crimes against humanity and so Razachstan, by its own statement, would be unable to add these additional charges to the indictment after the completion of the investigation.

40. Razachstan would also be unable to provide the victims with the protections and reparations that they are given under the Rome Statute. To meet international standards for criminal prosecution, Razachstan must adhere to a very high standard. The provisions of the ICTY and ICTR, as well as the ICC, show that very strong protections for victims and witnesses are a necessary part of a fair trial. Article 21 of the ICTR statute and Article 22 of the ICTY statute, along with Rule 34 and 69 of the ICTR and ICTY Rules of Procedure and Evidence provide for the creation of a victims unit to help protect those victims and witnesses who are in danger because of their testimony and to help secure special conditions for testifying when necessary. Without similar protections for the rights and safety of victims and witnesses, Razachstan will be unable to obtain the necessary evidence and testimony. The victims will be too scared to come forward and testify because they will not have the rights given them under the Rome Statute to testify in *in camera* proceedings or by technological means. They will also be unable to obtain necessary protections for themselves and their families.

41. Moreover, international standards for trials and the protections of those involved in them are very high, and it is unlikely that Razachstan will be able to meet them. Razachstan has not been free from occupation for very long and it takes “quite some time” (F. at 8) to re-establish peace and security after such a protracted period of conflict, as evidenced by the situations in Iraq and Afghanistan. Iraq’s Special Tribunal is even unable to protect the judges and defense attorneys involved in the trial because of the state of security in the country. (HRW-Iraq; BBC). Due to the newness of the Razachstan government and the high possibility of political or other violence in the country stemming from the extended period of occupation and violence, Razachstan will be unable to meet international standards for protection of victims and witnesses. These standards for trials and protections are imperative for the Court to be able to obtain the necessary testimony and evidence to prosecute the soldiers for the crimes committed.

42. Razachstan may also try to argue that the crimes within the jurisdiction of the Court are not of sufficient gravity to warrant prosecution at the international criminal court, but this is not an argument they are allowed to make. (Hall at 410). Under Article 19(2)(b) only the Court can make this determination. The chapeau of 19(2) refers to “challenges to the admissibility of a case on the grounds referred to in article 17”. However, subparagraph (b) limits these grounds to those listed in article 17(1)(a) and (b): cases that are being investigated or have been investigated and found not to warrant prosecution. (Hall at 410). The Court has obviously found that the crimes within the jurisdiction of the court are of sufficient gravity or it would not have confirmed the indictments against the Fatari soldiers.

B. The Prosecution and the Court have a duty to look after the interest of the victims under Article 54 of the Statute and Rule 86 of the Rules of Procedure

43. The Statute also requires the Court, including the Prosecution, to make decisions with the interests of the victims in mind. Article 54 states that the prosecutor shall “take appropriate measure to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses.” (Rome Statute art. 54). This duty is one that the prosecutor is obliged to follow during the investigation of crimes, such as is occurring now. (Schabas at 173).

44. It is in the interest of the victims to remain at the ICC. Under article 53, the Prosecutor already found that it was in their interests to initiate an investigation at the ICC into the crimes alleged. The circumstances that led to that determination have not changed. Razachstan still does

not have a court capable of trying all the crimes alleged and the discrimination against the Marijani is likely to lead to an impartial trial and less recognition of the victims' rights.

45. Also under article 53, the Prosecutor found the case to be admissible at the ICC. The Prosecutor was satisfied that there were no investigations ongoing in Razachstan, and if there were that Razachstan was unable or unwilling to genuinely prosecute. Because the case was admissible at the ICC, and not able to be tried anywhere else given that Fatari expressed no intention of prosecuting the soldiers itself, it was in the best interests of the victims to have the crimes investigated and prosecuted at the ICC. This has not changed. It is still in the best interest of the victims and witnesses for the crimes to be investigated and prosecuted at the ICC where their rights will be protected and their safety looked after.

46. Therefore, deferral under article 18 or dismissal under article 19 are not in the interest of the victims. With prosecution at the ICC, the victims are granted the right to participate. Without the right to participate, except as a witness called to give testimony against the accused, the victims will be "re-victimized" (Bitti at 456) and the goal of the ICC of restorative justice will not be achieved. Under the Rome Statute, the victims are permitted to submit observations and representations; they are allowed to voice their concerns to the Chamber, and their legal representatives, at the Chambers discretion, are allowed to be present at the trial, give opening and closing statements as well as question witnesses. (ICC Rules 91). This participation is a key ingredient in bringing justice to the victims and helping to heal the harms caused by the crimes the Court is prosecuting. The international community is better served by having the victims of the most heinous crimes of international law heard and restored in some way.

47. The interests of the victims are also better protected at the ICC because the Rome Statute provides for many more rights and protections than the criminal court in Razachstan. There is no evidence that there are any security measures set up in Razachstan to safeguard both the victims and witnesses and their families. Also, the victims will be able to participate in the proceedings at the ICC – something they are unlikely to be allowed to do in Razachstan given the discrimination against them in that country. Article 68, as well as rules 87, 88, 67 and 68, mandate protections to be provided to the victims. The ICC has a unit specifically organized to look after the rights of the victims, help them obtain security for themselves and their families, and help them seek special procedures for testifying when it is deemed necessary. They are

essential here, and none of these protections are present in Razachstan. Therefore, the interests of the victims will not be served by sending the case back.

48. Additionally, the victims are able to receive reparations under articles 75 and 79 of the Statute and rules 94-99 of the Rules of Procedure and Evidence. This is an important part of the Rome Statute and shows its desire for a criminal system that is restorative. The reparations help to restore the victims, in some small way, to what they were before the crimes were committed against them. There is no evidence of a provision in the Razachstan court for reparations and so the basic rights are wholly unavailable in Razachstan.

49. Rule 86 also imposes a duty on all Chambers of the Court to take into account the needs of all victims and witnesses when making any decision or order. Under this rule, all organs of the Court must take into account the interests of the victims and witnesses when performing their functions under the Statute. For the Court to send the case back to Razachstan, it would have to ignore the lack of a competent criminal justice system, the impartiality of the judicial system, and the threatened lack of independence of the Razachstan court. Sending the case back would be a violation of the duty to take into account the needs of all victims and witnesses. Their needs for a fair and just trial, protections and reparations granted by the Statute must be recognized.

50. The Preamble of the Statute states the importance of victim protection and participation in the proceedings. According to the Vienna Convention of the law of Treaties, the preamble of a treaty gives guidance for the interpretation of the entire treaty. (Vienna Convention art. 31). Given this, all aspects of the Rome Statute must be looked at and interpreted in a way that respects the rights and interests of the victims. It is not in the interest of the victims for the case to be sent back to Razachstan because any trial in Razachstan would not be independent and impartial; it would also lack necessary safeguards and rights because of the collapsed state of the Razachstan judicial system. The desires and mandate of the Rome Statute that the interests of the victims and witnesses be protected would be thwarted if the case is sent back to Razachstan. The spirit of the Statute requires that the case remain here at the ICC.

PRAYER FOR RELIEF

51. For the foregoing reasons we respectfully request this Court to find that the ICC jurisdiction is proper and the case is admissible. We request that the Court deny Razachstan's challenge and retain the case at the ICC.

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