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SITUATION IN THE DEMOCRATIC REPUBLIC OF RAZACHSTAN

PROSECUTOR'S MEMORIAL

The Office of the Prosecutor

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Art.	Article(s)
Cl.	Clarifications
Convention	European Convention on Human Rights
E.C.H.R.	European Court of Human Rights
I.C.C.	International Criminal Court
O.T.P.	Office of the Prosecutor of the International Criminal Court
¶	Paragraph
R.	Record
U.N.	United Nations

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Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950.

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PRELIMINARY STATEMENT

The present hearing results, pursuant to Rule 58 of the Rules of Procedure and Evidence, from Razachstan's petition challenging admissibility of the case against the Fatari soldiers before the International Criminal Court. The Office of the Prosecutor respectfully requests that this Court find (1) that it does not have jurisdiction over this case, and (2) this case is inadmissible before the court regardless.

1. Jurisdictional Arguments Before this Court

The defendants' alleged conduct, as charged, falls outside both the *ratione materiae* and the *ratione temporis* jurisdictional limitations set by the Rome Statute. Prosecution of the defendants before the I.C.C would violate the *ratione materiae* requirements of Articles 7 and 8. The Rome Statute's definition of 'war crimes' requires a connection with an *international* armed conflict. Here, although the situation in Razachstan has fallen under the scrutiny of the international community, there existed no armed conflict between two sovereign states. Moreover, the alleged conduct of the defendants had no connection with any armed conflict, thereby failing to adhere to either the technical criteria or the essence of the Rome Statute's definition of war crimes.

Proceeding with this case also violates the temporal jurisdiction of this Court's statute. Under Article 11, the *ratione temporis* jurisdiction of the Court is limited to crimes which were committed after the entry into force of the Rome Statute for a State Party or where a State has accepted the jurisdiction of the Court by a formal declaration lodged with the Court's Registrar. Here, the Fatari defendants stand accused of criminal conduct which occurred during their occupation of a Marijani village within Razachstan. This conduct followed the defendants' defection from their positions as U.N. Peacekeepers in November 2003, more than a year *prior* to the Rome Statute's entering into force for Razachstan on January 1, 2005. Although the Court may also exercise its jurisdiction based on the acceptance of that jurisdiction by the State of which the accused persons are nationals, the Rome Statute also did not enter into force for Fatar prior to the Fatari soldiers' occupation of the Marijani village.

2. Admissibility Arguments Before this Court

The principle of complementarity, as well as the object and purpose of this Court's statute, requires that those accused of international crimes be prosecuted in national courts when possible. Under Article 17, this Court must find a case inadmissible where that 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.” The objective criteria articulated in Article 17 allow this Court to usurp a state’s criminal jurisdiction only when there is a present, real inability to prosecute.

Here, Razachstan’s willingness to prosecute the accused is evidenced by its current admissibility challenge. Further, a determination that a state is unable to prosecute requires a finding of a *substantial* or *complete* collapse or that the unavailability of the national judicial system causes the state to be unable to secure the accused or necessary evidence. There is no indication that any of these conditions are currently present within Razachstan. Rather, the situation has stabilized, allowing for post-conflict democratic elections to be held and a permanent government to take office.

Alternatively, even if this Court should find that this case is admissible, that is, that this Court both has jurisdiction and the exercise of this jurisdiction would not violate Article 17 of the Rome Statute, the Office of the Prosecutor respectfully requests that this Court choose to defer to Razachstan’s prosecution in this case. In keeping with this Court’s mandate to end impunity for the most heinous crimes of concern to the international community by prosecuting where the states cannot or will not, the principle of complementarity assures that the states will also act in compliance with these values. The Rome Statute affirms that ending impunity requires effective prosecution not at only the international level, but at the national level as well. To this end, the statute emphasizes the positive duty of every state to exercise criminal jurisdiction over persons responsible for international crimes.

STATEMENT OF FACTS

Razachstan is a South East Asian country formerly occupied by the nation of Qurac. R.¶1. During the nine year occupation ending in 2004, Quraci forces committed brutal acts against the Razachstani population, especially members of the Marijani caste. R.¶1.

In 2002, the international community learned about the brutal and oppressive acts committed by the Quraci forces. R.¶¶1,2. U.N. Peacekeepers, acting under a United Nations Security Council Chapter 7 Resolution, led an international coalition of troops to maintain peace during negotiations for Quraci troop withdrawal. R.¶2. The international community maintained a presence in Razachstan beginning in February 2002. R.¶2. U.N. coalition forces liberated the Razachstani province of Nadir, the Quarci principle base of operations, on December 5, 2004. R.4. Within a week, a cease fire was ordered and the Quarci troops surrendered. R.¶4.

The U.N. coalition members remained during the establishment of the Razachstani provisional government on December 31, 2004. R.¶5. In February of 2005, U.N. coalition forces discovered 27 Fatari soldiers, former U.N. coalition members, occupying a Marijani village in the Buchari province. R.¶7. These Fatari soldiers had broken away from the coalition approximately fourteen months earlier because of dissatisfaction with the U.N. leadership, and had remained in the Marijani village. R.¶¶3, 7.

The Buchari province is almost exclusively inhabited by Marijanis. R.¶3. Within Razachstan's social structure, which consists of a caste system, the Marijanis are the "lowest of the low." R.¶1. Even prior to the Quarci occupation, the Marijanis were often the subject of abuse. R.¶1. This abuse only increased with the Quarci occupation. R.¶1. Specifically, under the Fatari soldier occupation, the villagers indicated that these Fatari soldiers were responsible for killing nine men, raping and mutilating seventeen women, and torturing several villagers. R.¶7. The Fatari soldiers were taken into custody by the U.N. coalition troops. R.¶7.

When the troops were captured, the Razachstani provisional government was still in power, operating under a U.N. negotiated accord until democratic elections could be held. R.¶¶5, 7, 10. There was a difference of opinion among the provisional government members regarding how to deal with the Fatari soldiers and the villagers' accusations. R.¶8. Attempts were made to contact the Fatari government, and after receiving no reply, it was decided that the Fatari government did not intend to exercise jurisdiction over its nationals. R.¶8. Working with the provisional government, U.N. officials suggested that the Fatari soldiers be turned over to the

I.C.C. for prosecution, as Razachstan was a State Party to the Statute of the I.C.C. R.¶¶6, 8. The Fatari soldiers were turned over to the I.C.C. in April 2005. R.¶8.

The I.C.C., based on its jurisdiction over crimes arising during an international conflict in the territory of a signatory state, charged the Fatari soldiers with the following crimes: crimes against humanity (murder), and war crimes (wilful killing, attacking civilians, excessive incidental death, injury or damages, murder), all under Articles 7 and 8 of the Statute of the I.C.C. R.¶9.

Subsequently, democratic elections were held in Razachstan. R.¶¶5, 10. Razachstan filed a formal petition with the I.C.C. in May 2005 challenging this Court's jurisdiction in the instant matter. R.¶10. Shortly after being elected, Razachstani Prime Minister Khalid Faraz requested that the I.C.C. prosecutors return the Fatari soldiers for prosecution by the now functional Razachstani national courts. R.¶10. Prime Minister Faraz promised the I.C.C. Prosecutor that the Fatari soldiers would not be subject to the death penalty as a result of this prosecution. R.¶10.

In response to the Prime Minister's petition, representatives of the Marijani Liberation Front (M.L.F.) appeared before the I.C.C. on behalf of the Marijani villagers to challenge the transfer of prosecution back to Razachstan. R.¶11. The Marijanis' status as second-class citizens in Razachstan, the M.L.F. representatives argued, would prevent justice from being done in a national court, and the group requested the case remain under I.C.C. jurisdiction. R.¶11. The transfer of prosecution back to the national courts was also challenged by the Fatar government and the Fatari soldiers, who argued through their representatives that neither prosecution in Razachstani national courts nor Fatari national courts would result in a fair and impartial trial. R.¶12. The Fatari representatives argued that there were concerns regarding the Razachstani criminal system prior to the Quarci occupation and that these shortcomings still existed. R.¶12. The representative also argued that prosecution under Fatari law would subject the Fatari government to intense international pressure to make an "example" of the Fatari soldiers, effectively preventing that government's ability to ensure a fair and impartial trial. R.¶12.

Both Fatar and Razachstan are currently State Parties to the Rome Statute. R.¶6, Cl. ¶2. With respect to Fatar, the Rome Statute entered into force on January 1, 2004. Cl.¶2. The Rome Statute entered into force in Razachstan a year later on January 1, 2005. R.¶6.

ARGUMENT

**THE ACCUSED SHOULD BE RETURNED TO RAZACHSTAN FOR PROSECTUTION
AS THIS CASE IS INADMISSIBLE BEFORE THE INTERNATIONAL CRIMINAL
COURT**

Razachstan, as a state which has jurisdiction over the case under Article 12(2)(a), has challenged both the jurisdiction and admissibility of the present case. Under Article 19(1) of the Rome Statute, this Court must satisfy itself that it has jurisdiction over the case before it. The Court will activate its dormant jurisdiction only where all the prerequisites for both jurisdiction and admissibility of the matter have been met. In the instant case, however, the alleged conduct of the defendants as charged in the indictment is not within the jurisdiction of the Court. Further, even if the jurisdiction prerequisites had been met, the principle of complementarity, as well as the object and purpose of the Rome Statute, requires that this case be returned to Razachstan for prosecution in its national courts.

**I. THIS CASE IS INADMISSIBLE AS THE PREREQUISITES TO THIS COURT'S
EXERCISE OF JURISDICTION HAVE NOT BEEN MET**

The initial I.C.C. investigation of the matter referred to the Court by Razachstan resulted in charges “based upon the jurisdiction of crimes arising in an international conflict in the territory of a signatory state.” R.¶9. Under Article 13(a), this court may exercise its jurisdiction with respect to an Article 5 crime where a situation has been referred to the Prosecutor by a State Party. However, although Razachstan did properly trigger this Court’s jurisdiction by its referral under Articles 13 and 14, the Court may only exercise that jurisdiction in accordance with the provisions of the Rome Statute. R.S. 13.

**A. Prosecution of the Defendants before the ICC violates the *ratione materiae*
requirements of the Rome Statute**

The Rome Statute places very specific limitations on this Court’s jurisdiction. The defendants’ alleged criminal conduct is not within the *ratione materiae* of the Court. Article 5 limits subject matter jurisdiction to “the most serious crimes of concern to the international community as a whole.” The defining parameters of what conduct provokes such international concern can be discerned from the enumerated crimes within the Rome Statute.

1. The criminal conduct charged fails to meet the definition of a “war crime”

Specifically with regard to the war crimes charges (counts ii, iii, and iv of the indictment), Article 8 requires that the criminal conduct occur in connection with an armed conflict to fall within this Court’s subject matter jurisdiction. R.S. 8(2)(a)(i), 8(2)(b)(i), 8(2)(b)(iv); R.¶9. Although the Rome Statute does not define the parameters of an “armed conflict,” the Statute does reference the Geneva Conventions of 12 August 1949 and the “established framework of international law.” See R.S. 8(2)(a) and 8(2)(b).

Article 21’s articulation of applicable law, as well as the incorporation of the 1949 Geneva Conventions, reflects this Court’s adherence to accepted principles of customary international law. Specifically, after applying the Rome Statute, this Court may look to “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.” R.S. 21(1)(b). Although the Rome Statute notes that it shall not hinder the progression of customary international law for purposes *other than* the Rome Statute, the statute also explicitly states that this Court may only consider “*established* principles of the international law of armed conflict.” R.S. 10, 21 (1)(b)(emphasis added). This restricts the Court from progressively interpreting its own statute or principles of international law, and instead constrains the Court to current customary international law or relevant treaty. Any judicial finding that a requisite nexus exists between the defendants’ alleged criminal conduct and an international or internal armed conflict must therefore adhere to the customary definitions of those terms.

a. *The requisite connection with an “international” armed conflict is absent*

The war crimes charges laid out in the indictment require that the criminal conduct occur in relation to an international armed conflict, either by explicit language (Articles 8(2)(b)(i) and Art. 8(2)(b)(iv)) or by referencing the Geneva Conventions of 12 August 1949 (Article 8(2)(a)(i)). Article 2 of each of the four 1949 Geneva Conventions, generally considered customary international law, defines an international armed conflict as an “armed conflict which may arise between two or more of the [States], even if the state of war is not recognized by one of them,” and includes the “partial or total occupation of the territory of a [State], even if the said occupation meets with no armed resistance.” Under this definition, the Quraci occupation of Razachstan would constitute an “international conflict.” However, the occupation, and therefore

the *international* conflict, ended within a month of the Fatari soldiers' desertion from the U.N. peacekeeping forces. R.¶¶3, 5.

As charged, counts (ii), (iii), and (iv) of the indictment reflect alleged criminal conduct occurring sometime between November 2003 and February 2005. Throughout this period, the conflict situation within Razachstan changed dramatically; however, the Fatari soldiers' occupation of the Marijani village was constant. This indicates that even if the instances of criminal conduct occurred during the Quraci occupation, an international conflict by 1949 Geneva Convention standards, the requisite connection between the Fatari soldier conduct and the conflict is missing.

The continued presence of U.N. personnel after the Quraci forces' surrender does not in itself create an international conflict, nor does the presence of the renegade Fatari soldiers. The International Tribunal for the Former Yugoslavia has indicated that an armed conflict "*may* become international" because of international participation. Tadić I, ¶84 (emphasis added). However, the tribunal noted that this required either the intervention of foreign troops or conflict participants where those troops or participants act on behalf of a foreign state. Tadić I, ¶84.

Here, the U.N. forces remained in Razachstan in cooperation with the provisional government, not in conflict with Razachstan at the behest of a foreign state. R.¶4,5. The Fatari soldiers themselves were acting in their own interest, having broken away from the U.N. forces, and therefore from Fatar which had deployed them under U.N. auspices. R.¶2,3. A determination by this Court that this situation in Razachstan constitutes an international conflict would therefore constitute a progressive interpretation of the current state of customary international law, not an established principle.

b. *The requisite connection with an "internal armed conflict" is also absent*

Where the Rome Statute does not require a nexus with an international armed conflict, a connection with an internal armed conflict is required. Count iii of the indictment provides an alternative charge for conduct occurring during an "armed conflict not of an international character" under Article 8(2)(e)(i). R.9. Further, although Common Article 3 is exempt from the general international armed conflict requirement of each of the 1949 Geneva Conventions, this provision does presume the existence of an internal armed conflict as well. The definition of an internal armed conflict is considered vague with respect to situations involving non-state actors. Commentary IV, at 35. The Commentaries to the 1949 Geneva Conventions, however, provide

“convenient criteria” for determining whether hostilities amount to an armed conflict for the purposes of humanitarian law, including recognition of insurgents as belligerents by the *de jure* government or recognition by the United Nations Security Council that the hostilities are a threat to the international peace. Commentary IV, at 35. Absent such recognition, an internal armed conflict may exist where insurgents or hostile non-state actors have organized and act as a military force and where there is “an authority responsible for its acts, [and] acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.” Commentary IV, at 35.

None of the suggested criteria have been met here. Further, even if all of the alleged conduct had occurred *immediately* following the Fatari soldiers’ desertion from the U.N. coalition, prior to the Quraci forces subsequent surrender, the conduct still lacks the requisite nexus with *any* armed conflict. The International Tribunal for the Former Yugoslavia has explained “that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” Tadić II, ¶70. This definition requires at minimum two *organized* factions fighting within a state. In the present situation, the absence of the involvement of any organized faction prohibits a finding of the requisite nexus with an armed conflict.

2. The criminal conduct charged fails to meet the definition of a “crime against humanity”

Article 7’s definition of a crime against humanity (count i of the indictment), although silent on the matter of a connection with an armed conflict, should be interpreted within the context of the Rome Statute as a whole. See V.C.L.T. art. 31(1). Specifically, the meaning of the terms used in the separate articles defining criminal conduct should be interpreted consistently. Under Article 7, a crime against humanity must be carried out in “furtherance of a State or *organizational* policy.” R.S. 7(2)(a). For this article to be consistent with the Statute’s definition of a war crime, an “organization” must also adhere to the accepted international humanitarian law standards. As previously discussed, the Fatari soldiers fail to meet any of the 1949 Geneva Conventions’ criteria for constituting an organized group within the context of an armed conflict. A finding that these renegade soldiers could commit a crime against humanity within the meaning of Article 7 would require inconsistent interpretations of what constitutes an “organization” for the purposes of the Rome Statute.

B. Prosecution of the Defendants before the ICC violates the *ratione temporis* requirements of Article 11

The *ratione temporis* jurisdiction of the Court is limited to crimes which were committed either after the entry into force of the Rome Statute for a State Party or where a State has accepted the jurisdiction of the Court by a formal declaration lodged with the Court's Registrar. R.S. 11, 12. Here, the Fatari defendants stand accused of criminal conduct associated with their occupation of a Marijani village within Razachstan. This occupation followed the defendants' defection from their positions as U.N. Peacekeepers in November 2003, more than a year *prior* to the Rome Statute entering into force for Razachstan on January 1, 2005. R.¶¶3,6. The Court may also exercise its jurisdiction based on the content of the State of which the accused persons are nationals. However, here the Rome Statute did not enter into force for Fatar prior to the Fatari soldiers' occupation of the Marijani village.

Jurisdiction cannot be based on the fact that the Fatari soldiers' occupation of the Marijani village ended after the Rome Statute had entered into force for Razachstan. The existence of a "continuing crime" has not been recognized by the Court. As there is no explicit reference to this concept in either the Rome Statute or the Court's Rules of Procedure and Evidence, the Court may consider the principles and rules of international law. R.S. 21(1)(b).

The issue of continuing crimes has been addressed by the European Court of Human Rights (E.C.H.R.) in consideration of the European Convention on Human Rights (Convention). The E.C.H.R. held in the *Veeber* case that the continuing nature of a crime was not sufficient to bring it within the scope of that court's temporal jurisdiction. Veeber, ¶55. There the conduct in question, an alleged seizure in violation of E.C.H.R. Article 8, was "instantaneous" and the subsequent retention of the seized property by the government did not constitute a continuing violation of the Convention. Veeber, ¶55. Conversely, the E.C.H.R. held in *Sovtransavto Holding* that a continuing situation could be recognized, but only where understanding the conduct required consideration of the "sequence of events taken as a whole." Sovtransavto, ¶58. Such a situation would then warrant consideration of facts occurring before the Convention came into force. Sovtransavto, ¶58. In both cases, the E.C.H.R. based its decision on the established principle of international law that a convention or treaty only binds State parties with respect to events which occur after that convention comes into force for that State party. Veeber at ¶54; Sovtransavto at ¶56.

Here, it is not the occupation of the Fatari village itself that resulted in the criminal conduct charged. Rather it is individual occurrences of murder, rape and torture which are to be tried. Although these instances all took place in the same context, each is an individual crime which does not depend on the commission of another crime, or a “sequence of events” culminating from the crimes referred to in the indictment. Therefore these crimes must be considered “instantaneous.” Admissibility of this case before the I.C.C. would result in, at best, admission solely based on the unsubstantiated possibility that all the individual occurrences happened during the brief period near the *end* of the Fatari occupation rather than the beginning. As a matter of policy, this would reflect poorly on this new Court’s ability to remain within the confines of its own statute. At worst, admission of the instant case would result in the prosecution of crimes over which this Court has *no* jurisdiction.

Razachstan’s voluntary referral does not act as an affirmative declaration within the meaning of Article 12(3). See also R.S. 11(2). Article 12(3) allows a State to lodge an official declaration with the Registrar of the Court indicating its acceptance of this Court’s exercise of jurisdiction. In the instant case, there is no indication that Razachstan has taken that affirmative action.

II. EVEN IF THIS COURT FINDS THAT ALL THE PREREQUISITES TO JURISDICTION HAVE BEEN MET, THIS CASE IS STILL INADMISSIBLE AS RAZACHSTAN’S NATIONAL COURTS ARE WILLING AND ABLE TO PROSECUTE THE FATARI SOLDIERS.

The Court is also required to hear challenges to admissibility where, as here, a State which has jurisdiction over a case contests its admission before the I.C.C. because that State is itself investigating or prosecuting the matter. R.S. 19(2)(b).

The principle of complementarity, as well as the object and purpose of this Court’s statute, requires that those accused of international crimes be prosecuted in national courts when possible. The Preamble to the Rome Statute states “that the International Criminal Court established under this Statute *shall be complementary* to national criminal jurisdictions” (emphasis added). This reflects “the express will of States Parties to create an institution that is global in scope while recognizing the primary responsibility of States themselves to exercise criminal jurisdiction.” O.T.P. Policy, at 4. Article 17 specifically requires the Court to consider the complementary relationship of the Court to the states when determining the admissibility of a

case. R.S. 17(1). This Court must find a case inadmissible where that 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.” R.S. 17(1)(a).

A. Razachstan is willing to prosecute the instant crimes.

Razachstan’s willingness to prosecute the accused is evidenced by its current admissibility challenge. A State Party’s “unwillingness” to prosecute may be found where the national proceedings are designed to shield the defendants from responsibility, where there is an unjustified delay in the proceedings inconsistent with the intent to bring the defendants to justice, or where the proceedings are not being “conducted independently or impartially.” R.S. 17(2). Under international law, a court’s impartiality or independence is determined by considering the objective features of the judicial system itself, such as “the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence.” Ciraklar, ¶38. Specifically, an impartiality analysis requires consideration of the judge’s or judges’ personal bias *and* whether sufficient measures are in place to exclude any legitimate doubt regarding the impartiality of the judicial process. Ciraklar, ¶38.

Further, although Razachstan’s history regarding the Marijanis caste is disturbing, the “unwillingness” based on impartiality requires that national proceedings be biased *and* carried out in a manner “inconsistent with an intent to bring the person concerned to justice.” R.S. 17(2)(c). In light of the fact that Razachstani nationals were victims of the conduct charged, there is no indication that Razachstan does not intend to bring the Fatari defendants to justice.

B. Razachstan is genuinely able to prosecute the instant crimes.

The admissibility of this case before the Court therefore turns on whether Razachstan is genuinely unable to prosecute. R.S. 17(1)(a). The Rome Statute provides strict guidelines regarding a determination of a state’s inability to prosecute. Absent a finding that a *substantial* or *complete* collapse or unavailability of the national judicial system causes the state to be unable to secure the accused or necessary evidence, the case is not admissible before the Court. R.S. 17(1), (3). A substantial or complete collapse contemplates a lack of central government, a state of chaos resulting from current conflict, or public disorder resulting in the collapse of a national judicial system. O.T.P. Policy, at 4. There is no indication that any of these conditions are present within Razachstan. Rather, the situation has stabilized, allowing for post-conflict

democratic elections to be held and a permanent government to take office. R.¶¶5,10. Further, the wording of the Rome Statute indicates that conditions resulting in the inability of a State to prosecute should be present *at the time of this Court's admissibility determination*. See R.S. 17(3). The objective criteria articulated in Article 17 allow this Court to usurp a state's criminal jurisdiction only when there is a present, real inability to prosecute. Here, there is at best only a speculative concern regarding future conduct of the Razachstani courts.

A determination of a State's "inability" to prosecute based on anything less than the strict criteria set out by the Rome statute, namely a *substantial* or *complete* collapse, would place this Court in the position of subjectively reviewing the conditions of national judicial systems. This is contrary to this Court's complementary relationship with the State Parties, as well as the Rome Statute's commitment to respecting state sovereignty.

C. The object and purpose of the Rome Statute, the ending of impunity for international crimes, requires that this case be prosecuted nationally.

A treaty must be interpreted in light of the object and purpose for which it was created. V.C.L.T., art. 31. Created in response to the "millions of children, women and men [who] have been victims of unimaginable atrocities that deeply shock the conscience of humanity," the Rome Statute's "object and purpose" is to ensure that grave crimes which are of concern to the international community as a whole do not go unpunished. R.S. Preamble ¶4. The Statute affirms that ending impunity requires effective prosecution not only at the international level, but at the national level as well. R.S. Preamble ¶4. To this end, the Statute emphasizes the positive duty of every state to exercise criminal jurisdiction over persons responsible for international crimes. R.S. Preamble ¶6.

In this light, finding this case admissible would not allow for a true resolution of the Marijani situation in Razachstan, and would deflect from the pressure on states to resolve such atrocities in compliance with international standards on their own initiative. See generally, Arsanjani & Reisman, at 395. The I.C.C.'s complementarity jurisdiction provides not only protection for state sovereignty, but promotes ending impunity on the national level. As stated previously, the object and purpose of the Rome Statute, and therefore of the I.C.C. itself, is to end impunity for perpetrators of international crimes. This not only allows for, but requires state participation.

Razachstan's voluntary referral to the I.C.C. under Article 13(a) does not trump Article 17's complementarity requirements. Admissibility based solely on one State party's voluntary

referral without consideration of complementarity places one state's wishes above those of another. This would proscribe the statutory rights granted by the Statute to the accused or another State which may have jurisdiction. Arsanjani & Reisman, at 396. A finding that *any* state which has jurisdiction over the accused, has the ability to conduct a genuine prosecution, and is willing to do so *must* be found as the preferable forum, according to the Rome Statute, for prosecution.

Razachstan is not prevented by the Statute from challenging jurisdiction even where Razachstan originally triggered these proceedings. Just as there is nothing in the statute which precludes a state from making a voluntary referral regarding a situation which occurred on its territory, there is no explicit language prohibiting a state from subsequently challenging that admissibility once the situation allows for national prosecution.

CONCLUSION

Wherefore the Office of the Prosecutor respectfully requests that the Court find that the jurisdictional prerequisites have not been met. Further, even if there was no jurisdictional bar to prosecution before this Court, the Prosecutor also respectfully requests that this Court find that exercising jurisdiction would violate the principle of complementarity and as such is inadmissible.

CERTIFICATION OF TEAM MEMBERS

We hereby certify that the memorial for Syracuse University College of Law is the product solely of the undersigned and that the undersigned have not received any faculty or other assistance, other than that allowed for in the Rules, in connection with the preparation of this memorial.

/s Kelly M. Berger

Kelly M. Berger

/s Veronica Margrave Krause

Veronica Margrave Krause

/s Jennifer J. Phillips

Jennifer J. Phillips

Date: 09/12/2006