

**IN THE
INTERNATIONAL CRIMINAL COURT**

PROSECUTOR

v.

TWENTY-SEVEN SOLDIER NATIONALS OF FATAR

MEMORIAL FOR THE DEFENDANTS

September 13, 2006



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STATEMENT OF FACTS

In February 2002, pursuant to a Security Council Chapter 7 resolution and in response to international outcry, the United Nations (“UN”) sent Peacekeepers into Razachstan to maintain peace during negotiations for the withdrawal of Quraci troops, who had brutally occupied Razachstan for many years. (R. ¶¶ 1-2). Neighboring Fatar joined twenty other countries in contributing Peacekeepers. (R. ¶ 2). Qurac surrendered on December 12, 2004. (R. ¶ 4). On December 31, 2004, under a UN negotiated accord, a Razachstani provisional government was established to govern the fledgling nation until its first democratic elections in May 2005. (R. ¶¶ 1, 5). During its occupation, Razachstan had signed on to the Rome Statute of the International Criminal Court (“Rome Statute”), and, on January 1, 2005, the Rome Statute entered into force, empowering the ICC with jurisdiction to prosecute persons who had committed genocide, war crimes, and crimes against humanity. (R. ¶ 6).

In November 12, 2003, while Qurac still controlled Razachstan, twenty-seven Fatar peacekeepers had become dissatisfied with the way in which the UN was conducting the Razachstani mission and had moved into the Buchari province of Razachstan, an area comprised mostly of members of the Marijani caste, which occupies the most inferior social position in Razachstani society. (R. ¶¶ 1, 3). In February 2005, a UN coalition mission into Buchari found the Fatar peacekeepers living in a Marijani village. (R. ¶ 7). Upon the villagers’ allegations that the Fataris had been staying in the village for over a year and had allegedly committed possibly illegal acts while there, the coalition immediately arrested the Fataris without any further evidence. (R. ¶ 7).

Although other Razachstanis have historically subjected Marijanis to innumerable violent crimes, the occurrence of which tripled during the occupation, the Razachstani government wanted to summarily execute the captured Fatar peacekeepers immediately, seemingly without any collection of further evidence or a fair and impartial trial. (R. ¶ 1, 8). Khalid Faraz, the then-candidate for and now current Prime Minister, publicly expressed his angry desire to try the Fataris in Razachstan. (R. ¶¶ 8, 10). The Fatar government showed no intent to exert jurisdiction over the case. (R. ¶ 8). Further, because Razachstan was a signatory state to the Rome Statute, and because it would be “quite some time” before Razachstan had the requisite capacity to properly try the case, UN representatives urged that the Fatar peacekeepers be tried in the ICC. (R. ¶¶ 8-9). The Razachstani government discussed the issue and, in April

2005, concluded that the ICC should try the case. (R. ¶ 8). In May 2005, after an initial investigation, the ICC charged the Fatari peacekeepers under the Rome Statute with crimes against humanity of murder (Rome Statute art. 7(1)(a)) and the war crimes of murder (Rome Statute art. 8(2)c(i)-1), willful killing (Rome Statute art. 8(2)(a)(i)), attacking civilians (Rome Statute art. 8(2)(b)(i) or 8(2)(e)(i)), and excessive incidental death, injury, or damages (Rome Statute art. 8(2)(b)(iv)). (R. ¶ 9).

During the period of political jockeying before the first democratic elections since its occupation nine years before, Razachstani government representatives filed a petition with the ICC in late May 2005, challenging its jurisdiction. (R. ¶ 10). Soon after, newly elected Prime Minister Faraz met with ICC prosecutors in an attempt to persuade them to return the Fatari peacekeepers for immediate trial in Razachstan, professing that they would not be subjected to execution. (R. ¶¶ 1-10). However, it is unclear whether Faraz even had the power to effectuate his avowal. Moreover, representatives of Fatar and the accused expressed misgivings of an unfair and partial trial in Razachstan due to that country's history of subverting human rights and the rights of the accused, Razachstan's complete inability to conduct a genuinely fair trial that could meet international standards, and mounting international pressure to "make an example" of the peacekeepers. (R. ¶ 12).

SUMMARY OF THE ARGUMENT

Under Article 17 of the Rome Statute, the case against the Fatari Peacekeepers is admissible in International Criminal Court (“ICC”). After exercising its broad jurisdiction to make preliminary decisions whether to admit a case at the ICC, the Court should reject Razachstan’s idealistic petition to retain this case, as it has determined that Razachstan is entirely unwilling and unable to conduct a genuine investigation of the serious acts of which peacekeepers have been accused.

Moreover, because the Razachstani judiciary system is entirely unwilling and unable to investigate this case, and because historic evidence indicates that countries emerging from conflicts cannot be willing or and able to conduct a genuine investigation, any preliminary rulings under Article 18 regarding the admissibility should favor the ICC’s jurisdiction due to Razachstan’s waiver of or, alternatively, lack of power to investigate this case. Thus, the Court should deny Razachstan’s challenges to the jurisdiction of the Court and the admissibility of this case under Article 19 of the Rome Statute.

ARGUMENT

- I. THIS CASE IS ADMISSIBLE UNDER ARTICLE 17 OF THE ROME STATUTE, BECAUSE THE ICC HAS BROAD JURISDICTION TO DECIDE WHEN TO ADMIT A CASE AND HAS DETERMINED THAT RAZACHSTAN IS ENTIRELY UNWILLING AND UNABLE TO CONDUCT A GENUINE INVESTIGATION OF THE ALLEGED ACTS OF THE FATARI PEACEKEEPERS.

Article 17 of the Rome Statute dictates that this case is admissible in the International Criminal Court (“ICC”). Rome Statute art. 17. If a State that would otherwise have jurisdiction over a case is either unwilling or unable to genuinely carry out an investigation of the case, that State lacks jurisdiction, and the ICC has jurisdiction over the case. *See id.* Here, Razachstan ceded jurisdiction to the ICC when it failed to demonstrate its willingness or ability to conduct a genuine investigation of the alleged acts of the Fatari peacekeepers, whereby the accused would be afforded their recognized rights under international law. (R. ¶ 10).

A. The ICC has jurisdiction to determine that this case is admissible in the ICC.

The ICC preliminarily exerts broad jurisdiction to determine whether a case is admissible before it. *See* Rome Statute art. 17(1). Although Article 17(1) of the Rome Statute provides that the ICC “shall be complementary to national criminal jurisdictions,” the language is forceful: “The Court *shall* determine that a case is inadmissible” when it corresponds to an enumerated exception to the Court’s jurisdiction (emphasis added). *Id.* By logical extension, the Court is similarly empowered to make a *sua sponte* determination to accept a case that is not admissible in any other jurisdiction due to its failure to fit into one of the enumerated categories. *Id.* Thus, in signing the Rome Statute, all signatories demonstrate their awareness and support of the ICC’s role as the ultimate arbiter of the issue of admissibility of cases that may come before it. *See* Rome Statute art. 12(1).

B. The Court should exercise its clear jurisdiction to investigate this case, because Razachstan has demonstrated its unwillingness to investigate the alleged occurrences

Article 17(1) of the Rome Statute instructs a four-prong test to evaluate whether a case is inadmissible and, by inference, admissible in the ICC. A case is inadmissible if the defendant

has already been tried for the same conduct, the alleged conduct is not of sufficient gravity, or a willing and able State that has jurisdiction has been or is genuinely investigating or prosecuting the alleged act. *Id.* Here, the Fatari peacekeepers have not been tried, the accusations are serious, and the case against them has not been and is not being properly investigated. (R. ¶¶ 10, 12). Thus, because this case does not correspond to any of four exceptions to ICC jurisdiction, it is admissible.

Razachstan has shown its complete unwillingness to genuinely investigate the accusations against the Fatari peacekeepers. Properly trying a defendant entails a demonstrated “willingness” to do so. Rome Statute art. 17(2). In evaluating a State’s willingness to genuinely investigate a case, the ICC considers several factors, including whether the proceedings are being conducted independently and impartially. Rome Statute art. 17(2)(c). Thus, “willingness” is a term of art that signifies a State’s readiness to abide by the recognized principles of due process under international law, not merely an asserted desire. *Id.*

Here, although Razachstan asserts its wish to try the Fataris, it has not met the requisite threshold of “willingness.” First, without conducting a timely, proper investigation into the villagers’ allegations, and without affording the peacekeepers due process, a faction of the Razachstani government wanted to summarily execute them. (R. ¶ 8) Further, as government representatives jockeyed for power, the political incentives for holding the trial, as evidenced in the public’s expressions of vengeance, effectively rendered Razachstan unwilling to conduct impartial proceedings. (R. ¶¶ 8, 10, 12) Thus, because political motive and an emotional response to the moment has consistently tainted its handling of this case, Razachstan has not shown a willingness to genuinely investigate the serious allegations against the Fataris. *Id.* In fact, during meetings with the provisional government, United Nations (“UN”) representatives suggested that “it would be quite some time before Razachstan would have the ability to properly try the Fatari soldiers,” and, therefore, they should be tried in the ICC at The Hague. (R. ¶ 8) A month does not qualify as “quite some time.” Thus, Razachstan has failed to demonstrate its plans to overcome clear historic obstacles to its judicial independence and impartiality in order to afford the accused their right to due process. *Id.*

Therefore, proceeding in the ICC is the only guarantee that the accused will receive their recognized right to due process under international law. Parts 5 and 6 of the Rome Statute

expressly detail the proper internationally accepted procedural and substantive rights of the accused, both pre- and post-trial. Rome Statute, parts 5-6

The protections that the Rome Statute provides for the accused accord with those defined in Article 14 of the International Covenant of Civil and Political Rights and customary international law. *See* ICCPR art 14-15; Third Geneva Conventions art. 84(2); Farhad Malekian, 38 CORNELL INT'L L.J. at 711-713 (2005) (citing the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and a host of other international treaties); Asbjorn Eide et al., 89 AM. J. INT'L L. at 221-22 (1995) (citing minimum necessary due process guarantees contained in Articles 9 and 11 of the Declaration of Minimum Humanitarian Standards to the Commission on Human Rights). Major international human rights instruments instruct affording a defendant the presumption of innocence, the rights to be tried in an independent and impartial court that guarantees a means of defense, to attend one's own trial, to not be forced to testify against oneself, and to not be tried twice for the same offense, amongst others. *Id.* Due process for the accused also requires an assurance of a separation of powers amongst the various government branches, as well as adequately defined criminal procedures and binding codes of ethics of judicial conduct. Suzannah Linton, 4 J. INT. CRIM. L. at 330 (2006); *see* International Center for Transitional Justice Press Release (listing requisite measures of due process). Here, it is unclear whether any of these cognizable fundamental rights under international law would be available to the Fataris in Razachstan. (R. ¶¶ 1-12) Moreover, seemingly no international commitment exists to assist Razachstan in its purported attempt to fairly investigate the accused peacekeepers. *Id.*

In fact, "the ICC is a model of due process" and often offers the only alternative to "most national criminal-justice systems, [which] are far less even-handed, particularly those in States that have experienced atrocities serious enough to draw the Court's interest." Kevin Jon Heller, 4 J INT'L CRIM. JUST at 17 (2006); "The ICC safeguards the constitutional and due process rights of the defendants in criminal cases" due to its neutrality. Linton at 330. Should the ICC preside over this case, the Rome Statute, Elements of Crimes and its Rules of Procedure and Evidence, and the principles and rules of international humanitarian and human rights law would apply to

ensure that the accused would receive a fair and impartial trial with due process of the law. Rome Statute art. 21. No such guarantees exist in war-torn Razachstan. (R. ¶¶ 1-12).

C. Moreover, because the Razachstani judiciary system is entirely unable to investigate this case, the Court should insist on jurisdiction in the ICC.

Razachstan is unable to try this case. A total or substantial collapse or unavailability of a national judicial system signifies a state's inability to carry out genuine legal proceedings, such as obtaining reliable and verifiable evidence. Rome Statute art. 17(3). The Razachstani judicial system suffered a total collapse and is entirely unavailable to carry out any genuine legal proceedings. (R. ¶¶ 1, 8) Only moments after surviving nine years of occupation and three years of brutal war, achieved only with the assistance of UN peacekeepers, Razachstan hopefully but groundlessly professes an ability to conduct a fair and impartial trial for serious crimes allegedly committed on its soil. *Id.* With Razachstan's deeply rooted history of unaddressed widespread human rights violations against its own people, the defendants rightfully fear a similar deprivation of their internationally recognized human and civil right to due process. (R. ¶ 1) The sheer gravity of the crimes concerned requires a heightened level of fairness and impartiality that Razachstan is simply unable to match with its infant government and only burgeoning rule of law. (R. ¶¶ 1, 8).

D. Historic evidence indicates that countries emerging from conflicts cannot be willing or and able to conduct a genuine investigation.

Razachstan is not the first country to assert an illusory willingness and ability to conduct a genuine investigation. Historically, war-wracked states cannot effectively investigate or try case due to their a lack of resources and will, as well as an educated judiciary and established rule of law. Patricia M. Wald, 46 VA. J. INT'L L. at 329 (2006). In its failed efforts to hold similar judiciary proceedings, Indonesia exemplifies the troubles that occur when states assume such a burden. *Id.* at 331-32. In its assumption of jurisdiction over prosecuting crimes committed during its recent civil strife, Indonesia demonstrated a new state's complete lack of judicial capacity. *Id.* Similarly, Serbia, Croatia, and the Srbska Republica all have proven their inability to hold proper proceedings against the accused. *Id.* Cambodia also has shown the shortcomings of domestic courts to handle those accused of war crimes. *Id.* In many countries,

such as Cambodia, the reasons for the abysmal state of Razachstan's post-conflict legal and judicial system are complex and derive from history, culture, socio-political conditions, and basic human and infrastructural capacity. Linton at 329.

Iraq's *sui generis* establishment of the Iraqi Special Tribunal (IST) has similarly faced some of the difficulties feared here. *Curtis F.J. Doebbler and Michael P. Scharf*, 37 CASE W. RES. J. INT'L L. at 25-26 (2005). Namely, the newly reestablished judiciary was not politically disinterested, and the then-candidate for prime minister highly pressured the IST to commence the trials more quickly. *Id.* at 25, 28. The IST is widely criticized for its violation of more than twenty due process rights, such as timely notice of charges and to stand before an accuser. *Id.* (citing Third Geneva Convention art 104 and the International Covenant on Civil and Political Rights art 14(3)(a)); Farhad Malekian, 38 CORNELL INT'L L. J. at 706-10.

However, assuming that the IST is legitimate, its purpose significantly differs from the suggested Razachstani court. First, the IST was established as a domestic court to try Iraqi nationals and residents accused of international crimes in Iraq. Mikhail Wladimiroff, 38 CORNELL INT'L L.J. at 950 (2005). Razachstan hopes to try foreigners. Further, the IST's aim is to prosecute crimes directly relating to its internal conflict. Razachstan wishes to investigate the actions of foreign UN Peacekeepers, who have only a tangential relationship to the conflict in that country. Thus, the IST does not provide a model for giving Razachstan jurisdiction over this case.

Ultimately, a war crimes investigation is not an appropriate moment to introduce Razachstan to the concepts of fair trial and due process. On the other hand, the ICC can provide "five-star justice" for the accused. *See id.*; Rome Statute art. 36. Thus, while Razachstan has an interest in developing its status as a sovereign state, the fundamental rights of the Fatari peacekeepers cannot be subjugated to that cause. First, the international community does not recognize a state's sovereignty as absolute. Wald at 342-43 (discussing exceptions that override state sovereignty). Second, to weigh the promotion of Razachstani independence with the assurance of legal process for the accused is a false balancing test. Rather, the legitimacy of the new Razachstan rests in its actions to guarantee justice. *See* Michael J. Frank, 57 OKLA. L. REV. at 312 (2004) (discussing the interconnection between assuring due process and strengthening the post-conflict state). Thus, Razachstan must here recognize the ICC's jurisdiction over the accused.

II. ANY PRELIMINARY RULINGS UNDER ARTICLE 18 REGARDING THE ADMISSIBILITY SHOULD FAVOR THE ICC'S JURISDICTION DUE TO RAZACHSTAN'S WAIVER OF OR, ALTERNATIVELY, LACK OF POWER TO INVESTIGATE THIS CASE.

First, a Party to the Rome Statute accepts the Court's jurisdiction. Rome Statute art.12(1). Moreover, when, in accordance with Article 14, a Party refers a case to the Prosecutor, requesting an investigation to determine whether an individual should be charged with a crime enumerated in the Rome Statute, the Court may exercise its jurisdiction if the conduct in question happened on the territory of a Party to the Rome Statute. Rome Statute art. 12(2)(a), 13(a), 14(1). Additionally, assuming *arguendo* that the ICC had initiated the investigation of this case *proprio motu*, when, after an initial investigation, the ICC charged the Fatari peacekeepers, "based upon the jurisdiction of crimes arising in an international conflict in the territory of a signatory state," the Court's jurisdiction would be no less legally justified. *See* Rome Statute art. 15. Here, after the Fatari peacekeepers were found in the Buchari province within Razachanstani territory, the government of Razachstan referred the situation to the Prosecutor under 13(a), requesting the Court to investigate the case. Thus, not only did Razachstan cede jurisdiction to the ICC to make the determination of whether the Court should investigate this case, upon an affirmative response, the Prosecutor then rightfully pursued an investigation of the averred acts. Moreover, the Court also had the power to determine whether the Prosecutor should initiate an investigation due to Fatar's insistence that its nationals be tried at the ICC. Rome Statute art. 12(2)(b).

Second, when a Party refers a situation to the Court pursuant to Article 13(a) and the Prosecutor determines a reasonable basis to commence an investigation, the Prosecutor notifies all of the States that would normally exercise jurisdiction. Rome Statute art. 18(1). Those States have one month to inform the Court of their possible intention to investigate the crimes at the national level, to which the Prosecutor defers, unless the Prosecutor applies to the Pre-Trial Chamber, which decides to authorize the investigation. Rome Statute art. 18(2).

Here, although the Prosecutor is seemingly deferring to Razachstan's desire to investigate, the Court should exercise its jurisdiction to prevent that investigation. First, by failing to respond in a timely manner, Razachstan waived its only opportunity to investigate. In order to investigate a case, a State must respond to the Prosecutor's notification of its

investigation within one month, the peacekeepers arrested the Fataris in April but Razachstan did not respond until late May. (R. ¶¶ 6-8). *See* Rome Statute art. 18(2). Razachstan necessarily was aware of the Court’s involvement in this investigation, because it was that State that initially referred the case to the ICC. *Id.* Nonetheless, after the Prosecutor had given notification of its commencement of an investigation, Razachstan failed to express any intent to begin its own.

More importantly, the possibility of ceding investigatory power to a State presumes that State’s willingness and ability to genuinely carry out the investigation. *See* Rome Statute art. 18(3). The Rome Statute reserves a six-month period after a State assumes an investigation within which the Prosecutor may determine a change of circumstances that prevents the State from genuinely executing that investigation. *Id.* However, the presumption is that the State demonstrates willingness and ability from the time of their request. *Id.* That time is not a trial period to test that State’s competence. *Id.* Thus, assuming *arguendo* that it had acted within the one-month limit, for reasons discussed, Razachstan does not meet the requisite standard of willingness and ability.

Moreover, in challenging the Court’s ruling to deny that its request, Razachstan would be wrong to urge, under Article 18(7), that it has experienced a “*significant* change of circumstances.” (emphasis added). Despite wishes and political promises with no demonstrated enforceability, the situation for the accused has not changed at all in Razachstan. Hence, in preliminary rulings regarding the admissibility of this case in the ICC, Razachstan waived or, alternatively, lacked the requisite qualifications to assert its right to investigate the Fataris peacekeepers. Therefore, the Court retains the jurisdiction that Razachstan explicitly granted it on multiple occasions, despite Razachstan’s later untimely and unwarranted attempts to assert its own jurisdiction.

Additionally, Fatar has a cognizable interest in this issue of admissibility, as a State that would “normally exercise jurisdiction over the crimes concerned.” *See* Rome Statute art. 18(1). Because the Rome Statute often provides equal rights to States on the territory of which the conduct occurred and States of which the person accused of the crime is a national, Fatar’s claims are arguably equal to or greater than Razachstan’s. *See* Rome Statute art. 12(2)(a). Thus, although it has declined to investigate, Fatar has a right to appeal Razachstan’s jurisdiction. Rome Statute art. 18(4). In order to avoid meritorious appeals, the Court should not turn over this investigation to Razachstan.

III. RAZACHSTAN'S CHALLENGES TO JURISDICTION OF THE COURT OR THE ADMISSIBILITY OF A CASE UNDER ARTICLE 19.

As stated, the Court has the jurisdiction to determine the admissibility of a case at the ICC, and it must preliminarily satisfy itself that its jurisdiction over a case is proper. Rome Statute art. 19(1). It has done so here. Further, after the ICC determines that a case is admissible within its jurisdiction, several categories may challenge its jurisdiction, including Parties to the Rome Statute, which are required to accept jurisdiction under Article 12(1). Two other classes may also challenge the admissibility of the case or the ICC's jurisdiction: the accused and States that have jurisdiction over the case, on the condition that they are investigating or have investigated the case. Rome Statute art. 19(2)(a), (b). Clearly, neither of these provisions apply here, where the accused would strongly request that the case remain in the ICC, and, as discussed, Razachstan unquestionably lacks jurisdiction over this case due to its unwillingness and inability to genuinely investigate the allegations. Rome Statute art. 19(2)(c). Thus, because it is a Party to the Rome Statute, Razachstan is authorized to present a challenge to the admissibility of this case at the ICC. Rome Statute art. 19(2)(c).

However, Razachstan's preliminary challenges to the admissibility of this case at the ICC lack merit and merely prolong the length of these proceedings, thereby depriving the Fatari peacekeepers an expeditious trial. *See* Rome Statute art. 19(7). First, a State mandatorily must make any challenge to the Court's jurisdiction over a case "at the earliest opportunity." Rome Statute art. 19(5). Because it initially requested ICC jurisdiction and no relevant conditions have changed that would excuse that its lengthy delay in raising this challenge to ICC admissibility, Razachstan waived its opportunity to do so now. *See id.* Moreover, because the Prosecutor must suspend its investigation until the Court makes a determination on a preliminary challenge, such a challenge unnecessarily delays a speedy resolution to the case, denying the accused a timely hearing and delaying justice for all parties. *See* Rome Statute art. 19(7). Thus, Razachstan's groundless and untimely challenge to the ICC's jurisdiction over this case should not divert the Court's attention from providing expeditious legal process.

CONCLUSION

For the foregoing reasons, this case is clearly admissible under the jurisdiction of the International Criminal Court.