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SITUATION IN THE DEMOCRATIC REPUBLIC OF RAZACHSTAN

MEMORIAL FOR THE DEFENSE

**SYRACUSE UNIVERSITY COLLEGE OF LAW**

The Office of Counsel for the Defense

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para.	paragraph
paras.	paragraphs
pg.	page
R.	Record
R.S.	Rome Statute of the International Criminal Court
U.N.	United Nations

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**PRELIMINARY STATEMENT**

Pursuant to Rule 58 of the Rules of Procedure and Evidence, this hearing results from Razachstan’s petition challenging the admissibility of the case against the Fatari soldiers before the International Criminal Court. Counsel for the Defendants respectfully requests that this Court find (1) that it may properly exercise its jurisdiction over this case, and (2) that this case is admissible before the court.

**1. Jurisdictional Arguments Before this Court**

Under Article 19 of the Rome Statute, this Court must determine that it may properly exercise its jurisdiction over a case. This Court may exercise its jurisdiction over the case concerning the Fatari soldiers as the prerequisites to jurisdiction have been met. Razachstan, the State in which the alleged actions occurred, referred this matter to the Court, thereby triggering the Court’s jurisdiction over the situation in Razachstan. Moreover, the alleged actions of the Fatari soldiers fall within the scope of this Court’s subject matter jurisdiction. Article 5 of the Rome Statute gives this Court jurisdiction over “crimes of concern to the international community as a whole,” including crimes against humanity and war crimes. The alleged crimes occurred within the context of an armed conflict, the nine year Quraci occupation of Razachstan, to which the Fatari soldiers were sent as part of a U.N. peacekeeping mission. After the Fatari soldiers broke away from their national continent, they formed an independent organization and occupied a Marijani village in the Buchari province. There, the soldiers allegedly raped, mutilated, murdered, and tortured the Marijani villagers until being discovered by the U.N. coalition forces. Because these alleged crimes were committed in the context of a U.N. peacekeeping mission, they concern the international community as a whole.

This Court also has temporal jurisdiction over this case as the Fatari soldiers’ alleged actions constitute a continuing crime. Although the exact dates of the alleged crimes are unknown, it is known that the Fatari soldiers broke away from the U.N. forces in November 2003 and were discovered in the village in February 2005. The alleged crimes occurred during this period of occupation by the soldiers.

The Counsel for the Defendants respectfully requests that this Court find that it may properly exercise its jurisdiction over this case as the prerequisites for jurisdiction have been met.

## **2. Admissibility Arguments Before this Court**

Assuming that this Court has found that it may properly exercise its jurisdiction over the situation concerning the Fatari soldiers, the Court must also determine whether the case is admissible under the requirements established in Article 17. Operating under the principle of complementarity, the Court should determine whether the case is being investigated or prosecuted by a State that is genuinely willing and able. Here, the Counsel for the Defendants respectfully requests that this Court find that Razachstan is neither willing nor able to genuinely prosecute the Fatari soldiers.

Fatar is the State that may properly exercise its national jurisdiction over the defendants as it retained exclusive criminal jurisdiction over its nationals when it contributed troops to the U.N. peacekeeping mission. However, Fatar is unwilling to genuinely prosecute its soldiers because of the international pressure urging it to render an exemplary verdict, thereby depriving the defendants of their right to an impartial trial. For this same reason, if the Court should find that Razachstan may exercise its national jurisdiction over the soldiers, Razachstan will also be subject to this international pressure, and the defendants will not receive a fair trial.

Razachstan, which has experienced nine years of Quraci occupation and which has a newly formed government, will not be able to effectively prosecute the soldiers in its national courts. After suffering years of violent abuse and second-class treatment, the Marijani victims will not likely participate in the trial, thereby depriving the Fatari soldiers of the ability to collect exonerating evidence.

The Rome Statute provides protections to ensure that justice is done for the defendants, the victims, and the international community as a whole. The Counsel for the Defendants respectfully requests that this Court find that Razachstan is neither willing nor able to genuinely prosecute the Fatari soldiers.

As such, the Counsel for the Defendants asks the Court to find (1) that it may properly exercise its jurisdiction over this case, and (2) that this case is admissible before the court.

**STATEMENT OF FACTS**

1. Fatar is a country located near Qurac. R.2. Qurac occupied the South East Asian country of Razachstan for nine years, ending its occupation only after a three year war. R.1. During this occupation, the Quraci forces committed numerous brutal acts against the Razachstani population, especially members of the Marijani caste. R.1.
2. In 2002, the international community became aware of the acts committed by the Quraci forces. R.1,2. When the U.N.'s Security Council issued a Chapter 7 resolution to send its peacekeepers into Razachstan in response to the Quraci acts, Fatar contributed troops to the U.N. coalition forces. R.2. With Fatar's aid, U.N. coalition forces liberated the Razachstani province of Nadir, the Quraci principle base of operations, on December 5, 2004. R.4. Within a week, a cease fire was ordered and the Quraci troops surrendered. R.4.
3. The U.N. coalition forces maintained their presence until the Razachstani provisional government was established on December 31, 2004. R.5. In February 2005, U.N. coalition forces discovered 27 Fatari soldiers, former U.N. coalition members, occupying a Marijani village in the Buchari province. R.7. Dissatisfied with the U.N. leadership, these Fatari soldiers had broken away from the coalition approximately fourteen months earlier, and had remained in the Marijani village. R.3,7.
4. 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," and are viewed as second-hand citizens. R.1, 8. Prior to the Quraci occupation, the Marijanis were often the victims of abuse, suffering at least 500,000 violent crimes annually. R.1. The abuse tripled in frequency with the Quraci occupation. R.1. During the Fatari soldier occupation of the Buchari province, the Marijani villagers alleged that these soldiers killed nine men, raped and mutilated seventeen women, and tortured several villagers. R.7. Upon hearing these allegations, the U.N. coalition troops took the Fatari soldiers into custody. R.7.
5. In February 2005, when the Fatari soldiers were taken into custody, the Razachstani provisional government operated under a U.N. negotiated accord until democratic elections could be held. R.5,7,10. After much debate, the provisional government members could not agree on what should be done with these Fatari soldiers. R.8. While some provisional government members were angry and wanted to immediately execute the Fatari soldiers, other

members felt that the crimes did not warrant punishment by execution because the victims were only Marijanis. R.8.

6. Although attempts were made to contact Fatar about its soldiers, the provisional government members assumed that Fatar did not intend to exert jurisdiction in this matter. R.8. Working with the provisional government, U.N. officials suggested that Razachstan turn the Fatari soldiers over to the I.C.C. for prosecution, as it would be quite some time before the Razachstani courts had the ability to properly try the Fatari soldiers. R.8. The Fatari soldiers were turned over to the I.C.C. in April 2005. R.8.

7. The I.C.C. charged the Fatari soldiers with the following crimes: crimes against humanity (murder) and war crimes (willful killing, attacking civilians, excessive incidental death, injury or damages, murder), all under Articles 7 and 8 of the Rome Statute. R.9.

8. In May 2005, a month after it turned the soldiers over to the I.C.C., Razachstan filed a petition with the I.C.C. challenging the Court's jurisdiction over the situation. R.10. Shortly afterward, in early July 2005, the newly elected Razachstani Prime Minister, Khalid Faraz, met with I.C.C. prosecutors urging the return of the Fatari soldiers to Razachstan for trial. R.10. Prime Minister Faraz claimed that Razachstan now had a criminal court and that the soldiers would not be subject to execution. R.10.

9. After learning that the Fatari soldiers were charged with crimes under the Rome Statute, Fatari representatives appeared before the I.C.C. to challenge the Razachstani petition, requesting that the soldiers be tried before the I.C.C. and not in Razachstan. R.12. The soldiers would not receive a fair trial in Razachstan, because even prior to the Quraci occupation, Razachstan did not provide its defendants with rights in accordance with international standards. R.12. Alternatively, if the soldiers were tried in Fatar, the international pressure on Fatar to impose an exemplary sentence would prevent them from receiving a fair trial there. R.12.

10. Representatives of the Marijani Liberation Front also appeared before the I.C.C. to challenge the Razachstani petition, arguing that these victims would not receive justice in a Razachstani court because of their extensive history of discrimination. R.11.

11. 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 CASE CONCERNING THE FATARI SOLDIERS MAY BE PROPERLY TRIED  
BEFORE THE INTERNATIONAL CRIMINAL COURT**

1. Under Article 19(1) of the Rome Statute, this Court must determine both that it has jurisdiction over a situation and that the case is admissible under article 17 of the Rome Statute. R.S. 19(1). Challenges may be made either to a Court’s exercise of jurisdiction over a situation or to the admissibility of a case before the Court by a State from which acceptance of jurisdiction is required under Article 12. R.S. 19(2)(c). Razachstan, as a State which may accept jurisdiction over the case under Article 12(2)(a), has challenged both the jurisdiction and admissibility of the present case. R.10. On behalf of its nationals, the defendant soldiers in this case, Fatar appears before the Court to challenge Razachstan’s petition, arguing that this Court has jurisdiction over the situation in Razachstan and that the case concerning Fatar soldiers is admissible.

**I. This case is admissible as the prerequisites to this Court’s exercise of jurisdiction have been met**

2. This Court may properly exercise its jurisdiction over the situation in Razachstan, as the necessary prerequisites triggering its active jurisdiction have been satisfied. Under Article 13(a), this Court may exercise its jurisdiction in a situation involving the commission of Article 5 crimes if a situation has been referred to the Prosecutor by a State Party. R.S. 13(a). Razachstan, a State Party to the Rome Statute, referred this situation concerning the Fatar soldiers to the Prosecutor in April 2005. R.S.12(2)(a); R.6, 8. Fatar, also a State Party, additionally requests that this case regarding its nationals be tried before this Court. R.S.12(2)(b); Cl.2.

**A. The alleged actions of the Fatar soldiers fall within the scope of this Court’s subject matter jurisdiction**

3. Both Fatar and Razachstan consented to this Court’s jurisdiction over Article 5 crimes when they became State Parties to the Statute. R.S. 12(1). Under Article 5, the Court may exercise jurisdiction over “the most serious crimes of concern to the international community as a whole,” including crimes against humanity and war crimes. R.S.5. Charging the Fatar soldiers under Articles 7 and 8, the Prosecutor based the Court’s jurisdiction on the commission of “crimes arising in an international conflict in the territory of a signatory state.” R.9. These

alleged acts were committed against members of the Marijani civilian population in the Buchari province. R.7.

*1. The Quraci occupation of Razachstan constitutes an armed conflict*

4. The Fatari soldiers are charged with war crimes under 8(2)(b)(i) and 8(2)(b)(iv), each requiring the existence of an international armed conflict, and also 8(2)(e)(i), requiring the existence of an armed conflict not of an international nature. R.S.8. Although the Rome Statute does not provide definitions for either an international armed conflict or an armed conflict not of an international nature, it does define war crimes as involving grave breaches of the Geneva Conventions of 12 August 1949 and other serious violations of the laws and customs applicable in international armed conflicts. R.S.8(2). Article 2 of each of the four 1949 Geneva Conventions 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.” Additionally, the International Tribunal for the Former Yugoslavia found that an armed conflict “is international if it takes place between two or more States” or “may become international ... if ... another State intervenes in that conflict through its troops.” Tadić, at para. 84.

5. Here, Qurac occupied Razachstan for nine years, ending its occupation only after a three year war. R.1. The Security Council, responding to the brutal acts committed during the Quraci occupation, sent U.N. peacekeeping forces into Razachstan. R.2. Over twenty countries, including Fatar, contributed troops in support of this U.N. initiative, resulting in the end of the Quraci occupation. R.2. If the U.N. had not issued its peacekeepers to Razachstan, the Fatari soldiers would not have been invited into Razachstan, and the soldiers’ alleged acts could not have taken place in the Buchari province.

6. Alternatively, even if this Court finds that the situation in Razachstan does not constitute an international armed conflict, the Fatari soldiers are also charged with war crimes under Article 8(2)(e)(i), requiring the existence of an armed conflict not of an international nature. The Fatari soldiers were in Razachstan during the Quraci occupation. R.2. These alleged acts occurred within the context of an armed conflict, whether international or not, bringing it within the Court’s jurisdiction over war crimes under Article 8 of the Rome Statute.

2. *The Fatari soldiers allegedly committed an attack against the Marijanis of the Buchari province*

7. The Prosecutor also charged the Fatari soldiers with murder under Article 7, constituting a crime against humanity. R.S.7. Under Article 7, a crime against humanity is an act “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” R.S.7(1). The attack on the civilian population must involve the “multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of [an] organizational policy to commit such attack.” R.S.7(2)(a).

Discussing similar language regarding crimes against humanities, the International Tribunal for the Former Yugoslavia found that

[t]he act may be intimately related to the attack on a civilian population, that is, it may fit precisely into a context of persecution of a particular group, and yet be unrelated to the armed conflict. It would be wrong to conclude in these circumstances that, since the act is unrelated to the armed conflict, it is being committed for purely personal reasons. Tadić, at para. 252.

Relying on customary law drawn from other international tribunals and national courts, the Tribunal continued by insisting that these crimes must be done with the knowledge by the individual actor that the crimes fit into the wider pattern of crimes directed against a civilian population. Tadić, at para. 255.

8. While in the Buchari province, the Fatari soldiers are alleged to have occupied the Marijani village and to have committed a series of attacks directed only toward the Marijanis. R.7. After breaking away from the peacekeeping coalition, the Fatari soldiers formed their own organization, with policies distinct from any State, including the State of Fatar. In Razachstan, the Marijanis were a civilian population that has traditionally been treated as the lowest members in the caste system, warranting only second-class protection from crimes perpetrated upon them. R.1, 8. Prior to the Quraci occupation, the Marijanis were the victims of more than 500,000 violent crimes annually, with that number tripling during the Quraci occupation. R.1. As they had been in Razachstan for a year before they broke away from the U.N. forces in November 2003, the Fatari soldiers likely knew of the Marijani’s social status and chose the Buchari province. While the individual acts committed by the soldiers may have had some personal motivation, it is likely that the greater organizational policy of the Fatari soldiers was to subject the Marijanis to their control as a group, allegedly allowing them to perpetrate crimes on

individual Marijanis. Through these acts, this Court has subject matter jurisdiction under Article 7 of the Rome Statute.

3. *Crimes allegedly committed during a U.N. peacekeeping mission concern the international community as a whole*

9. Article 5 gives this Court jurisdiction over “the most serious crimes of concern to the international community as a whole.” R.S. 5. Perpetrators of these crimes must be punished as these crimes threaten the “peace, security and well-being of the world.” R.S. at preamble. Here, the Fatari soldiers’ alleged crimes were committed in the context of a U.N. peacekeeping mission, which greatly concerns international security. When operating well, U.N. peacekeeping missions provide a means for the international community to work toward promoting regional stability, long-term peace, and development. DPKO Fact Sheet. Unfortunately, the potential global benefits of the peacekeeping missions have been diminished through reported incidents of sexual exploitation and abuse committed by the peacekeeping personnel in recent years. DPKO Fact Sheet.

10. In 2003, Secretary-General Kofi Annan issued a bulletin detailing measures designed to protect beneficiaries of U.N. services from sexual exploitation and abuse at the hands of U.N. personnel. Sec. Gen. Bulletin (2003), at section 2. When entering into a cooperative arrangement with a non-U.N. entity, this bulletin further indicates that U.N. officials must inform the non-U.N. entity of these protective policies and obtain a writing indicating acceptance of these policies. Sec. Gen. Bulletin (2003), at section 6. If the entity does not agree to these standards, the U.N. shall stop its cooperation with the entity. Sec. Gen. Bulletin (2003), at section 6.

11. The Rome Statute’s purpose is clear: “to put an end to impunity ... [and] to guarantee respect for and the enforcement of international justice.” R.S. at preamble. Atrocities perpetrated on aggregate individuals place the entire international community at risk – threatening the “delicate mosaic.” R.S. at preamble. Although criminal liability attaches to an individual for committing a crime of international concern under Article 25, international prosecutions of these crimes are viewed by some scholars as an opportunity to search for truth aimed at achieving public justice for victims of crimes. Koskenniemi, pg. 3 – 4. In an international trial for crimes against humanity, justice must be achieved not only for the individual victim, but also for the international community as a collective humanity.

Koskenniemi, 19 – 25. By placing the crime within its historical context, the international community gains an opportunity to learn about the structural causes underlying the crime and to engage in structural reform to prevent the crime from happening again. Koskenniemi, 19 – 25.

12. Here, although the individual Fatari soldiers should be punished if found guilty, their trial must take place with a view toward the broader historical context, with the goal being the achievement of structural reform and justice for the wider humanity. The Fatari soldiers were originally in Razachstan on a U.N. peacekeeping mission, but due to a lack of oversight and coordination, the soldiers were able to break away and form their own organization. R.3. Punishing the individual soldiers alone will not prevent a commission of crimes during other peacekeeping missions. Instead, the international community must engage in widespread reform in order to address these structural shortcomings.

13. Therefore, this Court should hear this case as it concerns the entire international community.

**B. The alleged actions of the Fatari soldiers constitute a continuing crime within this Court’s temporal jurisdiction**

14. Under Article 11, this Court has jurisdiction over crimes committed either where the Rome Statute has entered into force for a State Party or where a State has accepted temporal jurisdiction by lodging a formal declaration with the Court’s Registrar. R.S. 11,12(3). This Court has not yet decided whether this temporal jurisdiction may also cover “continuing crimes,” in which acts occurring before the Statute’s entry into force are either still ongoing or have an effect on acts occurring after the Statute’s entry into force. Stahn, pg. 429.

15. The International Criminal Tribunal for Rwanda, across a series of decisions, recognized the existence of continuing crimes if acts occurring before the commencement of the Tribunal’s temporal jurisdiction could be connected to acts within the Tribunal’s temporal jurisdiction. Specifically, in the *Ngeze* case, the trial chamber considered “facts related to the conduct of the accused before [the entry into force of the Statute] insofar as they were related to other facts that fell within the Tribunal’s temporal jurisdiction.” Ngeze, at para. 3. Moreover, in the *Nsengiyumva* case, the trial court accepted the doctrine of “continuing crime” as it related to the development of a conspiracy. Nsengiyumva, at paras. 27 - 28. Finally, the tribunal in the *Nahimana* case recognized the possibility that [victims’] allegations may be “subsidiary or

interrelated allegations to the principal allegation in issue and thus may have probative or evidentiary value.” Nahimana, at para. 27 - 28.

16. Discussing the intent required in the commission of a continuing crime, the International Criminal Tribunal for the Former Yugoslavia found sufficient intent either through the individual’s shared intent with other individuals who directly participated in the crime’s physical commission or through the individual’s knowledge and continued participation in the criminal enterprise. Kvočka, para. 284.

17. In the instant case, the Fatari soldiers allegedly committed various crimes against Marijanis during the soldier’s occupation of the Buchari province village. R.7. Although the exact dates of these crimes remain unknown at this time, it is known that the Fatari soldiers broke away from the U.N. forces in November 2003 and were discovered in the village in February 2005. R.3,7. 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. As the parties have not yet had the benefit of full discovery in this case, it is possible that the crimes were entirely committed after the Statute’s entry into force for both States, between January and February 2005. Even if some of the crimes were committed before the Statute entered into force for Razachstan, the crimes could have been committed after the Statue entered into force for Fatar, between January 2004 and February 2005.

18. Failing this, the Court could recognize the existence of continuing crimes, hearing evidence related to acts which occurred before the Statute’s entry into force which have a continuing effect on acts which occurred after the Statute’s entry into force. Here, the individual acts were committed in the context of the Fatari occupation of the Marijani village. Even if it cannot be proven who participated in the individual crimes, it could be proven that each of the soldiers contributed to the state of occupation, in a collective violation of the Marijani’s rights. Each of the soldiers would have been aware that the occupation was occurring and participated in the continuance of the occupation, enabling the commission of crimes against individual Marijanis. In this way, acts that may have occurred before the Statute’s entry into force contributed to the criminal acts that may have occurred after the Statute’s entry into force. Therefore, the Court has temporal jurisdiction over the instant case.

19. The Court’s jurisdiction over the instant case in Razachstan has already been appropriately triggered, as the necessary prerequisites have been satisfied, including both subject matter jurisdiction and temporal jurisdiction.

**II. The case concerning the Fatari soldiers is admissible before this Court because there are no national courts that are willing and able to prosecute the Fatari soldiers**

20. Assuming that the Court has found that it may properly exercise its jurisdiction over this situation, the Court must also determine whether this case satisfies the admissibility requirements established under Article 17. R.S.19(1). Operating under the principle of complementarity, the Court shall determine a case to be inadmissible where 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.” R.S.17(1); preamble at para. 10.

**A. No national court is genuinely willing to prosecute the Fatari soldiers**

21. A State Party to the Rome Statute has a duty to effectively prosecute criminals at the national level for violations of international crimes. R.S. preamble at paras. 4,6. Although the Rome Statute was created to serve in a complementary role to State Parties’ national criminal jurisdictions, it was not intended to displace proceedings designed to garner the respect necessary to secure lasting international justice. R.S. preamble at para. 11.

22. The Rome Statute outlines three criteria for determining a national court’s unwillingness to prosecute: 1) national proceedings are taking place to shield the accused from criminal responsibility; 2) there has been an unjustified delay in prosecution; and 3) the proceedings were not impartial or conducted independently or conducted in a manner that does not align itself with the intent of bring the accused to justice. R.S.17(2).

*1. Fatar is unwilling to prosecute the Fatari soldiers*

23. Under Article 19 of the Rome Statute, a challenge to admissibility can be made by a State that has jurisdiction over the case “on the ground that it is investigating or prosecuting the case.” R.S. 19(2)(b). Fatar, not Razachstan, is the State that may properly lay claim to jurisdiction over this case, as it involves crimes allegedly committed by its nationals, and therefore, it is the State which may properly prosecute its nationals in its domestic courts. Although Razachstan was able to refer the Fatari soldiers to this Court for prosecution as the State on whose territory the alleged conduct occurred, satisfying this Court’s preconditions for its exercise of jurisdiction

under Article 12(2)(a), it may not exercise its own national jurisdiction over the Fatari soldiers by prosecuting them within its courts. If Razachstan is successful in its challenge to this Court's jurisdiction over the instant case, there will be no national courts that are willing and able to prosecute the soldiers, as Fatar is unwilling to do so.

24. When contributing troops to a U.N. peacekeeping mission, the national court of the sending country retains jurisdiction with respect to violations of international humanitarian law by members of its national contingent. Sec. Gen. Bulletin (1999), at section 4. Here, as Fatar sent its troops to assist in the U.N. peacekeeping mission in Razachstan, its national courts are the only national courts able to properly exercise jurisdiction over these alleged violations. To be successful, the U.N. peacekeeping missions depend upon the voluntary cooperation of member States, like Fatar. These States will be less likely to contribute troops to the U.N. peacekeeping missions if their troops will be subject to foreign courts in the hosting countries.

25. Moreover, as this Court has an established independent relationship with the U.N., it is an appropriate venue in which to hear crimes committed in the context of U.N. peacekeeping missions. R.S.2. The Rome Statute makes it a war crime for individuals to harm U.N. staff, including peacekeepers. R.S.8(b)(iii). Although the Fatari soldiers were not acting as peacekeepers when they allegedly committed these acts, they were protected by the Rome Statute before they broke away.

26. Fatar recognizes that it has a duty as a signatory of the Rome State “to exercise its [national] criminal jurisdiction over those responsible for international crimes.” R.S. preamble However, the Statute also imposes a duty on its signatories to adhere to the recognized principles of due process and to provide the defendants with independent and impartial proceedings. R.S. 17(2). The international pressure placed on the Fatari courts to render a judgment against the defendants, and thereby make an example, will deprive the defendants of their right to receive an impartial trial. R.12. To ensure that these defendants receive a fair trial, Fatar requests this Court to rule that this case is admissible.

*2. Razachstan is not genuinely willing to prosecute the Fatari soldiers*

27. If the Court finds that Razachstan is able to exercise its national jurisdiction over the Fatari soldiers, the circumstances indicate that despite its statement of willingness, Razachstan is not genuinely willing to prosecute the Fatari soldiers in its national courts.

- a. The Fatari soldiers will not receive the benefits of the due process principles recognized by international law

28. To be considered willing to genuinely prosecute a case, a State must ensure that its national criminal prosecution will comply with the principles of due process recognized by international law. R.S.17(2). As a means of providing a defendant with a fair and impartial trial, the Rome Statute provides some express procedural protections within its provisions. If the Fatari soldiers are tried in Razachstan's courts, they will not receive the benefits of the due process principles recognized by international law.

29. As codified in the Rome Statute, the principles of due process recognized by international criminal law require that defendants are able to properly prepare a defense, which necessitates access to evidence on an equal basis. R.S. 67(1)(e). The Statute further requires the Prosecutor to disclose evidence to the defense which tends to show the defendant's innocence or which may affect the credibility of the Prosecutor's evidence. R.S. 67(2). Because this case will force Fatari Counsel to operate within a foreign jurisdiction, the Fatari Counsel might be unable to effectively access evidence which could show the defendants' innocence. If this case were to be tried in this Court, the Fatari Counsel could avail itself of the Rome Statute's protections, thereby ensuring that the defendants will have a fair trial.

30. Fatar is unwilling to prosecute these soldiers within its national courts because the international pressure to render an exemplary verdict will deprive the soldiers of their right to receive an independent and impartial trial. R.12. The international community will likely place similar pressure on the Razachstani courts, depriving the soldiers of an impartial and independent trial and rendering Razachstan unwilling to genuinely try the soldiers. R.S. 17(2)(c). Under Article 14(2) of the International Covenant for Civil and Political Rights, a defendant will have the right to be presumed innocent until proven guilty in a court of law. Similarly, in *Alenet de Ribemont v. France*, the European Court for Human Rights has found that defendants are entitled to a presumption of innocence before they are tried. Alenet, para. 41. There, high ranking police officials made statements in the press implicating the defendant in a murder before the defendant was tried in the French courts. Alenet, paras. 31 – 41. These statements "encouraged the public to believe him guilty and ... prejudged the assessment of the facts by the competent judicial authority." Alenet, para. 41. This protection is also found within Article 66 of the

Rome Statute. R.S. 66. The burden of proof remains with the Prosecutor, and the defendant is to be protected against a reversal of this burden. R.S. 67(1)(i).

31. As the Fatari soldiers will not receive the benefits of due process as recognized by international criminal law, this Court should find that Razachstan is not genuinely willing to prosecute this case.

b. The Marijani victims will not receive justice within the Razachstani national courts

32. As discussed above, the Marijanis had endured at least 500,000 violent crimes annually at the hands of Razachstani citizens before the Quraci occupation. R.1. If this case is prosecuted in Razachstani courts, the Marijanis will be asked to testify as to the details of the instant alleged crimes, which include rape, mutilation, and torture, in court before Razachstani officials. Additionally, evidence of these alleged crimes will need to be collected. The Marijani victims will be exposing their personal traumas to a society that does not want justice for them, as they are the “lowest of the low.” R.1, 8.

33. This Court, however, provides a venue in which the victims are able to participate in the proceedings. This Court is charged with ensuring that the trial is conducted with “due regard for the protection of victims.” R.S. 64(2). In doing this, both the Court and the Prosecutor must “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims.” R.S. 68(1). Moreover, the victims are not merely passive participants in a trial before this Court, but may take an active role and present their views and concerns. R.S. 68(3). The Prosecutor will also receive advice from the Victims and Witnesses Unit “on appropriate protective measures, security arrangements, counselling, and assistance.” R.S.68(4). Moreover, the Victims and Witnesses Unit will make available staff who have expertise in sexual violence and trauma. R.S.43(6). With these procedural protections designed to protect the victims and witnesses, this Court would ensure justice for the Marijanis without subjecting them to further trauma within the Razachstani system.

34. Therefore, this Court should hear this case to ensure that justice is achieved – for both the Fatari soldiers and the Marijani victims – as Razachstan is not genuinely willing to prosecute the Fatari soldiers.

**B. Razachstan is unable to genuinely prosecute the Fatari soldiers**

35. Even if this Court finds that Razachstan is willing to prosecute the Fatari Soldiers, it is not genuinely able to prosecute them. Article 17(3) indicates that a State is unable to genuinely try a case if cannot obtain necessary evidence or carry out its proceedings “due to a total or substantial collapse or unavailability of its judicial system.” R.S. 17(3). A prosecutorial investigation conducted by Razachstani officials will not be able to obtain necessary evidence, rendering its courts unable to genuinely prosecute the Fatari soldiers.

36. In Razachstan, the Marijani victims have experienced at least 500,000 violent abuses annually, making them unlikely to voluntarily participate in the trial. R.1. The Razachstan prosecutors will not be able to effectively investigate the case because the Marijanis are not likely to talk openly and candidly to the law enforcement officials, and the Fatari soldiers may not receive the necessary evidence proving their innocence.

37. Moreover, doubts have been raised as to whether the Razachstani courts in existence prior to the Quraci occupation adhered to generally recognized principles of international law, and more importantly, as to whether the current Razachstani courts have changed these processes. R.12. If these processes have not changed, then the Razachstani courts will likely not be able to genuinely prosecute the Fatari soldiers because of a lack of a proper court.

38. Here, the facts indicate that the Razachstani provisional government did not have the ability to prosecute these soldiers in April 2005, causing them to surrender the Fatari soldiers to this Court. R.8. The current Razachstani government was established in May 2005, one month after the soldiers’ surrender. R.1. Within that same one month, deciding that it wanted to try the Fatari soldiers, Razachstan turned around and challenged this Court’s jurisdiction. R.10. It is unlikely that Razachstan is now genuinely able to prosecute the Fatari soldiers, despite its statements of willingness and ability. Therefore, this Court should find this case admissible under Article 17.

**CONCLUSION**

39. Wherefore, for the above reasons, the State of Fatar respectfully requests that this Court find that the case concerning the Fatari soldiers may be properly tried before it, as the Court may exercise its jurisdiction over the situation and the case is admissible before it.

**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

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Kelly M. Berger

/s Veronica Margrave Krause

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Veronica Margrave Krause

/s Jennifer J. Phillips

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Jennifer J. Phillips

Date: 09/12/2006