

**IN THE
INTERNATIONAL CRIMINAL COURT**

PROSECUTOR

v.

TWENTY-SEVEN SOLDIER NATIONALS OF FATAR

MEMORIAL FOR THE PROSECUTOR

September 13, 2006



**KRISTINA ARVANITIS
MEAGAN HASSAN
R. OLIVIA PULLEY**

TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

STATEMENT OF THE FACTS.....4

SUMMARY OF THE ARGUMENT.....6

ARGUMENT.....7

I. The International Criminal Court Should Allow State Courts with Willingness and Ability to Try the Defendants.....7

A. The Principles of State Sovereignty Call and Complementarity Demand that States with Willingness and Ability be Allowed to Prosecute War Criminals in their own State Courts.....7

B. Article 17 of the Rome Statute Provides the Criteria for when a State is Willing and Able to Prosecute under International Laws.....9

C. Pursuant to Article 18 of the Rome Statute, the Prosecutor Shall Defer to a State’s Investigation and Prosecution Unless Extraordinary Circumstances are Warranted.....10

II. The International Criminal Court Should Cede Jurisdiction over the Defendants to the State Courts of Razachstan11

A. The Government of Razachstan was Democratically Elected by its People, and has the Willingness to Prosecute the Defendants.....12

B. The International Criminal Court Should Allow the Nation of Razachstan the Chance to Prove that its Court System is Able to Prosecute the Defendants, for Reasons of State Sovereignty and National Unity.....13

CONCLUSION.....14

TABLE OF AUTHORITIES

Ad-Hoc International Criminal Tribunal Cases

The Prosecutor vs. Bernard Ntuyahaga: Decision on the Prosecutor’s Motion to Withdraw the Indictment, Case No. ICTR-98-40-T, 18 March 1999 (“Ntuyahaga”)7

The Prosecutor vs. Dusko Tadic (aka “Dule”): Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (“Dule”).....7

Journal Articles

Charney, Jonathan I., *International Criminal Law and the Role of Domestic Courts*, 95 A.J.I.L 120 (January 2001).....8, 13

Ellis, Mark S., *The International Criminal Court and its Implication for Domestic Law and National Capacity Building*, 15 Fla. J. Int’l L. 215 (Fall 2002).....12, 13

Public Statements

Statement made by Mr. Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court at the Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, 16 June 2003, at http://www.icc-cpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf (last accessed September 12, 2006) (“Moreno-Ocampo”).....8

Summary of recommendations received during the first Public Hearing of the Office of the Prosecutor, convened from 17-18 June 2003 at The Hague – Comments and conclusions of the Office of the Prosecutor, http://www.icc-cpi.int/library/organs/otp/ph/ph1_conclusions.pdf (last accessed September 12, 2006) (“Public Record”).....9, 11

Paper on some policy issues before the Office of the Prosecutor, September 2003; http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf (last accessed September 13, 2006) (“Policy Paper”).....7

Treaties

The Rome Statute of the International Criminal Court, July 18, 1998, U.N. Doc. A/CONF 189/9, reprinted in 37 I.L.M. 999 (1998) (“Rome Statute”).....4-14

Statute of the International Criminal Tribunal for the former Yugoslavia, U.N. SCOR, 48th Sess., 3217th mtg. at 28, U.N. Doc. S/RES/827 art. 1 (1993) (“ICTY Statute”).....7

Statute of the International Criminal Tribunal for Rwanda, U.N. SCOR., 44th Sess., 3453d mtg. at 15, U.N. Doc. S/RES/955 & Annex art. 1 (1994) (“ICTR Statute”).....7

STATEMENT OF THE FACTS

In May 2005, after nine years of occupation and war, the war-torn nation of Razachstan finally held democratic elections. (R. ¶ 1) In an attempt to foster goodwill and national unity after years of strife and occupation, representatives of the newly elected government requested the return of twenty-seven Fatari soldier-nationals to be tried before the Razachstani state courts. (R. ¶ 10)

In 1996, the government of Qurac forcibly occupied the nation of Razachstan. During the occupation, the Quraci forces committed brutal acts against the peoples of Razachstan, especially against the lowest sect in the class-based Razachstani society, the Marijani caste of Razachstanis. (R. ¶ 1) It is well-documented that during the occupation, acts of violence against the Marijani tripled in number from 500,000 per year to almost 1,500,000. (R. ¶ 1) In February 2002, the United Nations [“UN”] sent a coalition of Peacekeepers (comprised of forces from over twenty UN member nations) into Razachstan under the authority of a Security Council Chapter 7 resolution. This coalition was deployed to maintain peace during negotiations for a Quraci withdrawal of troops. (R. ¶ 2) Among the UN Peacekeepers at this time was a number of troops from Fatar, a neighbor of Qurac. (R. ¶ 2) This UN action caused violence to break out between the occupational Quraci forces and the UN Peacekeeping forces. (R. ¶ 1)

On or about November 12, 2003, twenty-seven Fatari soldiers attached to the UN peacekeepers broke away due to “dissatisfaction with the way the UN Peacekeepers had been conducting the Razachstani mission.” (R. ¶ 3) These soldiers marched into the predominantly Marijani province of Buchari and occupied a Marijani village until February 2005 (R. ¶¶ 3, 7) During those fifteen months, the aforementioned Fatari soldiers killed nine men, raped and mutilated seventeen women, and tortured several others. (R. ¶ 7)

On or about December 5, 2004, UN forces liberated Nadir, the province in Razachstan that was, until that time, serving as the principle base of operations for the Quraci occupying forces. This led to a full cease-fire and surrender by the Quraci forces on or about December 12, 2005. (R. ¶ 4). Under a UN accord, a provisional government was established in Razachstan to rule until democratic elections could be held. (R. ¶ 5) Because of Razachstan’s status as a signatory to the Rome Statute of the International Criminal Court [“ICC”] prior to its occupation, the Rome Statute came into force with regards to Razachstan on January 1, 2005. (R. ¶ 6) The

provisional government empowered the ICC to “prosecute and punish persons who committed genocide, war crimes, or crimes against humanity in Razachstan where the competent national courts are either ‘unwilling’ or ‘not available’ to exercise their jurisdiction.” (R. ¶ 6)

After discovering the Fatari soldiers’ yearlong occupation of the Marijani village (and the crimes committed therein) in February 2005, the Razachstani provisional government ceded jurisdiction over the Fatari soldiers to the ICC in April 2005. (R. ¶ 8) The decision of the ICC to indict the Fatari soldiers was reached after it became clear that the government of Fatar was unwilling to pursue justice and that the provisional government of Razachstan believed that their national courts would be unable to properly try the Fatari soldiers for “quite some time.” (R. ¶ 8) Accordingly, in May 2005, after an initial investigation, the Prosecutor’s Office at the ICC charged the Fatari soldiers with the following crimes:

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

(R. ¶ 9) In May 2005, the people of Razachstan also held democratic elections and voted into power a fully democratic government. (R. ¶ 1) Later that month, the newly elected representatives of the Razachstani people filed a petition challenging the ICC’s jurisdiction over the aforementioned Fatari soldiers. (R. ¶ 10) The newly elected Prime Minister of Razachstan, Khalid Faraz, argued in July 2005 that the criminal courts of Razachstan were ready to try the accused Fatari soldiers and requested that they be returned to Razachstan for justice. (R. ¶ 10)

SUMMARY OF THE ARGUMENT

The ICC should cede jurisdiction over the accused to the government wherein the alleged crimes were committed. If the ICC takes the power of national justice out of the hands of a democratically elected government, it effectively violates the spirit and intent of the Rome Statute's ideas of the ICC as a court of last resort.

This action is being properly raised by the State of Razachstan under Article 19(2)(c) of the Rome Statute. Section (2) of Article 19 provides that, "A State from which acceptance of jurisdiction is required under article 12" may challenge the grounds of admissibility before the Court. The Prosecution does not wish to challenge the Razachstani request for jurisdiction to be returned to the State courts.

Pursuant to Article 17 of the Rome Statute, if a nation has both the intent and the means to prosecute the accused, the ICC must cede jurisdiction to the national court. Furthermore, pursuant to Article 18, if a case is properly referred to the ICC under Article 13(a) or the Prosecutor initiates an investigation pursuant to Articles 13(c) and 15, the States affected and/or notified have a period of one (1) month to inform the Court that it is conducting its own investigation and criminal proceeding, at which time the Prosecution shall defer to the State's investigations unless extraordinary circumstances are warranted.

In the instant case, the Prosecution has no cause to argue that the investigation should not be carried out by the Criminal Courts in Razachstan. The democratically elected government of that State believes that the crimes can be fairly prosecuted in the State Courts. It would violate the spirit and intent of the Rome Statute and its framers to deprive any nation of its right to administer national justice. The ICC should be a court of last resort, for nations that are otherwise unwilling or unable to prosecute criminal defendants. Especially in a case such as this where justice for the people of Razachstan can be a catalyst for bringing the nation together to foster national unity and revitalize the justice system, the Prosecutor's Office will not challenge the Razachstani government's motion to remove the proceedings to State courts.

ARGUMENT

I. The International Criminal Court Should Allow State Courts with Willingness and Ability to Try the Defendants.

The Rome Statute was designed with a strong bias toward state sovereignty. The framers of the statute clearly intended for state parties to the Rome Statute that were willing and able to try defendant criminals in their home jurisdictions to be allowed to do so, except when special circumstances warranted otherwise. The ICC has always been envisioned by the international community as a “court of last resort” and thus should defer to state-led investigations and trials of criminal defendants when the state has shown a willingness and ability to hold these trials in a fair manner that comports with the principles espoused in the Rome Statute. The balance of interests that must be performed by the Prosecutor in regards to allowing any state to prosecute war criminals weighs heavily in favor of allowing the state to attempt the investigation and prosecution if they express willingness to do so. For those reasons, the Prosecution is not challenging Razachstan’s petition.

A. The Principles of State Sovereignty and Complementarity Demand that States with Willingness and Ability be Allowed to Prosecute War Criminals in their own State Courts.

The International Criminal Court (“ICC”) was conceptualized as a system of justice that would have complementary jurisdiction to that of national systems. Policy Paper, at 4. Conversely, the tribunals established in Rwanda [“ICTR”] and the Former Yugoslavia [“ICTY”] have “primacy” over national systems in those states. ICTR Statute, Art. 8(2); ICTY Statute, Art. 9(2). However, even though the statutes that established the ICTR and ICTY call for primacy of jurisdiction, the statutes also call for concurrent jurisdiction under several circumstances. ICTR Statute, Art. 8(1); ICTY Statute, Art. 9(1). Several arguments against the primacy of jurisdiction have been made before each of these courts, because the inherent principle of complementarity is so ingrained into the international humanitarian community (although none were successful because of the Statutes’ explicit biases toward primacy of jurisdiction over domestic proceedings). See e.g. Dule, at 17; Ntuyahaga at 10.

Furthermore, the systems of justice established by the ICTR and ICTY have given rise to an increase in prosecutions of criminals for international crimes in the state courts of Rwanda

and the Former Yugoslavian nations. Charney, at 120. Most often states will, when given the opportunity, choose to prosecute war criminals in domestic court systems. In the present case, the Fatari soldiers were turned over to the ICC for justice by a provisional government in Razachstan. Although the Prime Minister, Khalid Faraz, was a member of this provisional government, he was democratically elected by the Razachstani populace under the watchful eye of UN peacekeepers.

The Preamble to the Rome Statute, as well as Articles 1 and 17 of the same, *specifically dictate* that the ICC jurisdiction be complementary to that of the States party to the Statute. This language indicates that the framers of the Rome Statute meant for the ICC to only pursue cases if the national system is unwilling or unable to do so. The principle of complementarity, as expressed in the preceding sentence, is extremely integral to the procedures of the court. In fact, the Prosecutor's office has been dedicated to the overarching values of state sovereignty since the Court's inception in 2003:

States Parties will necessarily continue to play an active role so that the Court can enhance the wide support that it enjoys today and achieve universal participation.... The Court is complementary to national systems. This means that whenever there is genuine State action, the Court cannot and will not intervene. As a consequence of complementarity, the number of cases that reach the Court should not be a measure its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.

Moreno-Ocampo, at 2. In the present case, it was the provisional government in Razachstan that expressed a desire to execute the Fatari soldiers. (R. ¶ 8) Although the current democratically elected prime minister, Khalid Faraz, was part of this provisional government, he has promised the international community that no executions of these soldiers will occur if they are found guilty in Razachstani courts. (R. ¶ 10) Furthermore, the provisional government's discussion about the possible trial and suggestion that there is no bias in the government toward either the Fatari soldiers or the Marijani, because of the Marijani's status as a "lower-caste" in society, indicates that the state court will indeed be able to try the case with relatively little bias toward either group. (R. ¶ 8)

It cannot be understated that the government of Razachstan, which was democratically elected by its people, requests leave from the Court to try the defendants in state courts. The principle of sovereignty demands that the ICC allow a democratic government to make its own

choices about which criminals to try. The principle of complementarity demands that the Court allow the same government the first bite of the proverbial apple. Again, the Prosecutor's Office of this Court has stated the same, finding that

[t]here has been broad agreement on the dual role of the Office of the Prosecutor in analysing and assessing efforts made by national authorities under the complementarity regime, as well as co-operating with national jurisdictions. The presumption in favour of State action enshrined in the Statute is principally based on a recognition of the duty of States to investigate and prosecute the most serious crimes of concern to the international community as a whole. .

Public Record, at 2. The presumption in favor of allowing States themselves to attempt to try cases that arise in their own jurisdictions becomes even more important in a fledging state, torn by war for so many years, as an avenue to getting back on track judicially. Willingness is clearly present in Razachstan. The ability to hold a fair trial has yet to be established, although it seems that holding the trial in the State courts along with the presence of international observers would assist the domestic system more than removing this case wholesale to the ICC.

B. Article 17 of the Rome Statute Provides the Criteria for when a State is Willing and Able to Prosecute under International Laws.

Article 17 of the Rome Statute states that “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution,” the ICC will surrender jurisdiction to the national courts. Rome Statute, at Art 17(1)(a). Sections 2 and 3 of Article 17 give further indication as to when a state might be unable or deemed unwilling to undertake a domestic proceeding.

In determining the unwillingness of a State to take action in prosecuting the, The Rome Statute sets out specific criteria to mark a State as “unwilling”. These include inquiring whether the domestic proceedings are taken in bad faith to shield the defendants from international prosecution; whether an “unjustified delay” is present in the proceedings that is inconsistent with any sincere desire of the State to bring the defendants to justice; and/or whether the fundamental principles of impartiality and independence of the judiciary are present in the State system. Rome Statute, Art. 17(2).

The question of whether the ICC will find that a State is “unable” to pursue a case are less defined, and are stated in Article 17 as follows: “[T]he Court shall consider whether, due to

a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.” Rome Statute, Art. 17(3).

From the beginning of negotiations regarding the Rome Statute and eventual ICC, the conflicting values of justice for the victims and state sovereignty have been delicately handled by the international community. On one hand, it is clear that justice for those affected and harmed by war crimes should be at top priority; but on the other hand, the international community has shown a strong bias toward allowing the national court systems to try these cases except under extraordinary circumstances.

The qualifications that determine “unwillingness” or “inability” of State parties to prosecute criminals in domestic courts are conceded to be murky. However, the Prosecutor believes that this case can mark a clear delineation in future cases as a case wherein the State party is both willing and able to try this matter. Again, the Prime Minister of Razachstan, democratically elected by the entire populace (including the oppressed Marijani caste), has indicated that the criminal judiciary in the state is up to the task of prosecuting the defendants. (R. ¶ 10) An international presence in Razachstan allowed for free and fair elections for the first time in nearly a decade, and there is no evidence to the contrary that a similar international presence of advisors and observers would be able to help where the state courts might falter. The framers of the Rome Statute clearly had a prejudice toward cases being heard in state courts, and the Prosecution sees no reason why the case should not go back to Razachstani state courts, as the government there seems both willing and able to handle it.

C. Pursuant to Article 18 of the Rome Statute, the Prosecutor shall defer to a State’s Investigation and Prosecution unless Extraordinary Circumstances are Warranted.

Article 18 of the Rome Statute deals with issues surrounding preliminary rules of admissibility. Procedurally, Article 18(2) indicates that the Prosecutor’s responsibility toward the state should be as one of helpmate, rather than as an overseer:

Within one month of receipt of [the] notification [of the Office of the Prosecutor], a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. *At the request of that State, the Prosecutor shall defer to the State's investigation of those*

persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

Rome Statute, Art. 18(2) (emphasis added).

The Prosecutor is not challenging the appeal of Razachstan at this time. Although an investigation has commenced and charges were filed against the criminal defendants in the instant case (R. ¶ 9), the State did institute a timely appeal for the purposes of removing jurisdiction back to the domestic courts.

In addition, the Prosecutor's office has stated that it "will not defer to the exercise of national jurisdiction where a referral is received from the Security Council acting under Chapter VII of the *Charter of the United Nations*." Public Hearing Record, at 2. Because the case was not referred to the Court by the Security Council, but rather by the Razachstani provisional government itself, the Prosecutor sees no bar to allowing the trial of the criminal defendants in domestic courts.

Article 18 clearly states the overall bias found in the Rome Statute toward affording states jurisdiction over criminal defendants if requested. Because the Fatari soldiers were turned over to the ICC by the provisional government in Razachstan in April 2005, and then requested back by the democratically elected government within a month, the Prosecution will not challenge Razachstan's jurisdiction in this matter. (R. ¶ 8, 10) Article 18 also provides procedural safeguards to both the defense and the victims, in case the state courts prove to be incapable of handling the trial to the satisfaction of the international community.

II. The International Criminal Court Should Cede Jurisdiction over the Defendants to the State Courts of Razachstan.

According to Article 19(2)(c) of the Rome Statute, a State from which acceptance of jurisdiction is required under Article 12 may make a challenge to the jurisdiction of the Court. As §(3) of the same article reads: "The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility," which is what the Prosecutor's office is attempting in this pre-trial hearing. Furthermore, as Razachstan is only allowed one challenge to the jurisdiction of the Court in any one case, the Prosecutor's office supports the State position that this is the proper time to make this challenge, as it is the earliest time available, and soon after

the democratic election of the new government in Razachstan. Rome Statute, Art. 19(4),(5) As such, the Prosecution is not challenging the Razachstani request for admissibility of the instant case to the State courts.

By allowing the Razachstani people the chance to investigate these claims and try these defendants under the newly elected government, the international community would be underscoring its respect for state sovereignty and its commitment to the principles of democratic governance. These trials and the due process standards being used will be emulated in the rest of the justice system. If a nation can develop a fair justice system, it helps promulgate democratic ideals in the remainder of society. The trials of these defendants could, in effect, become the cornerstone for a real democracy to take root in Razachstan.

Furthermore, by emulating special tribunals in other nations that have been erected to try some of the worst offenders of international human rights, the Razachstani courts can be both guided and also held accountable by the international community that will definitely take a special interest in the proceedings.

A. The Government of Razachstan was Democratically Elected by its People, and has the Willingness to Prosecute the Defendants.

It is in the best interests of the international community as a whole and the ICC as an institution to allow the newly democratic nation of Razachstan the chance to investigate and prosecute the criminal defendants in this matter. The Rome Statute was written with the intent of allowing states to prosecute criminals under national laws in domestic judiciaries. Furthermore,

[o]ne of the most important contributions of the ICC to domestic law will not be the number of cases it handles, but its unique role of monitoring and supporting states' judicial processes. To permit domestic courts to undertake trials without a process to examine the effectiveness of those domestic courts would significantly diminish the importance of the ICC.

Ellis, at 229.

The Prosecution agrees with this argument. Because the state of Razachstan has requested a review of the jurisdiction of this case by the pre-trial chamber, the Prosecution must cease investigation under Article 18(2). Additionally, the ICC can further prevent confusion relating to the role of the Court as it relates to domestic proceedings by allowing the nation of

Razachstan to instigate its own proceedings under the watchful eye of the international community.

Because of the principle of complementarity set forth explicitly in the Rome Statute Preamble, Articles 1 and 17, the Prosecution is not challenging the jurisdiction of Razachstan to try these defendants. In fact, as a matter of international law, because the government was elected in free and fair elections by all people of the state, and because the Prime Minister has expressed a willingness to try the defendants in domestic courts, the Prosecution sees no reason to continue the prosecution of the defendants at the ICC.

B. The International Criminal Court Should Allow the Nation of Razachstan the Chance to Prove that its Court System is Able to Prosecute the Defendants, for Reasons of State Sovereignty and National Unity.

It is in most states' best interests to try criminal cases for international human rights crimes in domestic courts. This is especially true of Razachstan, which was for the first time recently able to hold fully democratic elections. The government, selected by its people, is requesting this case to be tried in state courts in order to bring the perpetrators to justice while at the same time creating a sense of national unity and bolstering its own domestic courts and the public faith in the same.

In most cases, ... the state may well wish to retain control over such prosecutions. To allow its own nationals or aliens charged with the commission of crimes on its territory to be prosecuted by a distant international tribunal would deprive the state of control and suggest the inadequacy of its domestic legal system.... [S]tates find it more desirable to resolve a matter domestically than to surrender responsibility to an international body.

Charney, at 122.

In the instant case, the State of Razachstan desires a mechanism to create national unity and prove to the international community that it is able to put their violent past behind them. It is clear from domestic trials held under the auspices of the ICTR and ICTY jurisdictions that when these cases are heard in state courts, the body of law and sense of national unity flourishes and grows. Ellis, at 220. The state, in essence, becomes stronger with each successful trial of criminal defendants in domestic courts.

The fledging democracy of Razachstan is requesting the right to try the criminal defendants in the present case. (R. ¶ 8, 10) The Prime Minister has expressly promised that

these defendants, should they be found guilty, would not be executed, as per the dictates of the Rome Statute. (R. ¶ 10) The full ability of the state courts to try criminal defendants is in question. At the same time, it is also clear that by allowing the Razachstani court to take this prosecution upon itself, the case and procedures within will become a building block of a democratic justice system that this nation so greatly needs. Furthermore, there are procedural safeguards that allow both the office of the ICC Prosecutor and the international community the ability to monitor the proceedings and in extreme cases step in to reassess the value of the domestic court to the principles of justice.

CONCLUSION

For the foregoing reasons, the ICC should cede jurisdiction over the accused to the State of Razachstan. The democratically elected government in Razachstan should be allowed to demonstrate both willingness and ability to prosecute the defendants in accordance with the principles of complementarity that designed the ICC as a court of last resort.