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## **I. STATEMENT OF FACTS**

Razachstan, a country placed in South East Asia, has a very unstable past, once its last twelve years have been characterized by great instability and the consequent occupation of the Razachstani territory by the military forces of the nation of Qurac.

Prior to the conflict, the Razachstani society was already characterized by social convulsions, mostly in relation to the members of the Marijani caste, who were victims of about 500.000 violent crimes a year. This disproportionate number of crimes committed in the country leads to the existence of an internal armed conflict, between Marijanis and other social groups.

The Quraci occupation continued until February 2002, when the Security Council of the United Nations, under a Chapter 7 Resolution, sent its peacekeepers, in order to enforce security during the negotiations for the withdrawal of Quraci troops. The coalition led by the UN personnel was comprised of military troops from over twenty countries.

On November, 2003, a regiment of 27 Fatari soldiers abandoned the UN mission as they were dissatisfied with the way the Peacekeepers had been conducting the peace actions. These soldiers then marched into Buchar, a province in Razachstan. In February 2005, these same officers were surprised in February 2005 by troops of the UN coalition forces, which had remained in Razachstani soil after the cease fire and the troubled period after Quraci occupation. Before that meeting, there are no facts to demonstrate that the United Nations or the other members of coalition forces worried about the destiny those soldiers had, whether they were alive or suffering from hostilities.

After being informed by the inhabitants of the village that the soldiers had committed several crimes, the coalition troops immediately arrested the Fatari soldiers and put them into the custody of the Razachstani provisional government. Some members of the government were extremely radical and desired to execute the captured soldiers immediately (Prob. para. 8), in a clear tendency to disrespect international legal standards and international law as a whole. The leading candidate for Prime Minister Khalid Faraz openly expressed his desire to have the soldiers tried and punished in Razachstan.

However, negotiations between the provisional government and the United Nations led to the decision of turning over the matter to the ICC, as Razachstan had no material conditions to properly try the soldiers, due to over twelve years of turmoil in Razachstan. Then, the Provisional Government turned the soldiers over to that International Tribunal in April 2005 (Clarifications, 5, May 31).

The ICC then started investigating the case, and charged the Fatari military officers with several crimes against humanity and war crimes, based upon the jurisdiction of crimes arising in both international and non-international armed conflicts, e.g., the crimes described in the Articles 8(2)(e)(i) and 8(2)(c)(i) of the Rome Statute (Prob. para. 9). Besides that, the jurisdiction of the ICC was based on the fact that Fatar was a State Party to the Statute since January 1, 2004 (Clarifications, 2, May 31).

However, in late May, Razachstani representatives appeared before the ICC, challenging the ICC's jurisdiction. In July, 2005, Khalid Faraz, shortly after being elected and now acting as Razachstan's Prime Minister, held meetings with ICC prosecutors, requesting the immediate return of the soldiers to Razachstan, arguing that Razachstan had now an appropriate and structured judicial system, able to investigate and try the defendants for the crimes they had been charged with.

These challenges were made one month only after the referral of the situation by Razachstan itself.

## **II. ARGUMENT**

*“The doctrines of ‘political questions’ and ‘non-justiciable disputes’ are remnants of the reservations of ‘sovereignty’, ‘national honour’, etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the “political question” argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well. The Court has consistently rejected this argument as a bar to examining a case. It considered it unfounded in law. As long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, the Court considers that it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue” (ICTY. Decision on the motion for interlocutory appeal on jurisdiction. Prosecutor v. Tadic).*

### **1. The International Criminal Court has jurisdiction over this case**

After an intense examination of this problem, some details and rules inserted in the Rome Statute (hereinafter “the Statute”) must be pointed out, in a way to make clear and imperative the necessity for this case to be judged under the International Criminal Court

(hereinafter “The Court” or “The ICC”), as a matter of lawfulness and justice. As it will be demonstrated in the following arguments, the ICC has jurisdiction over the present problem and shall investigate and try the defendants.

In abstract, the Court may exercise its jurisdiction for a specific case in two different situations: a) if the crime has taken place in the territory of a State Party to the Rome Statute; b) if the person charged with a crime is a national of a State Party to the Statute (Article 12(a)). Prior to any profound consideration, it should be mentioned that these conditions are not cumulative, which means that, once one of them is fulfilled, the ICC is a legitimate authority to investigate and prosecute the persons charged with crimes established in Article 5 of the Statute.

1.1) The ICC shall exercise its jurisdiction over this case.

1.1.1) At the time the alleged crimes were committed, the Statute was already in force for the State Party of Fatar.

The International Criminal Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute (Article 11(1)). The Rome Statute entered into force for Fatar in January 2004 (Clarifications, item 2, May 31), while the alleged crimes have been committed throughout the presence of the officers in the village (Clarifications, 10, May 31), which lasted until February 2005 (Problem, para. 3 and 7). Thus, at the time the alleged crimes are said to have been committed, the Rome Statute had already entered into force for the State of Fatar. This temporal element, therefore, empowers the Court to exercise its jurisdiction over the present case, in accordance with the principle of legality.

1.1.2) The defendants are nationals of a State Party to the Rome Statute.

The Court has jurisdiction with respect to crimes committed by nationals of State Parties to the Rome Statute (Article 12(2)(b)). In the present case, the defendants, former members of the UN coalition forces that operated in Razachstan, are nationals of the State of Fatar. Regarding that the conditions for the exercise of jurisdiction are to be alternatively considered, the International Criminal Court has jurisdiction *ratione personae* over the present situation, which is enough to justify the judgement of the defendants under the ICC.

### 1.2) The referral of the situation by Razachstan was legal.

Razachstan, as a State Party to the Statute, which has entered into force for that State in January 2005 (Problem para.7), has referred the case to the Court in April 2005 (Problem para.8 / Clarifications, 1, May 31). A State Party has the power to refer a case to the Court over which the Court has jurisdiction (Articles 13 and 14 of the Statute). The requirements for a valid referral of a case, while it is appointed by a State, are thereby the followings: the State concerned must be part to the Rome Statute at the time of the referral; plus, the case referred must fall within the jurisdiction of the Court. The State which refers a case to the Prosecutor does not need to have jurisdiction over that specific situation, whereas the triggering mechanism relates to a prerogative and to a real duty of any Party to the common project of an international criminal jurisdiction (UN General Assembly: Resolution 3074 (XXVIII) of 3 December 1973). In this sense, the International Law Commission has understood that the referral “is the mechanism that invokes this facility and initiates the preliminary phase of the criminal procedure. Such a complaint may be filed by any State party which has accepted the jurisdiction of the court with respect to the crime complained of” (ILC Draft Commentary, 1994, p. 45). Razachstan properly has done so, for it has accepted the jurisdictional power of the Court over the alleged crimes (Article 12(1) of the Statute). At the same time, the Court has jurisdiction over the case and shall exercise it with respect to the alleged crimes for they were committed after the entry into force of the Statute for Fatar (Article 11(2) of the Statute, *see also* topic 1.1.1).

#### 1.2.1) The referral acted as an acceptance by Razachstan of the Court’s jurisdiction for this specific case.

Certainly, there is no necessity of a Razachstani declaration under Articles 11(2) and 12(3) of the Statute, since the case referred to the Court satisfies the preconditions to the exercise of jurisdiction (Article 12(2)(b)). However, once Razachstan itself was the State that referred the matter to the ICC and turned over the soldiers to this Tribunal, that country automatically fulfilled the provision of article 12(3) combined with article 11(2) of the Statute (Prob. para. 9), having accepted with this act the jurisdiction of the Court for this specific situation (IACHR, *Mayagna v. Nicaragua*, 31 august 2001, para. 89-91). On the aforesaid basis, the jurisdiction of the Court may be also founded on the criterion of territoriality (12(2)(a) – jurisdiction *ratione loci*) and entail an investigation based upon crimes arising in the territory of Razachstan as a signatory state (Problem para. 9).

1.3) Subject-matter jurisdiction: the ICC shall exercise its jurisdiction in relation to the crimes allegedly committed by the defendants.

As determined in the Article 5 of the Statute, the Court has jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression (pending regulations). These are the only species of crimes that, once perpetrated, leads to the authority of the ICC to investigate and prosecute individuals for their criminal responsibility.

Nevertheless, it is necessary accordingly to examine the limits of the Court's jurisdiction in this case. The defendants have been unduly charged with several crimes, some of which did not really occurred, once the acts perpetrated by the defendants do not fulfill its required elements. However, it is true that the alleged violations committed by the defendants, in this specific situation, are not a matter to a national jurisdiction, for the supposed crimes were committed in a context of non-international armed conflict. As demonstrated below, the ICC shall exercise its jurisdiction exclusively with respect to the crimes referred to in articles 8(c)(i)-1 and 8(2)(e)(i) of the Statute. The prosecution of these specific war crimes as violations of the law of internal armed conflicts thereby must happen before the Court, since it is the only instance with jurisdiction over the case which can properly try the defendants.

1.3.1) Preliminary issue: the existence of a non-international armed conflict.

The acts allegedly perpetrated by the defendants took place in a context of non-international armed conflict, which empowers the Court to judge them pursuant the provisions applicable only to crimes committed in such circumstance, i.e., crimes defined in Articles (8(2)(e)(i) and 8(2)(c)(i)-1) of the Statute.

The number of crimes committed against Marijanis before the occupation of Razachstan corroborates the existence of a non-international armed conflict in the territory of a State Party to the Geneva Conventions (Clarifications, July 25) between opposed organized groups. This domestic conflict is permanent, as it has been confirmed by the statistics of violent crimes committed annually against the members of the Marijani caste. It is present prior to the occupation of Razachstan, it is enforced during the international hostilities and remains afterwards as an endemic attribute of that society. "On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State" (Tadic Appeal Decision, para. 70). The MLF (Marijani

Liberation Front), as a pro Marijani organization, reinforces the role of this very caste as directly implied in the internal conflict. It can also be concluded, hence, that the Razachstani State has at least tolerated the existence of this sort of actions within its territory, or even played a decisive role as a part to the conflict (MANGAS MARTÍN, 1992, p. 55).

1.3.1.1) Nexus between the defendant's behavior and the non-international armed conflict.

Since the Fatari soldiers have been integrated to the local population and had spent there more than a year, isolated from the events of the war of occupation, their acts were backgrounded by this very internal conflict. Even if they were not aware of its status, their acts took place and were associated with the non-international armed conflict (Elements of crimes, Art.8, ICC-ASP/1/3).

In order to determine that the acts in questions are sufficiently related to the armed conflict, it is relevant to consider the following facts: the perpetrator is a combatant; the victims are members of a party or directly involved in the conflict; the alleged crimes were committed in a context of violations largely perpetrated involving this same group (ICTY, Appeals Judgment, The Prosecutor v. Dragoljub Kunarac et al./ CASSESSE, 2001, p. 180).

1.3.1.2) The substantial disconnection of the alleged crimes with the international armed conflict.

Charges that represent grave breaches of Geneva Conventions (8(2)(a)(i)), and also violations of the laws and customs applicable to international armed conflicts (8(2)(b)(i) and 8(2)(b)(iv)), must not remain, for the supposedly committed crimes did not really occurred, since the actions of the accused were not associated with the international armed conflict that took place in Razachstan. In fact, if the international conflict is said to have played a contributory role in taking the soldiers into Razachstan, it cannot be argued that this same conflict contributed for the acts they supposedly committed in the Marijani village.

Actually, even after the cease fire and the capitulation of the Quraci forces in December 2005, the Fatari officers continued living in the region of Buchar the same way as before. The end of the international conflict did not determine any change in the position of the soldiers in relation to the inhabitants of the Marijani village they had been living in. Therefore, the course of events in that specific place did not keep any connection to the Quraci occupation, from the very moment the Fatari soldiers broke from the UN coalition

forces: it is to say that their subsequent actions were not anymore related to the international armed conflict.

First, there must have been an armed conflict at the time the offences were allegedly committed. Secondly, there must be a close nexus between the armed conflict and the alleged offence, meaning that the acts of the accused must be ‘closely related’ to the hostilities (ICTY. Prosecutor v. Pavle Strugar, para. 215). The first condition cease at the definitive peace settlement of the armed conflict of international character. The second one has never existed and for this reason cannot be considered as satisfied.

### 1.3.2) The War Crimes said to have been committed

The crimes said to have been committed are thereby the followings:

- War Crime of murder (8(c)(i)-1)
- War Crime of attacking civilians in a context of internal conflict (8(2)(e)(i))

Common elements of crimes under article 8 are met: there was an established framework of armed conflict in which the defendants’ conduct took place and the perpetrators were aware of the factual circumstances that have launched the conflict. With respect to these two elements common to each crimes under this article, “[t]here is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non international” (Elements of crimes, ICC-ASP/1/3).

In fact, the defendants did not know the legal status of that conflict, its existence or the existence of groups acting in that context. Besides that, the defendants acted knowing the factual circumstances that established the non-international armed conflict as it has been verified above. They were not supposed to know the existence of opposed groups or to operate in furtherance of one of those. Indeed, they did not even know the local population was Marijani, neither the meaning of that distinction. Nevertheless, as they acted in those circumstances, even ignoring the legal dimension of the situation, they necessarily apprehended the factual conditions in which they were in, i.e., the factual circumstances that established the existence of a non-international armed conflict.

The mental element (*mens rea*) persists in the perpetrator’s capacity not to benefit or determine their conduct taking into account the context of non-international armed conflict, but acting in that context with knowledge (*see* Article 30 (3) of the Statute) . As it has been stood in relief, the level of association with the conflict relates to facts, not to a legal evaluation. The defendants acted in a factual context which cannot be denied, even if the

International Community has done so for more than a decade (Prob. para. 2) (MOMTAZ 1999, pp.177-192 / DUGARD, 1996, pp. 91-96).

The necessary nexus between the alleged offences and the non-international armed conflict is thereby satisfied (*see* also topic 1.3.1.1), since the acts in issue took place in that context and, for this reason, were minimally associated with the circumstances. “The [ICTY] Appeals Chambers considered that the armed conflict ‘need not have been causal to the commission of the crimes’ but the existence of an armed conflict must ‘at a minimum’ have played a substantial part in the perpetrators ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed” (ICTY. Prosecutor v. Pavle Strugar, para. 215). Furthermore, the defendants do admit the relation of their conduct with the internal armed conflict as they could not ignore being in a hostile camp.

As it is said, the defendants killed one or more persons with civilian status (we must assume that the natural status of civilian could not be unknown by the perpetrators). This material element, combined with the common elements already described, specifically having regard to the non-international armed conflict, conduces the alleged violations of law within the subject-matter jurisdiction of the Court under article 8(2)(c)(i)-1 (KRESS, 2000, pp.103-177).

As it is also said, the defendants have directed an attack against individual civilians presumably not taking part in the hostilities with non military intent. This material element combined with the common elements already described, specifically having regard to the non-international armed conflict, conduces the alleged violations of law within the subject-matter jurisdiction of the Court under article 8(2)(e)(i).

### 1.3.3) The impracticability of crimes against humanity in the circumstances

“Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world” (Elements of Crimes, ICC-ASP/1/3).

### 1.3.3.1) Definition

The contemporary definition of crime against humanity is given in Black's Law Dictionary as "a brutal crime that is not an isolated incident but that involves large and systematic actions, often cloaked with official authority, and that shocks the conscience of humankind" (GARNER, 2004). Article 7 of the Rome Statute emphasizes the required character of the acts within its terms as being part of a widespread and systematic attack directed against any civilian population, with knowledge of the attack. For the purpose of this provision, "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack (*see* Article 7(2)(a) and Article 7(1) / VALLENCIA VILLA, 2000).

### 1.3.3.2) The alleged offences were not parts of a widespread or systematic attack

Still in the jurisdictional ground, should the material element be present, considering that the defendants have caused death to one or more person, the other requirements which compose the strict provision in Article 7(1)(i) cannot be satisfied. First, the defendants' conduct have not been determined as part of a widespread or systematic attack direct against a civilian population. Secondly, the defendants did not know that their conduct was part or intended the conduct to be part of a widespread or systematic attack against a civilian population (Elements of Crimes, ICC-ASP/1/3).

The specificity of crimes against humanity results not from the status of the victim but the scale and organization in which it must be committed (KUNARAC Appeal Judgment). The number of violent crimes committed against Marijanis per year not necessarily implies the existence of a State or organizational policy in this sense. Moreover, it has been verified the nature of this abnormal situation, consistent to the internal armed conflict which persists in the Razachstani soil. Despite this fact, the alleged acts perpetrated by the defendants would not bare relation to any existent plan, as the supposed violations inflicted were isolated and with a very limited scope (BASSOUNI, 1999).

In addition, the Fatari soldiers were not aware (nor could have known) that the so said civilian population they have supposedly targeted was Marijani. As a consequence, they could not have known the social status of the Marijani caste within the Razachstani society or the constantly violent crimes suffered that were reflexes of this social structure. On the other hand, the remote village they have settled in at random was exclusively inhabited by Marijanis, for the defendants could not identify any caste distinction or act in furtherance of a

plan against a specific group, whose existence or reasons to discriminate they did not ever know. No doubt remains that the alleged offences were randomly perpetrated, in a context of pre-existent internal armed conflict hostilities. (ICTY, Prosecutor v. Blaskic / JIA, 1999, pp. 243-271).

Whether a widespread or systematic attack in these terms has occurred, the State of Razachstan and its representatives are those who have to respond criminally before the Court for the commitment of crimes against all the humanity. The same concerned which now challenge the admissibility of this case.

## **2. Issues of Admissibility**

### **2.1) The case is admissible before the International Criminal Court**

Articles 17 to 19 of the Rome Statute determine the conditions of admissibility, which can be defined as requirements to the acceptance of a specific case over which the ICC has jurisdiction. As it will be discussed in the following arguments, the present situation is admissible before the International Criminal Court, once the requirements established in the Rome Statute are completely fulfilled.

### **2.2) Principle of Complementarity**

“The ICC system of complementarity, globally considered, shows that the Court must generally defer to national courts, except when these courts are not in a position to do justice in a proper and fair way” (CASSESSE, 2001, p. 353 / Hernández, 2000).

According to the Rome Statute, Article 17(1)(a), the Court shall admit a case whenever the States Parties which have jurisdiction over it are either “unable” or “unwilling” to carry out investigative procedures. In the current case, none of the States which have jurisdiction over it fulfill the necessary conditions to investigate and judge the defendants, which leads to the plenty of authority of the International Criminal Court, as the only juridical system able to properly try the Fatari officers.

### **2.3) The case is admissible before the ICC, for Fatar is not willing to investigate and judge the defendants**

As stated in the Rome Statute (Article 17(2)), “unwillingness”, in general terms, means that a State is not taking the necessary actions to bring the person accused of a crime into justice, and this sort of reluctance may be identified in different ways: a) if the investigation or trial is being conducted for the purpose of shielding the person concerned

from criminal responsibility for crimes within the jurisdiction of the Court; b) if there has been an unjustified delay in the proceedings; c) if the proceedings were not or are not being conducted independently or impartially.

In this specific situation, the examination of features described above in order to determine the unwillingness of a State is not necessary, for Fatar has declared deliberately that it had no intention to investigate, prosecute or try its nationals, after repeated attempts to contact the Fatar government while the defendants were under custody in Razachstan (Prob. para. 8 and Clarifications, June 15). What is more, the government of Fatar expressed his intention to see the soldiers tried in The Hague by the International Criminal Court, once this is the only way for the soldiers not to receive cruel or unusual penalties in Razachstan (Prob. para. 12).

The factual circumstances above are enough to characterize the State of Fatar as not willing to exert jurisdiction over the defendants, reason why the case is admissible under this International Tribunal.

#### 2.4) The case is admissible before the ICC, for Razachstan is unable to properly try the defendants

The Rome Statute prescribes the “inability” of a State to investigate or to prosecute defendants whenever the State is unable to carry out proceedings, due to a total or substantial collapse or unavailability of its national judicial system (Article 17(3)).

It is clear that Razachstan does not have the necessary conditions to properly try the soldiers in question, for multiple reasons. First, there are no indications that a criminal investigation has commenced. Secondly, its judicial system is absolutely collapsed, after twelve years that comprised war and occupation of that country by the forces of Qurac. Last but not least, prior to the armed conflict, it is verified that Razachstan had a very arbitrary judicial structure, in which rights of defendants did not meet international standards (Prob. para. 12) and inhuman penalties were usually applied.

##### 2.4.1) Razachstan has not yet started a criminal investigation.

Razachstan has not yet initiated a criminal procedure in order to try the Fatar soldiers for the commission of the alleged crimes. The precondition for challenges to the admissibility, for this reason, is not fulfilled, which determines that the case must not be turned back to the national courts of Razachstan (Articles 17(1)(a) and 18(2) of the Rome

Statute). “The rounds for holding a case to be inadmissible are, in summary, that the crime in question has been or is being duly investigated by any appropriate national authorities” (ILC Draft Commentary, 1994, p.52).

In fact, the Prime Minister’s and the representatives’ petitions (Prob. para. 10) did not demonstrate that a criminal procedure had already been commenced (Statute, Article 19(2)(b)). If this information is not explicit, the Court has to understand that an investigative or criminal procedure did not start in Razachstan, reason why, besides the other elements of incongruence, the matter must remain under the ICC’s authority.

#### 2.4.2) Razachstan has no material conditions to proceed the prosecution and trial.

Besides the absence of evidence on the existence of previous investigation, it is to be considered the absolute disintegration of Razachstani state structures, after approximately twelve years of conflicts, which requires the action of an international jurisdiction. Otherwise, if the principles and rules of international criminal law are not accompanied by the prospect of a genuine ability of the State to investigate and prosecute the defendants in regard to the law and to justice, these same principles will have very little impact, since the breakdown of the State and the implosion of its functions, in particular the judiciary, clearly render the State incapable of fulfilling its obligation to properly try people charged with crimes arising in an armed conflict (Preparatory Document Drafted by the International Committee of the Red Cross for the first periodical meeting on international humanitarian law, Geneva, January 19-23, 1996).

In no way it is reasonable that one month after the referral and the turn over of the soldiers to the ICC, after nine years of occupation and three years of an armed conflict, the Nation of Razachstan could have challenge the jurisdiction of the ICC, based on the reestablishment of its national judicial system. In similar cases, countries such as East Timor and Rwanda were not able to have their State structure reorganized in such little period of time. Indeed, case studies prove that countries destroyed by years of war take much more than years to reactivate their judicial system.

Even though, if we insist that Razachstan had the ability to reestablish the structure of its juridical system, the inquiry of witnesses, as an indispensable proceeding, tends strongly not to be accurate and impartial (*see also* topic 2.4.3). The Marijanis, as members of a caste which have been discriminated for a long time in Razachstan, would never be properly heard, because of the preexistent tension between this caste and the

institutional government. Therefore, it is to be recognized the inability of Razachstan to properly gather necessary evidence or testimony to try the defendants and carry out its proceedings in an entirely collapsed system (Article 17(3) of the Statute).

2.4.3) The process cannot be conducted impartially by Razachstani national courts.

Evidences that the process is being conducted impartially within a national jurisdiction validate the admissibility of the case before the ICC (Statute, Article 17(2)(c)), in detriment of a national jurisdiction.

There are many indications that Razachstan will not proceed a fair criminal investigation, once its juridical tradition was embedded in a non-democratic system, which, of course, will never ensure to the defendants the individual guarantees needed. In other words, Razachstan is not prepared to ensure a legal prosecution in observance to international standards of justice and due legal process, mainly in such situation.

In this specific case, it could not be avoided that, once the matter is turned back to its national courts, the process and the judgment of the case will be illegitimate and unfair. It cannot be forgotten the first impulse of the members of the provisional government of Razachstan, who, since the very beginning, wanted to execute the defendants without a previous judgment (Prob. para. 8), revealing the arbitrary tradition which have remained firmly in place after the cease fire and the establishment of the interim administration. This arbitrary position of the Razachstani leaders indicates that a fair trial is, indeed, extremely far from happening, once they have even anticipated both the condemnation and the penalty to be applied (Prob. para. 8).

2.5) The seriousness of the alleged crimes is not to be at issue.

Once the Rome Statute establishes that the crimes allegedly perpetrated by the defendants are to be judged before the Court, as they are to be classified among war crimes, there is no reason why to argue the insignificance of such offences (Article 17(1)(d) of the Statute / KRESS, 2000, pp. 103-177).

2.A. Unilateral act: the commitment of Razachstan does not avoid atrocities from happening to the defendants, having regard to the principles of due process recognized by international law.

Prime Minister Khalid Faraz has declared that, if found guilty, the defendants would not face death penalty. The declaration of the Razachstani representative in not executing the Fatari soldiers could be considered as a unilateral act of juridical nature.

In general words, the unilateral act consists in a manifestation of will, originated from an individual or a collectivity, which produces juridical effects for itself. (GUERRERO PENICHE, RODRÍGUEZ CEDEÑO, 2003, p. 8 / COMBACAU, J., SUR, S., 2001). Congruent to that conception, with regard to the case *New Zealand v. France*, it was understood at the International Court of Justice “that such a unilateral statement was binding upon France statements were made publicly and that the Court could infer an intention to be legally bound” (O’BRIEN, J, 2001, p. 328).

As so, it is to be assumed that Razachstan has committed itself in these terms, for the prime minister is the head of government, who formally represents the Razachstani will before the international community. Whether the commitment produces legal consequences, the defendants do not challenge the binding effect and the true intention not to apply capital punishment. Nevertheless, as known, the obligation bound by a State through a unilateral act must be interpreted in a restrictive way (ICJ, *Nuclear Tests Case. New Zealand v. France* (1973-1974)). In this vein, the international practice proves that the binding reach of the obligations arising from a unilateral act does not usually avoid unacceptable behaviors and abuse of right. For instance, the same France which has bound itself to the declaration made by a Minister of State not to carry on its atmospheric nuclear program, has, after only few years, initiated atomic tests under the sea (ICJ, *Request for an examination of the situation., New Zealand v. France* (1995)).

That is why the commitment of the Prime Minister refers only to the capital punishment, being insufficient to assure that other sorts of cruel penalties and mistreatment will not be applied. In reality, the promise of Razachstan hides its true intention, which is the application of penalties such as torture, mistreatment and corporal infliction, in a way to punish the defendants unfairly and in conflict with the international law standards. Not only, their real objective is to keep on disrespecting the international standards of the rights of defendants, specifically in this case (Prob. para. 10).

## 2.B. The principle of estoppel – “non concedit venie contra factum proprium”

The same provisional government which has referred the case to the Court in April 2005 (Problem para.8) is the one who has requested the immediate return of the defendants for a national trial, in late May (Problem para.10/2ndpart). It is true that shortly one month after, Khalid Faraz has been elected Prime Minister and has endorsed the challenge of the Razachstani representatives (Problem para.10/1stpart). However, the petition challenging the Court’s jurisdiction had been filled by the provisional government, and so, even before the conclusion of the democratic elections and the institution of a renewed Razachstani direction.

The institution of estoppel is an equitable principle barring a claim by one party who has made a representation to the contrary, when an opposing party relies on that representation to its detriment (BROWNLIE, 2003, pp.615-616 / ICJ, Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.) para.63 (1990)). By virtue of this principle, Razachstan could not have changed its position requesting the defendants’ trial to take place in its national courts, especially if considered that the governmental transition had not yet occurred.

Certainly, a State may challenge the jurisdiction or the admissibility of a case on the grounds of the principle of complementarity (Article 19 of the Statute). Nonetheless, as above-mentioned, the referral to the Court by a State which coincidentally could also, in theory, exercise jurisdiction over this situation represents a factual waiver (IACHR, Lysias Fleury. v. Haiti (2004)). Actually, Razachstan has not only waived the right to judge the defendants by referring the case to the Court, but has also denied its ability to properly try the Fatari soldiers. Having taken the particular position of turning over the defendants to the Court, Razachstan is under the obligation to act consistently with its past representation on subsequent occasions (OPPENHEIM, 1992, pp.1188-93) / D’AMATO, 1969, p.8).

Therefore, this State is estopped from challenging the Court’s jurisdiction based on a right it had itself denied.

## III. PLEADING

For all the reasons stated above, according to the Rome Statute of the International Criminal Court and the general principles of International Law, this case must be declared admissible under this Court, and the defendants properly investigated and tried only in respect to charges of war crimes.

## **CERTIFICATION**

We hereby certify that the memorial for Universidade Federal de Minas Gerais Law School (UFMG) 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.

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