

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**

**No.: ICC-01/06**

**Date: 13 September 2006**

Original: English

**International Criminal Court Moot Court Competition 2006  
Pace Law School**

**PROSECUTOR'S MEMORIAL**



**The Office of the Prosecutor**

**UNIVERSIDADE FEDERAL DE MINAS GERAIS  
BELO HORIZONTE – BRASIL**

No.: ICC-01/06

13 September 2006

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## **I. STATEMENT OF FACTS**

Razachstan is a South East Asian country, which has been occupied by the nation of Qurac for nine years. The Marijanis are a group that are considered the lowest substract of the caste system of Razachstan

On 2002, the United Nations under Security Council Chapter 7 resolution sent Peacekeepers from over twenty countries during the negotiations for the withdrawal of Quaraci troops from Razachstan.

On November 12, 2003, due to dissatisfaction with the way the UN Peacekeepers had been conduction the mission in Razachstan, a regiment of twenty-seven Fatari soldiers broke away the coalition and marched into the Buchari province, an area almost exclusively inhabited by Marijanis.

On January 1, 2004, the Statute of the International Criminal Court (hereinafter the Statute), entered into force to Fatar.

On December 5, 2004, the UN colition forces liberated the province of Nadir, the principle base operations for Quraci forces in Razachstan. On December 12, 2004, the Commander of the Quraci forces, General Faraz Kushari, ordered forces to cease fire and surrender.

On December 31, 2004 a provisional government was established in Razachstan.

On January 1, 2005, the Statute entered into force to Rachstan.

In February 2005 UN coalition forces found twenty-seven Fatari troops occupying a Marijani village. These soldiers had allegedly been occupying the village for over one year, time during which they would have committed crimes such as homicides, tortures and rapes. The UN coalition immediately arrested the soldiers. The government of Fatari was contacted but did not express any intent to exercise its jurisdiction over the twenty-seven soldiers.

In April 2005, even without consensus within the provisional government, Razachstan turned over the Fatari soldiers to the International Criminal Court (hereinafter the ICC).

In May 2005, after initial investigations, the ICC based upon the jurisdiction of crimes arising in an international conflict on the territory of a signatory state, charged the Fatari military officers with crimes against humanity of murder, war crimes of willful killing, war crimes of attacking civilians, war crimes of excessive incidental death, injury or damage, and war crimes of murder. In the same month, representative of the Razachstani government filed a petition challenging the jurisdiction of the ICC.

In early July 2005, shortly after he had been elected Prime Minister, Khalid Faraz, held meetings with ICC prosecutors requesting the immediate return of the Fatari soldiers to Razachstan for trial. Prime Minister Faraz indicated that Razachstan now had a criminal court that could properly try soldiers for war crimes. Further, in an effort to allay the ICC Prosecutor's concerns, Prime Minister Faraz promised that should the soldiers be found guilty, they would not be executed.

The Prosecutor is not challenging Razachstan's petition seeking to have the ICC reverse its original decision to investigate and prosecute the case and return the matter to the national courts of Razachstan.

## **II. ARGUMENT**

The International Criminal Court is a Court of Law, and, as such, it can take into account principles and rules only in so far as these are given a sufficient expression in legal form (*Ethiopia v. South Africa*; *Liberia v. South Africa*, 1966 ICJ 4. 325, 1966 WL 2, para 49) The Court is bound to act only through and within the limits of its own disciplines, established by the Rome Statute.

A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes (article 14 (1)).

Further, the Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation (article 53 (1)). The Court shall satisfy itself that it has jurisdiction in any case brought before it, as well as, it may, on its own motion, determine the admissibility of a case in accordance with article 17 (article 19 (1)).

Challenges to the the jurisdiction of the Court or challenges to the admissibility of a case on the grounds referred to in article 17 may be made by a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted (article 19 (2) (b)), as Razachstan did.

If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because the case is inadmissible under article 17; or a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, and his or her role in the alleged crime; he or she shall inform the Pre-Trial Chamber

and the State making a referral under article 14 of his or her conclusion and the reasons for the conclusion.

The Prosecutor is entitled to seek the Court's ruling regarding a question of jurisdiction or admissibility. In the case at hand, he or she may not only exercise this discretion, but is also bound to request the Court to dismiss the case on preliminary basis, since the Court does not lack jurisdiction, and the basic issues of admissibility are not present (article 19.3) , as will be demonstrated below.

### **1. The Court has no jurisdiction over the present case**

The Court has no jurisdiction for acts perpetrated by the Fatari troops in Razachstan on the grounds of territoriality, and lacks pre-requisites for exercising its jurisdiction on other basis.

#### **1.1. The Court can not exercise its jurisdiction under article 11.1 and 12.2.(a) of The Statute**

The Court does not have jurisdiction, and can not exercise it over the present case, based on articles 11 and 12.2.(a), since, first, the acts perpetrated prior to January 2005 occurred before the Court's entry into force for Razachstan; second, there is a reasonable doubt concerning the occurrence of crimes during the period in which the Statute was into force for Razachstan; and, third, Razachstan did not deposit a declaration of acceptance of jurisdiction under article 12.3 before referring the defendants to the Court.

##### **A) The Court does not have jurisdiction over acts perpetrated before January 2005 on the territory of a non State Party**

According to article 11.1 of the Rome Statute, the Court has jurisdiction only with respect to crimes committed after the entry into force of The Statute. This article consacrates "a logical and necessary corollary of the doctrine of strict legality, which determines that criminal rules may not cover a conduct undertaken prior to the adoption of such rule." (CASSESE, 2003, p.147). The legality enshrined in article 11 refers to a procedural and not a substantial legality, this is, the fact that the Court does not have jurisdiction over the matter

does not mean that the investigated can not be trialed and convicted for the same acts in other forums. (BAADE, 1961, p. 412 / HEAZLETT, 1962, p.127 / GREEN, 1962, p. 457).

In general international law, a State Party to a convention is a State for which a convention is in force (Viena Convention on the Law of Treaties, Art. 1(f)). The Statute entered into force for Razachstan only in January 2005. Before this date, Razachstan was a Signatory State to the Rome Statute, and not a State Party.

Therefore, The Court does not have jurisdiction over acts committed from November 2003 until January 2005 in Razachstan under Article 11.1, since at that time the Statute was not into force for Razachstan.

**B) The Court can not presume the existence of acts perpetrated after January 2005, and therefore has no jurisdiction over them**

According to international criminal practice all elements related to the criminal procedure should be proved “beyond a reasonable doubt” (AMBOS, 2005, p.343/ SAFFERLING, 2001, p. 73/ AMERICAN LAW INSTITUTE, 1985, pp. 298, 358, 360). This rule is expressly enshrined in article 66.3 of the Statute which concerns the culpability of the defendant beyond reasonable doubt (TRIFFTERER, 1999, art. 66 - p.18/ ZAPPALÀ, 2003, p. 84).

There are no facts in the case that indicate that the crimes were committed in the brief period between January and February 2005. Since, there is at least a reasonable doubt that any crimes have occurred during the period in which “The Statute” has been into force, The Court is impeded from making any such assumption.

Therefore, The Court has no jurisdiction over the case at hand based on Article 11.1 of its Statute, and in respect to the principle of non-retroactivity.

**C) The Court can not exercise its jurisdiction due to the absence of a declaration of acceptance of jurisdiction of a non-State-Party**

If a State becomes a Party to the Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute (Art. 11.2), unless that State has made a declaration under Article 12, paragraph 3. Lodging it with the Registrar is a prerequisite, i. e., indispensable, for the exercise of the jurisdiction of The Court in such cases, as demonstrated by the title of Article 12.

The facts of the case do not state that any declaration whatsoever was lodged with the Registrar. Without, such declaration Razachstan could not have turned the Fatari soldiers over

to The Court. The rule was not followed. Consequently, the ICC can not exercise its jurisdiction.

**1.2. The Court can not exercise its jurisdiction under article 12.2(b)**

The Court can not exercise its jurisdiction as complementary to Fatar since first, there is still a reasonable doubt that the facts occurred after the entry into force of The Statute for that country, and second, since Fatar did not refer the soldiers to The ICC.

**A) There is a reasonable doubt whether the facts occurred after the entry in to force of the Statute to Fatar**

As stated above, the exercise of jurisdiction of The Court should be founded on a relative certainty that the supposed crimes would have happened after the entry into force of the Statute. This is applicable to the State in relation to which The ICC would exercise its complementary jurisdiction.

The Prosecutor does not challenge the fact that the Court could have had jurisdiction over the defendants based on the principle of nationality enshrined in Article 12.2(b), for acts perpetrated after 1<sup>st</sup> January 2004. Nevertheless, it is not clear that any of the alleged crimes were committed after such date.

The soldiers broke away from the UN coalition on 12 November 2003. The Statute entered into force on the 1<sup>st</sup> January 2004. The clarifications affirm that the acts were engaged by the soldiers, during their stay at the village. The case also points that the soldiers have stayed in such place for more than one year when found. The alleged crimes could have happened at any period of their settlement in the area, and it is plausible that they could have been engaged in its first month or so. In such hypothesis the Court would lack jurisdiction.

Since, there is also a reasonable doubt that any crimes have occurred during the period in which The Statute has been in force to Fatar, The Court is impeded from making any such assumption. Therefore, The Court has no jurisdiction over the case at hand based on article 12.2(b) of its Statute.

**B) The case was not properly referred to the Court**

Even in case the Court understands that there is no reasonable doubt that crimes were carried out after 1 January 2004, the case was not properly referred to the Court.

The matter of referral to The ICC is found in an Article named exercise of jurisdiction (Art. 13). It is, therefore, clearly a basic requirement for such exercise.

The Court would still be hampered from exercising its jurisdiction, since the case were not duly referred to it by a competent State. Fatar, who would then be competent to refer the matter to the Court, abstained from doing so, and Razachstan was impeded from referring to The ICC in respect to the principle of non-retroactivity.

*i. Fatar did not refer the matter to The Court*

As State Party, Fatar had the authority to refer the soldiers to the ICC (Art. 13).

However, Fatar was originally opposed to The ICC investigating and prosecuting its soldiers, which proves that its government had no intent to trigger The Court. Thus, The ICC can not rely on a Fatar referral to exercise jurisdiction over the defendants.

*ii. Razachstan does not have the right to refer acts occurred before 1 January 2005 to The Court, on the bases of being a State Party*

Article 13 of the Statute establishes that a State Party may refer a case to The Court. This article should be read as a corollary to the principle of complementarity. Thus, if the Court has the complementary jurisdiction of a case, other State Parties would also be able to refer such cases to trial. Nevertheless, this principle can not be read as a derogation of the principle of non-retroactivity.

If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute, unless that State had made a declaration under Article 12, paragraph 3 (Art. 11.2). The use of the expression 'exercise of jurisdiction' demonstrates that such limitation is not regarding the existence of jurisdiction, but the matter treated in Art. 13, which carries as a title the same expression, and deals with referral of alleged crimes to The Court.

Before a State becomes Party to the Statute, it can not trigger the exercise of jurisdiction against international crimes by the Court (Art. 13, which refers to State Parties, Security Council and Prosecutor only), unless these facts were conducted under the jurisdiction of that State, and this State lodges a declaration to the Registrar.(Art. 12.3). On the contrary, the principle of procedural non-retroactivity would be bluntly violated.

As it has been demonstrated, it is most likely that the Fatar soldiers acts, questioned before The ICC, happened before the entry into force of The Statute for Razachstan. Therefore,

Razachstan is not entitled to refer a case to the ICC on the basis of Fatari jurisdiction over its nationals.

*iii. Non-compliance with the chapeau of Article 13.*

The Court may exercise its jurisdiction with respect to crimes referred to in Article 5 in accordance with the provisions of The Statute. As will be further demonstrated basic elements to the verification of the crime listed on the terms of reference are absent to this case (see item 3). Hence, the referral to The Court by Razachstan was mistaken due to the absence of a requirement of the chapeau of Article 13.

**1.3. The Crimes lacks jurisdiction *ratione materiae* to the Court**

The jurisdiction *ratione materiae* of The Court is based on the charges of different types of Crimes Against Humanity and War Crimes. The circumstances in which the alledged crimes were perpetrated precluded the occurrence of both these crimes according to Articles 7 and 8, respectively.

**A)The circumstances of the case preclude the possibility of occurrence of crimes against humanity**

The provision of Article 7, must be construed in a strictive manner, since crimes against humanity are amongst the most serious crimes of concern to the international community as a whole, and convicting a regular offender as a responsible for such crime would be imposing to a defender an undue burden.

The alleged crimes committed by the former Fatari UN soldiers cannot be characterized as crimes against humanity, since, first, they were not perpetrated by actors on their official capacity, second, the crimes were not actively promoted or encouraged by any government, and third, the crimes were not conducted with knowledge of an attack.

*i. The crime were not committed by agents of any government on their official capacity.*

Crimes against humanity are generally only perpetrated by governmental agents acting on their official capacity, unless in compliance with a general State policy (CASSESSE, 2003, p.83/ B., 1948, pp. 6-10/ Ehel. M., 1949, p. pp 67-9/ S. 1950, pp.56-7). When the agents are officials, but they act outside their capacity, their conduct cannot be classified as a crime against humanity (Kupreskic et. al. ,2001 para. 555) since they would not be acting in

accordance with a governmental policy, not being able to abuse its authority (Weller, 1948, p. 7-12).

The Fatari soldiers were not acting under any official capacity, as they had broken away from the UN Coalition on November 2003, and the acts were perpetrated after that. Their acts were completely outside the scope and domain of the United Nations and Fatar, and could not be an expression of these organizations' powers.

Therefore, the crimes against humanity requirement of being conducted by an governmental official of a State responsible for a widespread an systemtic attack is absent to the case at hand.

*ii. The crimes were not actively promoted or encouraged by any government.*

An attack directed against a civilian population means, for the purpose of article 7, a course of conduct involving a multiple commission of certain acts , pursuant to or in furtherance a State or organizational policy to commit such attack (Art. 7.2 (a)). According to this provision, the Statute requires that the offender, in committing a crime against humanity, pursue or promote such a practice. To the Statute that binds this honorable court, a practice that is merely condoned or tolerated by a State or Organization cannot characterized as an attack directed against a civilian population, and, therefore, cannot constitute a crime against humanity (CASSESSE, 2003, p. 93). The 'Elements of Crime', approved by a two thirds majority of the Assembly of States Parties, pursuant to article 9 of The Statute, and which assists the Court in the interpretation and application of the crimes under its jurisdiction *ratione materiae*, states that the policy to commit such attack requires that the State or organization "actively promote or encourage" such an attack against a civilian population. This position reflects the position of previous decisions (ALBRECHT,1949, p.750).

Affirming that there was an actively promoted or encouraged policy against the Marijiani's by governmental authorities would be imputing a State's or organization's policy as a criminal one. The Fatari soldiers were never subordinated to any of the State's directly affecting the conflict.

The defendants were formerly an UN Troop, and are Fatari nationals. The only two States that could possibly be directly influencing any policy towards the Marijiani population are Razachstan and Quraci, although no proves of such facts have been presented to the Court. The defendents do not have any subodination to non of these two States.

As UN officials the defendants could not be perpetrating a policy of systematic and widespread attack which constituted the institution's policy, since it is obvious that the United

Nations itself would not undertake such policy. As Fatari officials, the soldiers were subordinated to a State that did not have any interests in the region, and therefore would not be engaged in a actively promoting a policy against the Marijiani minority.

*iii. The crimes were not committed with knowledge of being a part of an attack against a civilian population*

A crime against humanity can only be perpetrated if it is committed with knowledge of an attack against a civilian population. The expression ‘knowledge’ means, to The Statute, “awareness that a circumstance exists or a consequence will occur in the ordinary course of events”.

The soldiers were found by UN colition forces by accident at a Marijani village. The villagers only indicated that these soldiers had been occupaying the place for over an year. Upon learning that the fatari soldiers had killed 9 men, raped and mutilated 17 women, and tortured villagers. They were accused of crimes against humanity of murder (Article 7 (1)(a)).

However, it did not remain proven the modus operandi of the soldiers. Further, the instance of violence occurred on an indetermined period of time. It can be affirmed that there is no proves to a recurring pattern or a protracted period of violence within Razachstan. Especially, associating these crimes to other violent crimes occurred in the country against the Marijjanis would be attributing to these soldiers the knowledge that their acts were part of the govenmental policy of attacks against that population. It seems unreasonable to believe that this soldiers who were sent to maintain peace between to nations at the region, and who broke away from UN forces because of procedural disagreements, would be now intentionally perpetrating crimes as part of an attack against civilian population governmental policy.

**B) The circumstances of the soldiers’ acts precluded the possibility of occurrence of war crimes**

The acts of the Fatari soldiers cannot constitute war crimes, since, first they do not occur in the context and in association with an armed conflict, and second, they were not perpetrated as a part of a plan or policy or as part of a large-scale commission.

*i. The facts occurred in the Marijiani village did not occur in the context and in association with an armed conflict*

A criminal offence, to be regarded as a war crime, must have an objective link with an armed conflict. This was reiterated by decisions from the ICTY (Tadic (Trial Chamber),1997,

para.573/ Delalic et. al.,1996, para. 193). The requirement of such link has also been the basis for the dismissal of several claims of war crimes before the ICTR (Kayishema and Ruzindana, 1999, para. 185-9, 590-624/ Akayesu, 1998, para. 630-4, 638-44/ Musema, 2000, para. 259-62). The demonstration of such link is independent of the fact of the parties being civilian or military. As have been previously decided, offences with no military purpose or in no way related to the official's function do not constitute war crimes (Lehnick and Schuster, 1994, p. 30).

The expression 'armed conflict' covers whichever confrontations where 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*, Jurisdiction, para. 70). The concept of armed conflict in Article 8 of The Statute does not include situations of disturbances and tensions, such as acts of violence and other acts of similar nature (CASSESE, 2003, p. 61 / Akayesu, 1998, para. 601).

No armed conflict between the soldier and the Marijanis caste took place according to the facts of the case, which would justify the imputation of war crimes of willful killing (Article 8(2)(a)(i)), war crimes of attacking civilians (Article 8(2)(b)(i) or Article 8(2)(e)(i)), war crimes of excessive incidental death, injury or damage (Article 8(2)(b)(iv)) and war crimes of murder (Article 8(2)(c)(i)).

The jurisdiction of the Court, concerning crimes of war are not applicable to the present case, since the crimes committed by the soldiers can not be hold as an armed conflict, but as an isolated act of violence. There was no confrontation between a dissident group and a State. The State had no involvement during the occurrence of the crimes. Especially, there were no two distinct parts that could characterize and armed conflict. Therefore, such acts should not be regarded as targets of international protection, but internal issues, which should be solved within the State.

*ii. The offences were not conducted as part of a plan or policy or as part of a large-scale commission of such crimes*

These criteria are expressed on the Chapeau of Article 8.

The offences to be trialed were not conducted as a part of plan or policy, since the soldiers acted on their own capacity and did not act subordinated to any government. This is inferred from the same reasons which demonstrates that the the acts were not undertaken as a part of a widespread or systematic practice.

They were also not engaged as a part of a large-scale commission of such crimes, or at least the facts are not suffice to demonstrate the occurrence of such large scaled comission. This fact is most notorious for the offences of wilful killing. Twenty seven soldiers had killed nine men during their settlement at the Village. Though reproachable the killings can not be consired as a large scale conduct, and therefore should fall outside the scope of The Courts competence. The same could be said about the number of rapes and mutilations, which are inferior to the number of offenders. Regarding the conduct of tortures, the fact of the case do not point any number, making only a reference to several, which wheather it means or not there was a large scale practice.

**C) The National Courts of Razachstan are competent to prosecute the defendets for international crimes.**

It is important to mention the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by General Assembly resolution 3074 (XXVIII) of 3 December 1973, which establishes in paragraph 5. that “persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes.”

Furthemore, even if the Court understands that the crimes committed by the soldiers can be considered as war crimes and crime against humanity, as stated above, Razachstan has the right to try them as the fatari government has demonstrated no intent to exert jurisdiction over their national soldiers.

Therefore, the national tribunal of Razachstan may exercise its jurisdiction not only in matters of ordinary criminal law, but also in matters of alleged violations of crimes against humanity and war crimes (S. Kadic, et al., Plaintiffs-Appellants v. Radovan Karadzic, Defendant-Appellee, October 13, 1995).

**2. The Court shall determine the case as inadmissible**

The Fatari Troops case is not admissible before The Court for two reasons. First, the ICC is impeded to analyse the mertis of the case due to the principle of complementarity, and second, the gravity of the acts perpetrated does not justify the resource to The Court.

## 2.1. The Principle of complementarity

The ICC is based on the principle of complementarity whereby the Court is subsidiary or complementary to national courts. These courts enjoy priority in the exercise of jurisdiction except under special circumstances, when the ICC is entitled to take over and assert its jurisdiction. This approach undertaken by the Statute was adopted since, the national courts may have more means available to collect the necessary evidence and to lay their hands on the accused, and also since there was the intent to respect State sovereignty as much as possible. (CASSESE, 2003, p. 351/ KRESS, LATTANZI, 2000, p. 130/ BERG,2006, p. 4).

Complementarity is laid down in paragraph 10 of the Preamble as well as in Article 1 of the Statute and is spelled out in Articles 15, 17, 18 and 19. Due to this principle the Court is barred from exercising its jurisdiction over a crime, whenever a national court asserts its jurisdiction over the same crime and under its national law the State has jurisdiction; and the State is willing and has the ability of adjudging (Art. 17.1 (a)).

### **A) Razachstan has territorial jurisdiction over the acts perpetrated by the Fatari Troop**

The basic principle of territoriality determines that a crime committed in a State's territory is justiciable in that State. In the Lotus case, the Permanent Court of International Justice stated in 1927 that "in all systems of law the principle of the territoriality character of criminal law is fundamental." (France v. Turkey, 1927, p. 20). Further, a US court stated in Rivard v. United States that "all the nations of the world recognize the principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done." [Rivard v. United States, US Court of Appeal judgment of 375 F ed 882 (5th Cir. 1967)]. The principle is grounded basic principle of territorial sovereignty, which denotes denotes the enjoyment of rights over territory. Territorial sovereignty involves the exclusive right to display the activities of a State. (Netherlands vs. United States, 1928, para. 829).

Razachstan is a sovereign State, and, for that reason, the principle of territory would prosper. In addition, there is two important advantages, which justify its applicability. First, the locus delicti commissi (the place where the offence has allegedly been committed) was within Razachstan, country where it is easiest to collect evidence. It is therefore considered the appropriate place of trial (Israel v. Eichman, 1962).

## **B) Burden of Proof**

It is a well established principle that bad faith cannot be presumed under international law (I.C.J. Reports 1957, p. 53/ WIPO, Case No. D2004-0535, 2004). Razachstan has shown interest in prosecuting the defendants in its own domestic courts. It is not to the Razachstan authorities to prove that they will conduct such procedures as determined by applicable law. Trust, as a corollary to this statement has also been acknowledged as a basic principles that guides International Law (BILDER, 1981, p. 294).The burden of proof of demonstrating that Razachstan has not conducted an investigation or is unwilling or unable of conducting a fair trial is upon those alleging it. Nevertheless, there are facts and evidences that demonstrate that Rachzachtan will indeed comply with its obligations when trying the Fatari Soldiers.

## **C) The Fatari Troops Case is being duly investigated by Razachstani authorities**

Razachstan has challenged the Court's admissibility on the bases it will prosecute the Fatari Soldiers. It can be presumed from this fact that the State's authorities have been duly undertaking investigations regarding the conduct of the Fatari Troops, since these are a necessary step for initiating any criminal trial.

The facts of the case do not indicate expressly the existence or inexistence of investigations. Since it is presumed that States undertake their obligations assumed in good faith, the burden to prove the inexistence of investigations is on those challenging such fact.

Furthermore, the omission on the case at hand of engagement or not of investigations might be due to the fact that, according to customary criminal practice, when circumstances require, criminal investigations can be conducted secretly. The Rome Statute, itself recognizes confidentiality as a adequate procedure to conduct investigations in particular situations.(Art. 18.1).

Thus, it is to be presume that investigations are being dully conducted in Razachstan, and, consequently, The Prosecutor is bound to deffere the State's investigation, and competence to analyse the case (Art. 18.2). The Court should, therefore, dismiss the case on the grounds of admissibility, and return the soldiers to trial on Razachstan domestic Courts.

## **D) The coutry has demonstrated ability to conduct a just and fair trial**

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.

Razachstan is now governed by an elected Prime Minister and maintain a democratic political regime. Razachstan restored its legal system and has been investigating the crimes committed by the soldiers. Prime Minister Faraz has indicated that Razachstan now had a criminal court that could properly try soldiers. These circumstances demonstrate that the country is consolidating at a fast pace its democratic institutions

The trial of the Fatari soldiers in Razachstan courts would be an important step for achieving international recognition of its international credibility. Precluding Razachstan from underaking such trial would be hampering the recovery of the recognition before the international community of the country's stability.

**E) Razachstan has shown willingness to conduct a just and fair trial to the Fatari Troop**

A State may assume an international obligation in relation to certain other states, international organizations or Tribunals by a unilateral declaration. A declaration undertaking a declaration intending that it should become bound by such declaration, when publicly given is binding (New Zealand v. France para. 43).

In early July 2005, the elected Prime Minister, Khalid Faraz, held meetings with ICC prosecutors requesting the immediate return of the Fatari soldiers to Razachstan for trial. Further, in an effort to allay any international concern, he promised that should the soldiers be found guilty, they would not be executed.

The Declaration of Prime Minister Faraz demonstrates the State's willingness for conducting a fair and just trial, exhempt from unhuman penalties. It was publicly made, by na highest governmental representative of Razachstan, and wth the clear intent to be binding upon the countries authorities. Therefore, the Court is to recognize the validity of such declaration as an demonstration of good faith in conducting the Fatari Soldiers trials.

**2.2. The crimes committed in Razachstan do not justify the action by the Court**

The Court shall determine the case is inadmissible where the case is not of sufficient gravity to justify further action by the Court. (Article. 17.1.(c)).

Under international law, national or territorial states have the right to prosecute and try international crimes, and often even a duty to do so. Further, national jurisdiction over those crimes is normally very broad, and embraces even lesser international crimes, such as

sporadic or isolated acts, which do not make up, nor are part of, a pattern of criminal behaviour. Were the ICC also to deal with all sorts of international crimes, including those of lesser gravity, it would soon be flooded with cases and become ineffective as a result of an excessive and disproportionate workload. It is therefore quite appropriate that the ICC should intervene only when national institutions fail to do so (ICTY, Order, 1998).

The crimes committed by the soldiers were an isolated and sporadic act of violence, which can be punished by the national criminal court of Razachstan. There were no armed conflict, as already clarified above, and therefore no sufficient gravity to justify further action by the Court.

### **2.3. Conclusion**

Razachstan passed through years of occupation. Nevertheless, the State is rebuilding itself to meet international standards; democratic elections has already been held; the ability to properly try the soldiers has been achieved; the crimes are not sufficient serious to justify further action by the Court; the country has demonstrated its willingness and the Prime Minister has also promised not to apply the death penalty.

## **IV. PLEADING**

As already considered by the ICTY, in the case Prosecutor v. Tadic, “the Appeals Chamber does not consider that the International Tribunal is barred from examination of the Defence jurisdictional plea by the so-called "political" or "non-justiciable" nature of the issue it raises.” (ICTY, Prosecutor v. Tadic, Appeal Chamber, para. 25).

The Rome Statute considers that if the Prosecutor concludes that a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, he or she shall inform the Pre-Trial Chamber and the State making a referral under article 14 of his or her conclusion and the reasons for the conclusion. The Prosecutor may request the Court to dismiss the case on preliminary basis (Art. 53 (2).(c)).

## **CERTIFICATION OF TEAM MEMBERS**

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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