



**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**

**TRIAL CHAMBER I**

**PACE LAW SCHOOL  
SECOND ANNUAL INTERNATIONAL CRIMINAL COURT MOOT  
COMPETITION, 2006**

**SITUATION IN THE STATE OF RAZACHSTAN**



*In the case of*

**Prosecutor**

**v.**

**Fatari Soldiers**

**MEMORIAL SUBMITTED ON BEHALF OF DEFENSE**

**GUJARAT NATIONAL LAW UNIVERSITY  
GANDHINAGAR**

**DEFENSE COUNSEL**

12 SEPTEMBER 2006

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**ARGUMENTS AND PLEADINGS: -**


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<b>I. ICC has exclusive jurisdiction in accordance with Rome Statute to try crimes committed on the territory of Razachstan, a state party.....</b>	<b>2</b>
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*(A) The Court has jurisdiction in order to try crimes committed in accordance with the following aspects of Jurisdiction:-*

- *Ratione Materiae and*
- *Ratione Temporis.....*2

*(B) Perpetrators of crimes committed on territory of Razachstan cannot be tried anywhere except before ICC.....*3

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<b>II. The case of trial of perpetrators of crimes on the territory of Razachstan is admissible in the International Criminal Court.....</b>	<b>5</b>
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*(A) Issues of Admissibility render the case admissible and particularly no violation of principle of complementarity in particular.....*5

*(B) This case is admissible in ICC in order to ensure 'fair trial' of the Fatari soldiers.....*7

*(C) Challenges to Admissibility of the case cannot be contended under Article 19 of the Rome Statute.....*9




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**III. Acts committed by Fatari soldiers cannot be considered crimes under Jurisdiction of the Court. ....10**

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(A) *Fatari soldiers acted in good faith and had no mens rea* .....10

(B) Confirmation of the charges of Fatari military officers without substantive investigation would not be in accordance with the principle of presumption of innocence.....

(C) *The infringed acts of Fatari soldiers did not constitute crimes charged by the prosecutor of ICC under Article 5 of the Statute. These acts pretend criminal liability*.....12

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**-Rules of Procedure and Evidence, cited as Rules-**

1. Finalized Draft Text of the Rules of Procedure and Evidence, Preparatory Committee for the International Criminal Court., at 37, UN Doc PCNICC/2000/INF/3/Add.1 (2000), *cited as Draft Rules*.....
2. Discussion Paper Proposed by the Coordinator, Preparatory Committee for the International Criminal Court, at 2, UN Doc., PCNICC/1999/WGEC/RT.6 (1999), *cited as Discussion Paper Prep Com*.....
3. Rule 85.....

**[CASES]**

**-CASES ADJUDICATED BY THE ICJ-**

1. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), 1986 ICJ 14, ¶ 218, cited as US v. Nicaragua
2. Certain Expenses Case, ICJ cited as **Certain Expenses Case**.....11

**-CASES ADJUDICATED BY THE ICTY AND ICTR-**

1. Prosecutor v. Furundzija, Case No. IT-95-27/1, Trial Chamber II, Dec. 10, 1998, *cited as Furundzija Trial Judgment*,
  - Judgment, ¶ 288
  - Para. 163
  - Trial Chamber, International Legal Materials, Vol. 38, 1999, p. 317
2. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Oct. 2, 1998, *cited as Akayesu Trial Judgment*,
  - Para. 589

- Para. 687
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3. Prosecutor v. Kabanda, Case No. ICTR 97-23-S, Judgment and Sentence, 4 September, 1998, *cited as Kabanda*,
    - Para 14
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  4. Prosecutor v. Simic, The Yale Journal of International Law, Vol. 27, 2002, No. 1, *cited as Simic Judgment*.....
  5. Prosecutor v. Blaskic, Case No. cited as **Blaskic Trial Judgement**, para. 153, 15.....13
  6. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, para. 590 (Aug. 2, 2001), *cited as Krstic Judgment*
  7. Prosecutor v. Milan Kovacevic, IT-97-24-PT, *cited as Kovacevic Trial Judgment*,
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  8. Prosecutor v. Tadic, Case IT-94-1-A, Judgment, 15 July 1999, cited as, **Tadic Appeal Judgment**,
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  9. Prosecutor v. Kayishema, ICTR, Judgement, Kayishema, Clément (ICTR-95-1); Ruzindana, Obed (1: ICTR-95-1; 2: ICTR-96-10), 21 May 1999, *cited as Kayishema Trial Judgement*,
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- Para. 126-127.....14

**[TREATIES, CONVENTIONS and OTHER U.N SECURITY COUNCIL DOCUMENTS]**

**-INTERNATIONAL CONVENTIONS AND TREATIES-**

1. Art 86(2) of Additional Protocol I to Geneva Conventions, 1977
2. The Statute of the International Criminal Tribunal for the former Yugoslavia, Annex to the Report of the Secretary- General pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc, S/25704, 3 May 1993, *cited as Annex ICTY*
  - Art. 7
3. Declaration on the Protection of all Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. GA Res. 3452 (XXX) OF 9 Dec., 1975, *cited as Torture Declaration.*
4. United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, United Nations G.A. Res. 39/46, UN GAOR Supp. (No. 51), Dec. 10, 1984, *cited as Torture Convention.*
5. Draft Code of Offences against the Peace and Security of Mankind, U.N. Gaor, 6<sup>th</sup> Session, U.N. Doc. A/CONF. 183/9 (1998), art. 7(1) (h), U.N. Doc. A/1858 (1951), Art. 2(10), *cited as Draft Code*

6. Document presenting the recommendations addressed to Dr. Bernard Kouchner, the UN Special Representative of the Secretary-General and head of UNMIK retrieved from *web.amnesty.org*, cited as **Kouchner** .....4
7. The Fourth Geneva Convention, 1949, Convention (IV) Relative to the Protection of Civilian Persons in the time of War., cited as **Geneva IV**.....13

-OTHER UNITED NATIONS AND SECURITY COUNCIL DOCUMENTS-

1. SC Res. 808(1993), UN Doc. S/RES/808,22 February 1993 .....15
2. SC Res. 827 91993), UN Doc. S/RES/827 (1993), 25 May 1993.

[BOOKS REFERRED]

1. Bassiouni, Cherif M., '*Crimes against Humanity in International Criminal Law*', ed. 2nd ed., Martinus Nijhoff Publishers, 1999 cited as **Bassiouni**.....5
2. Blakesley, Christopher L. '*Extraterritorial jurisdiction, in International Criminal law*' p.33, 47-54, vol. 2 (1999), P. 33-107, ed. Bassiouni. Cherif. M., '*International Criminal Law, Procedural and Enforcement Mechanisms*, cited as **Blakesley1**...5
3. Blakesley, Christopher L., '*Jurisdiction, Definition of Crimes and Triggering Mechanism International Criminal Court: Reservations and Issues before the 1997-1998 Preparatory Committee and administrative and financial implications*' M Cherif Bassiouni Editor 1997, cited as **Blakesley2** .....5
4. Brownlie, Ian, '*Principles of Public International Law*' (5<sup>th</sup> ed.), Oxford University Press, Great Clarendon Street, Oxford, England, 1998, p. 303-09 cited as **Brownlie**.....5
5. "*Section 10, Final Analysis and Suggestions, The Rome Statute: A Tentative Assessment by Board of Editors of book*", '*Commentaries on Rome Statute of International Criminal Court*,' ed. Antonio Cassese, Paula Gaeta, cited as **Gaeta**.
6. Danilenko, '*ICC Statute and Third States*', in Cassese/Gaeta/Jones Commentary, 1871, at 1886-1887, cited as **Danilenko**
7. Wolfrum, R, '*Enforcement of International Humanitarian Law*' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* ,Oxford University Press, Oxford, 1995, p. 532, cited as **Wolfrum**..... 13

8. Y. Sandoz, et al., ed., '*Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*', para 3555, cited as **Sandoz**..... 14
9. Cryer, Robert, 'Selectivity and the law: II – general principles of liability and defenses', in '*Prosecuting International Crimes*', Cambridge University Press, 2005, cited as **Selectivity II**..... .9
10. Kriangsak, Kittichaisaree, '*International Criminal Law*', Oxford University Press, Oxford 2001, pp. 266, 267 cited as **Kriangsak**.....15

### [ARTICLES AND OTHER PUBLICATIONS]

1. Jain, Neha, 'A separate law for peace keepers: The clash between the Security Council and the International Criminal Court', *Eurpoean J. Int'l l*, Vol. 16, No.2, 2005.
2. Cassese, Antonio, 'The Statute of the International Criminal Court: Some Preliminary Reflections,' *European J. Int'l L.*, Vol. 10, 1999, pp. 157-169, cited as **Cassese**.
3. Gaeta, Paola, 'The Defence of Superior Orders: The Statute of the International Criminal Court verses Customary International Law,' *European J. Int'l L.*, Vol. 10, 1999, pp. 183-185, cited as **Gaeta**.....7
4. Schabas, William, 'Was Genocide committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia.' *Fordham Int'l L.J.*, Vol. 25, Nos. 1-2, 2001, cited as **Schabas**.
5. O'Donnell, Michael J, 'Genocide, The United Nations, and The Death of Absolute Rights', *Boston College Third World L.J*, Vol. XXII, Winter 2003, No. 2, pp. 405-408, cited as **O'Donnell**.
6. Meron, Theodor, 'International Criminalization of Internal Atrocities', *American J. Int'l L.*, Vol. 89, July 1995, No. 3, pp. 555-568 cited as **Meron**.
7. Burke-White, William W., 'A Community of Courts: Toward a system of International Criminal Law Enforcement', *Michigan J. Int'l Law*, Vol. 24, 2002-03, Fall 2002, No.1, pp. 1-12, cited as **Burke-White**.....
8. Oosterveld, Valerie, 'Sexual Slavery and the International Criminal Court: Advancing International Law', *Michigan J. Int'l L.*, Vol. 25, No.3, 2004, pp. 607-613, cited as **Oosterveld**.

9. Frulli, Micaela, 'Are Crimes against Humanity, More Serious than War Crimes?' *European J. Int'l Law*, Vol. 12 (2001), pp. 311, 335-8, *cited as Frulli*.
10. Dieng, Adama, 'International Criminal Justice: From Paper to Practice- A Contribution from the International Criminal Tribunal for Rwanda to the Establishment of the International Criminal Court,' *Fordham J. Int'l L.*, Vol.25, No. 3, March, 2002, p. 696, *cited as Dieng*.
11. McHenry III, James R., 'The Prosecution of Rape under International Law: Justice that is Long Overdue', *Vanderbilt J. of Transn'l L.*, Vol. 4, pp. 1285-1296, *cited as McHenry*.
12. Robinson, Darryl, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court', *European J. Int'l L.*, Vol. 14, No. 3, June 2003, p. 485-491, *cited as Robinson*.
13. Ferstman, Carla, 'The Reparation Regime of the International Criminal Court: Practical Considerations', *Leiden J. Int'l L.*, Vol. 15, 2002, pp. 667-670, *cited as Ferstman*.
14. Manashaw, Linnea D, 'Genocide and Ethnic Cleaning', *California Western Int'l L.J.*, Vol. 35, No. 2, 2004-05, pp.310-313, *cited as Manashaw*.
15. Sivakumaran, Sandesh, 'Torture in International Human Rights and International Humanitarian Law: The Actor and the Ad Hoc Tribunals' *Leiden J. Int'l L.*, Vol. 18, No. 3, Oct. 2005, pp. 546-549, *cited as Sivakumaran*.
16. Orentlicher, Daine F., 'Politics By Other Means: The Law of the International Criminal Court', *Cornell J. Int'l L.*, Vol. 32, No. 3, 1998-99, p. 495, *cited as Orentlicher*.....5
17. Scharf, Michael P., 'The Amnesty Exception to Jurisdiction of the International Criminal Court', *Cornell J. Int'l L.*, Vol. 32, No. 3, 1998-99, pp. 514-516, *cited as Scharf*.....15
18. Zwanenburg, Marten, 'The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?' *European J' Int'l l.*, Vol. 10 No.1 1999; *cited as Zwanenburg*..... 5
19. Jennifer Green et al., 'Affecting the Rules for the Prosecution of Rape and other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique', *5 Hasting's Women's L.J.* 171 (1994), *cited as Green*.....11

20. Diane F. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, *100 Yale L.J.* 2537, 2589 (1991), cited as **Orentlicher** .....6
21. Paulus, Andreas, ‘Legalist Groundwork for the International Criminal Court: Commentaries on the Statute of International Criminal Court,’ *European J. Int’l L.* 2003, cited as **Paulus**.....16
23. Sellers, Patricia Viseur & Okuizumi, Kaoru, ‘*Intentional Prosecution of Sexual Assaults*,’ 7 *Transnational Law & Contemporary Problems*, P. 45, 46, 47 (1997), cited as **Sellers**
24. Minna Schrag, ‘*The Yugoslav Crimes Tribunal: A prosecutor’s view*,’ 6 *Duke J. Comp. & Int’l L.* 187, 192-93 (1995), cited as **Schrag**.....16
25. Meron, Theodor, ‘The Humanization of Humanitarian Law,’ *94 Am. J. Int’l L.* 239 (2000), cited as **Meron1**.....15
26. Randall, Kenneth, ‘Universal Jurisdiction under International Law,’ *66 Tex. L. Rev. No.2*, (1988), cited as **Randall**
- pp. 785,788-89 .....5
  - p. 787 .....5
27. Harris, David, ‘The Right to a Fair trial in Criminal Proceedings as a Human Right’, *Intn’l Comp Law Q.*1967; 16: 352-378, cited as **Harris**.....
28. Ellis, Mark S., ‘Achieving justice before the international war crimes tribunal: Challenges for the Defense Counsel’, *7 Duke J. of Comp. & Int’l L.* 519, cited as **Ellis**.....7
29. Holmes, John T., “ICC: Elements of Crimes and Rules of Procedure and Evidence, Jurisdiction and Admissibility,” cited as **Holmes**.....7
30. Amnesty International press release, 9 March 2004, Special Court for Sierra Leone: Challenges remain as new court-house is officially opened, cited as **Amnesty Press Release**.....9
31. ‘Uganda: First ever arrest warrants by International Criminal Court - a first step towards addressing impunity’ Amnesty International Media Briefing AI Index: AFR 59/008/2005 (Public) News Service No: 274 14 October 2005 , cited as **Amnesty Media Briefing**.....

32. ‘UN Peacekeepers exempted from war crimes prosecution for another year’, Peace Women Women's International League for Peace and Freedom, June 12, 2003 retrieved from <http://www.peacewomen.org/un/pkwatch/News/03/exemption.html>, cited as **Peace Women**.....
33. ‘Fair Trials and the Role of International Criminal Defense’, 1982, Developments in the law- International Criminal Law, *Harvard Law Review*, Volume 114, May 2001, Number 7, The Harvard Law Review Association, cited as **Harvard**.....7
34. Regional Enforcement of International Criminal Law Post-9/11 Professor Tim McCormack, Foundation Australian Red Cross Professor of International Humanitarian Law and Foundation Director, Asia Pacific Centre for Military Law, The University of Melbourne Law School Asian Law, Centre Asian Economics Centre, Melbourne Asia Policy Papers, University of Melbourne, cited as **McCormack**.....7
35. Shea, Jamie, NATO Spokesperson, ‘Responding to a question regarding the International Criminal Tribunal for the Former Yugoslavia’s jurisdiction over NATO actions in Kosovo’, May 16, 1999 cited as **Shea**..... 16
36. UN begins formal inquiry into rape allegations against UN police officers in Haiti, cited as **UN Doc. 1**
37. Atta, Dale van, ‘The Folly Of The United Nations (U.N.) Peacekeeping’, *Readers Digest*, November, 1995, cited as **Atta Readers’ Digest**.....15
38. Belle, Kingsley. E, “‘Equality of Arms’ a significant aspect of fairness in international criminal justice’, cited as **‘Equality of arms’**.....6
39. Statement issued by the principal defender at the beginning of the defense case in the cdf trial, Special court for Sierra Leone, office of the principal defender, cited as (**Special Court of Sierra Leone, Statement of Prosecutor**).....6
40. Sunga, Lyal. S., “*The emerging system in International Criminal Law, Developments in codification and implementation*”, Kluwer Law International, 1999, The Hague, Netherlands cited as **Sunga**.....7

- Additional Bibliography -

1. Agnes Callamard, Barbara Bedout. et al, '*Investigating Women's Rights Violations in Armed Conflicts*', Amnesty International (Rights and Democracy), International Centre for Human Rights and Democratic Development.
2. Ball, Howard '*War crimes and Justice*'- Reference Handbook of Contemporary World Issues, 2002.
3. Bantekas, Ilias, '*Principles of Direct and Superior Responsibility in International Humanitarian Law*', Manchester University Press, Manchester, UK, 2002.
4. Bassiouni, Cherif M, '*Crimes against Humanity in International Criminal Law*', Second Revised Edition, Kluwer Law International, The Hague, The Netherlands, 1999, pp. 274-281, cited as **Bassiouni**.
5. Bassiouni, Cherif M, '*The Protection of Human Rights in the Administration of Criminal Justice- A Compendium of UN Norms & Standards*', Transnational Publishers, Inc., Irvington-on-Hudson, New York, 1994.
6. Beigbeder, Yves, '*International Justice against Impunity*', Martinus Nijhoff Publishers, Bosten, Leiden, The Netherlands, 2005.
7. Cameron, Iain '*The Protective Principle of International Criminal Jurisdiction*'-, Dartmouth Publishing Company Ltd., England, 1994.
8. Cryer, Robert, '*Prosecuting International Crimes- Selectivity & The International Criminal Regime*', Cambridge University Press, Cambridge, UK, 2005.
9. Dormann, Knut, '*Elements of War Crimes under the Rome Statute of the International Criminal Court, ICRC: Sources and Commentaries*', Cambridge University Press, Cambridge, UK, 2003.
10. Garden, Judith, '*The Library of Essays in International Law- Humanitarian Law*', Dartmouth Publishing Company Ltd., Hants, England, 1994.
11. Bantekas, Ilias & Nash, Sushan, '*International Criminal Law*', 2<sup>nd</sup> Edition, Cavendish Publishing Limited, London, UK, 2002.
12. Jean Marie Henckaerts & Lousie Doswald- Beck. Et all, '*Customary International Humanitarian Law*', Vol.1, Rules, International Committee of the Red Cross, Cambridge University Press, UK, 2005
13. John R.W.D. Jones & Steven Powles, '*International Criminal Practice*', 3<sup>rd</sup> Edition, Oxford University Press, Oxford, 2003.

14. Johnson, Sterling, '*Peace without Justice- Hegemonic Instability of International Criminal Law*', Ashgate Publishing Ltd., Hants, England, 2003.
15. Jorgensen, Nina H.B., '*The Responsibility of States for International Crimes*', Oxford University Press, Great Clarendon Street, Oxford, General Eds. Prof. Ian Brownlie, 2000.
16. Judge Richard May & Marieke Wierda, '*International Criminal Evidence*', Transnational Publishers Inc., Ardsley, New York, 2002, pp. 288-293
17. Knoop, Jan Alexander, '*The Prosecution & Defense of Peacekeepers under International Criminal Law*', Transnational Publishers Inc., Ardesley, New York, 2004, pp. 256-264, cited as **Knoops**.
18. Lattimer, Mark and Sands, Philip Q.C., '*Justice for Crimes against Humanity*', Hart Publishing, Oxford and Portland, Oregon, 2003
19. Meron, Theodor, '*War Crimes Law Comes of Age, Essays by*', Oxford University Press, Oxford, 1998.
20. Othman, Mohamed C., '*Accountability for International Humanitarian Law Violations: The Case of Rwanda & East Timor*', Heidelberg, Germany, 2005.
21. Passas, Nikos, '*The Library of Essays in International Law- International Crimes*', Dartmouth Publishing Company, England, 2003.
22. Schabas, William, '*The Abolition of the Death Penalty in International Law*', 3<sup>rd</sup> Edition, CUP, Cambridge, UK, 2002.
23. Steven R Ratner & Jason S Abrams, '*Accountability for Human Rights- Atrocities in International Law- Beyond the Nuremberg Legacy*', 2<sup>nd</sup> Edition, Oxford University Press, Oxford, 2005.
24. Lee, Roy, S., '*The International Criminal Court- Elements of Crimes & Rules of Procedure and Evidence*', published and distributed by Transnational Publishers Inc., New York, US, 2001.
25. Politi, Mauru & Nesi, Giuseppe, '*The Rome Statute of the International Criminal Court*', - '*A Challenge to Impunity*', Ashgate Publishing Ltd., Hants, England, 2001
26. Simbeye, Yitiha, '*Immunity & International Criminal Law*', Ashgate Publishing Ltd., Hants, England, 2004.
27. Zappala, Salvatore, '*Human Rights in International Criminal Proceedings*', OUP, Oxford, 2003.

**-WEBPAGES and ELECTRONIC SOURCES**

1. www.iss.cos.za/ASR/11No4/duPlessis.pdf, *cited as Site1* .....5
2. web.amnesty.org, *cited as Site2*,.....5
3. <http://www.hrw.org/press/2003/02/afghan020903.htm>, *cited as Site3*.....5
4. <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList106/911763EAA63170C0C1256B66005D85D0>, *cited as Site4*..... 16
5. <http://www.icc-cpi.int/chambers/pretrial.html>, *cited as Site5*.....16
6. <http://www.hrw.org/about/projects/womrep/General-24.htm>, *cited as Site6*..... 16
7. Survive, Some Misconceptions and Facts about Rape, at <http://survive.org.uk/index1.htm#miscon>, *cited as Site7*
8. Belle, Kingsley E., “*Equality of Arms*” a significant aspect of fairness in international criminal justice’, opinion article, Sierra Leone Court Monitoring Programme, retrieved from [http://www.slcmp.org/opinion\\_article.html](http://www.slcmp.org/opinion_article.html) *cited as Belle*.....9
9. Burke, Erin Boeke, “Never Again”: An Obligation for World Federalists’, Issues Team Intern, Macalester College, Class of 2004 World Federalist newsletter, Summer 2002, Third World Traveler, retrieved from [http://www.thirdworldtraveler.com/World\\_Federalism/Never\\_Again.html](http://www.thirdworldtraveler.com/World_Federalism/Never_Again.html) , *cited as Burke*..... 5
10. ‘Afghanistan: Warlords Face International Criminal Court, Future War Crimes Can Be Prosecuted’, New York January 11, 2003, HRW documents on Afghanistan, Human Rights Watch, retrieved from <http://www.globalpolicy.org/security/issues/afghan/2003/0211war.htm>, *cited as Afghanistan HRW Documents*.....6
11. Price, Susannah, ‘DR Congo sex abuse claims upheld’ BBC News, United Nations, January 8, 2005, retrieved from <http://news.bbc.co.uk/2/hi/africa/4156819.stm> *cited as Congo*.....15

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### LIST OF ABBREVIATIONS

1. &:	And
2. §:	Section
3. ¶:	Paragraph
4. American J. Int'l L.:	American Journal of International Law
5. Art.:	Article
6. Boston College Third World L.J.:	Boston College Third World Law Journal
7. California Western Int'l L.J.:	California Western International Law Journal
8. Co.:	Company
9. Conf.:	Conference
10. Conn. J. Int'l L.:	Connecticut Journal of International Law
11. Cornell J. Int'l L.:	Cornell Journal of International Law
12. Crim.:	Criminal
13. CUP-	Cambridge University Press
14. Dev.:	Development
15. Doc.:	Document
16. e.g.:	exempli gratia, for example (Latin)
17. ed.:	Edition
18. et. at.:	et alii, and others (Latin)
19. etc.:	et cetera, and so on (Latin)
20. Eds.:	Editors
21. European J. of Int'l L.:	European Journal of International Law
22. Fordham J. Int'l L.:	Fordham Journal of International Law
23. G.A.:	General Assembly

24. G.A.O.R:	General Assembly Official Records.
25. Govt.:	Government
26. ICC.:	International Criminal Court
27. ICJ.:	International Court of Justice
28. ICRC.:	International Committee for Red Cross
29. I.R.R.C.:	International Review of Red Cross
30. ICTR-	International Criminal Tribunal for Rwanda
31. ICTY-	International Criminal Tribunal for Former Yugoslavia
32. I.H.L.:	International Humanitarian Law
33. I.L.C.:	International Law Commission
34. I.L.M.:	International Legal Materials
35. I.L.R.:	International Legal Reporter
36. I.L.C.:	International Law Commission
37. I.M.T.:	International Military Tribunal
38. Int'l:	International
39. i.e.:	id est., that is (Latin)
40. ibid.:	ibidem, in the same place (Latin)
41. J.:	Journal
42. L.:	Law
43. Ltd.:	Limited
44. Leiden J. Int'l L.:	Leiden Journal of International Law
45. M.L.F.:	Marijani Liberation Front
46. Michigan J. Int'l Law.:	Michigan Journal of International Law
47. No.:	Number
48. OUP:	Oxford University Press
49. p.:	Page
50. Para.:	Paragraph
51. pp.:	Pages
52. P.C.I.J:	Permanent Court of International Justice
53. PrepCom-	Preparatory Committee
54. R.P.E.:	Rules of Evidence and Procedure



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55. Rep.:	Report
56. Res.:	Resolution
57. Rev.:	Review
58. SCOR.:	Supreme Court Official Records
59. S.C.R.:	Supreme Court Reports
60. Ser.:	Series
61. Sess.:	Session
62. Soc'y:	Society
63. Supp.:	Supplementary
64. The Statute:	Rome Statute, 2002
65. UCLA Woman's L. J.:	University of California, Los Angeles Women's Law
66. U.N.:	United Nations
67. U.N.C.C.:	United Nations Compensation Committee
68. U.N.G.A.:	United Nations General Assembly
69. U.N.T.S.:	United National Treaty Series
70. v.:	Verses
71. Vanderbilt J. of Trans'n'l L.:	Vanderbilt Journal of Transnational Law
72. Vol.:	Volume
73. Y.B.:	Year Book
74. Yale J. Int'l L.:	Yale Journal of International Law

## INTRODUCTION

International Criminal Court (herein after ICC) was established pursuant to Rome Statute entered into force on July 1, 2002. It was established with the motive of punishing heinous crimes in International Law. The Pre-Trial chamber of the ICC has confirmed charges on twenty seven Fatari soldiers based upon its jurisdiction on crimes committed in an International conflict in accordance with Article 5 of the Rome Statute. The case is now before the trial chamber of the court. The relevant facts from the side of defence along with the submissions on behalf of defence for the twenty seven Fatari soldiers are as follows:

## STATEMENT OF RELEVANT FACTS

1. Razachstan is a country whose entire social structure is embedded in a caste system, in which the Marijani are considered the “lowest of the low”. These Marijanis were oppressed and atrocities were committed on them. These atrocities increased during the Quraci occupation. The United Nations under a Security Council Chapter VII resolution sent its Peacekeepers, to lead an international coalition of troops to maintain peace during the negotiations for the withdrawal of Quraci troops.
2. **November 12, 2003:** A Fatari regiment comprising of twenty-seven troops broke away from the coalition due to dissatisfaction with the way the operation was being conducted by the United Nations, and they marched into the Buchari province, a province dominantly inhabited by Marijanis.
3. **December 31, 2004:** A provisional government was established in Razachstan, under a UN negotiated accord that would govern until the democratic elections could be held.
4. **January 1, 2005:** The Statute of the ICC came into force, with Razachstan being a signatory, empowered the Court to prosecute and punish persons who committed genocide, war crimes and crimes against humanity in Razachstan, where competent domestic courts were unwilling to exercise jurisdiction.
5. Some members of the Razachstani provisional government wanted to execute the captured Fatari troops immediately, for the commission of such atrocities. Leading candidate for Prime Minister in upcoming elections, Khalid Faraz, from the Provincial Government, expressed his anger and desire to see the perpetrators being tried in Razachstan. Others did not consider the

crimes to be outrageous to warrant execution, especially as the victims were Marijanis, second-class citizens of Razachstan.

6. **May 2005:** The ICC submitted the investigating report charging the Fatari soldiers having committed crimes against humanity (murder) and war crimes (wilful killing, attacking civilians, excessive incidental death, injury or damage and murder).

7. **Early July 2005:** Prime Minister Khalid Faraz requested for immediate return of the Fatari soldiers to Razachstan for trial, for now they had a criminal court to try the perpetrators.

8. **Late May 2005:** Representatives of the Razachstani government filed a petition with the ICC challenging the ICC's jurisdiction.

### **ARGUMENTS ADVANCED:**

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#### **1. ICC HAS THE EXCLUSIVE JURISDICTION TO TRY CRIMES COMMITTED ON THE TERRITORY OF RAZACHSTAN, A STATE PARTY.**

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##### **(A) Court has jurisdiction over alleged crimes of Fatari Military officers under Article 5 of the Rome Statute:**

1. The crimes on which the court has jurisdiction are incorporated in Art.5 of the Statute. The crimes covered within the ambit of the jurisdiction of the Court: Genocide, war crimes, crimes against humanity and aggression. The above crimes constitute subject-matter jurisdiction of the court. The Pre-Trial Chamber framed charges on the defendants of war crimes and crimes against humanity.

2. The Statute limits the jurisdiction of the Court to genocide, crimes against humanity, war crimes and aggression. **(Zwanenburg)**

3. It has been alleged that that Fatari soldiers killed nine men, raped and mutilated seventeen women, and tortured several villagers **(Facts ¶ 7)**. U.N coalition forces arrested them and ICC based upon its jurisdiction has already charged these officers before Pre-Trial Chamber for crimes against humanity and war crimes. Arrest of soldiers was carried out pursuant to indication

by villagers that the accused were occupying the Marijani village for over one year (**Facts ¶ 7**). Thus, primary criterion for jurisdiction according to the Statute i.e., principle of jurisdiction *ratione materiae* renders the Court, competent to exercise the jurisdiction over the Fatari troops.

**(B) The ICC Jurisdiction has already been invoked by the Razachstan provisional government under Article 13(a) of the Rome Statute.**

4. The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (Article 13(a) of the Statute). Here the case is referred by the provisional government of Razachstan. In the subsequent period, this same provisional government came into power.

5. In this case, the United Nations under a Security Council Chapter VII resolution sent its peacekeepers to lead an international coalition of troops to keep the peace during the negotiations for the withdrawal of Quraci troops. (**Facts ¶ 2**). Thus the case has been referred by the provisional government which falls within the ambit of the Article 13(a) and not 13(b).

**(C) Razachstan cannot exercise jurisdiction on the Fatari Military officers considering the principle of territoriality.**

6. The Quraci occupation was carried out in Razachstan from last nine years on people belonging to Marijani caste and the war was going on between Qurac and U.N coalition forces. (**Facts ¶ 1**) A provisional Government was established in Razachstan on December 31, 2004. In early July 2005, it was contended by the Prime Minister of the democratic Government of the Razachstan that they had a criminal court which could properly try soldiers for war crimes. It is highly improbable for the formation of a criminal justice system in such a short span of time in the country which was at war for the last three years and under occupation since nine years. Delays in establishing a functioning, multi-ethnic, independent and impartial judicial system must have had a negative effect on the possibilities for re-establishing respect for the rule of law in Kosovo (**Kouchner**).

7. Moreover, it is the strong contention of Fatari military officers that they would not get a fair and impartial trial in Razachstan Courts, as some shortcomings of Razachstan justice system apart from the elimination of death penalty were still prevalent (**Facts ¶ 12**). Denial of opportunity to Fatari military officers for being tried in ICC would amount to violation of the principle protection of rights of accused (**Article 67 of Statute**). Thus, on account of lack of effective criminal justice system for trying war crimes and crimes against humanity which are considered to be the most serious crimes of International concern according to Rome Statute (**Art.1 of the Statute**) it is hereby submitted that Fatari military officers must not be tried in the domestic courts of Razachstan.

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## **2. THE CASE OF TRIAL OF PERPETRATORS OF CRIMES ON TERRITORY OF RAZACHSTAN IS ADMISSIBLE IN THE INTERNATIONAL CRIMINAL COURT.**

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### ***(A) Issues of Admissibility as mentioned in Article 17 of the Rome Statute render case admissible and no violation of principle of complementarity in particular.***

8. The Court should admit this case, as the case of trial of Fatari soldier has already been admitted in Pre-Trial Chamber after an initial investigation and therefore the defence submits that the case of the alleged perpetrators of crimes is admissible in the Trial Chamber of the Court for number of reasons (a) Issues of admissibility under Article 17 of the Rome Statute are satisfied and there is no violation of principle of complementarity (b) Principle of 'fair trial' of Fatari soldiers can only be assured before the ICC and not before the Razachstan Courts. Razachstan has not yet initiated the case in their local courts and its Prime Minister is only indicating that they have now courts which are sufficient to try the case. Moreover, the case has already been admitted in the Pre-Trial Chamber. (**Art. 17(1) of the statute**)

9. The case of trial of defendants was in fact referred by the provisional government of Razachstan in April 2005, and in late May 2005 Prime Minister Khalid Faraz filed a petition challenging the jurisdiction of the case. (**Facts, ¶ 10**) Hence it is difficult to comprehend how inequalities and discrimination can be corrected by the creation of a court in the short span of

one month. Moreover, the facts are silent on the part of any significant change of circumstances alleged by the Prosecutor. It is unheard of situation wherein the Prosecution itself is challenging the admissibility of the case in the Trial Chamber, though the Court has accepted the case as admissible.

10. The pre-ambular ¶10 of the Statute which reflects the principle of complementarity (**enunciated in Art. 1 as well as Article 17(1) of the Statute**) states that the ICC would be able to exercise jurisdiction if national courts are unwilling and genuinely unable to prosecute.

11. According to the standard agreements signed upon the establishment of a peacekeeping mission, the sending state agrees to prosecute any crimes committed by its personnel-which would prohibit the ICC from acting. (**Burke**) Fatar had sent troops to the U.N. for the role of Peacekeeping force. The Fatar Government had no intent to exercise jurisdiction over their personnel. So, in accordance with the issues of admissibility the defence hereby contends for the trial of the twenty seven Fatari soldiers to be held by ICC rather than by the Fatar Courts as the latter were not willing to exercise the jurisdiction. Moreover, the establishment of the Razachstani domestic courts occurred only in July 2005, while the jurisdiction of ICC was challenged in May 2005. Thus an objection to the ICC jurisdiction as violative of the principle of complementarity is unsubstantial.

13. ICC has distinguished clearly between war crimes and crimes against humanity. (**Art. 5 of the Statute**) Professor Cassese of ICTY notes that the distinction between war crimes and crimes against humanity has become concrete. (**Blakesley2**) Professor Orentlicher notes that “In the International Law Commission’s fourth report on the draft code (of offences against peace and security of mankind), its special Rapporteur asserted that the autonomy of crimes against humanity from war crimes has now become absolute. (**Orentlicher**) Here there is no indication to try perpetrators of crimes against humanity. Khalid Faraz indicted that the case should fall under ‘genuinely unable’ category thus rendering the case admissible in the ICC as domestic courts were ready only to try war crimes which is not sufficient for establishing admissibility.

**(B) This case is admissible in ICC in accordance with the principle of ‘fair trial’ of the Fatari soldiers if they are found guilty.**

14. The principle of ‘fair trial’ of the accused is one of the primary issues as far as the rights of accused are concerned. Moreover, it is necessary that the Trial Chamber ensures that trial is fair

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and expeditious and is conducted with full respect for the rights of the accused with due regard for the protection of victims and witnesses. **(Art. 64(2) of the Statute)** Due to the fear of discrimination, the Fatari soldiers objected to trial in domestic courts. The Razachstani provisional government's discontent was noted; when the U.N forces discovered the presence of troops in Razachstan. The fear that the soldiers would not be granted fair trial in domestic courts is genuine. This goes against the fundamental principle of criminal law **(Equality of Arms)** captured in the statute. Ensuring a defendant's right to an expeditious trial should not compromise the right to a fair trial," **(Amnesty Press)** While the Court is aware of the seriousness of the offences for which the accused persons are charged, the Court is nevertheless called upon to truly ensure a fair trial of the accused persons. The international community has recognized the right to a fair trial as the basic human rights. **(Special Court of Sierra Leone, Statement of Prosecutor)**

15. Full observance of fair trial standards is necessary to international law **(Sunga)**. To ensure that defendants received fair trials within this unique framework, the tribunals must guarantee structural uniformity and effectiveness, especially in the provision of the defense counsel **(Harvard)**. Thus, as the Pre-Trial Chamber has already rendered the case admissible it will be unjustifiable to revert to Razachstan.

16. As Richard Goldstone, the first Chief Prosecutor for the ad hoc tribunals has commented, 'whether there are convictions or whether there are acquittals will not be the yardstick (of ICTY). The measures would be fairness of the proceedings. **(Ellis)**. There are sometimes counter considerations that make the concept of fair trials, particularly complex for the International Criminal Courts, one of these is accountability. The extreme character of the crimes alleged before such courts makes the case for accountability stronger than in domestic prosecutions. This is one of the reasons for contentions for admissibility in ICC.

17. Fair trial question becomes complicated for the unique structures for the domestic courts which may be civil law or common law legal systems. There are inherent difficulties in prosecuting these types of crimes as it might call for extraordinary trial procedures at least from the perspective of domestic legal norms. A state must have an internationally respected judicial system, but if it failed to investigate or prosecute in a genuine manner a specific case, the court may determine that the case is admissible. **(Holmes)**

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18. Defences are those which apply to exclude liability at the merits stage of proceedings. They do not include immunities from jurisdiction, which are not defenses in this sense. **(Selectivity II)** The Rome Statute contains all the procedural guarantees for a fair trial. Indeed Rome Statute demonstrates progress in protection of the rights of the defendants in international criminal trial that has been made since Nuremberg and Tokyo. **(Gaeta)**.

20. The abject failure of an exclusive reliance on national courts and legal processes to rein in impunity for the perpetration of atrocities is the single most compelling argument for an effective international criminal law regime. **(McCormack)** The reasons for proclaiming the tribunals' primacy was clear and in the case of the former Yugoslavia, the ongoing armed conflict among the successor states and the deep-seated animosity between the various ethnic and religious groups made it unlikely that national courts would be willing or able to conduct fair trials. **(International v. National Jurisdiction)** In this case, even if death penalty was eliminated as a part of Razachstan judicial system, the rights of the defendants do not meet international standards and the other shortcomings in the Razachstan judicial System were still prevalent. **(Facts ¶ 12)** The Fatari soldiers fear that they might not get proper justice in the local courts i.e. Razachstan Courts. Thus, in consideration with rights available with the accused the Fatari soldiers has approached the ICC and counsel on their behalf contends that the case must remain under ICC jurisdiction and determine their innocence and acquit them. Even if an iota of suspicion is raised on impartiality and fairness of Razachstani courts, the ICC must decide not to send the case back to them. This is perhaps the first case where a state having first referred a case to an International Criminal tribunal now has a change of heart and decides later to seek return of the case to its courts.

**(C) Challenges to Admissibility of the case cannot be contended under Article 19 of the Statute.**

21. The crimes alleged against Fatari troops constitute war crimes and crimes against humanity. The Court may, on its own motion, determine the admissibility of a case **(Art. 17 and Art. 19(1) of the Statute)**. The challenges to the admissibility of a case or jurisdiction in the court 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 **(Art. 19(2) (b) of Statute)**.

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22. The pre-requisite for the case to be admissible in the ICC is that the state on which crimes have been committed or the state, of which the perpetrator is the national, must begin the investigation or prosecution. Razachstan does not have jurisdiction over the case as it has not initiated the investigation against the Fatari soldiers. In early July 2005, Prime Minister Khalid Faraz indicated that they had courts ready to prosecute the criminals accused of war crimes. A petition challenging the jurisdiction was filed in late May 2005. Thus courts were not ready to try war crimes when the petition was filed challenging the jurisdiction which renders the case admissible in the ICC. The court shall satisfy itself that it has jurisdiction in any case brought before it. **(Art. 19 of the Statute)** ICC had charged Fatari Military officers based on its jurisdiction on crimes arising in an international conflict in the territory of the signatory state. **(Facts ¶ 9)**. Thus jurisdiction of the court has already been determined once by the Court. It is improbable for defense counsel to comprehend the contention on behalf of the prosecution to challenge admissibility of the case without any significant change in facts and circumstances.

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**(3) THE FATARI TROOPS HAVE NOT COMMITTED CRIMES AS ALLEGED BY THE MARIJANIS; HENCE THEY CANNOT BE CONVICTED OF CRIMES BASED UPON THE JURISDICTION OF THE COURT.**

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**(A) Fatari soldiers acted in good faith and had no mens rea.**

23. The alleged atrocities committed by the Fatari troops are completely baseless and the Marijani villagers had indicated that the troops had been occupying the village for over a period of one year. The UN Coalition forces had arrested these twenty-seven men on the grounds of suspicion, of the being strangers, intruders over the foreign soil. It should be noted that prior to the Quraci occupation there were a minimum of 500, 000 violent and brutal crimes committed against Marijanis annually and during the Quraci occupation, that figure tripled.

24. On November 12, 2003, a regiment of twenty-seven soldiers broke away from the coalition due to dissatisfaction with the way the U.N. Peacekeepers had been conducting the mission and

marched into the 'Buchari' province, an area almost exclusively inhabited by Marijanis, because their main aim was to stop the atrocities committed on Marijani people and save them from the Quraci forces. On December 12, 2004, the commander of Quraci forces- ordered for ceasefire and surrender, so from November 12, 2003 to December 12, 2004, Quraci forces as well as Fatari troops were present in Razachstan. Hence for nearly for two years the UN peace keepers were busy engaged in operation of peace-making.

25. Mens rea is very important as far as the commission of the crimes is concerned. Fatari soldiers broke away from the U.N coalition forces as they were not satisfied by the way the peacekeeping operation was performed. Their primary intention was to liberate Marijanis. Thus, even if not as a part of U.N peacekeeping forces, Fatari soldiers ultimately were engaged in the peacekeeping operations.

26. The U.N. Secretary General Kofi Annan has pointed out that, no U.N. peacekeeper had ever been accused of committing the sort of crimes that come under the ICC's jurisdiction. Pakistan's Permanent Representative, Munir Akram, stressed that UN peacekeepers should not be exposed to any arbitrary or unilateral action by any national or international body. **(Peace Women)**. The UN has jurisdiction over its own civilian staff but no power to punish peacekeepers **(Congo)**. Art. 98 endorses existing immunities under customary and treaty law **(Paulus)**. These immunities though not applicable to the Fatari soldiers, they are not liable for the crimes committed on the territory of Razachstan as they did not have in relation to these acts mens rea. Thus, according to Article 30 of the Statute the Fatari soldiers cannot be held liable, Fatari soldiers may be held liable only if material elements of all the crimes are satisfied, and proof of mens rea is one of them.

**(B)Confirmation of the charges of Fatari military officers in trial chamber without substantive investigation would not be in accordance with the principle of presumption of innocence.**

27. It is submitted in the honourable court that the Trial Chamber should ensure that a trial is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses **(Art. 64(2) of the statute)**. Also, the presumption of innocence is the feature of the main legal systems of the world and is encapsulated in the Statutes of the modern tribunals and ICC **(Article 66, 67(1) (g) and (i))**.

28. Every person has the right to object to the charges, challenge the evidence presented by the Prosecutor and present evidence. **(Site5)**. The presumption of innocence governs the application of the burden of proof. The Fatari soldiers must be presumed innocent until their guilt has been proved beyond a reasonable doubt, in strict application of the highest standards for the gathering and assessment of evidence. Moreover, presumption of innocence is very important as far as accused is concerned. Any desire to do away with the presumption of innocence violates Article 14 (2) of the ICCPR "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

**(B) The infringed acts of Fatari soldiers did not constitute crimes charged by the prosecutor of ICC or under Article 5 of the Statute. These acts pretended criminal liability.**

50. Fatari troops came as a part of U.N. peacekeeping mission to save Marijanis from Quraci occupation. Ultimate goal of the peacekeeping operation is both: the prevention of conflict and endorsement of peace. The three main principles of traditional peacekeeping are: a) consent of the host state to the deployment of the peacekeeping force b) impartiality of this force and non-intervention in the state sovereignty; and c) non use of force beyond self-defense. The UN has instituted a "zero tolerance" policy on sexual liaisons by civilian staff and military troops and police officers during peacekeeping missions. **(UN Doc. 1)**. The criterion for distinguishing enforcement from peacekeeping is, according to the ICJ, whether the measures were taken against the state. In the *Certain expenses case* the ICJ held that presuming peacekeeping forces are engaged with the consent of the host state, they do not constitute enforcement action. However, any action directed against a non-consenting state amounts to enforcement action and requires compliance with Chapter VII of U.N Charter. According to the ICJ the principle of impartiality distinguishes peacekeeping from enforcement measures under Chapter VII. The efforts on the part of Fatari soldiers constituted peacekeeping mission. Fatari soldiers had an intention of saving the Marijanis thereby preventing them from Quraci people. Fatari troops came to prevent the conflict that was going on the territory of Razachstan.

51. The Fatari soldiers did not commit any *crimes against humanity* as defined in the Statute. Their actions do not satisfy the elements of crimes under **(Art. 7 of the Statute)**, for the following reasons: i) Crimes were not committed as a part of or intended the conduct to be widespread or systematic attack against a civilian population. ii) Crimes were not committed

with knowledge of the attack. Killings of Marijanis took place while Fatari soldiers defended Marijanis as Quraci forces were already present on the territory of Razachstan. Thus, there was no intention on the part of Fatari soldiers to carry out an ‘attack’ on Marijanis which would render them liable for ‘crimes against humanity’.

52. Therefore pursuant to an UN, the Fataris were a part of the mission to liberate Razachstan from Quraci oppression and being dissatisfied with the progress, the Fataris deserted from post and marched into the Buchari province of Razachstan. The Quraci forces were pulling out of the State of Razachstan after their defeat, in the hands of the UN coalition forces but some of the Quraci aggressors remained. The Fatari soldiers stayed back for liberating the Marijanis of Buchari province; thus under the UN mandate, being holders of sovereignty.

53. Also the killings and other forms of atrocities are limited to one village in the Buchari province of Razachstan and do not satisfy the element of being committed as a part of a widespread or systematic attack. The defendants entered the Razachstan soil as liberators, peacekeepers, to punish the aggressors, and to provide relief to the victims, and they did not intend to engage in this kind of conduct. (**Art. 30(2) (a)**) Nor they were aware that civilians would be killed in the ordinary course of events. (**Art. 30(2) (b)**) Further, there is no satisfaction of the element that one has ‘awareness that a circumstance will occur in the ordinary course of events. (**Art. 30 (3)**). Thus the acts committed by Fatari troops especially killings is not a part of policy or an attack on Marijanis which renders it unable for being ‘crimes against humanity’.

54. The unavoidable circumstances do not satisfy the *elements of war crimes*. The defendants’ actions in the capacity of being UN peacekeepers and later, no longer within the ambit of the sovereignty of the UN do not constitute war crimes. Further, the conduct did not occur during the course of an international armed conflict. The conflict in question is between the UN peacekeepers brought to action by the passing of an UN mandate, and the Quraci forces, which inflicted atrocities and violated the fundamental right of the oppressed Marijanis in Razachstan. ‘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 the State,’ amount to an international armed conflict (**Tadic trial judgment, ¶ 70**). The troops are not under the control of the sovereign’s military commander, but under the de jure control of the UN. Therefore the ICC does not have the power to exercise jurisdiction over this matter.

55. The Fatari troops had been sent in a mission to liberate the oppressed Marijanis. Thereby it was their moral responsibility to safeguard and protect the lives of civilians during the course of war. So even if the killings have actually taken place, there is no evidence to support whether the Fataris have actually committed those atrocities. The troops did not commit the crime of wilful killing. The *mens rea* constituting all the violations of international humanitarian law includes both guilty intent and recklessness which may be linked to serious criminal negligence. Further requirements include a substantial knowledge of law and with an intention to inflict grievous bodily harm upon the victim. **(Kupreskic case)** Further, if the act which amounts to wilful neglect, if it amounts to recklessness, or gross or criminal disregard of the individuals duties, is sufficient for *mens rea*. The Fatari troops who withdrew from their duties under UN command were humans who understood and respected the values and customs and abide by the norms set under customary laws and under any circumstances would they violate the code of conduct.

56. The Fatari troops did not commit the crime of torture and there is not enough evidence to show that they inflicted such atrocities upon the Marijanis. The perpetrators did not know, ‘that the conduct was a part of or intended, to be a part of a widespread or systematic attack, directed against a civilian population. [Art. 7(1) (f) (5) of Elements] Furthermore, it is only mentioned that victims were tortured, and not whether they are, ‘in the custody, or control of the perpetrator.’ [Art. 7(1) (f) (2)] Nor can it be assumed that the ‘pain and suffering did not arise only from, and was not inherent in or incidental, to lawful sanctions.’ [Elements, 7(1) (f) (3)] Hence these charges are rendered invalid. While the Fourth Geneva Convention will not, generally, be applicable to peacekeeping forces, practice has shown that multinational forces do apply some of the relevant rules of the law of occupation by analogy.

**(C) *Fatari Commander and not the twenty seven soldiers be tried and charged under the principle of ‘Command responsibility’, thereby granting them, the immunity from the atrocities which were committed against the Marijanis.***

59. Should any criminal liability be imposed on anyone, it must be on the hierarchy of officers commanding the Fatari troops and not on individual members of troops as such. Article 28(a) of the Statute has codified this principle of command responsibility. It states that commander

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shall be responsible for the acts committed by the troops under his control within the jurisdiction of the court.

60. The Trial Chamber in the **Celibici** case, agreed to the submission by the prosecution that individuals in positions of authority, whether civilians or within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their of *de facto* as well as *de jure* positions as superiors (**Celibici Trial judgment ¶ 354**). The chamber also noted that this interpretation was made in accordance with the principle of command responsibility in customary law (**Celibici Trial judgment ¶304-305**). This reasoning finds support in the similar interpretation by the trial chamber in the *Alekosovski* case, where it was ruled that ‘anyone including a civilian, may be held responsible pursuant to Art. 7(3) of the Statute it is proved that the individual had effective authority over the perpetrators of the crimes. (**Alekosovski trial judgment**)

61. The commander on the spot must consider that the local population entrusted to him is subject to his authority and was responsible for the protection and restoring and ensuring public order and safety as far as possible, and should take all measures in his powers to achieve this, even regarding the troops which are not directly subordinate to him. The prosecution submitted that Kordic should be held criminally responsible under ICTY statute because he knew or had reason to know that various crimes were about to be committed by persons subordinate to him. (**Kordic trial judgment ¶ 20; Protocol I, Art. 86[2]** The knowledge requirement or the duty of a superior is to prevent or to punish a crime laid down under Art 7(3), and should take necessary steps to prevent such violations. (**Kordic Trial judgment, ¶442; Protocol I, Art. 87[3]**)

63. The concept of command responsibility constitutes a cardinal feature in international criminal law and has therefore, also been included in the Statute of the ICTY. This is enshrined in ¶ 3, Art. 7, as the crimes committed is always charged under Article 7(1) or 7(3). Individual criminal responsibility, especially with regard to responsibility for the crimes committed in the former Yugoslavia, has been addresses by the Security Council in a number of resolutions. It has been held that individual criminal responsibility should be invoked for violations of the seriousness of those committed in the former Yugoslavia. (**SC Res. 808(1993)**) The Secretary General described Superior Responsibility as being applicable to ‘[a] person in a position of

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superior authority’, making no mention of a difference between the responsibility of military commanders and that of ‘civilians’ in a superior position. (SC Res. 808(1993), ¶ 64)

64. The ICTY has expressed its intent to prosecute the misfeasance or knowing nonfeasance of those in command, as well as the soldier in the field who actually commits the act of rape. (*Schrag*).
65. Article 33 of the ICC statute goes further by defining situations where superior orders may be a defence. Commission of crime within ICC’s Jurisdiction pursuant to an order of a government or a superior, whether military or civilian, may be a defence, where the accused was under a legal obligation under the orders and the accused did not know that the order was not manifestly unlawful. This replicates the reason of the U.S military tribunal in the **Einsatzgruppen** trial. (**Kriangsak** )
66. Hence it is submitted before the Honorable court that the commanding officer who was incharge of the Fatari troops should be brought in question for the crimes committed and not the Twenty Seven Soldiers (military officers) who were deployed on a mission to save the Marijanis living in the Buchari province, from the atrocities committed.
67. Thus, presuming that Fatari soldiers are innocent and in accordance with the determination of the rights of the accused, it is thereby contended that the Fatari soldiers have acted in good faith and not in mens rea and all the material elements of war crimes and crimes against humanity are not satisfied, thereby leading to the conclusion that Fatari soldiers cannot be charged with the war crimes and crimes against humanity in ICC. Neither can they be tried in Razachstan for fear of violation of the fair trial norms.

### **Final Submissions**

Wherefore, in the light of facts of the case, issues raised, arguments advanced and authorities cited, this court may be pleased to adjudge and declare that:

1. The Court has Jurisdiction over the crimes which have been committed according to Article 12, 13 of Rome Statute by the Fatari soldiers in accordance and court can exercise jurisdiction.
2. The trial of Fatari soldiers is admissible in the Trial Chamber of the International Criminal Court according to Articles 17 and 18 of the Statute.
3. Razachstan Courts cannot exercise jurisdiction on the Fatari soldiers considering as the case can be admitted only in International Criminal Court to ensure fair and impartial trial of the soldiers. There are no good reasons for the Trial Chamber to overrule Pre-Trial Chamber's decision holding that the case is admissible and should be tried before the ICC.
4. Commander of the Fatari soldiers and the Military officers must be held accountable for the acts committed under his control if at all the crimes are committed within the jurisdiction of the court.

And pass any other order in favour of the defence that it may deem fit in the ends of justice, equity and good conscience.



Place: Hague

Date: September 6, 2006

All of which respectfully submitted

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(Counsel for Defence).

**Certification**

We hereby certify that the memorial for Gujarat National Law University 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.

\_\_\_\_\_  
Team member

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Team member

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Team member

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Team member

Date: 12 September 2006