



**Cour
Pénale
Internationale**

**International
Criminal
Court**

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

TRIAL CHAMBER I

SITUATION IN THE STATE OF RAZACHSTAN



In the case of

Prosecutor

v.

Fatari Soldiers

MEMORIAL SUBMITTED ON BEHALF OF THE PROSECUTOR

**GUJARAT NATIONAL LAW UNIVERSITY
GANDHINAGAR**

**OFFICE OF THE
PROSECUTOR**

12 SEPTEMBER 2006

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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
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 Transn'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 was established pursuant to the Rome Statute which entered into force on July 1, 2002 to try the most serious international crimes. The Pre-Trial chamber of the International Criminal Court 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.

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 predominantly 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 party to the Statute, empowered the Court to prosecute and punish persons who committed genocide, war crimes and crimes against humanity in Razachstan, as the competent domestic courts were unwilling to exercise jurisdiction.
5. **February 2005:** During a survey mission, the coalition troops discovered the twenty seven Fatari troops occupying a Marijani village. The villagers indicated that these soldiers were occupying this village for over a period of one year. Upon hearing that nine men were killed, seventeen women raped and mutilated and tortured several villagers, the coalition forces immediately arrested the Fatari troops. Even after



repeated attempts to contact the Fatari Govt., it was decided that Fatar being a signatory state, ICC could try the case.

6. **April 2005:** Fatari soldiers were turned over to the ICC by the provisional government of Razachastan.
7. **May 2005:** The ICC submitted the investigating report and charged the Fatari soldiers or committing crimes against humanity (murder) and war crimes (wilful killing, attacking civilians, excessive incidental death, injury or damage and murder).
8. Marijani Liberation Front (MLF), on behalf of the villagers presented their contentions before the ICC that Marijanis are strongly discriminated against and it would be impossible for them to obtain justice in Razachastan and thereby the case be tried in the ICC.
9. The soldiers argued that, prior to Quraci occupation the defendants in Razachastan did not get international standards of justice and it would be impossible to receive a fair and impartial trial in that country, considering the fact that death penalty was eliminated, but other shortcomings still remained.
10. Fatar too argued that it would be impossible for the soldiers to receive an impartial trial in Razachstan nor could they receive a fair trial in Fatar due to international pressure, hence they accepted that ICC should try this case and deliver a fair trial.

ARGUMENTS ADVANCED

(1) INTERNATIONAL CRIMINAL COURT HAS JURISDICTION TO TRY FATARI SOLDIERS FOR CRIMES COMMITTED ON THE TERRITORY OF RAZACHASTAN BUT IT CANNOT EXERCISE ITS JURISDICTION.

(A) Jurisdiction has been invoked by the provisional government of Razachstan in accordance with Article 13(a) of the Rome Statute.

1. The jurisdiction of ICC is limited to most serious crimes of concern to international community as a whole. (Art. 5 of statute) The crimes over which



court has jurisdiction are genocide, war crimes and crimes against humanity. Pursuant to Art. 13 of the statute the jurisdiction of the court can be invoked by three means: referral of situation by state party, by U.N. Security Council or the prosecutor can initiate investigation pursuant to *proprio motu* powers assigned to him.

2. In this case, the matter has been referred to the court by the provisional government of Razachstan, which is established under a U.N. negotiated accord. (***Refer ¶ 8 of facts***). Fatari soldiers have committed war crimes and crimes against humanity as charged by the Pre-Trial Chamber based on the information provided by the prosecutor which comes under the jurisdiction of the court in accordance with Art. 5 of the Statute. So, the jurisdiction of the Court has been invoked in accordance with Art. 13(a) of the Statute which provides for the referral of a situation to court by a state party.
3. A state party may refer a situation to the Court, particularly to the Prosecutor if the situation involves one or more crimes, within the jurisdiction of the Court (**Art. 14 of the Statute**). The referral by a state party is a request to the Prosecutor to investigate the situation for the purpose of determining whether one or more persons should be charged with an ICC crime.

(B) All pre-conditions under Article 12 of the Rome Statute are satisfied, for the court to exercise its jurisdiction.

4. Art. 12(1) and (2) deal with the pre-conditions for exercising jurisdiction on states which are parties to the Rome Statute. In this case, the Rome Statute came into force in Razachstan on January 1, 2005. Thus, by becoming party to the Statute, Razachstan has accepted jurisdiction over crimes which are incorporated in Art. 5 of the statute in accordance with Art. 12(1) of the statute. In this case, Razachstan and Fatar are parties to the Rome Statute. Therefore in order to enable the court to exercise its jurisdiction, territorial states and state of whose accused person is a national must be parties to the

statute or must have accepted its jurisdiction in accordance with Art. 12(2) of the statute (**Solera**) Thus, the pre-conditions required prior to exercising of the jurisdiction under Art. 12 are satisfied.

(C) ICC has jurisdiction on acts committed by Fatari troops according to the following aspects of jurisdiction.

• **Jurisdiction Ratione Materiae**

5. The Court has jurisdiction in accordance with the statute over the crimes against humanity, war crimes, genocide, and aggression. (**Art. 5 of the Statute**) Thus crimes committed by Fatari soldiers comprises of actual subject matter jurisdiction of the court. The court has jurisdiction over the people belonging to Marijani caste in accordance with the principle of *ratione materiae* assuming that the crimes have been committed by the Fatari soldiers as charges have been laid out in the Pre-Trial chamber. Moreover the first sentence of Art. 4 ¶ 1, of the Statute does not contain any limitation of the international legal personality of the ICC *ratione materiae*. (**Luder**)

• **Jurisdiction Ratione Temporis**

6. The Rome Statute entered into force in respect of Razachstan having ratified the statute on January 1, 2005. The U.N coalition forces discovered the twenty seven Fatari soldiers committing crimes on Marijanis in February 2005. Hence the court has jurisdiction only with respect to crimes committed after the entry into force of this statute. (**Art. 11 of the Statute**). No person shall individually criminally be responsible under the Statute for conduct prior to the entry into force of the statute. (**General principle of non-retroactivity ratione personae as defined in Art. 24 of the Statute**). The court may find jurisdiction over the Fatari soldiers in accordance with the concept of ‘continuing crimes’ under the Rome Statute. It has been said by Prof. William Schabas that the “issue of continuing crimes remains undecided and it will be for the court to determine how it should be handled”. (**Schabas**) A continuing crime has been described as a state of affairs where a crime continued to be committed or maintained. (**Brownlie; Pauwelyn**) Therefore the Court has jurisdiction on all the crimes that have been committed considering the principle of *jurisdiction ratione temporis* as follows: -

Crimes against Humanity:

Fatari soldiers have committed crimes against humanity of murder, pursuant to Art. 7 (1) (a) of the Statute as they had killed nine men, as indicated by the villagers. Hence it is highly probable that some of the killings might have been committed after 1st January 2005. Thus, individual liability of the Fatari soldiers must be determined by the Court and therefore ICC has jurisdiction in accordance with the aspect of *jurisdiction ratione temporis* over crimes against humanity of murder.

War Crimes:

Torture: Torture, which is a continuing offence in international criminal law, was committed on Marijanis in Buchari province as it was indicated by the villagers. **(Facts ¶ 7)** Thus, the Court must exercise jurisdiction over Fatari soldiers according to the principle of *jurisdiction ratione temporis* for the crime of torture.

Rape and outrages upon personal dignity: Rape is a completed crime in international criminal law. Moreover, Pre-Trial Chamber has already determined to exercise jurisdiction over Fatari soldiers.

(D)The crimes committed by the Fatari soldiers on the territory of Razachstan are crimes committed in relation to an ‘International Armed conflict’.

7. A sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of IHL for a crime to fall within the jurisdiction of the International Tribunal. **(Tadic Trial Judgement, ¶ 572)** In this case, the crimes were committed by the Fatari soldiers on the people belonging to the Marijani caste. Therefore, the perpetrator must be aware of the factual circumstances that established the existence of an armed conflict. The term ‘international armed conflict’ includes military occupation. **(Article 8 (2) (a) of the Statute)** as well as all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance(**Common Article Art.2**). International armed conflict is by far the most regulated type of conflict under IHL.

8. The Fourth Geneva Convention's Article on occupation provides basic norms on the administration of occupied territory and the protection of populations under foreign occupation. Both the 1899 and 1907 Hague Conventions and the 1949 Geneva Conventions (**with the exception of Art. 3 common to the Conventions**), apply to international armed conflicts and occupation, as does Additional Protocol I. Apart from armed conflict between States, Additional Protocol I also cover "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination". (**Article 1 (4) of ICRC Conference**) Thus, in accordance with the Fourth Geneva Convention, the Fatari soldiers occupying the territory of Razachstan and Marijanis fighting against them comes under the definition of 'International Armed Conflict'. The three parameters for the Court to exercise its jurisdiction are as follows: (a) The Court would exercise its jurisdiction only with the consent of the States competent to investigate; (b) the Court would determine its own jurisdiction, according to a series of criteria expressly laid down in the Statute; and (c) the Court would be free to establish its own jurisdiction within flexible parameters. (**RPCICC**) Though in this case the conditions for the exercise of jurisdiction are satisfied, issues of admissibility which would allow ICC to render case admissible are not satisfied. Therefore ICC, in spite of having jurisdiction, cannot exercise the same over the Fatari soldiers.

9. The Geneva Conventions shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance (**Common Art. 2**). Art. 1(4) of Additional Protocol I also explicitly provides that "...armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" automatically qualify as international armed conflicts for the purposes of the Protocol. Thus, considering above contentions, it is hereby submitted that the occupation carried out by Fatari soldiers comes within the definition of 'International Armed Conflict'. Thus, ICC has jurisdiction over the Fatari soldiers.

(2) THE CASE CONCERNING THE TRIAL OF FATARI SOLDIERS IS NOT ADMISSIBLE IN THE ICC, IN THE EVENT THAT, ICC HAS JURISDICTION.

(A) Principle of Complementarity renders the case inadmissible.

10. The principle of complementarity incorporated in ¶10 of preamble as well as Art. 1 of the Statute states that the jurisdiction of the ICC must be complementary to national jurisdictions. If the Pre-Trial Chamber determines that the case appears to fall within the jurisdiction of the court and if there is a reasonable basis to proceed with an investigation, it shall authorize the commencement of investigation. Such a decision by the Pre-Trial Chamber is without prejudice to a subsequent decision by the Court regarding its jurisdiction and the admissibility of the case (*Article 15(4) of the Statute*). Thus, the decision of Trial Chamber regarding jurisdiction and admissibility is not inhibited by a prior decision of the Pre-Trial Chamber.

11. Complementarity, one of the three important underlying principles, of the Statute, means that the Court may assume jurisdiction only when a national jurisdiction is unable or unwilling to exercise it (*Arsanjani*). A state which has challenged a ruling of the Pre-Trial Chamber may challenge the admissibility of a case under Article 19 of the Statute on the ground of additional significant facts or significant change of circumstances (*Article 18(7) of the Rome Statute*). In principle, national justice should have primacy over international justice. A better option would be for peacekeepers to be tried in the country they allegedly committed the crime. (*Brian*)

12. National tribunals have primacy for investigating and prosecuting the crimes within the jurisdiction of the ICC. ICC will be governed by the key principle of complementarity between the ICC and national courts (*Moscow Appeal*). 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 (i) the State has jurisdiction; (ii) the case is being duly investigated or prosecuted by its authorities or these authorities have decided, in a proper manner, not to prosecute the person concerned; (**Art. 17**) The Court has already exercised jurisdiction over the Fatari officers as they have already been charged once in Pre-Trial Chamber (**Facts, ¶ 9**). But the case is inadmissible at this point, since the courts have already been created in Razachastan and are able and willing to exercise the jurisdiction over the Fatari military officers. Therefore not allowing Razachstan to exercise jurisdiction will lead to violation of the principle of complementarity. (**Art. 17(1) of the statute**)

13. Therefore within one month of the receipt, the state may request the deferral to the national sphere on the basis that it is investigating or has investigated the situation concerned, that is if the state alleges that it is or has been able and willing to investigate and prosecute the situation in question. Consequently, cases related to the situation investigated would be inadmissible pursuant to Art. 17(1) (a)-(c) of the Statute. In such a case, the Prosecutor is obliged to grant the request and defer the investigations to the national level.

14. Firstly, a state that has already challenged a decision of the Pre-Trial Chamber under Art. 18 of the Statute can only challenge the admissibility under Art. 19 if new significant facts have surfaced or significant changes have occurred. Furthermore, a challenge to the jurisdiction and admissibility can only be made once and that too before or at the commencement of the trial. To “relocate” these cases, a domestic judicial system had to be based on democratic foundations and the national courts would have to be enabled to accomplish their work with independence and impartiality, and with due regard for the principles governing international humanitarian law and the protection of human rights. (**Bolander**)

15. National justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws, for crimes falling under the jurisdiction of the ICC. The ICC will only act in the absence of judicial action by

national systems (*site2*). In contrast to the ICTY Statute, which establishes the principle of the primacy of the ICTY's jurisdiction, the statute of the ICC fully espouses the principle of complementarity. It therefore has a duty to cooperate with national institutions, complementing actively in terms of the complementarity principle (**Rodrigues**). The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information. (*Article 53(4) of the Statute*) Thus it is submitted that ICC has jurisdiction but cannot exercise it instantly on ground of the principle of complementarity.

(B) Initial ruling of Pre-Trial Chamber is no bar to review by Trial Chamber in changed circumstances.

16. In view of readiness and willingness of Razachstani judiciary to try them, the trial cannot take place in the ICC and the case is inadmissible (*Art. 17(1) of the Statute*). The case was referred to ICC by a provisional government of Razachstan to try Fatari soldiers as they did not then have sufficient judicial mechanisms for trying of soldiers. Subsequently the leader of the provisional government, Khalid Faraz, claimed that they had efficient judicial mechanism to try Fatari soldiers in their national courts. Thus, it clearly seems that Razachstan is now willing to try Fatari soldiers which satisfies the first condition laid down in Art.17 of the statute. Moreover, challenges to jurisdiction and admissibility can be referred to Trial Chamber (*Article 19(6) of the Statute*). Therefore pursuant to Art18(7) of the Statute, a state which has challenged a ruling of the Pre-Trial Chamber may challenge the admissibility of a case under Art.19 on the grounds of additional significant facts or on significant change of circumstances. Therefore the initial ruling of Pre-Trial Chamber is no bar to review by Trial Chamber in changed circumstances in accordance with Art.18 (7) and 19(6) of the Statute.

(C) Trial of Fatari soldiers can take place in Razachastan Courts.

There are, however, good reasons why the court should now review its earlier decision and rule that the trial of Fatari troops can take place in Razachstan courts. They are as follows:

(1) Elimination of death penalty as a part of Razachastan judicial system



17. The Statute of ICC does not recognize death penalty. Razachstan has also eliminated death penalty as a part of their legal system. This change was made in their judicial system in order to bring it in line with the Statute of ICC, when Razachstan ratified the Rome Statute. This can be considered as one of the most important steps taken by Razachstan in order to ensure that the trial of Fatari soldiers will be fair and expeditious. **(Article 64(2) of the Rome Statute)** Khalid Faraz, then a leading candidate for the Prime Minister and member of the provisional government had also given the assurance that even if the Fatari soldiers were found guilty they would not be executed. This also clearly illustrates the motive of Khalid Faraz to try Fatari soldiers by assuring them of a fair trial.

(2) Razachstan Court has jurisdiction over the Fatari soldiers in accordance with the territorial principle of Jurisdiction and a competent judiciary for a domestic trial.

18. Territorial jurisdiction is the primary basis for criminal jurisdiction under international law; indeed it is an essential attribute of State sovereignty. If a state wishes to prosecute even foreign nationals for crimes committed on its territory, it is entitled to do so. **(Section 10, ‘Final Analysis and Suggestions’, The Rome Statute: A tentative assessment)**. In this case crimes were committed on the territory of Razachstan by Fatari soldiers as charged by the Fatari soldiers. Thus, Razachstan courts, if are ready, can exercise jurisdiction over these foreign nationals according to principle of territoriality.

III. FATARI TROOPS HAVE COMMITTED WAR CRIMES AND CRIMES AGAINST HUMANITY ON PEOPLE BELONGING TO MARIJANI CASTE THEREBY VIOLATING THE PROVISIONS OF ROME STATUTE OF THE ICC.

19. **(A)** Considering all the above mentioned facts, the Prosecutor is accusing the twenty-seven Fatari troops that they have committed ICC crimes, as provided under Art. 5 of the Statute, namely:

- a) Crimes against Humanity (Art. 7 of the statute) : Murder- Art.7(1)(a) of the Statute
- b) War Crimes (Art. 8 of the Statute) :Wilful Killing -Article 8 (2) (a) (i) , Attacking the Civilians – Article 8 (2)(b)(i) or 8(2)(e)(i) and Excessive Incidental death , injury or damage (Article 8(2)(b)(iv)) , Murder (Article 8(2)c (i) - 1)

Count 1 - (Crimes against humanity) – Article 7 of the Statute

i) The Fatari troops are charged of committing crimes against humanity, namely murder, as defined in Art. 7(1) (a) of the Statute

20. The act of killing the villagers amounts to an act of murder. Any act or omission which is able (has aptitude) to cause death of an individual and is undertaken for that purpose can be qualified as murder. **(US Elements) Murder (Draft Code 1996, Art. 18; The Statute, Art. 7(1) (a))** is defined as homicide committed with the intention to cause death. The legal ingredients of the offence as generally recognized in national law may be characterized as follows: a) the victim is dead, b) as a result of an act of the accused, committed with the intention to cause death. **(Akayesu Judgement, para 589; Tadic Appeals Decision, para. 87, 717; Celebici Judgement, para. 298)** Further, to constitute a crime against humanity, the unlawful act must have been committed on a systematic basis, which led to the death of nine men. ‘It is now well established that requirement that the acts must be directed against a civilian population can be fulfilled if the acts occurred either on a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts.’ **(Vukovar ¶ 646)**

ii) The Fatari troops are charged of committing crimes against humanity, namely ‘Torture’, as defined in Art. 7(2)(e) of the Statute.

21. The acts committed by Fatari troops amounts to an act of torture, in complete violation to the provisions established by the Geneva Conventions. **(Scharf)** The cruel and inhuman treatment of torture was perpetrated and executed by these men. **Art. 1(1) of Torture Convention** defines ‘Torture as the intentional infliction of pain or suffering, either physical or mental, by a person acting in an official capacity for purposes of intimidation, coercion, or for any reason bases on discrimination, and orders states to



prevent acts of torture in any territory under their jurisdiction (**Torture Convention, Art. 2(1)**) to include torture as an offense under their criminal law, (**Torture Convention, Art. 4(1)**) and due to a derivative of the *jus cogens* principle (**De Wet, E, p. 97**) it is necessary to punish offenses with penalties appropriate to the severity of the crime. (**Torture Convention, Art. 4(2)**). (**Further clarifications check, (Bouters, p.51, Sivakumaran), (The report of first Special Rapporteur on torture, Koojimans, 15), and (Celebici Judgement ¶ 552)**)

Count 2 - (War Crimes) – Article 8 of the Statute

- i) The Fatari troops are hereby charged of committing ‘war crimes’, namely willful killing, as defined in Art. 8(2)(a)(i) of the Statute.*
- ii) The Fatari Troops are further charged of committing war crimes of attacking civilians, as defined in Art. 8(2)(b)(i) or Art. 8(2) (e) (i) of the Statute.*

22. The villagers indicated that nine of the men from the Marijani caste have been wilfully and intentionally killed. To satisfy the mens rea for wilful killing, it must be established that the accused had the intent to kill, or to inflict serious bodily injury in reckless disregard of human life (**Celebici Trial Judgment ¶ 439**). The crime of wilful killing was perpetrated, executed and performed, by these men and are accused as such, having killed one or more person, where persons were protected under the Geneva Conventions, had complete knowledge of their acts; directed an attack, against a civilian population, such a conduct having taken place in relation with an international armed conflict; intentionally launching an attack in the knowledge that such attack would cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

- iii) The Fatari troops are hereby charged of committing war crime, namely excessive incidental death, injury or damage as defined in Art. 8(2)(b)(iv) of the Statute.*

23. The Fatari soldiers attacked the civilians and tortured and committed heinous crimes, namely murder, rape and severe, which claimed nine lives among the male population of the Marijani caste, seventeen women were raped and mutilated and several more tortured.

iv) *The Fatari troops are hereby charged of committing ‘war crimes’, namely war crime of murder, mutilation, cruel treatment, torture, rape, outrages upon personal dignity as defined in Art. 8(2)(c) of the Statute.*

24. Rape has always been a military tactic (**Levy, pp. 255,257**) a way to terrorize population and assert control (**Levy, p. 257**) and violate personal dignity and provide humiliate treatment, thereby is a punishable offence under international humanitarian law, (**CEDAW, 1992**) motivated by religion or ethnicity, culture, gender and race. Women suffer unique physical and psychological injuries when they become victims of such crimes. (**Women Caucus, pp. 27-29**) The atrocities committed against women in Rwanda and former Yugoslavia illustrates how gender violence can take the form of sexual torture and mutilation (**Women Caucus, p. 28**) ‘Women shall be especially protected against an attack on their honor, in particular against rape, enforced prostitution, or any for of indecent assault. (**Geneva I, Protocol II, Art. 4(2) (e); Draft Code 1996, Art. 18**)

25. The war crimes of murder, mutilation, cruel treatment, torture, outrages upon personal dignity, committed by these men and are accused of perpetrating, executing and committing; a) killing of one or more persons, b) subjected by one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or appendage, c) infliction of severe physical or mental pain or suffering upon me or more persons, such persons were taking no active part in the hostilities, d)humiliating, degrading or otherwise violating the dignity of one or more persons and the severity of the mutilation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity, while the victims taking no active part in the hostilities and the perpetrators were aware of the circumstances.

(B) *Fatari soldiers Fatari soldiers are ‘individually criminal responsible’ and liable in accordance with the Rome Statute.*

- **Fatari soldiers are individually criminally responsible:-**

26. The atrocities committed on the Marijanis constituted complete violations of international humanitarian law. All those who either engage directly in the perpetration of a crime under the Statute, or otherwise contribute to its perpetration, are held accountable (*Report of the Secretary-General ¶ 54, Tadic Appeal Judgment ¶ 190*). Hence individual criminal responsibility ‘covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law’ (*Tadic Appeal Judgement ¶ 188*). Moreover individual responsibility too requires certain elements to be fulfilled; namely: a) Foreseeability of perpetration of crime and b) the accused willingly taking the risk. (*Tadic Appeals Judgement ¶ 228*)

27. Individuals have committed such crimes by abusing their official status. It is primarily through the position and rank they occupy that they are in a position to order, instigate, or aid and abet or culpably tolerate or condone such crimes as genocide or crimes against humanity or grave breaches of the Geneva Conventions (*Cassesse*). Lords Millet and Phillips of Worth Matravers in the House of Lords’ decision of 24 March 1999 in *Pinochet* took the view, with regard to any senior state agent, that functional immunity cannot excuse international crimes. [*Pinochet ILR (1999)*] As far as the scope of application *ratione personae* is concerned, the Geneva Conventions establish the responsibility of the direct authors of grave breaches and that of their superiors acts are defined in detail in Art. 50 of the First Convention, Art 51 of the Second Convention, Art.130 of the Third Convention and Art 147 of the Fourth Convention, and include crimes such as wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health. (*Site4*) Art. 25(2) of the Statute enunciated the principle of individual criminal responsibility of persons who commit crimes within the jurisdiction of the Court. This principle lay at the heart of the Nuremberg Judgment. The International Military Tribunal found the principle: ‘[t]hat international law imposes

duties and liabilities upon individuals as well as upon States. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.’

(C) Mens rea on part of Fatari Soldiers in the commission of the crimes in accordance with Article 30 of the Rome Statute renders them liable.

Mental element of Fatari soldiers to commit crimes.

28. A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements of the crimes are committed with intent and knowledge (**Art. 30 of the Statute**). The concept of mens rea though not explicitly explained in either the Nuremberg Charter nor in other conventions in international crimes may be required by the very nature of crimes concerned (*Schabas, pp. 400-419*). It is apparent that it is a general principle of law that the establishment of criminal culpability requires an analysis of two aspects: The first of these may be termed the actus reus i.e., the physical act necessary for the offence and the second aspect relates to the necessary mental element, or mens rea. (**Prosecutor v. Mucic et al., ICTY Trial Chamber judgment 1998, ¶ 424**)

29. Intent is a basic pre-requisite for the responsibility of the crime. (**US Military tribunal, Nuremberg, judgment of 1948 known as Einsatzgruppen Trial, p.470**) Concerning the mental element of crime against humanity, the agent need not have sought all the elements of the general context in which the acts were perpetrated. It suffices that, in the capacity he willingly held, he knowingly took the risk of participating in the implementation of the context. (**The Prosecutor v. Tihomir Blaskic - Rodrigues and Shahabuddeen**) Thus, as stated above, Fatari soldiers not being intending to carry out the peacekeeping mission had an intention of occupation on Marijanis. Therefore the Fatari troops have committed war crimes and crimes against humanity on people belonging to Marijani Caste thereby violating the provisions of Rome Statute of the ICC.

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 5, 12 and 13 of Rome Statute by the Fatari soldiers in accordance with but court cannot exercise jurisdiction.
2. The case of trial of Fatari soldiers is inadmissible in the Trial Chamber of the International Criminal Court according to Articles 17 and 18 of the Statute considering the principle of complementarity.
3. Fatari soldiers have committed war crimes and crimes against humanity in accordance with the Rome Statute enumerated as follows: -
 - Crimes against Humanity
 - Murder
 - War Crimes
 - Murder
 - Wilful Killing
 - Attacking the Civilians
 - Excessive Incidental death , injury or damage
 - Torture
 - Rape
 - Fatari soldiers have a negative mental element (mens rea) for the commission of crimes.

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



All of which respectfully submitted

Place: Hague

Date: September 12, 2006

(Counsel for Prosecution).

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

Team member

Team member

Team member

Date: 12 September 2006