



**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 VICTIMS' ADVOCATE

**GUJARAT NATIONAL LAW UNIVERSITY
GANDHINAGAR**

VICTIM'S ADVOCATE



11 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. Eds.:	Editors
17. European J. of Int'l L.:	European Journal of International Law
18. Fordham J. Int'l L.:	Fordham Journal of International Law
19. G.A.:	General Assembly
20. G.A.O.R.:	General Assembly Official Records.
21. Govt.:	Government
22. ICC.:	International Criminal Court
23. ICCPR-	International Covenant on Civil and Political Rights
24. ICJ.:	International Court of Justice
25. ICRC.:	International Committee for Red Cross
26. ICTR-	International Criminal Tribunal for Rwanda
27. ICTY-	International Criminal Tribunal for Former Yugoslavia
28. I.H.L.:	International Humanitarian Law
29. I.L.C.:	International Law Commission

30. I.L.M.:	International Legal Materials
31. I.L.R.:	International Legal Reporter
32. I.L.C.:	International Law Commission
33. I.M.T.:	International Military Tribunal
34. Int'l:	International
35. J.:	Journal
36. L.:	Law
37. Ltd.:	Limited
38. Leiden J. Int'l L.:	Leiden Journal of International Law
39. M.L.F.:	Marijani Liberation Front
40. Michigan J. Int'l Law.:	Michigan Journal of International Law
41. No.:	Number
42. OUP:	Oxford University Press
43. p.:	Page
44. pp.:	Pages
45. P.C.I.J.:	Permanent Court of International Justice
46. PrepCom-	Preparatory Committee
47. R.P.E.:	Rules of Evidence and Procedure
48. Rep.:	Report
49. Res.:	Resolution
50. Rev.:	Review
51. SCOR.:	Supreme Court Official Records
52. Ser.:	Series
53. Sess.:	Session
54. Soc'y:	Society
55. Supp.:	Supplementary
56. The Statute:	Rome Statute, 2002
57. UCLA Woman's L. J.:	University of California, Los Angeles Women's Law Journal
58. U.N.:	United Nations
59. U.N.C.C.:	United Nations Compensation Committee



60. U.N.G.A.:	United Nations General Assembly
61. U.N.T.S.:	United National Treaty Series
62. Vanderbilt J. of Transn'l L.:	Vanderbilt Journal of Transnational Law
63. Vol.:	Volume
64. Y.B.:	Year Book
65. Yale J. Int'l L.:	Yale Journal of International Law
66. U.N.S.C –	United Nations Security Council

INTRODUCTION

International Criminal Court was established pursuant to Rome Statute which entered into force on July 1, 2002. This is the first tribunal of its kind which addresses rights of the victims. In present situation, the Fatari soldiers have committed crimes on people belonging to Marijani caste in Buchari province. The Court has already admitted the case and charged the soldiers based upon its jurisdiction on crimes arising in an International Conflict. The Marijani Liberation Front, a pro-Marijani organization has invoked the jurisdiction of the court for redressal of those who became the victims of this occupation by the Fatari troops.

STATEMENT OF RELEVANT FACTS

1. The prevalent caste system, atrocities meted out on the downtrodden Marijanis, and then the Quraci occupation, witnessed a rapid increase in oppression and breached principles of human rights law. The UN took up the issue and under the Security Council Chapter VII resolution, sent its peacekeepers to liberate Marijanis. The peace keepers included forces from Fatar, the neighboring state of Qurac.
2. **November 12, 2003:** The subsequent breaking away of the twenty-seven Fatari troops from the coalition forces and their marching into the Buchari province, a province dominantly inhabited by Marijanis, is indeed a grave matter of concern.
3. **December 31, 2004:** A *provisional government* was established in Razachstan, under a UN negotiated accord with functions of governance till the elections.
4. **January 1, 2005:** The Statute came into force and Razachstan being a signatory state, empowered the Court, to prosecute and punish persons who committed, war crimes and crimes against humanity, in cases where competent domestic courts were unwilling to exercise jurisdiction.
5. **February 2005:** A survey mission by the coalition troops led to the discovery of twenty seven Fatari Troops occupying a Marijani village. The villagers pointed out the village were occupied for more than a year. Subsequently, hearing about the killings of nine men, rape and mutilation of seventeen women and subsequent torture led to the arrests of Fatari soldiers by U.N coalition forces.

6. Some members of the Razachstan Provisional Government wanted to execute the captured Fatari troops, for the inhuman acts. The leading Prime Ministerial candidate in upcoming elections, Khalid Faraz, of the Razachstani Provisional Government expressed his rage and wanted the perpetrators to be tried in Razachstan.
7. Meanwhile, attempts to contact the Fatari govt. failed and due to the unavailability of domestic courts in Razachstan, suggested that the ICC has jurisdiction over this matter.
8. **April 2005:** The Fatari soldiers were handed over to the ICC. Prime Minister Khalid Faraz requested for immediate return to Razachstan for trial, because they now had a competent Criminal Court.
9. **May 2005:** The investigatory report of the ICC charged the Fatari troops of committing crimes against humanity and war crimes upon the Marijani villagers.
10. **Late May 2005:** Representatives of the Razachstan government filed a petition with the ICC challenging its jurisdiction.
11. The MLF contended, Marijanis are oppressed and discriminated, and hence obtaining justice in a corrupt environment would indeed be difficult. The Fatari troops argued that Razachstani judicial system failed to meet international standards, necessary to conduct proceedings. An atmosphere of hatred and one-sidedness, would fail to ensure a fair trial. Fatar argued the impossibility of a fair trial in Razachstan. A trial cannot be conducted in Fatar owing to international pressure and wanted the ICC to try this case.

ARGUMENTS AND PLEADINGS

I. THE COURT HAS JURISDICTION TO TRY THE CASE, AND DELIVER JUSTICE AND PROVIDE REDRESSAL TO THE VICTIMS FOR THE ATROCITIES COMMITTED ON THEM.

(A) Court has jurisdiction to try Fatari soldiers in accordance with Article 5 of the Rome Statute i.e. subject matter jurisdiction.

1. It is submitted before the ICC that it has jurisdiction with respect to the crimes committed by the Fatari soldiers. Crimes committed by the Fataris were war crimes and crimes against

humanity. The jurisdiction of the court is limited to the most serious crimes of the International concern (**Art. 1 of the Statute**). The crimes are defined in **Article 5 of the Statute** which constitute the subject matter jurisdiction of the court

2. Victims, may initiate criminal trials or intervene in them, and even obtain judgments that effect compensation or indemnification in a civil sense as well as criminal conviction and sentence. There is a trend in criminal justice towards what is called ‘restorative justice’, an approach that is victim oriented (*Dieng*). The practice of ICC evidences that the victim may approach it in a number of ways (*Schabas*). The Fatari soldiers had killed nine men, raped and mutilated seventeen women, and tortured several villagers belonging to Marijani village, in Buchari province of Razachstan, an area exclusively occupied by Marijanis, causing a systematic attack over a vulnerable population which clearly amounts to genocide, crimes against humanity and war crimes in accordance with Art. 5 of the Statute and fulfilling all pre-requisites, required under Rule 85 of the R.P.E. (*Burke-White*) for ICC, to exercise jurisdiction over Fatari soldiers and provide redressal to the victims. The ICC has jurisdiction to try the case, as the atrocities occurred after the Rome Statute came into force. The case also has the assent of the state parties, hence satisfying the requirement under Art. 12 of Statute.

(B) *The people belonging to Marijani caste are the victims in accordance with Rules of Procedure and Evidence and customary International law.*

3. The Marijanis are ‘victims’ in accordance with the Rule 85 of R.P.E. Rule 85(a) of the R.P.E defines victims’ as “Victims are natural persons who have suffered harm as a result of the commission of crimes within jurisdiction of the court.” As submitted earlier, Fatari soldiers have committed crimes against humanity and war crimes which are crimes within the jurisdiction of the court. Thus it is contended that the Marijanis can be assigned the status of victims’ in accordance with the Rome Statute. Customary International Law also defines victims’ in a more or less similar manner (**Refer UNGA Resolution 40/34, 1985, Oosterveld**). Marijanis are victims, who have suffered mental and physical harm, agony and torture. This definition of victim is consistent with the earlier definitions of the term victims, found in the opinion of the most scholars, in the field of International Criminal law, whose

status has attained the level of customary law (*Boven*) (See also Principle 8 of Draft UNCHR and Art. 2(3) of ICCPR).

4. The atrocities committed violate the unalienable and universal right to the physical and moral integrity of an individual, and in contravention to the well established principles of human rights and humanitarian law (**Basic Principles 1997**). Therefore, according to the principle of complementarity (**Draft Statute, Art. 15; Zupthen, Art. 11**) the realization of the right to justice of victims of international crimes should be ensured by effective willingness and ability to exercise the jurisdiction of an ICC.
5. The victims have the right to know the truth, and meet the following criteria: (**Draft Statute, Art. 12**)
 - a) the proceedings before the Court upholding the principles and rules of a fair trial
 - b) Prosecutor will act independently in the interests of justice

In the light of the injuries caused and harms suffered by the victims, the court must have the jurisdiction to conduct a fair trial of the case [*UN Principle for Victims, Art. 6(b)*], and to access to justice, fair treatment, restitution, compensation and assistance (**Clark, p.355; ENTRC**). Therefore, it is submitted that the Marijanis are victims under the Statute and the ICC has the jurisdiction over Fatari soldiers and thus over Marijanis, for providing redressal to victims.

II. MARIJANI LIBERATION FRONT HAS A *LOCUS STANDI* BEFORE THE INTERNATIONAL CRIMINAL COURT AND THE CASE IS ADMISSIBLE.

MLF has a *locus standi* to appear with the following submissions before the ICC:

(A) Victims have right to participate in proceedings in accordance with Article 68 of the Rome Statute.

6. The representatives of the Marijani Liberation Front (hereinafter MLF) appeared before the ICC on behalf of the victims, for atrocities committed on them which are contrary to the principle of nullus crimen, and in accordance with the Article 68(3) of the Statute, which allows victim's participation in ICC proceedings to obtain redressal for the 'Crimes against Peace and International Law' The victims may even participate in the proceedings and have

the right to be heard. This Chamber should allow participation of the victims when, criteria (*Cassese*) as laid down under Art. 68(3) are met.

- a) There is a personal interest of the victim to intervene in the proceedings,
- b) There is no threat to the rights of the accused and to a fair and impartial trial, and
- c) Opportunities shall be provided at appropriate stages of the proceedings for the views and concerns of the victim to be presented and considered.

Victims in this case suffered atrocities committed by the people of Fatar. On account of them being treated as second class citizens, some members of the provisional government did not consider the soldiers' crimes as heinous since the victims had only been Marijanis (**Facts ¶ 8**). Thus, it is difficult to imagine that victims would get justice and proper redressal in Razachstan. This will be in violation to Art. 68(3) of the Statute as there would not be fair and impartial trial of soldiers. Thus, it is hereby contended that victims can participate in the proceedings in the ICC and case would not be admissible in Razachstan domestic courts but the ICC.

(B) The court should accept this case as admissible

7. It is further submitted on behalf of victims' counsel that the case is admissible. The Prosecutor has shown that ICC has jurisdiction to try this case, the war crimes have occurred and the twenty-seven troops have, 'committed, planned, instigated, ordered or otherwise aided and abetted a campaign of persecutions and committed other serious violations of international humanitarian law and customs applicable armed conflict,' (**Simic Case, Judgement; ILC, 1994, 49th Session; Robinson**) which were directed against the victims. Therefore, the ICC is empowered to prosecute the wrongdoers and charge them as war criminals for having committed such atrocities. Further, it is necessary to prosecute and punish the perpetrators of the atrocities in such a way as to put an end to such activities and thereby to promote national reconciliation and restoration of peace. Any person has right to an effective remedy pursuant to Art. 2(3) of ICCPR. Therefore, according to the principle of complementarity the realization of the right to justice to the victims of international crimes should be ensured by the effective willingness and ability to prosecute and exercise jurisdiction of the court. The case would be admissible in ICC and not in Razachstan domestic courts on account of the two main reasons:

(i) Fatari soldiers would not be tried in Razachstan courts in accordance *with the principle of fairness and impartiality* pursuant to belief by some members of the provisional government itself that crimes committed on Marijanis were not that much serious.

(ii) The *judicial system of the Razachstan courts was not proper* as to try the soldiers as the courts were constituted in July 2005. However the petition challenging the jurisdiction was filed in May 2005. Thus, it is hereby contended that case of trial of Fatari soldiers would be admissible in ICC and Marijanis can participate in the proceedings in ICC. Thus, it is submitted that MLF has *locus standi* before the court.

III. COURT SHOULD FIND AND ACCEPT THAT ATROCITIES WERE COMMITTED IN RAZACHSTAN AGAINST THE LOW CASTE MARIJANIS.

(A) The nature of conflict

8. The court should exercise its jurisdiction over crimes committed by the Fatari soldiers over an international conflict in the territory of a signatory state. The conflict occurred between the UN Peacekeepers and the Quraci forces, which had occupied the country for nine years and were three years at war. ‘A crime under international law’ involves a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of United Nations’ (*Reservations Case, p.23; Barcelona Traction Case, p.32*). The Appeals Chamber in *Aleksovski* held that this principle requires, ‘that a person may only be found guilty of a crime in respect of acts which constituted a violation of the law at the time of their commission’ (*Aleksovski Appeal Judgment, ¶126-127*).
9. Initial investigations by the ICC, based upon the jurisdiction of crimes arising in an international conflict in the territory of a signatory state, charged the Fatari troops, occupying the Marijani village, with crimes such as murder, rape and torture, in complete disregard to the norms established by IHL.

(B) The casualties and the sufferer

10. A victim’s primary status is that of a person who has suffered harm; and may also have the secondary status of a person who has seen or heard things (**Guigou; Robinson**). The victims belonged to the Marijani caste, a vulnerable group, prone to atrocities since a decade.

Monetary compensation will be the best possible way to restore the victims' to their original state. "Life cannot be recovered, nor can a rape or torture victim have the rape or torture expunged. In such cases, money becomes a substitute for the pre-injury status." (**Shelton, Art. 75, 79**). Thus, compensation becomes inevitable part of reparation.

11. All victims are protected under the provisions of the Geneva Conventions, in the capacity of being civilians. Under the protocols of Geneva Convention, parties to an armed conflict are prohibited to direct attacks against the civilians. The perpetrators have violated these rules and therefore, 'whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable' (**Tadic Appeal Judgement**).
12. The ICC has global jurisdiction to try individuals for gross violations of IHL (**Blakesley, p.77**), with jurisdiction over crimes committed against peace, war crimes, and crimes against humanity (**Mac Pherson, p.1, 8**). Thereby the international community has seized a unique opportunity to re-conceptualize human rights by recognizing that gender based crimes are a grave as any crime motivated by race, ethnic origin, or religion (**Report Prep Com**) and outrages personal dignity and self-respect (**UN Doc, 1993**).

(C)Mental Element

13. According to Art. 30(1) of the Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court only if the material elements are committed with intent and knowledge. The performers of the atrocities, did purposely engage in such conduct, were aware of the consequences, satisfying Art. 30(2) of the Statute, thereby, giving rise to 'a desire to deprive a defined group of its fundamental rights as laid down in international customary or treaty law so as to remove the persons in that group from the society in which they live or even from humanity itself' (**Kordic Final Brief ¶501, Kupreskic Trial Judgment ¶ 634, Frulli**).
14. The *dolus specialis* required for crimes against humanity includes the knowledge of being part of a wide-spread or systematic attack against civilians (**Kupreskic Judgment, ¶ 556; Kayishema Trial Judgment, ¶133-134; Blaskic Trial Judgment, ¶ 249**). The killing of innocent civilians during a war may be a war crime, but the same killings are part of another crime, a graver one, that is genocide- a crime against humanity (**Erdemovic Trial**

Judgement, ¶124, 128). ‘The crime of Genocide is unique because of its element of *dolus specialis*, (special intent) which requires that the crime be committed with the intent ‘to destroy in whole or in part, a national, ethnic, racial, or religious group as such’ (**Kambanda Judgment and Sentence, ¶ 16).**

(D) Charges

Considering all the above mentioned facts, the Fatari troops are accused of committing crimes as provided under Art. 5 of the Statute, such as:

- a) The crime of Genocide (Art. 6 of the Statute),
- b) Crimes against Humanity (Art. 7 of the statute) and
- c) War Crimes (Art. 8 of the Statute).

Count 1- (Genocide)

- i) **Recognized, established and are punishable under Art. 6(a), (b) of the Elements of Crimes under the Statute.**

15. The act of killing of nine Marijanis by the Fatari troops amounts to Genocide. The Genocide Convention safeguards all persons, ‘whether they are constitutionally responsible rulers, public officials or private individuals (**Genocide Convention, Art. IV**). Also deters, punish those who engage in acts of genocide (**Genocide Convention, preamble**). Art. IV of the Genocide Convention specifies that any person who commits acts of genocide can be held accountable under the terms of this convention. ‘The murders committed by the accused are sufficient to establish the material element of the crime of genocide and it is possible to believe that the accused harbored the plan to exterminate an entire group without this intent having been supported by any organization in which other individuals participated’ (**Jelasic Judgment, ¶100**).

16. Genocide requires evidence of “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” (**Genocide Convention, Art.2; O’Donnell**), an intention destroy or harm a substantial part of the group, (**Robinson, p.63; ILC, p.89**) or “is part of customary international law and therefore, [is] consistent with the principle of *nullus crimen sine lege*” (**DOD, Appendix**).

17. The troops are accused of perpetrating, executing and committing, the crime of Genocide:

- a) By Killing or intending to destroy one or more men, such persons belonged to a particular national, ethnical, racial or religious group, and ‘the conduct caused such destruction.’ (**Tadic Appeal Judgement, ¶ 697**)

b) The perpetrators caused serious bodily or mental harm to one or more persons, killed or intended to destroy, that national, ethnical, racial or religious group as such in whole or in part, and the conduct caused such destruction.

18. The prohibited act must be committed against an individual because of his membership in a particular group (**Commission Report, Art. 17**). The group itself is the ultimate target of criminal conduct (**Krstic Judgement, ¶ 590**). Therefore, the atrocities committed, reflects intention, the required criteria for committing the crime of genocide, according to the Statute.

Count 2

(Crimes against humanity)

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

19. The act of killing the villagers by the twenty-seven troops amounts to an act of mass murder. Any act or omission which causes death of an individual and is undertaken for that purpose can be qualified as murder (**US Elements**). Murder (**Draft Code 1996, Art. 18; Art. 7(1) (a) of the Statute**) 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,
- c) Committed with the intention to cause death (**Akayesu Judgement, ¶ 589; Tadic Appeals Decision, ¶ 87, 717; Celebici Judgment, ¶ 298**). The war crime of murder was perpetrated and executed by the killing one or more persons and conduct was committed as a part of widespread or systematic attack directed against a civilian population

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

20. The acts committed by the Fatari soldiers' 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, executed and performed, 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 based on discrimination, and orders states to prevent acts of torture in any territory under their jurisdiction. Therefore to include torture as an offense under 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)**) (See also *Bouters, p.51, Sivakumaran, Koojijmans, p.15 and Celebici Judgement, ¶ 552*).

21. Moreover, offenses are set forth in **Art. 5(2) of the UN Torture Convention**, where measures have to be taken to establish the jurisdiction over offenses in cases where the alleged offender is present in any territory under its jurisdiction (**Reydam, p. 67**). Victims of torture have a legal right to many forms of reparation- from legal redress to medical and psycho-social rehabilitation (**ENTRC, 2004**).

Count 2- The perpetrators are hereby charged of committing ‘crimes against humanity,’ namely;

- a. Murder; recognized and punishable under Art. 7(1)(a) of the Elements of Crimes of the Statute.**
- b. Torture or inhuman treatment; recognized and punishable under Art. 8(2)(a)(ii) of the Elements of Crimes of the Statute.**

Count 3-(War Crimes)

- 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.**

26. The villagers gave evidence to the fact that nine men from the Marijani caste have been willfully and intentionally killed, and therefore these activities are ultra vires under the provisions of the Statute. To satisfy the mens rea for willful 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 Judgement, ¶ 439**). The crime of willful killing was committed by these men, by:

(a) Killing one or more person, where persons were protected under the Geneva Conventions, had complete knowledge of their acts; (b) Directing an attack, against a civilian population, and, such a conduct took place in association with an international armed conflict; (c) Intentionally launching an attack in the knowledge that such attack will 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.

22. The Fatari soldiers attacked the civilians and oppressively tortured them and committed heinous crimes, namely murder, rape and which claimed nine lives among the people of the Marijani class, seventeen women were raped and mutilated and several more tortured. ‘This offense of violence to life and person should be considered the same underlying offense as ‘willfully causing great suffering or serious injury to body or health’ (**Kordic Pre-Trial Brief, Vol. II, ¶ 412**).

23. The crime of excessive incidental death was perpetrated, executed and committed; when (a) the attack caused incidental death or injury to civilians, and wide-spread, long-term and severe damage to the natural environment, and (b) the perpetrators had complete knowledge that such an attack would have terrible consequences and yet committed such crimes.

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.

i) Rape has always been a military tactic (**Levy, p. 255,257**) a way to terrorize population and assert control and violate personal dignity and commit humiliating treatment (**Draft Rome Statute, Art. 7(1)(g)**) and is a punishable offence under international humanitarian law, (**CEDAW, 1992**) serving as evidence of complete victory, (**Chesterman, p. 299, 325**) motivated by religion or ethnicity, culture, gender and race (**Draft Rome Statute, Art. 7(1)(h)**). 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 the former

Yugoslavia illustrates how gender violence can take the form of sexual torture and mutilation (*Women Caucus, p. 28*).

ii) Rape is not committed as an act of self defense, and the element of mens rea exists always. “The mental element required to be proven to constitute a crime against humanity is that the accused was aware of or willfully blind to the facts or circumstances which would bring his or her acts within the definition of a crime against humanity. However, it would not be necessary to establish that the accused knew that his or her actions were inhuman” (**Finta, 701, 812**).

24. The War crime of murder, mutilation, cruel treatment, torture, outrages upon personal dignity, committed by these men and are accused of perpetrating, executing

a) Killing one or more persons,

b) Subjecting one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or appendage,

c) Inflicting 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, such persons were taking no active part in the hostilities and the perpetrators were aware of the circumstances.

Count 3- War Crime

i) Willful Killing- recognized, established and punishable under Art. 8(2) (a) of the Elements of Crimes under the Statute.

ii) Attacking civilians- recognized and punishable under Art. 8(2) (b)(i) and Art. 8(2) (e) (i) of the Elements of Crimes under the Statute.

iii) Excessive incidental death, injury or damage- recognized and punishable under Art. 8(2) (b) (iv) of the Elements of Crimes under the Statute.

iv) Murder, mutilation, cruel treatment, torture, outrages upon personal dignity recognized, established and are punishable under:

Art. 8(2) (c) (i) and Art 8(2) (c) (ii) of the Elements of Crimes under the Rome Statute.

IV. VICTIMS HAVE RIGHT TO REPARATION IN THE ICC AS WELL AS RIGHT TO ACCESS TO JUSTICE.

33. Marijanis, who suffered the atrocities committed by the Fatari troops, are the victims' and they have the right to reparation. Art. 75(1) of the Statute states that "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation, satisfaction, and guaranteed non-repetition" (**Independent Expert, Principle II & X**) and a right of access to justice (**Independent Expert, Principle VIII**). Victims of torture have a legal right to many forms of reparation- from legal redress to medical and psycho-social rehabilitation (**ENTRC**). In case of gross violations, along with criminal investigation and prosecution, reparation must be provided (**ICRC, BPGRR, Art. 7**). Compensation as a form of reparation helps victims to manage the material aspect of their loss (*Lutz, p.557*). Moreover, reparation is as much about the restoration of dignity and acknowledgement of a harm, as it is about monetary compensation or restitution (**Ferstman**).
- i. The United Nations Compensation Commission (UNCC) established by UNSC resolution, which reviews claims for compensation for direct loss and damage arising from Iraq invasion of Kuwait of 1990 held Iraq responsible for damages to Kuwait and granted monetary compensation in the favour of the latter and all private individual victims of war. The UNCC has awarded compensation to former prisoners of war held by Iraq who have been subjected to ill-treatment in violation to third Geneva Convention. Similar are the cases in *Eritrea-Ethiopia* claims commission as well as *Austrian Reconciliation Fund and the German Foundation*. Thus, the establishment of UNCC can be cited as one of the precedent in ICC for victims' to claim compensation and to seek reparation (**UNCC, Decision 3 & 11**).
 - ii. The civilized legal systems have established the Right of Victims to Reparation. The Victims' Trust Fund had been established pursuant to Article 79 of the Statute of ICC explains that the fund will include money and other property collected through fines and forfeitures imposed by the court on perpetrators. Thus, compensation should be provided, on the quantum of loss suffered and implemented as per the courts practice.
 - iii. Article 75(2) of the Statute concerning reparation to the victims' gives the ICC power "to make an order directly against convicted persons specifying appropriate reparations to, or in

respect of victims, including restitution, compensation and rehabilitation.” The Fatari troops, members of the UN Peace keeping force, sent to liberate Razachstan from Quraci forces, committed atrocities on the Marijanis. Thus Khalid Faraz’s proposal to try the case in Razachstan’s domestic courts seems *prima facie* illogical and unreasonable.

- iv. The UN Principles on the Right to a Remedy state that the right to an adequate remedy against a violation of IHL includes “all available international processes in which an individual may have legal standing” (**Right to Remedy, Principle 12**). Thus, Marijanis must be able to exercise their rights and participate in the proceedings, and also claim for a guarantee of non-repetition of such atrocities (**Impunity Report; Ferstman**).
- v. The victims deserved to be compensated (**Interim Text, Art. 18.3**) for the atrocities committed against them, under **Art. 75 of the Statute**. **Art. 6 of ICCPR** provide that every human being has the inherent right to life, which is protected by law. No one shall be arbitrarily deprived of his life. Under the **Torture Victim Protection Act of U.S.A**, two cases to be brought are *Doe v. Karadzic (S.D.N.Y. 1994[A])* and *Kadic v. Karadzic (S.D.N.Y. 1994[B])* where Muslim women were seeking damages for various acts of sexual violence that occurred during the disintegration of the former Yugoslavia. These type of suits help cultivate international awareness of the war crime of rape, and also give some redressal which is necessary for such persons. Therefore ICC should be there for the specific purpose of reconciliation through adjudication of the guilt of those accused of committing war crime and to impose criminal sanctions on them.
- vi. The United Nations concluded separate agreements with the States to which the individuals who had suffered damages belonged after the operation in Congo and thereby recognized its responsibility in the violation of International Humanitarian Law. Compensation was thus awarded through States acting in diplomatic protection and not directly to individuals (**Letters, 1967**).
- vii. It is hereby submitted that the victims have the right to reparation and compensation. The counsel leaves it to the court to determine the source from which the compensation is to be provided whether from the Victims Fund or from the accused, as it may deem fit. The victims also demand guarantee of non-repetition of the crimes against Marijanis from the court in accordance with the statute and customary International Criminal Law.

FINAL SUBMISSIONS

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

1. Court has jurisdiction over crimes committed by Fatari soldiers and to provide redressal to the victims.
2. Marijani Liberation Front has a standing before the International Criminal Court and the case is admissible only in ICC with victims' having no right to access to justice in courts of Razachstan.
3. Fatari Soldiers are responsible for violating customary and international humanitarian laws and should be punished in accordance with the procedure established by law.
4. The ICC should guarantee non-repetition of these offences and liberate the Marijanis from such brutalities and award compensation to the Marijanis for the atrocities suffered by them.

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

All of which is respectfully submitted.

(Counsel on behalf of Victims')

The following pleadings are submitted it is humbly prayed that justice would prevail; compensation would be given to the victims who have suffered from the criminal acts.

**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