

IN THE INTERNATIONAL CRIMINAL COURT
LA COUR PÉNALE INTERNATIONALE
AT HAGUE, NETHERLANDS

Case No. /2006

IN THE MATTER OF

THE PROSECUTOR

versus

THE SOLDIERS OF FATAR

MEMORIAL SUBMITTED ON BEHALF OF THE DEFENDANTS



NATIONAL LAW UNIVERSITY
JODHPUR (INDIA)

TEAM NO:

AGENTS FOR THE DEFENDANTS

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LIST OF ABBREVIATIONS & ACRONYMS

1.	¶	Paragraph
2.	&	And
3.	Am. J. Int'l L.	American Journal of International Law
4.	App.	Appeal
5.	Art.	Article
6.	BYU J. Pub. L.	Brigham Young University Journal of Public Law
7.	Chinese J. Int'l L.	Chinese Journal of International Law
8.	Clev. St. L. Rev.	Cleveland State Law Review
9.	Colum. Hum Rts. L. Rev.	Columbia Human Rights Law Review
10.	Cornell Int'l L. J.	Cornell International Law Journal
11.	Dick. J. Int'l L.	Dick Journal of International Law
12.	ed.	Edition
13.	eds.	Editors
14.	Emory Int'l L. Rev.	Emory International Law Review
15.	et seq.	and the following ones
16.	Eur. J. Int'l L.	European Journal of International Law
17.	I.C.J.	International Court of Justice
18.	ICC	International Criminal Court
19.	ICTR	International Criminal Tribunal for Rwanda
20.	ICTY	International Criminal Tribunal for the Former Yugoslavia

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21.	Law & Comtemp. Probs.	Law and Contemporary Problems
22.	Mich. J. Int'l L.	Michigan Journal of International Law
23.	Mil. L. Rev.	Military Law Review
24.	Ors.	Others
25.	p.	Page
26.	St. John's J. Legal Comment	Saint Johns Journal of Legal Commentary
27.	Tex. Int'l L. J.	Texas International Law Journal
28.	U.C. Davis J. Int'l L. & Pol'y	University of California Journal of International Law and Policy
29.	U.N.	United Nations
30.	Va. L. Rev.	Virginia Law Review
31.	Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
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STATEMENT OF JURISDICTION

The accused soldiers from Fatar submit to the jurisdiction of the International Criminal Court. The crimes that the accused have been charged with fall within the ambit of this Court's Jurisdiction as enumerated under Article 5 of the Rome Statute. The state of Fatar has also submitted to the jurisdiction of this Court. Hence it is most respectfully submitted that this Honourable Court has the requisite jurisdiction to try the matter at hand.

All of which is urged in detail in the pleadings section and is submitted most respectfully.

QUESTIONS PRESENTED

I: Whether the International Criminal Court has the requisite jurisdiction to try the defendants for the alleged War Crimes and Crimes against humanity?

I.1 Whether the ICC has inherent jurisdiction under the Rome Statute?

II. Whether the present case is admissible under Art. 17 of the Rome Statute?

II.1 Whether the Principle of complementarity enshrined under the Rome Statute is applicable in the present case?

II.2 Whether the Razachstan is unable to carry out an investigation or prosecution?

II.3 Whether the jurisdiction of the International Criminal Court can be challenged by Razachstan under Art. 19 of the Rome Statute in the present case?

II.4 Whether Fatar is unwilling to try its soldiers who have allegedly committed the aforesaid crimes?

II.5 Whether the soldiers can claim immunity for their acts?

II.6 Whether International law is in any way in derogation to state sovereignty?

II.7 Whether the aforesaid crimes have attained the status of jus cogens?

STATEMENT OF FACTS

[PARTIES INVOLVED]

- Razachstan** A South East Asian country which has been occupied by Qurac for the past nine years and has been facing war for the past three years.
- Qurac** The country that has occupied Razachstan for the past 9 years.
- Fatar** A country neighbouring Qurac that had sent its soldiers as a part of the UN peacekeeping force to Razachstan.
- Marijanis caste** Residents of Razachstan who are considered the “*lowest of low*” caste. There has been continuous violence against these persons both prior and during the occupation of Razachstan.
- Marijani Liberation Front (MLF)** A pro Marijani organization that has opposed the petition filed by Razachstan for transfer of the case from the ICC to Razachstan.

[EVENTS LEADING TO THE DISPUTE]

- February 2002** The brutal and oppressive nature of the Quraci occupation of Razachstan became publicly known. The United Nations vide a Security Council Chapter VII resolution sent its peacekeepers to lead an International coalition of troops to maintain peace during the negotiations for withdrawal of the Quraci troops.
- November 12, 2003** A Fatari regiments of 27 soldiers broke away from the UN peacekeeping coalition and occupied a province called Buchari.
- December 5, 2004** UN forces liberated the principle base of the Quraci operations.
- December 12, 2004** Quraci forces surrendered and ceased fire.

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- December 31, 2004** A provincial government established in Razachstan under U.N accord.
- January 1, 2005** Statute of ICC entered into force pursuant to Razachstan having signed the Rome Statute prior to its occupation.
- February 2005** A survey mission by UN coalition forces in the Buchari province revealed that the Fatari soldiers had killed 9 men, raped and mutilated 17 women and tortured others.
- April 2005** After much discussion and deliberation on the trial of the Fatari soldiers were handed over to the ICC.
- May 2005** Democratic elections were held in Razachstan. After an initial investigation, the ICC based upon the jurisdiction of crimes against humanity in an international conflict in the territory of signatory state, framed charges under the provisions of crimes against humanity and war crimes. The provincial government has filed a petition before ICC challenging the jurisdiction of ICC.
- July 2005** The Democratic government that was elected was in favour of trying the accused persons before the national courts. Meetings were held with the ICC officials for immediate return of the Fatari soldiers. The Prime Minister of Razachstan promised that if found guilty the accused shall not be executed.
- The MLF has appeared before the ICC challenging the petition on the ground that the Marijanis have been greatly discriminated against and as such they would not be able to get justice before their national courts.
- The representatives of the Fatari government and the soldiers of Fatar have also challenged Razachstans petition. The soldiers fear that they could be denied a fair trial. Fatar has accepted the jurisdiction of ICC on the ground of the possibility of a fair trial.

SUMMARY OF PLEADINGS

ISSUE-I WHETHER THE ICC HAS JURISDICTION TO TRY THE PRESENT MATTER?

The International Criminal Court has the Jurisdiction to try the accused soldiers because the crimes committed by the accused fall under the jurisdiction of the Honourable Court. The Court further has jurisdiction owing to the fact that the crimes were committed in the territory of a signatory state i.e. Razachstan also the crimes were committed after Razachstan became a party to the Rome Statute. Further the government of the country who the accused are nationals of, i.e. Fatar has already ceded to the jurisdiction of this Honourable Court.

ISSUE-II WHETHER THE CASE IS ADMISSIBLE UNDER THE ROME STATUTE?

Under the principle of complementarity enshrined under the Rome Statute the ICC assumes jurisdiction in a matter where a member state is unable to carry out an investigation due to a collapse of its judicial system owing to a long period of war or armed conflict. Razachstan for almost nine years has been in a situation of armed conflict and political turmoil and hence is not in a position where its judicial system can commence an investigation to prosecute the accused or accumulate the necessary evidence.

The Rome Statute expressly provides that the statute shall apply equally to all persons and no person shall be granted any sort of immunity emanating from his/her personal or official capacity. The accused soldiers in the present case although were sent as part of the U.N. peacekeeping force, the soldiers cannot take the defence of immunity as the statute does not provide for it.

The admissibility of the present case before the ICC will not undermine in any manner the sovereignty of the states involved. The present case involves such heinous crimes that they are not just crimes against the law or a criminal code of any individual nation but crimes against the entire society. A balance needs to be maintained between states sovereignty and punishment of criminal behaviour. Moreover wherever there exists a conflict between sovereignty of a state and protection of human rights, the latter shall prevail. Furthermore the crimes alleged to have been committed in the case at hand have acquired the status of *jus cogens*.

PLEADINGS

I. THE ICC HAS THE REQUISITE JURISDICTION TO TRY THE DEFENDANTS FOR THE ALLEGED WAR CRIMES AND CRIMES AGAINST HUMANITY

I.1 Inherent Jurisdiction of the ICC.

1. The preamble of the Rome Statute clearly expresses its opinion regarding the serious violations of human rights and at the same time has emphasized that such acts should not go unpunished. It is the duty of every member state that the norms laid down in the Statute should be duly respected and nothing should be done so as to derogate from the principles that are set out therein. By prosecuting and trying the perpetrators of egregious crimes, the International Criminal Court could provide an important measure of relief to victims and their families and more widely, to affected social communities. [*Jelena Pejic*]
2. Article 1 of the Rome Statute states that the ICC “*shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.*” According to Article 5 of the Statute, the ICC has an inherent jurisdiction over war crimes, crimes against humanity, genocide and aggression.

I.1.1 Jurisdiction Rationae Materiae:

3. The International Criminal Court’s *ratione materiae* jurisdiction under Article 5 of the Statute encompasses three international crimes namely genocide, war crimes and crimes against humanity. In the present case the regiment of Fatari soldiers which broke away from the group of the U.N. peacekeeping coalition sent to the state of Razachstan have been charged of the following crimes: Crimes against humanity of murder (Article 7(1)(a)); War crimes of wilful killing (Article 8(2)(a)(i)); War crimes of attacking civilians (Article 8(2)(b)(i) or 8(2)(e)(i)); War crimes of excessive incidental death, injury or damage (Article 8(2)(b)(iv)); War crimes of murder (Article 8(2)(c)(i)-1) [Compromis ¶ 3]. These crimes fall within the jurisdiction of ICC, in accordance with Article 5 of the Rome Statute.

I.1.2 *Jurisdiction Rationae Temporis:*

4. The Rome Statute of the International Criminal Court entered into force on 1 July 2002. The crimes in the present case were committed after the Rome Statute entered into force. The crimes were committed within Razachstan. Razachstan became a party to the Rome Statute before the crimes were committed. [Compromis ¶ 6] The Rome Statute entered into force on 1 July 2002. Since then, more than 85 states (including Razachstan) have become Parties to the Statute. “A state which becomes a party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5”. [Article 12 (1) of the Rome Statute] Since the crimes were committed after this period, Razachstan comes under the jurisdiction of the ICC. [Art. 11 of the Rome Statute]

I.1.3 *Jurisdiction Rationae Loci:*

5. Article 12(2) of the Rome Statute provides that so long as either the territorial state or the state of nationality of the accused accepts its jurisdiction, the ICC can exercise jurisdiction. The Statute also provides that the Court may exercise jurisdiction if the accused is a national of a signatory state or if the alleged conduct occurred in a state that has either ratified the statute, or has accepted the jurisdiction of the ICC with respect to the crime in question. [MAJ Michael L. Smidt p. 160-163]. However, if the territorial state is a party to the Rome Statute but the state of the nationality of the accused is not and has made no declaration to accept the jurisdiction of the ICC, the ICC may still exercise jurisdiction over the case under the Article 12(2) of the Rome Statute. [Lijun Yang]

6. The territorial jurisdiction determines the territory over which crimes must be committed for the Court to exercise its jurisdiction. The crimes in the present matter were committed on the soil of Razachstan. “The ICC may exercise its jurisdiction at the territory of the state party in which the conduct in question occurred”. [Article 12(2)(a) of Rome Statute]. Since Razachstan is a party to the Rome Statute, it is clear that Razachstan will fall under the jurisdiction of the ICC.

II. THE CASE IS ADMISSIBLE UNDER THE ROME STATUTE

II.1 The Principle of Complementarity.

7. The ICC utilizes the principle of “*complementary jurisdiction.*” [*Mahnoush H. Arsanjani*]. Paragraph 10 of the Preamble and Article 1 of the Rome Statute explicitly provide that the ICC shall be complementary to national criminal jurisdictions. [*Zeidy*]

8. Article 17 of the Rome Statute deals with the admissibility of the case before the ICC. [Article 17(2) of Rome Statute; See also *Brown*; See also *Zeidy*] A case is admissible if a state is unwilling to genuinely prosecute or investigate. [Art 17(1)(a) of Rome Statute; See also *Brown* p. 75; See also *Zeidy*] Factors to determine unwillingness include: (1) a states decision to shield the perpetrator from criminal responsibility, (2) unjustified delay in prosecution or investigation, or (3) national proceedings which do not manifest intent to bring the perpetrator to justice. [Article 17(2)(c) of Rome Statute; See also *Brown* p. 73-74; See also *Zeidy*].The inability to prosecute also includes the collapse of a states judicial system, its inability to apprehend the accused and the inability to obtain the necessary evidence or testimony. [Article 17(3) of Rome Statute; See also *Brown* p. 74; See also *Zeidy*]

9. A case is *per se* inadmissible if the state with jurisdiction over the individual is investigating or prosecuting the case or has investigated or tried the individual with an intent to bring the individual to justice. [Article 17(1) (a)-(d) of Rome Statute, See also *Brown* p.74]

II.2 Razachstan is genuinely unable to prosecute the accused.

10. The agreed formula in the Rome Statute is that a state with jurisdictional competence has the first right to institute proceedings unless the International Criminal Court itself decides that the state “*is unwilling or unable genuinely to carry out the investigation or prosecution.*” [Art. 17(1)(a) & Art. 17(1)(b) of The Rome Statute; See also *Katherine L. Doherty*]

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11. The assumption in Rome was that such a determination would be straightforward for the International Criminal Court in either of two situations: (1) where the state, for whatever reason, chooses not to exercise its jurisdictional competence the “*unwilling*” state or (2) where the states legal and administrative structures have completely broken down i.e. the all too common so-called “*failed state*” phenomenon as the quintessential “*unable*” state.

12. The guidelines for making a finding that a national judicial system is unable to try a particular case are found in Article 17(3) of the Statute. Article 17(3) specifically mentions instances where there has been a total or substantial collapse of the system or where the system is unavailable, a list which is reflective but not exhaustive. In fact, Article 17(3) gives the Court considerable latitude, allowing it to make a finding of inability where it is “*otherwise unable to try the accused.*” [Art. 17(3) of The Rome Statute] In application of the admissibility criteria of unwillingness and inability, the ICC thus exercises supervisory functions over the adequacy of national criminal jurisdictions. [Article 17(1) clarifies that it is the Court that determines whether a case is inadmissible. Articles 18 and 19 together with Rules 52-62, and 133 of the Rules of Procedure and Evidence provide for the procedures applicable to preliminary rulings regarding admissibility and challenges to the admissibility of a case]. Moreover, the language of this article does not limit the Court’s ability to make such a finding with respect to state parties.

13. Inability, is defined in more objective terms as a situation in which, “*due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.*” [Article 17(3) of Rome Statue] Such a situation usually occurs in a country with successive years of war or natural disasters, and as a result, the whole national judicial system is in a state of paralysis. For example, reference is made to the turmoil and war in the Former Yugoslavia and Rwanda in the 1990s. [Lijun Yang]

14. The notion equally extends to a state being otherwise unable to carry out its proceedings due to a total or substantial unavailability of its national judicial system. Such a form of inability may result from the absence or inadequacies of a substantive legislation. In other words, the defects of domestic laws, which render a national judicial system totally or

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substantially unavailable, can make a case admissible before the Court. [*Katherine L. Doherty* p.152]

15. The above provision, it seems, would cover a situation such as that in Rwanda, in which the states national judicial system was unable to carry out its proceedings due to political turmoil, armed conflict, and the resultant damage and destruction to the infrastructure and governmental institutions. [*Jimmy Gurulé*] Razachstan has been under the occupation of Qurac for the past nine years and has been at constant war for the last three years. [Compromis ¶ 1] In the year 2002 U.N. peacekeeping forces were sent to Razachstan to restore peace and it was only after a period of many years i.e. in the year 2004 that a provisional government finally came into force. It is quite clear that the situation in Razachstan is covered under Article 17(3) of the Rome Statute as the country has for a long time been in a situation of armed conflict and political turmoil and hence is not in a position where it's judicial system can commence an investigation to prosecute the accused or obtain necessary evidence and testimony or otherwise be able to carry out proceedings as even the most flawless judicial system cannot function when threatened with military might.

II.2.1 *The principle of due process has been equally recognized by International Criminal Law:*

16. In this situation reference must be made to “*having regard to the principles of due process recognized by international law.*” The task of interpreting basic protections outlined in the Statutes and Rules of the ICC will necessarily involve a balance of competing interests. Giving useful effect to the provisions of this court's Statute and Rules, however, should not in any way derogate from the basic due process rights accorded to the accused. The dictates of a fair trial process for the accused require that priority be given to basic due process protections for the accused in the interpretive jurisprudence of the courts. [*Defrancia* p.1381]
17. The rights of the accused regards a fair trial stands jeopardized if Razachstan is allowed to take the matter in its own hands in light of the political, governmental and judicial scenario prevailing in the state of Razachstan. Moreover even the accused soldiers are of the opinion that they would be unable to get a free and fair trial in Razachstan. [Compromis ¶ 12]

18. Under the given circumstances, the ICC should play an essential function as a forum of the last resort. Hence it shall be reasonable to conclude that due to the collapse of the political and judicial system in Razachstan the country will be unable to carry out an investigation and prosecute the accused for the crimes they have allegedly committed. Hence, it is submitted that the ICC should try the present matter.

II.3 The jurisdiction of the International Criminal Court cannot be challenged by Razachstan under Art. 19 of the Rome Statute in the present matter.

19. The charges that have been levied against the accused persons fall within the ambit of Art. 5 of the Rome Statute and as such the jurisdiction of the ICC as regards these crimes cannot be questioned. It is the mandate of the Rome Statute that if any challenge to jurisdiction has to be made then it has to be made under Art. 19(2). In the present case the accused soldiers have already accepted the jurisdiction of the ICC. [Compromis ¶ 12] As submitted above Razachstans political, economical as well as social situation has recently been totally jeopardized and hence the state is in no position to conduct a criminal trial which would meet the ends of justice. Further the facts nowhere indicate that the state has initiated any such investigation against the accused persons. As such the provision enshrined under Art. 19(2)(b) has no application. Hence, it is submitted that the admissibility of the present case cannot be challenged under Art. 19(2)(b) of the Rome Statute.

20. Art. 19 (2)(c) enshrines another very important principle. In view of Art. 12 of the Rome Statute, Razachstan being a party to it has accepted the jurisdiction of the ICC vide Art. 12(1). It has to be further seen that Art. 12(2) and Art. 13(c) mandates the exercise of jurisdiction by the ICC. Hence, it is submitted that any challenge to admissibility of the present matter under Art. 19 of the Rome Statute is without merit.

II.4 Fatar is unwilling to try the accused.

21. Article 17 of the Rome Statute provides that the case becomes inadmissible before the ICC if the state having jurisdiction over the case has investigated and decided not to

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prosecute, as long as its decision is not due to an unwillingness or inability to prosecute. [Art. 17(1)(a) & Art. 17(b) of the Rome Statute; See also *Sasha Markovic*]

22. In order to determine unwillingness in a particular case, the court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court. (b) There has been an unjustifiable delay in the proceedings inconsistent with the intent to bring the person to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with the intent to bring the person to justice. [*David A. Nill*]
23. The accused are nationals of the country of Fatar [Compromis ¶ 3] therefore the criminal courts of Fatar have the jurisdiction to investigate and prosecute the accused. After the commission of the crimes became known, concrete efforts were made by the ICC and the government of Razachstan to contact the Fatar government about the status of the accused soldiers. [Compromis ¶ 8] Pursuant to its principle of complementarity the Rome Statute actually encourages the investigation and prosecution by the state of nationality rather than through the ICC. The Rome Statute accomplishes this by directing the prosecutor to notify all states having jurisdiction over a crime for every case referred to the ICC or initiated by the ICC Prosecutor [Art. 18(1) of the Rome Statute], however even after repeated efforts the government of Fatar showed no intent or interest towards exercising jurisdiction to try these soldiers as there wasn't even the slightest intimation or communication from the government of Fatar.
24. The conduct of the state of Fatar clearly shows its unwillingness to try the accused under Art. 17(1) of the Rome Statute. According to Art. 17(2)(b) a state is said to be unwilling to investigate a particular matter when there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with intent to bring the person concerned to justice. It is very evident that in the present matter Fatar has shown no intent whatsoever to prosecute the accused and the same has caused a delay in investigating the matter, moreover even the government of Fatar feels that that the only way the accused

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Fatari soldiers could receive a fair trial [Compromis ¶ 13] was if the case was tried before the ICC, this further shows the unwillingness of the state of Fatar to prosecute the accused.

25. Even if it is argued that since Fatar is not a member of the ICC, hence its nationals i.e. the twenty seven accused soldiers cannot be tried by the ICC does not hold good as Article 12(1) of the Rome Statute confers automatic jurisdiction, permitting the ICC to exercise its jurisdiction if either the territorial state or the state of nationality of the accused is a party to the Statute. Under the Rome Statute the ICC has jurisdiction to prosecute a case when either the crime has been committed by a national of a country who is a party to the Rome Statute or the crime has been committed in the territory of the country which is a party to the Rome Statute, i.e. either one of the conditions need to be fulfilled.[Art. 12(1) & Art. 12(2)(b)]. Even if it is assumed that the state of Fatar is not a member to the ICC, since the crimes committed by its nationals were committed in the territory of Razachstan (which is a party the Rome Statute) the ICC automatically assumes jurisdiction.

II.5 No immunity to the accused soldiers under the Rome Statute.

II.5.1 The Rome Statute does not provide for immunities:

26. According to Article 27(1) the provisions of the Rome Statute shall apply equally to all persons without any distinction based on official capacity of a person. In particular, official capacity as a head of a state or government, a member of government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the Statute, nor can it constitute a ground for reduction of sentence. According of Paragraph 2 that Art., "*Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*"
27. The combined effect of these provisions is to deny official or personal capacity to constitute a ground on the one hand, for either precluding responsibility for international crimes, mitigating the penalty for such crimes, or, on the other hand, for preventing the ICC from assuming jurisdiction over such matters.[*Ademola Abass*]

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28. Even Article 7 of the International Military Tribunal (for Nuremberg and Tokyo) states that “*the official position of the defendants, whether as heads of states or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.*”[*Otto Triffterer*] This position has been restated by many legislations such as Article II (4)(a) of the 1945 Control Council Law No. 10; Article IV of the Genocide Convention; Article III of the 1973 Apartheid Convention and Articles 7(2) and 6(2) of the Statutes of the ICTY and ICTR. [*Ademola Abass*] Article 27 of the Rome Statute is the latest affirmation of this principle. [*Salvatore Zappalà*]
29. The accused soldiers in the present case have been sent to Razachstan under a Security Council Chapter VII resolution. However even though the soldiers were sent as a part of the U.N. peacekeeping force, it does not prevent the ICC to exercise its jurisdiction for the alleged crimes because of the fact that the time when they committed the crimes they were no longer a part of the peacekeeping forces as they had broken away from the coalition and had occupied a village in the province of Buchari. [*Compomis ¶ 3*] Even if it assumed that the soldiers committed the crimes acting in their official capacity even then the accused cannot claim any immunity because Art. 27 of the Rome Statute expressly prohibits the same.

II.5.2 *The Rome Statute is itself the main source of law:*

30. Article 21 of the ICC Statute makes special provision for determining the law through the International Criminal Court. This article establishes the type and order of priority of the sources to be applied by the Court. [*Saland p.189*] Article 21 brings the legal sources of general international law into a hierarchy and adds some precision. [*Pellet p.1051*] Article 21 contains a dual hierarchy. First, in its instructions for application, it distinguishes between what “*shall*” and “*what*” may be used. Second, within Subsection one, three groups of legal sources are listed according to rank. Finally, a general rule for interpretation and application is found in subsection three. [*Gerhard Werle*]
31. The main source of law according to Article 21 is the ICC Statute itself, supplemented by the Elements of Crimes and the Rules of Procedure and Evidence.[*Caracciolo p.211*; See also *Chabas p. 72*]. The Rome Statute very clearly provides under Article 27 that no

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immunity of any kind shall be granted to any person acting under any kind of official or personal capacity. Since the Statute itself is the primary source of law the accused soldiers in the present case cannot take immunity of acting under official capacity as a defence because the same has been expressly prohibited by the Statute itself. It is submitted that immunity of acting under an official capacity cannot be a ground to bar the jurisdiction of the ICC and make the present case inadmissible.

II.5.3 Rome Statute entails principles of customary international law on immunities:

32. Several writers agree that Article 27 of the Rome Statute embodies the principles of customary law on immunities, [*Andrea Bianchi*; See also *Otto Triffterer* p.501.] It is also the aggregate opinion of several states that Art. 27 of the Rome Statute contains the principles of customary law on immunities. [*Salvatore Zappalà*]
33. In *Furundzija* , [*Prosecutor v. Anton Furundzija*] the ICTR Trial Chamber stated that the ICTY and ICTR Statutes “*are indisputably declaratory of customary international law,*” and the ICTY held in the *Tadic* case [*Prosecutor v. Tadic*] that “*the norms of the Rome Statute represented opinio juris of the vast majority of states.*” [*Salvatore Zappalà*]
34. It is submitted that since Art. 27 of the Rome Statute is consistent with the principle of customary law on immunities, there is no merit in the contention that since the accused were sent as a part of the U.N. Peacekeeping forces they should be provided with immunity of acting in an official capacity and the ICC should be barred from trying the accused soldiers.

II.6 The sovereignty of the state is a misnomer in the application of International Law.

35. The unwillingness of nations to prosecute raises important issues pertinent to state sovereignty.[*M. Cherif Bassiouni & Blakesley* p.160-165; See also *Robert T. Mounts* p.387; See also *Joel Cavicchia* p.223; See also *Leila Sadat Wexler* p.665] The doctrine that a state has absolute authority, independent of the affairs of other nations is outdated and unrealistic [*Patricia N. McKeon* p.564]and “*there is a balance between a society’s right to its sovereignty and the right of the international community to ensure punishment of criminal behaviour for certain acts which otherwise would go unpunished.*”

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36. It is further to be seen that there has to be a balance that needs to be struck in cases state sovereignty and the right of the international community to ensure the punishment of criminal behaviour for certain acts. [*Johan D.* p.321; See also *Patricia N. McKeon*] The present case involves such heinous crimes that they are not just crimes against the law or criminal code of any individual nation, but a crime against the *jus gentium*. It is an accepted principle that law of humanity as a protector of elementary human rights supersedes the law of the sovereign state.[*Oppenheims* p.998] Hence, the admissibility of the present matter in the ICC will not undermine Razachstans Sovereignty.

II.7 The prosecution of crime against humanity and war crimes has attained the status of jus cogens

37. The legal term *jus cogens* refers to norms so fundamental to the exercise of international law that individual states cannot, as a matter of international law, contravene them.[*Carter*] The rule of *jus cogens* has been firmly established in International law, especially after the Nicaragua case. [*Nicaragua v. US.*] Jus cogens norms are also known as peremptory norms and they enjoy the highest status within international law. [*Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)*].They are norms as accepted and recognized by the international society as norms from which no derogation is permitted.[*Oppenheims*] The Nuremberg Tribunals have been recognized as having the effect of establishing that a state loses its sovereign immunity under international law when it abuses human rights. The War Crimes Tribunal for Yugoslavia confirmed that under international law a state waives its sovereign immunity when it violates jus cogen norms. [*Weisburd*]

38. Sufficient legal basis exists to reach the conclusion that all these crimes are part of jus cogens.[*Bassiouni*] War crimes and crimes against humanity for which individuals are held personally responsible are part of jus cogens norms [*Brownlie*; See also *Hannikainen* p.685; See also *Parker*]. Pursuant to the above principle Bosnian Serbian leaders were indicted for war crimes as there acts were in violation of jus cogens norms. [*Weisburd*]. In the present case the crimes committed by the accused clearly come under the ambit of war crimes under the Rome Statute and their acts are in derogation of jus cogens norms. Since the crimes in the present case have attained the status of jus cogens,

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the ICC attains universal jurisdiction to try the present matter and challenges to the admissibility of the present case are unsustainable.[*R v. Bow Street Metropolitan Stipendiary & Ors ex p Pinochet Ugarte* See also *Bantekas* p.157]

PRAYER FOR RELIEF

In light of the arguments presented above it is most respectfully requested that the International Criminal Court adjudge and declare:

- (a) That this matter is within the Court's jurisdiction.
- (b) That this matter is admissible before the Court in under Article 17 of the Rome Statute.
- (c) Proceed with the trial under the charges framed by the Court.

Date: 10th Nov 2006

All of which is respectfully submitted

Place: The Hague

Agents for the Defendants