

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 VICTIMS



NATIONAL LAW UNIVERSITY
JODHPUR (INDIA)

TEAM NO:
VICTIMS ADVOCATE

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LIST OF ABBREVIATIONS & ACRONYMS

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

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22.	Law & Comtemp. Probs.	Law and Contemporary Problems
23.	Mich. J. Int'l L.	Michigan Journal Of International Law
24.	p.	Page
25.	P.C.I.J.	Permanent Court of International Justice
26.	Tex. Int'l L. J.	Texas International Law Journal
27.	U.C. Davis J. Int'l L. & Pol'y	University of California Journal of International Law and Policy
28.	U.K.	United Kingdom
29.	U.N.	United Nations
30.	U.S.	United States
31.	Va. L. Rev.	Virginia Law Review
32.	Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
33.	Vol.	Volume
34.	Whittier L. Rev.	Whittier Law Review

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STATEMENT OF JURISDICTION

The Marijani Liberation Front (MLF) which has filed the petition on behalf of the villagers along with the victims and the family of the victims submit to the jurisdiction of the International Criminal Court under Article 15 of the Rome Statute.

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 committing the war crimes and crimes against humanity?

I.1 Whether the ICC has the appropriate jurisdiction for the alleged crimes which reflect the harm suffered by the victims?

I.2 Whether the case is admissible under Article 17 of the Rome statute?

I.3 Whether Razachstan is unable to carry out an investigation or prosecution?

I.5 Whether the Rome Statute is itself the main source of law?

I.4 Whether any immunity can be claimed by the accused soldiers under the Rome Statute?

I.6 Whether Rome Statute entails principles of customary law on immunities?

I.7 Whether the Crimes in the present matter has attained the status of jus cogens?

I.8 Whether the Principles of Equity Call for ICC Jurisdiction in the present matter?

II. Whether the victims of the crimes should be remedied?

II. 1 Whether the redress and reparation for victims of gross violations of human rights is an imperative demand of justice and a pressing requirement under International Law?

II.2 Whether the people of Marijani caste who suffered great harm are considered victims under applicable International Law?

II. 3 Whether the victims of alleged crimes are entitled to access the mechanisms of justice and prompt redress?

II.4 Whether the ICC must establish principles relating to reparations to, or in respect of, victims, including restitution, and compensation?

II.5 Whether the Rome Statute created a trust fund for victims in this situation?

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 neighboring 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 caste 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 ICC to Razachastan.

[EVENTS LEADING TO THE DISPUTE]

- February 2002** The brutal and oppressive nature of the Quraci occupation of Razachastan became publicly known. The United Nations under a Security Council Chapter VII resolution sent its peacekeepers to lead an International coalition of troops to keep peace during the negotiations for withdrawal of the Quraci troops.
- November 12, 2003** Fatari regiments of 27 soldiers breaks away from the said UN peacekeeping force and occupies a province called Buchari.
- December 5, 2004** UN forces liberate the principle base of Quraci operations.
- December 12, 2004** Quraci forces surrender and cease fire.

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- December 31, 2004** A provincial government is 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 reveals that the Fatari soldiers had killed 9 men, raped and mutilated 17 women and tortured others.
- April 2005** After much discussion and deliberation on who should try the accused persons, the Fatari soldiers were handed over to 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, formed the 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 and was in favour of trying the accused persons before the national courts held meetings with the ICC officials for immediate return of the Fatari soldiers. The Prime Minister has promised that if found guilty the accused will not be executed.
- The MLF has appeared before the ICC challenging the petition on the ground that the Marijanis have been strongly discriminated and as such they would not be able to get justice under national courts.
- The representatives of Fatari government and the soldiers of Fatar have also challenged the Razachstan petition. The soldiers fear that they could be denied a fair trial. Fatar has accepted the jurisdiction of ICC on ground of possibility of fair trial.

SUMMARY OF PLEADINGS

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

The International Criminal Court has the Jurisdiction to try the accused soldiers because the crimes committed by the accused by fall under the jurisdiction of the Honorable Court. The Court further has jurisdiction owing to the fact that the crimes were committed in the territory of signatory state i.e. Razachstan and 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 Honorable Court.

Due to a collapse of the judicial system of Razachstan owing to a long period of war and 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.

II. THE VICTIMS OF THESE WAR CRIMES AND CRIMES AGAINST HUMANITY MUST BE PROPERLY REMEDIED.

In the present case the regiment of Fatar soldiers which broke away from the group of the U.N. peacekeeping coalition sent to the state of Razachstan committed crimes on people of Marijani caste. Marijani are considered the “*lowest of the low*”. Prior to the occupation there were at least 500,000 violent crimes committed against Marijanis annually; during the Quraci occupation, that figure tripled. The Victims are of the apprehension that the judicial system of Razachstan will not be able to give them justice.

Moreover the defendants in this case who committed these vicious war crimes are soldiers from Fatar. Because it is likely these specific defendants will be unable to fully compensate the victims who suffered from defendants' inexcusable acts, the Court must reach out for other means of compensation. The trust fund created in Article 79 of the Rome Statute is precisely what the victims from Marijani caste need in order to compensate for the harm they have suffered.

PLEADINGS

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

I.1 The ICC has the appropriate jurisdiction to try the accused for the multiple war crimes which reflect the harm suffered by the victims.

1. The drafters of the Rome Statute and the ICC Rules of Procedure and Evidence recognized the importance of involving victims of the most serious crimes directly and integrally in the Court's procedures, not only as witnesses for the prosecution but also as actors with a number of roles and rights within the process. [Redress, Ensuring the Effective Participation of Victims before the International Criminal Court]
2. The ICC may exercise jurisdiction when the requirements of Article 12(2) of the Rome Statute have been satisfied. Rome Statute, Art. 12. Pursuant to Article 12(2)(a), jurisdiction arises when conduct proscribed under the Rome Statute has occurred on the "territory" of a State party to the Statute.
3. This territorial requirement is based on the principle of territorial jurisdiction under general international law. [*U.K. v. U.S. Case*; See also *Oppenheim*; See also Codification of International Law: Part II]. A state which becomes a party to the Rome Statute accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5. [Rome Statute, Art. 12] The war crimes that are the focus of this case occurred on the territory of Razachstan, which is a state party to the Rome Statute.

I.2 The case is admissible under Article 17 of the Rome statute.

4. Preamble of the Rome Statute of the International Criminal Court [Paragraph 10 of the preamble] and Article 1 of the Statute explicitly provide that the ICC shall be complementary to national criminal jurisdictions. Thus the ICC utilizes the principle of "complementary jurisdiction." [*Mahnoush H. Arsanjani*]. Article 17 of the Rome Statute determines whether a case is admissible to the ICC. [Article 17(2) of Rome Statute; See

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also *Brown*] A case is admissible if a state is unwilling to genuinely prosecute or investigate. [Art. 17(1)(a) of Rome Statute; See also *Zeidy*] Factors to determine unwillingness include: (1) a state's decision to shield the perpetrator from criminal responsibility, (2) unjustified delay in prosecution or investigation, or (3) national proceedings which do not manifest an intent to bring the perpetrator to justice. [Article 17(2)(c) of Rome Statute; See also *Brown* p. 73-74].

5. The inability to prosecute also includes the collapse of a state's 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 *Zeidy*] which is the situation in the present case where the state of Razachstan which 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].

I.3 Razachstan is unable to carry out an investigation or prosecution.

6. The issue of Complementarity as envisaged stands as a corner stone in the Rome Statute. It exemplifies that cases will only be admissible before the ICC if and when states are unwilling or unable genuinely to carry out investigations or prosecutions [Preamble, ¶ 10; Articles 1, 17 and 20(3) of Rome Statute] The Rome Statute gives primary importance to the national jurisdiction of a state that has proper jurisdictional competence 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),(b) of Rome Statute; See also *Katherine L. Doherty*]
7. There are following situations that further clarify that situation: (1) where the state, for whatever reason, chooses not to exercise its jurisdictional competence i.e. the “*unwilling states*” or (2) where the state's legal and administrative structures have completely broken down i.e. the all too common so-called “*failed state*” phenomenon as the quintessential “*unable*” state.
8. Art. 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

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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 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]

9. Inability, as per the Rome Statute is more objective in its approach, [Article 17(3) of Rome Statute] 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] It is also an established fact that the lack of total or substantial national judicial system is another facet within the inability criteria. This could arise due to absence or inadequacies of substantive legislation. As such the defects of domestic laws may render a national judicial system totally or substantially unavailable. [Katherine L. Doherty p.152]
10. This is similar to the situation in Rawanda. Therein 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]. Razachastan 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 Razachastan to restore peace and it was only after a period of years i.e. in the year 2004 that a provisional government finally came into force. As such it is quite evident that Razachstan’s situation is covered under Art. 17 (3) of the Rome Statute and is very similar to the events which took place in Rwanda and the former Yugoslavia which led to the establishment of the ICTR and the ICTY respectively.

I.4 No immunity to the accused soldiers under the Rome Statute.

11. 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*

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in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.”[*Otto Triffterer*] This position has been restated by legislation 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*]

12. As per 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 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 this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Paragraph 2 of that Article states, “*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.*”
13. The combined effect of these provisions is to deny that official or personal capacity constitute grounds, 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*]
14. The accused soldiers in the present case have been sent to Razachastan under a Security Council Chapter VII resolution. However even though the soldiers were sent as a as a part of the U.N. peacekeeping force, it does not absolve them of their liabilities for the crimes they have committed because of the fact that the time 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 they cannot claim any immunity because Art. 27 of the Rome Statute expressly prohibits the same.

I.5 The Rome Statute is itself the main source of law.

15. 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]
16. 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 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 as a defence as the same has been expressly prohibited by the Statute itself.

I.6 Rome Statute entails principles of customary law on immunities.

17. 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]
18. 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 Tadic [Prosecutor v. Tadic] that “the norms of the Rome Statute represented opinio juris of the vast majority of states.” [Salvatore Zappalà]
19. 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

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were sent as a part of the U.N. Peacekeeping forces they should be provided with immunity of acting in an official capacity.

I.7 The crimes in the present matter have attained the status of Jus cogens.

20. There are certain crimes that affect the interests of the world community as a whole because they threaten the peace and security of the mankind and because they shock the basic conscience of the mankind. [*Cheriff*] If both these elements are present in a given crime, it can be concluded that it is a part of jus cogens. The jus cogens norms are considered to be the highest under the International law regime. [Committee of United states Citizens in *Nicaragua v. Reagan; Cheriff*; See also *Joseph Bergen*] The Vienna Convention on the Law of Treaties [The Vienna Convention on the Law of Treaties] uses the most widely used English term for jus cogens: ‘peremptory norm.’ Once an international norm becomes jus cogens, it is absolutely binding on all states, whether they have persistently objected or not. [*Nicaragua. v. U.S.*; See also *Karen Parker*]

21. The prohibitions that have been laid down against the crimes against peace is relatively new term but inspite of that it has attained the status of jus cogens from the very beginning. [*Tukin*] There has been reference made in this regard that the prohibition of aggressive war, the law of genocide, the principle of racial discrimination, crimes against humanity and the rules prohibiting trade in slaves and piracy are the one that have attained the status of jus cogens.[*Ian Browhlie*]

I.7.1 The right to life forms part of the basic jus cogens rule:

22. The right to life, called the most fundamental human right, is a jus cogens rule. [*Karen Parker*] The right to life is positioned prominently in virtually every major international human rights instrument. [Art. 3 of Universal Declaration of Human Rights,] As one scholar states, ‘ The right to life . . . is one of the rights universally recognized as forming part of jus cogens and entailing, on the part of states, obligations erga omnes toward the international community as a whole.’[Report on the Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief]

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I.7.2 Jus cogens provides a Standing:

23. The harm caused by violations of jus cogens affect all persons, whether actual victims, or incidental ones. Because all persons are harmed, each should have standing to bring a suit for redress. The standing requirement, as used in United States courts, has clearly frustrated attempts to remedy alleged human rights violations. Direct victims of a violation of jus cogens are often not in a position to bring suit themselves, and must rely on third parties to seek judicial relief. [Art. 6 of International Covenant on Civil and Political Rights; See also *Haitian Refugee Centre v. Gracey*,]

I.7.3 Jus Cogens allows for Universal Jurisdiction:

24. Jus cogens norms naturally call for universal jurisdiction for their enforcement: violations of jus cogens norms disrupt international order, and thus affect all states and persons. Since jus cogens obligations transcend national boundaries, jurisdiction over violations of these international standards must be universal. In the present case the alleged crime that have been committed clearly represent that they stand in derogation of the jus cogens norms that have developed over the years. It clearly calls for the world community to collectively take a stand against the perpetrators of these offences and the ICC is the correct forum for that to happen.

I.8 The Principles of Equity Call for ICC Jurisdiction in the present matter.

25. In furtherance of the purpose of the ICC to prevent impunity, principles of equity also necessarily call for the exercise of ICC jurisdiction. Equitable principles of law have long been used to decide international disputes. [*North Sea Continental Shelf case*, (holding that the parties should negotiate the division of the continental shelf, taking into consideration equitable principles); *Meuse case* (using principles of equity as a general principle of law in treaty dispute)]

26. The dreadful crimes committed by the accused call for a thorough investigation and prosecution. The accused should not be returned to Razachstan because their government will not follow through with a proper investigation and prosecution because the Marijani caste are considered as the lowest in the country and the number of crimes committed Against them are as it is very high. In this level of discrimination the chances of Victims

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getting a fair trial in Razachstan are very less. Due to the gravity of the injury inflicted on people of Marijani Caste and the possibility of the accused not being punished for the crimes they have committed, the ICC should proceed with an investigation and prosecution in order to bring justice to the victims.

II. THE VICTIMS OF THESE ALLEGED CRIMES MUST BE PROPERLY REMEDIED.

27. In many ways, victims have been the silent partners in the legal process, with little role other than as witnesses, and at the mercy of litigants. If the International Criminal Court (ICC) is going to fulfill its promise of providing justice for victims of atrocities and reconciling societies, it must incorporate a process that provides real justice to the victims.

28. In the present case the regiment of Fatari soldiers which broke away from the group of the U.N. peacekeeping coalition sent to the Razachastan have been charged of the following crimes: Crimes against humanity of murder (Article 7(1)(a)); War crimes of willful 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.

II. 1 Redress and reparation for victims of gross violations of Human Rights is an imperative demand of justice and a pressing requirement under International Law.

29. International Law Professor, Theo Van Boven, illustrates the growing awareness in the international community that reparation for victims of gross violations of human rights is necessary in offering justice. [See *Theo Van Boven*]. Victims of international criminal acts are entitled to seek justice and receive prompt redress. [*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*] Regardless of the outcome, the very fact that the ICC hears this dispute will help build a body of jurisprudence relating specifically to victims' reparations. The Court will therefore be better equipped to aid victims in future cases.

II.2 The people of Marijani caste who suffered great harm are considered "victims" under the applicable International Law.

30. The formulation of the status of victim under International Law is contained in the United Nations Declaration of Basic Principles for Victims of Crime and Abuse of Power (“the Victims Declaration”) adopted by consensus by the General Assembly in November 1985. This declaration reflects the collective will of the international community to establish a balance between the fundamental rights of suspects and offenders, and the rights and interests of victims. It recognizes that victims should be treated with compassion and respect for their dignity, and recommends measures to improve their access to justice and prompt redress (restitution, compensation and all necessary assistance/rehabilitation) for the harm they have suffered.
31. As the international community has recommended that states include such principles in their domestic legal systems, it should also be prepared to apply them on the international plane.

The General Assembly...”Cognizant that millions of people throughout the world suffer harm as a result of crime and the abuse of power and that the rights of these victims have not been adequately recognized, Recognizing that the victims ..., and also frequently their families, witnesses and others who aid them, are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders, Affirms the necessity of adopting national and international measures in order to secure the universal and effective recognition of, and respect for, the rights of victims of crime and abuse of power;.... “Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress...for the harm that they have suffered.” Paragraph 4, and excerpts from the United Nations Declaration of Basic Principles for Victims of Crime and Abuse of Power.

32. In the present case the victims belong to a Marijani Caste. Marijani are considered the “lowest of the low”. Prior to the occupation there were at least 500,000 violent crimes committed against Marijanis annually; during the Quraci occupation, that figure tripled. [Compromis ¶ 1] The regiment of Fatari soldiers which broke away from the group of the U.N. peacekeeping coalition sent to the Razachastan have been charged of the following

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crimes against the people of Marijani caste who are the victims in the present case : Crimes against humanity of murder (Article 7(1)(a)); War crimes of willful 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].

33. Article 68 of the Statute addresses the protection of victims and their participation in the proceedings, while article 75 contains the most important provisions on the victims' right to reparations. Article 79 establishes the first Trust Fund in the history of international jurisdictions for the benefit of victims of crimes. These and other norms of the Statute are specified and implemented in numerous provisions of the draft Rules of Procedure and Evidence ("the Rules") approved on June 30, 2000, by the Preparatory Commission for the ICC, and were adopted by the Assembly of the States Parties of the Court.

II. 3 Victims of International war crimes are entitled to access the mechanisms of justice and to prompt redress:

34. As stated by Roy S. Lee:

[T]his new Court has been transformed from an instrument initially designed for punishing individual perpetrators of atrocious crimes to an international court administering restorative justice. Under this system reparations will be made to victims, and victims will also be able to take part in proceedings, with rights to privacy, representation, and to security of person. The newly finalized Rules protect and promote these rights and interests, and establish a procedural framework to give meaning and effect to these important provisions, without in any way infringing upon the rights of the accused. A mechanism is also provided in the Rules to set up institutional support to victims through the Victims and Witnesses Unit. [See also Valerie Oosterveld]

The Rome Statute and the Rules affirm that victims have:

- (i) an absolute right to attend within trial proceedings under Rule 91(2) and discretionary right to participate under Rule 91(3)(a),
- (ii) the faculty to make representations before the Court even in the Pre-Trial procedure, as stipulated within Article 15.3,
- (iii) the right to be heard before decisions on reparation under Article 75.3, and
- (iv) the right to intervene on appeals concerning reparation orders under Article 82.4.

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All these provisions are to be interpreted as particular specifications of the general right of participation envisioned under Article 68.3 of the Rome Statute. [*Donat-Cattin*].

35. Article 68, paragraph 3 states that victims' participation shall take place "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." [*Michele Caianiello*] Such language allowed for the creation of a new dynamic wherein punitive justice, found within adversarial court systems, was to be balanced with restorative justice principles born out of a victim's movement under the doctrine of *partie civile*.
36. Although the modalities for victim participation in a given case is left to the Trial Chamber, the drafters of the Rome Statute sought to create clear mandates allowing for victim's participation through expansive Rules of Evidence and Procedure. Such a commitment is what truly laid the parameters with which a movement toward victims' rights was translated into international law.

II.4 The ICC must establish principles relating to reparations to, or in respect of, victims, including restitution, and compensation.

37. Article 75 of the Statute states that the Court will establish principles for reparations to victims, including restitution, compensation and rehabilitation. The Court is entitled to determine the scope and extent of any damage, loss and injury to victims, and to order a convicted person to make specific reparations.
38. Rules 94 to 99 set out the procedure for reparations to victims. Reparations may be granted by the Court upon request of victims or based on a motion of the Court itself. The Court may invite to the reparations' hearings not only the victims and the convicted persons (with their respective attorneys), but also other interested persons or interested states whose properties could be affected by the rulings on reparations.

II.5 The Rome Statute Created a Trust Fund for Victims in this Situation:

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39. Article 79 of the Rome Statute sets forth the concept of a trust fund. Subsection (1) of Article 79 enables the Assembly of States Parties to establish a trust fund for the benefit of victims. Rome Statute art. 79. Once the ICC is found to be the proper jurisdiction for international crimes, the Court may order money and other property collected through fines to be transferred through the trust fund to the victims and the families of such victims. [*Peter G. Fischer*]
40. The defendants in this case who committed these vicious war crimes are soldiers from Fatar. Because it is likely these specific defendants will be unable to fully compensate the hundreds of victims who suffered from defendants' inexcusable acts, the Court must reach out for other means of compensation. The trust fund created in Article 79 of the Rome Statute is precisely what the victims from Marijani caste need in order to compensate for the harm they have suffered.

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 falls within its jurisdiction
- b. That the matter is admissible in this court under Art. 17 of the Rome Statute.
- c. The 27 accused soldiers from Fatar should not be handed over to Razachstan.

Date: 10th Nov 2006

All of which is respectfully submitted

Place: The Hague

Victims Advocate