IN THE INTERNATIONAL TRIBUNAL
FOR CAPULETA AND MONTAGUIA No. 1 of 2019

BETWEEN:

THE PROSECUTOR
Prosecution

and

PETRO ESCALUS & MICHAEL ABRAHAM
Defence

WRITTEN SUBMISSIONS FOR THE PROSECUTION

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Summary of submissions:

1. **The International Tribunal for Capuleta and Montaguia ('the Tribunal') has jurisdiction to hear the matter.**

2. **Commander Escalus is criminally responsible for the charges brought against him under the Statute for the International Tribunal for Capuleta and Montaguia (*'the Statute'*).**

3. **Colonel Abraham intentionally launched the attack on the Amarga Factory ('the Factory') with the knowledge that it would cause incidental loss of life or injury to civilians, in contravention of art 5(d) of the Statute.**

4. **The expected risk of civilian deaths was clearly excessive in relation to the concrete and direct overall military advantage anticipated by the MTA.**

Submission 1: The International Tribunal for Capuleta and Montaguia ('the Tribunal') has jurisdiction to hear the matter.

1.1 The conflict between Capuleta and Montaguia established an *IAC*. This triggers the applicability of international humanitarian law.[1]

a) There was a resort to armed forces in the conflict between Capuleta and Montaguia.[2]

b) The conflict is international in character because Capuleta and Montaguia are States.[3]

1.2 There is a nexus between the alleged crime and the conflict.[4]

a) Allegedly, Commander Escalus is criminally responsible as commander of a detention facility in Capuleta's Greater Amiens region. The detention facility was a result of Montaguia's military operations, so there is a nexus between the alleged crime and the conflict.[5]

1.3 The detainees are protected persons in accordance with Volume IV of the *Geneva Conventions of 1949* because they are not nationals of Montaguia.[6]

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[1] *The Statute for the International Tribunal for Capuleta and Montaguia* art 1 (*'The Statute'*); *Geneva Conventions of 1949* common art 2; *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-94-1-A, 2 October 1995) [70].

[2] *Kaing Guek Eav alias Duch (Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Case No 001/18-07-2007/ECCC/TC, 26 July 2010) [423]; *Statement of Facts* [17]–[18], [22].

[3] *Prosecutor v Blaškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [94] ('*Blaškić Trial*'); *Prosecutor v Kordić and Čerkez (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-95-14/2-T, 26 February 2001) [109] (*'Kordić and Čerkez Trial'*); *Statement of Facts* [2]–[4].

[4] *Prosecutor v Delalic et al. (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-96-21-T, 16 November 1998) [193] (*'Delalic Trial'*); *Prosecutor v Aleksovski (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/1-T, 25 June 1999) [42] ('*Aleksovski Trial'*).

[5] *Delalic Trial* [196]–[197]; *Aleksovski* Trial [45]; *Statement of Facts* [9], [25].

[6] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 4; *Statement of Facts* [24]–[25].

Submission 2: Commander Escalus is criminally responsible for the charges brought against him under the Statute for the International Tribunal for Capuleta and Montaguia (*'the Statute'*).

2.1 The Military Police ('MP') at the Livna Camp, as Commander Escalus' subordinates, contravened Article 4 of *the Statute* by subjecting the detainees to inhuman treatment and by wilfully causing great suffering or serious injury to body and health.[7]

a) The MP kept the detainees in unsatisfactory living conditions. There was limited food, water, heating and space, and the detainees slept on pallets.[8]

b) The detainees were physically beaten by the MP with rifle butts, rope and truncheons.[9]

c) The detainees were forced to dig trenches. The trench-digging was part of a military operation for which the detainees did not volunteer their assistance.[10]

d) The MP demonstrated the requisite *mens rea* of intention in the commission of these crimes.[11]

2.2 As the commander of the Livna Camp, Commander Escalus is criminally responsible for the MP's aforementioned conduct at the Livna Camp. Commander Escalus should be held

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[7] *The Statute* arts 4(b), 4(c); *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 50; *Prosecutor v Naser Orić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-03-68-T, 30 June 206) [294]–[306].

[8] *Prosecutor v Kvočka (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-30/1-T, 2 November 2001) [45], [51], [112] (*'Kvočka Trial'*); Statement of Facts [35], [42].

[9] *Kvočka Trial* [641], [116]–[117]; *Delalic Trial* [510]; *Statement of Facts* [42], [43].

[10] *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) arts 49-50, 52; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), arts 40, 51; *Aleksovski Trial* [56]; *Blaškić Trial* [700], [713], [737]–[738]; *Kordić and Čerkez Trial* [204], [800]; *Statement of Facts* [40], [42], [46].

[11] *Delalic Trial* [511], [543]; *Statement of Facts* [33], [34], [42].

criminally responsible as a superior because the three requirements from *the Statute* have been satisfied.[12]

a) Commander Escalus had effective command and control over the MP at the Livna Camp because he had the material ability to prevent or punish the MP's criminal conduct. Whether or not Commander Escalus had a *de jure* command role is irrelevant to this finding.[13]

   i. Commander Escalus had express permission to exercise control over the MP, on account of being appointed to supervise them, and was able to give orders to the MP.[14]

   ii. If Commander Escalus was dissatisfied with the conduct of the MP, he was able to takes steps in the disciplinary process by consulting General Benvolio. This is sufficient to establish a material ability to prevent or punish.[15]

b) At the very least, Commander Escalus had constructive knowledge of the MP's grave breaches of the *Geneva Conventions of 1949.* This is sufficient to satisfy the knowledge requirement.[16]

   i. Due to his interactions with the detainees and the MP, as well as his presence in the camp and his professional background as a police officer, Commander Escalus would have, at the very least, been put on notice of the risk that his subordinates were engaged in criminal conduct.[17]

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[12] *The Statute* arts 10(3), 12; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I*), opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 86(2); *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia,* SC Res 827, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, Un Doc S/RES/1877 (7 July 2009) art 7(3); *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 28; *Delalic Trial* [340].

[13] *The Statute* art 12(a), 12(b)(ii); *Prosecutor v Blaškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT 95-14-A, 29 July 2004) [69]; *Prosecutor v Delalic et al. (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT 96-21-A, 29 July 2004) [251]–[252], [254]; *Prosecutor v Halilović (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-48-A, 16 October 2007) [59]; *Delalic Trial* [356], [370]; *Aleksovski Trial* [75]–[76].

[14] *Aleksovski Trial* [137]; Statement of Facts [28], [37]–[38], [45].

[15] *Kvočka Trial* [315]–[316]; *Blaškić Trial* [302]; Statement of Facts [33], [37].

[16] *The Statute* arts 10(3), 12(a)(i), 12(b)(i); *Delalic Trial* [383].

[17] *Kvočka Trial* [441]–[448].

c) Commander Escalus failed to take necessary and reasonable measures to prevent the crimes, punish the perpetrators or remit the matter for investigation, despite having the material ability to do so (see 2.2 (a)). Commander Escalus' lack of intervention is tantamount to an active contribution to the system of persecution at the Livna Camp.[18]

i. The prosecution notes that Commander Escalus need only have taken an important step in the disciplinary process. Despite this, he did not even remit the matter to his superiors.[19]

[18] *The Statute* arts 10(3), 12(a)(ii), 12(b)(ii); *Delalic Trial* [394].

[19] *Delalic Trial* [395]; *Kvočka Trial* [315]–[316]; *Blaškić Trial* [302].

Submission 3 – Colonel Abraham intentionally launched the attack on the Amarga Factory ('the Factory') with the knowledge that it would cause incidental loss of life or injury to civilians, in contravention of art 5(d) of the Statute.

3.1 The Capuletans who assisted the CDF at the Factory were civilians, and therefore were entitled to protection under art 51(1) of the *Additional Protocol I.*

a) The civilians who were in the factory and aided the CDF did not lose their protections as civilians by virtue of direct participation in hostilities.[20]

i. The acts of transporting arms and munitions amounted to indirect participation as they were not carried out as an integral part of a specific combat operation designed to directly cause harm.[21]

ii. Additionally, these acts do not meet the three cumulative criteria espoused by the ICRC, being: actual harm, causal proximity, and a belligerent nexus.[22]

iii. There is also insufficient evidence to suggest that the civilians were voluntarily acting as human shields, an act which may meet the threshold of direct participation.[23]

b) Even if the civilians did directly participate in hostilities, they had regained their civilian protections by the time of the attack on 6 May, as the duration of the participation had concluded.[24] If a person performs acts of resistance at one time, their civilian protections are not extinguished permanently, and these protections are reinstated once they sever their connection with the activity.[25]

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[20] *Additional Protocol I* art 50(1), (3), 51(2)–(3); *Public Committee against Torture in Israel v Government of Israel HCJ* 769/02, 13 December 2006 (Supreme Court of Israel) [33]–[37] ('*Public Committee against Torture in Israel*'); *Customary International Humanitarian Law Volume II: Practice* (Cambridge University Press, 2005) rule 16 ('*Customary IHL Vol II*'); *The Law of Armed Conflict*, D/DAT/13/35/66, Army Code 71130 (Revised 1981), Ministry of Defence, United Kingdom, prepared under the Direction of The Chief of the General Staff, 1981, Annex A, 44 [8]; *Prosecutor v Krupeškić* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, January 14 2000) [547]–[549].

[21] *Prosecution v Strugar (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-42-A, 17 July 2008) [176]–[177], [282].

[22] *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, May 2009, 46–58.

[23] *Public Committee against Torture in Israel* [36].

[24] *Additional Protocol I* art 51(3); *Public Committee against Torture in Israel* [38]–[39]; *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, May 2009, 70; *Customary IHL Vol II* rule 6; *Air Force Pamphlet 110-31,* International Law – The Conduct of Armed Conflict and Air Operations, United States Department of the Air Force, 1976 [3]; *The Law of Armed Conflict at the Operational and Tactical Level,* Office of the Judge Advocate General, Canada, 1999, 3 [28].

[25] *Blaškić Trial* [214]; *Kordić and Čerkez Trial* [180]; *Prosecutor v Naletilić and Martinović (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-98-34-T, March 31, 2003) [235].

i. There is no evidence to suggest that these activities were organised, systematic or continued after 4 May.[26]

c) The use of civilians as human shields did not justify Colonel Abraham's attack on the Factory.[27]

i. While the CDF had an obligation under Article 51(7) preventing them from employing the use of civilians as shields, their failure to remove civilians from the vicinity of the factory did not relieve the MTA of its typical obligations per Article 51(8), including precautionary measures, or its duty to abide by the principles of distinction and proportionality when launching the attack.[28]

3.2 Colonel Abraham did not take precautions to minimise civilian casualties.[29]

a) Colonel Abraham did not do everything feasible to verify the conflicting reports.[30] He relied on outdated and speculative intelligence in his assessment of the Factory which did not accurately portray the situation as of 6 May. The intelligence reports available to him were unclear on two issues; first, whether the civilians were directly participating, and second, whether they had ceased participating and therefore regained protections. Given the ambiguity, Colonel Abraham should have erred on the side of caution and assumed that the civilians were entitled to their protections, or sought further reliable information before launching the attack.[31]

b) The Capuletan civilians were not given any advance effective warning by the MTA prior to the attack.[32] The circumstances did not prevent Colonel Abraham from implementing measures – such as the dropping of leaflets, radio broadcasts and phone calls, or advance warning shots – as there was no tactical disadvantage or risk to the MTA in doing so.[33]

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[26] *Statement of Facts.*

[27] *Additional Protocol I* art 51(7)–(8).

[28] *Prosecutor v Galić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-98-29-T, 5 December 2003) [61] ('*Galić Trial*'); *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,* ICRC, Geneva, May 2009, 56; *Statement of Facts* [53]–[56].

[29] *Additional Protocol* art 57(1).

[30] *Additional Protocol I* art 57(2)(a)(i).

[31] *Galić Trial* [50]; *Public Committee against Torture in Israel* [40]; *Statement of Facts* [54], [55], [57].

[32] *Additional Protocol I* art 57(2)(c).

[33] *The Operation in Gaza, Factual and Legal Aspects*, Report, Israeli Ministry of Foreign Affairs, July 2009 [264]; *Isayeva v Russia* (European Court of Human Rights, Application No 57950/00, 24 February 2005) [25]; Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces* (ICRC, Geneva, 1987) [436]; *Customary IHL Vol II* rule 20.

3.3 Colonel Abraham is individually criminally responsible for the attack on the Factory.[34]

a) He was directly involved in the planning, preparation and execution of the attack, and did so wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties.[35]

[34] *The Statute* art 10.

[35] *Galić Trial* [59]; *Statement of Facts* [51]–[59].

Submission 4 - The expected risk of civilian deaths was clearly excessive in relation to the concrete and direct overall military advantage anticipated by the MTA.

4.1 The Factory was not a legitimate military objective at the time of the attack on 6 May.

a) By its nature, location, purpose and use,[36] the Factory did not make an effective contribution to the military capabilities of the CDF.[37] The complex was only occupied by a small token force after the majority of CDF forces had moved out of the factory and regrouped in the Laertes region on 4 May, indicating that it no longer served a critical military function to Capuleta.[38] The MTA thus could not have expected to gain a definite military advantage from the factory's destruction.

4.2 The attack on the Factory was not proportionate. The test of proportionality involves an assessment of the concrete and direct overall military advantage anticipated, as compared to the incidental loss of life or injury to civilians[39] which may be expected by a reasonably well-informed person in the circumstances of the actual perpetrator.[40]

a) A reasonably well-informed person in Colonel Abraham's position would recognise that the limited overall anticipated advantage of the attack on the Factory was not proportionate to the reasonably foreseeable civilian casualties that would result.

i. As the Factory was no longer a legitimate military objective, any potential advantage that the MTA could have expected to gain from attacking a target of negligible value with limited enemy presence did not outweigh the risk of civilian casualties.[41]

ii. The method of attack by the MTA was indiscriminate and excessive in relation to the limited military advantage anticipated.[42] The number of CDF remaining at the Factory did not necessitate the use of artillery, which posed a significant risk of striking CDF and civilians without distinction.[43] Colonel Abraham could have used methods that ensured a lower risk of civilian casualties, such as the deployment of ground troops.

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[36] *Additional Protocol I* art 52(2); *Galić Trial* [51]; *Kordić and Čerkez Trial* [327]; *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, ICTY, The Hague, 14 June 2000 [35]; *Customary IHL Vol II* rule 8.

[37] *Statement of Facts* [57].

[38] Ibid.

[39] *Public Committee against Torture in Israel* [42]–[46].

[40] *Galić Trial* [58].

[41] *The Operation in Gaza, Factual and Legal Aspects,* Report, Israeli Ministry of Foreign Affairs, July 2009 [120]–[126]; *Statement of Facts* [57].

[42] *Additional Protocol I* art 51(4)(c), (5)(b); *Galić Trial* [57]–[58]; *Galić Trial* [57]–[58].

[43] *Statements of Facts* [58]–[59].

4.3 The relocation of the CDF to the outskirts of the Laertes region created a practical alternative course of action for Colonel Abraham.[44] In instances where there are multiple possible military objectives, each with a similar military advantage, there is an obligation to select the objective which may be expected to pose the least risk to civilians.[45] The new location presented a greater military advantage which would have caused less danger to civilian lives. Colonel Abraham was obliged to select this objective.

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[44] Ibid [57].

[45] *Additional Protocol I* art 57(3); *Customary IHL Vol II* rule 21.

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B International Conventions

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BALANCE OF INABILITIES

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WRITTEN SUBMISSIONS FOR THE DEFENCE

SENIOR COUNSEL Benjamin Mishricky

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Summary of Submissions

Escalus Indictment

1 Commander Escalus is *not* culpable for the alleged crimes under the doctrine of command responsibility.

2 The MP did *not* commit the underlying crimes.

Abraham Indictment

3 To the best of Colonel Abraham's knowledge, the civilians in the locality of the Amarga Factory complex had lost their civilian protection status.

4 In the alternative, the attack was not clearly excessive in relation to the concrete and direct overall military advantage anticipated.

5 Colonel Abraham is not individually criminally responsible for the crimes alleged.

Escalus Indictment

Submission 1 – Commander Escalus is *not* culpable for the alleged crimes under the doctrine of command responsibility

1.1 Commander Escalus *did not possess effective control* over the MP.[1] Effective control refers to the material ability to prevent or punish the commission of crimes,[2] and is determined by assessing the *reality of one's authority* — proof of de jure position is *not dispositive*.[3] When determining one's actual authority, regard must be had as to whether their orders were *followed*, and whether their authority *is recognized* by subordinates.[4]

1.1.1 Commander Escalus did not have the effective ability to issue binding orders on the basis that the MP *blithely disobeyed* his directive on 17 March.[5]

1.1.2 Alongside the above, the considerable level of disrespect shown towards Commander Escalus[6] demonstrate that the MP *refused to accept his authority.*

1.2 Up until meeting with an ICRC representative on 16 March, Commander Escalus *did not know, nor ought to have known,* about the commission of the alleged crimes. For the Commander to have actual knowledge he must have been aware of the alleged crimes ('knew').[7] To have constructive knowledge, he must have possessed sufficiently alarming information which ought to have put him on notice of the alleged crimes ('had reason to know'),[8] or have negligently failed to acquire such information ('should have known').[9]

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[1] *The Statute* art 12(a), 10(3).
[2] *Prosecutor v Delalić* (*Appeal Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-96-21-A, 20 February 2001) [256].
[3] Ibid [197].
[4] *Prosecutor v Blaškić* (*Appeal Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No. IT-95-14-T, 29 July 2004) [610].
[5] Statement of Facts [46]. 'it is hard to conceive of a case where a defendant could be said to have had effective control over the perpetrators if he was not able to issue orders to them': see Guénaël Mettraux, *The Law of Command Responsibility* (Oxford University Press, 2009) 184.
[6] *Statement of Facts* [33], [34].
[7] *Prosecutor v Kordic and Cerkez* (*Trial Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No. IT-95-14/2-T, 26 February 2001) [427]. Actual may knowledge be inferred by direct or circumstantial evidence: at [428].
[8] *The Statute* art 10(3); *Delalić Appeal Judgement* (n 2) [238].
[9] *The Statute* art 12(a)(i); *Prosecutor v Bemba* (*Decision on the Confirmation of Charges*) (International Criminal Court, Trial Chamber, Case No. ICC-01/05-01/08-424, 15 June 2009) [432]–[434].

1.2.1 Commander Escalus *did not know* about the alleged crimes: he was not present at the camp overnight[10] or when detainees were taken out to dig trenches,[11] and was under the impression that any work undertaken by detainees was voluntary.[12]

1.2.2 Commander Escalus *did not have reason to know* of the alleged crimes: any potential injuries sustained by detainees can not be said to have been readily visible to the Commander, nor sufficiently severe to have put him on notice.[13]

1.2.3 It is unreasonable to expect that Commander Escalus *should have known* of the alleged crimes: he attended the camp every day in line with his duty to supervise, and his absence from the Livna-Camp at nighttime was a consequence of inadequate living facilities rather than a dereliction of duty.[14]

1.3 After 16 March, Commander Escalus took all *necessary and reasonable measures* to prevent and punish the commission of crimes.[15] Whether or not all necessary and reasonable measures were taken is to be determined on a *case-by-case basis*, and by reference to the material powers of the superior.[16]

1.3.1 The Commander discharged his duty to act by promptly ordering the MP to keep detainees on site and to cease 'encouragement'.[17]

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[10] *Statement of Facts* [30]; *Prosecutor v Aleksovski* (*Trial Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No. IT-95-14/1-T, 25 June 1999) [114] (*'Aleksovski Trial Judgement'*).
[11] *Statement of Facts* [47].
[12] Ibid [41].
[13] *Statement of Facts* [32], [48]. Cf. *Kvocka Trial Judgement* (n 5) [379]; *Aleksovski Trial Judgement* (n 10) [224].
[14] *Statement of Facts* [30]; *Prosecutor v Delalić* (*Trial Judgement*) *(*International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-94-1-AR72, 16 November 1998) [769] ('*Delalić Trial Judgement'*).
[15] *The Statute* art 12(a)(ii), 10(3).
[16] *Delalić Trial Judgement* (n 14) [395]; *Prosecutor v Blaškić (Trial Judgement) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No. IT-95-14-T, 3 March 2000)* [302] ('*Blaškić Trial Judgement*').
[17] *Statement of Facts* [45]; see *Blaškić Appeal Trial Judgement* (n 4) [302]; *Prosecutor v Bemba* (*Appeals Chamber*) (International Criminal Court, Trial Chamber, Case No. ICC-01/05-01/08-424, 8 June 2018) [8].

Submission 2 – The MP *did not* commit the alleged crimes.

2.1 The MP did not willfully cause great suffering or serious injury to the body or health of the detainees and did not subject them to inhuman treatment. The former crime requires that the MP intentionally inflicted suffering or injury of the requisite severity,[18] and the latter requires intentional treatment which does not conform to the principle of humanity.[19]

2.1.1 While the MP may have intentionally beat detainees, the suffering or injury sustained cannot be characterized as 'great' or 'serious,' nor an affront to human dignity.[20]

2.1.2 The alleged psychological abuse meted out to detainees was not of the requisite severity on the basis that it was relatively vague and indirect,[21] especially when compared to several cases of the *International Criminal Tribunal on The Former Yugoslavia.*[22]

2.1.3 While living conditions may have been poor, they were considerably more favorable than those of the prison-camps in precedent cases which often involved *inter alia* highly inadequate sanitary conditions,[23] and restricted access to medical facilities.[24] Moreover, the amount of food and water provided to detainees was not sufficiently scarce so as to constitute a war crime.[25]

2.1.4 At least up until 17 March, the detainees were not *forced* to work on the grounds that during worker selection, Commander Escalus ensured that any labour undertaken by detainees was voluntary.[26]

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[18] *Delalić Trial Judgement* (n 14) [509]–[511].
[19] Ibid [542]. The crime of willfully causing great suffering or serious injury falls within the scope of inhuman treatment: at [542]. See also *Aleksovski Trial Judgement* (n 10) [53]–[57].
[20] See e,g, *Prosecutor v Krnojelac* (*Trial Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No. IT-97-25-T, 15 March 2002) [204] (*'Krnojelac Trial Judgement');* Cf. *Krnojelac Trial Judgement* (n 20) [207], [214]; *Delalić Trial Judgement* [1016]–[1017], [919], [1033]; *Blaškić Trial Judgement* (n 16) [689], [693].
[21] *Statement of Facts* [34], [42].
[22] See e,g, *Aleksovski Trial Judgement* (n 10) [226]; *Delalić Trial Judgement* (n 14)[1086].
[23] See e,g, *Delalić Trial Judgement* (n 14) [1109]–[1111]; *Aleksovski Trial Judgement* [159]–[164].
[24] See e,g, *Delalić Trial Judgement* (n 14) [1101].
[25] *Statement of Facts* [1]; *Aleksovski Trial Judgement* (n 10) [173]. Cf. *Delalić Trial Judgement* (n 14) [1092]–[1097].
[26] *Statement of Facts* [41]. See *Blaškić Appeal Judgement* (n 4) [549].

Abraham Indictment

Submission 3 – To the best of Colonel Abraham's knowledge, the civilians in the locality of the Amarga Factory complex had lost their civilian protection status.

3.1 The civilians in question lost their protection status through *direct participation*.[27] Generally, civilians are non-combatants and may not be the object of attack,[28] unless and for such time as they take direct part in hostilities.[29] This requires three constitutive elements: threshold of harm, direct causation and belligerent nexus.[30]

3.1.1 The civilians *assisting in weapons transportation* became direct participants by loading ammunition onto army trucks with the direct purpose of supporting the CDF's retaliation against the MTA position.[31]

3.1.2 The civilians acting as *voluntary human shields* became direct participants by deliberately positioning themselves to create a physical obstacle to the MTA's offensive on the factory complex.[32]

3.1.3 Whilst civilians forced to act as *involuntary human shields* ordinarily retain protection status, the presence of such civilians in the factory complex at the time of attack is reasonably doubtful.[33]

3.2 The evidence available to Colonel Abraham gave no indication that the civilians in question had regained their protection status at the time of attack.

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[27] See *Statement of Facts* [53]–[55].
[28] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),* opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 51(2) ('*Additional Protocol I*').
[29] See also *Prosecutor v Galić* (*Trial Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-29-T, 5 December 2003) [45]–[58], [143] ('*Galić Trial Judgement*').
[30] ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities' (Report, 2010).
[31] *Statement of Facts* [55]. See, eg, *Public Committee Against Torture in Israel v Government of Israel* (2006) HCJ 769/02 (Israel) [35], [39] ('*PCATI*').
[32] *Statement of Facts* [54]. *PCATI* (n 31) [36].
[33] *PCATI* (n 31) [38].

Submission 4 – In the alternative, the attack was not clearly excessive in relation to the concrete and direct overall military advantage anticipated.[34]

4.1 The *concrete and direct overall military advantage anticipated* from the attack was significant. *Overall* refers to the military advantage that can be expected from an attack as a whole, rather than isolated or specific parts thereof.[35] *Concrete* and *direct* requires the advantage be 'substantial' and 'relatively close' as to disregard advantages which are 'hardly perceptible' or only appearing in the 'long term'.[36] *Anticipated* requires consideration of the 'likelihood' that the attack will actually achieve the advantage sought.

4.1.1 Amarga Factory was *singled out* by General Benvolio as a key strategic position for gaining and maintaining control in the Greater Amiens and Laertes regions.[37]

4.1.1 The *redeployment* of CDF solders away from Amarga Factory did not diminish the military value of the location to the MTA. Rather, it increased the *likelihood* of achieving the military advantage in question.[38]

4.2 The attack was *not clearly excessive* in relation to the anticipated advantage. The *question of proportionality* requires an assessment of whether a reasonably well-informed person in the circumstances of Colonel Abraham, making reasonable use of the information available to him, could have expected excessive collateral civilian casualties to result from the attack.[39] This assessment must not be influenced by the benefit of hindsight.[40]

4.2.1 Colonel Abraham's consistent engagement with intelligence reports and publications over the period spanning 19 March – 6 May 2009, in conjunction with

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[34] *The Statute* art 5(d).
[35] *Additional Protocol I* art 49(1), 52(2). States including Australia, Belgium, Canada, Germany, Italy, UK and US have interpreted this rule as such: see Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing, 2nd ed, 2008) 339.
[36] Claude Pilloud et al, *Commentary on the Additional Protocols*, ed Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (MN Publishers, 1987) 684.
[37] *Statement of Facts* [50].
[38] *Prosecutor v Gotovina* (*Trial Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-06-90-T, 2 August 2010) [549] ('*Gotovina Trial Judgement*').
[39] *Galić Trial Judgement* (n 29) [58]. *PCATI* (n 31) [42]–[46].
[40] *Galić Trial Judgement* (n 29) [58].

his remark that the 'usual assessment' was to be made, indicates that *a reasonable assessment* of civilian presence and potential casualties was conducted.[41]

4.2.2 The lack of conclusive intelligence placing the civilians in question within the factory complex suggested that the *reasonable commander* would not expect extensive civilian presence in the target area.[42]

Submission 5 – Colonel Abraham is not individually criminally responsible for the crimes alleged.

5.1 Colonel Abraham did not satisfy the *mens rea* requirement of the crimes alleged. The requisite *mens rea* under Article 10(1) of the Statute is that Colonel Abraham acted in the awareness of the substantial likelihood that a crime would result from his actions.[43]

5.1.1 Colonel Abraham's diligence in noting intelligence reports regarding civilian movements suggests that he did not have such knowledge or intentions.[44]

5.2 Even if Colonel Abraham is held individually responsible for the crime, the fact that he acted pursuant to General Benvolio's order should be considered in mitigation of any punishment received.[45]

[41] *Statement of Facts* [53]–[57].
[42] Ibid.
[43] *Galić Trial Judgement* (n 29) [168]–[172]. *Blaškić Trial Judgement* (n 16) [283]–[286].
[44] *Statement of Facts* [51]–[57].
[45] *The Statute* art 10(4). *Statement of Facts* [51].

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A *Articles/Books/Reports*

Guénaël Mettraux, *The Law of Command Responsibility* (Oxford University Press, 2009)

ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities' (Report, 2010)

Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing, 2nd ed, 2008)

Claude Pilloud et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ed Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (MN Publishers, 1987)

B *Cases*

Prosecutor v Aleksovski (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No. IT-95-14/1-T, 25 June 1999)

Prosecutor v Bemba (*Appeals Chamber*) (International Criminal Court, Trial Chamber, Case No. ICC-01/05-01/08-424, 8 June 2018)

Prosecutor v Bemba (*Decision on the Confirmation of Charges*) (International Criminal Court, Trial Chamber, Case No. ICC-01/05-01/08-424, 15 June 2009)

Prosecutor v Blaškić (*Trial Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No. IT-95-14-T, 3 March 2000)

Prosecutor v Delalić (*Appeal Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-96-21-A, 20 February 2001)

Prosecutor v Delalić (*Trial Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-94-1-AR72, 16 November 1998)

Prosecutor v Krnojelac (*Trial Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No. IT-97-25-T, 15 March 2002)

Prosecutor v Kvocka (*Trial Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No. IT-98-30/1-T, 2 November 2001)

Prosecutor v Galić (*Appeal Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-29-A, 30 November 2006)

Prosecutor v Galić (*Trial Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-29-T, 5 December 2003)

Prosecutor v Gotovina (*Trial Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-06-90-T, 2 August 2010)

Prosecutor v Martić (*Trial Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-11-T, 12 June 2007)

The Public Committee Against Torture in Israel v The Government of Israel (2006) HCJ 769/02

C *Treaties*

Geneva Convention Relative to the Protection of Civilian Persons in the Time of War (*Fourth Geneva Convention*), opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950)

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (*Protocol I*), opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 1(4)

Statute for the International Tribunal for Capuleta and Montaguia, opened for signature 10 May 2010 (entered into force 10 May 2010)