UNITED
NATIONS

International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-95-5/18-PT

Date: 28 April 2009

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Iain Bonomy, Presiding**
Judge Christoph Flügge
Judge Michèle Picard

Acting Registrar: **Mr. John Hocking**

Decision of: **28 April 2009**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON SIX PRELIMINARY MOTIONS CHALLENGING JURISDICTION

Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seised of the Accused's: "Preliminary Motion to Dismiss Paragraph 60(k) for Lack of Jurisdiction", filed on 10 March 2009 ("Motion to Dismiss Paragraph 60(k)"); "Preliminary Motion to Dismiss Joint Criminal Enterprise III – Foreseeability", filed on 16 March 2009 ("Motion on Foreseeability"); "Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction", filed on 18 March 2009 ("Motion to Dismiss Count 11"); "Preliminar y Motion on Lack of Jurisdiction concerning Omission Liability", filed on 25 March 2009 ("Motion on Omission Liability"); "Preliminary Motion to Dismiss JCE III – Special Intent Crimes", filed on 27 March 2009 ("Motion on Specific Intent Crimes"); and "Preliminary Motion on Lack of Jurisdiction: Superior Responsibility", filed on 30 March 2009, ("Motion on Superior Responsibility"), and hereby renders its decision thereon.

I. Background and Submissions

1. The Motion to Dismiss Paragraph 60(k), Motion on Foreseeability, Motion to Dismiss Count 11, Motion on Omission Liability, Motion on Specific Intent Crimes, and Motion on Superior Responsibility ("Motions") have each been filed by the Accused under Rule 72 of the Tribunal's Rules of Procedure and Evidence ("Rules") as challenges to the jurisdiction of the Tribunal to prosecute him for the crimes alleged in the Third Amended Indictment ("Indictment").

2. The Office of the Prosecutor ("Prosecution") filed: (1) a "Prosecution Response to Preliminary Motion to Dismiss Paragraph 60(k) for Lack of Jurisdiction" on 23 March 2009 ("Response on Paragraph 60(k)"), to which the Accused sought leave to reply and replied on 20 April 2009 ("Reply on Paragraph 60(k)"); (2) a "Prosecution Response to Preliminary Motion to Dismiss Joint Criminal Enterprise III – Foreseeability" on 25 March 2009 ("Response on Foreseeability"), to which the Accused sought leave to reply and replied on 3 April 2009 ("Reply on Foreseeability"); (3) a "Prosecution Response to Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction" on 1 April 2009 ("Response on Count 11"), to which the Accused sought leave to reply and replied on 8 April 2009 ("Reply on Count 11"); (4) a "Prosecution Response to "Preliminary Motion on Lack of Jurisdiction concerning Omission Liability"", filed on 7 April 2009 ("Response on Omission Liability"), to which the Accused sought leave to reply and replied on 14 April 2009 ("Reply on Omission Liability"); (5) "Prosecution Response to 'Preliminary Motion to Dismiss JCE III – Special Intent Crimes'", filed on 14 April 2009 ("Response on Specific Intent Crimes"), to which the Accused sought

leave to reply and replied on 20 April 2009 ("Reply on Specific Intent Crimes"); and (6) a "Prosecution Response to Preliminary Motion on Lack of Jurisdiction: Superior Responsibility" filed on 9 April 2009 ("Response on Superior Responsibility"), to which the Accused sought, on 14 April 2009, extension of time and leave to reply, and then filed a reply on 20 April 2009 ("Reply on Superior Responsibility").

3. The Chamber will briefly set out the submissions of the parties on each of these Motions in turn.

A. Motion to Dismiss Paragraph 60(k)

4. The Accused requests that the Trial Chamber dismiss paragraph 60(k) of the Indictment on the grounds that the acts of persecution described therein are not sufficiently grave to qualify as a crime against humanity, punishable under Article 5 of the Statute of the Tribunal ("Statute"). In particular, the Accused argues that those acts are not among the underlying offences enumerated in Article 5 and that, on the face of the Indictment, they do not, individually or cumulatively, rise to the same level of gravity as the enumerated underlying offences. In support of this contention, the Accused notes that no schedule of those acts is provided in the Indictment, that the number of people affected is not specified, and that no aggravating circumstances are described.[1] Alternatively, he argues that paragraph 60(k) "is so devoid of facts that it is impossible for the accused to prepare a defence to these allegations", as "[n]o acts, victims, perpetrators, locations, or dates are specified".[2]

5. Paragraph 60(k) of the Indictment provides as follows:

> Acts of persecution carried out by members of the Serb Forces and Bosnian Serb Political and Governmental Organs pursuant to one or more of the joint criminal enterprises included:
>
> ... the imposition and maintenance of restrictive and discriminatory measures including:
>
> i. the denial of freedom of movement;
> ii. the removal from positions of authority in local government institutions and the police and the general dismissal from employment;
> iii. the invasion of privacy through arbitrary searches of homes;
> iv. unlawful arrest and/or the denial of the right to judicial process; and/or
> v. the denial of equal access to public services.

6. In the Response on Paragraph 60(k), the Prosecution requests that the Trial Chamber deny the Motion to Dismiss Paragraph 60(k) for several reasons. Firstly, it cites relevant Appeals Chamber jurisprudence and argues that it is the cumulative effect of all underlying acts of persecution that must rise to the same level of gravity as the other underlying offences

[1] Motion to Dismiss Paragraph 60(k), para. 5.
[2] Motion to Dismiss Paragraph 60(k), para. 6.

enumerated in Article 5, not just those acts alleged in paragraph 60(k) of the Indictment taken in isolation.[3] Secondly, the Prosecution submits that the gravity assessment cannot be properly considered as a jurisdictional issue, because it is a factual question for proof at trial in the context of the entire evidentiary record.[4]

7. Thirdly, with regard to the purported lack of specificity of paragraph 60(k), the Prosecution submits that it is not required to plead the evidence by which such acts will be proved at trial, and that, given the high-ranking position of the Accused and the scale of the alleged crimes, a lower degree of specificity is required in pleading facts relating to the crime base, such as the names of all victims or perpetrators.[5] It submits that both the perpetrators and the victims are identified in the Indictment by reference to their membership of a category or group, namely the joint criminal enterprise and the Bosnian Muslim or Bosnian Croat group, respectively.[6] Moreover, the Prosecution affirms that the acts in question, as well as their location and dates, are sufficiently specified in the persecution charge of the Indictment.[7] Furthermore, the Prosecution submits that the Accused is being provided with the evidentiary basis for the allegations in paragraph 60(k) by way of pre-trial disclosure and in accordance with Rule 65 *ter* of the Rules, and that he may request further particulars of the crimes charged from the Prosecution in accordance with the relevant procedure set out in the Tribunal's case-law.[8]

8. Alternatively, the Prosecution submits that, even if the Chamber considers that the Indictment is defective, the appropriate remedy would be an order requiring the Prosecution to plead further material facts rather than the dismissal of the allegations.

9. The Accused seeks leave for his Reply on Paragraph 60(k) in order to demonstrate the "fallacy of the Prosecution's position." He further asserts that conduct not amounting to equal gravity cannot be combined to constitute a crime against humanity in the context of a joint criminal enterprise, because it could involve acts carried out by different actors in different locations and on different dates.[9] With regard to the alleged lack of specificity, the Accused underlines that the reference in the Indictment to 27 municipalities and the whole Indictment period, within which the acts in question are alleged to have occurred, do not provide adequate notice of the charges against him.[10]

---

[3] Response on Paragraph 60(k), paras. 4–6.
[4] Response on Paragraph 60(k), para. 7.
[5] Response on Paragraph 60(k), paras. 12–13.
[6] Response on Paragraph 60(k), para. 18.
[7] Response on Paragraph 60(k), paras. 15–16.
[8] Response on Paragraph 60(k), paras. 20–21.
[9] Reply on Paragraph 60(k), paras. 4, 7.
[10] Reply on Paragraph 60(k), para. 9.

B. Motion on Foreseeability

10. The Accused argues, pursuant to Rule 72(A)(i) of the Rules, that the allegations pertaining to the third form of joint criminal enterprise liability in relation to each count of the Indictment should be dismissed on the grounds that this Tribunal has no jurisdiction to prosecute him for unintended acts that "might" have been perpetrated by one of the members of the joint criminal enterprise and were, therefore, a "possible" consequence of the intended common plan. Instead, the relevant standard, according to the Accused, is that the acts were a "natural" consequence of that plan, and were therefore foreseen by the accused as "probable".[11] In support, the Accused points to a number of domestic cases from various jurisdictions,[12] as well as to prior Tribunal jurisprudence. As far as the latter is concerned, he notes that the standard was always one of "natural and foreseeable" consequences. With respect to whether these consequences were foreseen by a particular accused as possible or probable, the Accused notes that the practice of the Tribunal has not been uniform.[13] Because of this uncertainty, according to the Accused, the principle more favourable to him should be applied, and the "probability" standard used. He concludes that, for the reasons outlined above, the Indictment is based on a mode of liability over which the Tribunal has no jurisdiction.[14]

11. In its Response on Foreseeability, the Prosecution opposes the Motion, arguing (i) that it has correctly pleaded the *mens rea* standard for the third form of joint criminal enterprise, and (ii) that the Accused has failed to raise a proper jurisdictional challenge. In support of its first argument, the Prosecution cites to the *Vasiljević* Appeal Judgement, which applies the standard set out by the Prosecution in the Indictment.[15] As for its second argument, the Prosecution submits that this is not a valid jurisdictional challenge within the meaning of Rule 72(A)(i) as the Accused is simply seeking to alter "the accepted elements of a crime" which is "inappropriate for resolution at the preliminary phase of the proceedings.[16]

12. The Accused seeks leave for his Reply on Foreseeability "so that the Trial Chamber can sharpen its focus" on the issues in dispute between him and the Prosecution.[17] He further argues that, because there is inconsistent Tribunal jurisprudence on the requirements of the third form of joint criminal enterprise liability, which creates practical differences, it is appropriate for the

[11] Motion on Foreseeability, paras. 1–4.
[12] Motion on Foreseeability, paras. 5–18.
[13] Motion on Foreseeability, paras. 19–25.
[14] Motion on Foreseeability, paras. 25–26.
[15] Response on Foreseeability, paras. 1–3.
[16] Response on Foreseeability, paras. 4–6.
[17] Reply on Foreseeability, para. 3.

Trial Chamber to consider which standards are consistent with customary international law.[18] He also disputes the Prosecution's contention that his Motion on Foreseeability does not raise a proper jurisdictional challenge.[19]

C. Motion to Dismiss Count 11

13. The Accused also submits that Count 11 of the Indictment, charging him with "taking of hostages" as a violation of the laws or customs of war under Article 3 of the Statute, contains allegations of conduct that does not relate to Article 3. In his Motion to Dismiss Count 11, he analyses customary international law as it stood in 1995, when the alleged events took place, and concludes that the crime of "taking of hostages" set out in common article 3 of the Geneva Conventions, which is encompassed by Article 3 of the Statute, does not cover civilian hostage-taking, or the treatment of "detained belligerents."[20] His main arguments in favour of this conclusion are as follows:

> (i) the law of hostage-taking has developed in the context of the protection of civilians;
>
> (ii) the personnel described in Count 11 of the Indictment were not civilians, but captured prisoners of war, to whom the Third Geneva Convention applied;
>
> (iii) unlike the Fourth Geneva Convention, which deals with civilians, the Third Geneva Convention does not refer to an offence of hostage-taking except in article 3, which is common to all four Geneva Conventions but which deals exclusively with non-international conflicts;
>
> (iv) a restrictive interpretation must be given to common article 3 so as to avoid the result of affording greater protection to individuals in non-international armed conflicts than to those in international armed conflicts;
>
> (v) one of the elements of the offence of hostage-taking is unlawful detention.[21]

14. The Prosecution responds, firstly, that the Motion to Dismiss Count 11 does not raise a jurisdictional challenge within the meaning of Rule 72 (D), but rather contains arguments about the contours of the crime of hostage-taking and factual questions in relation thereto. It further argues that the crime of hostage-taking is not limited to civilians under common article 3 of the

[18] Reply on Foreseeability, para. 10.
[19] Reply on Foreseeability, paras. 12–16.
[20] Motion to Dismiss Count 11, paras. 59–60.
[21] Motion to Dismiss Count 11, paras. 49–57.

Geneva Conventions, and that there is no requirement of unlawful detention as an element of the crime.[22]

15. The Accused seeks leave for his Reply on Count 11, stating that it is necessary in order "to address misinterpretations by the Prosecution" of his arguments in the Motion to Dismiss Count 11.[23] The proposed Reply argues, contrary to the Prosecution, that the Motion does indeed raise a proper jurisdictional challenge because a challenge to the elements of a crime under customary international law is jurisdictional in nature, citing an Appeals Chamber decision in *Gotovina* in support of this position.[24] It maintains that one of the elements of hostage-taking under customary international law is that the victim(s) be civilian, while another is that the confinement of the persons in question be unlawful.

D. Motion on Omission Liability

16. In the Motion on Omission Liability, the Accused requests the Chamber to instruct the Prosecution to delete references to his alleged criminal responsibility by way of omission contained in paragraphs 30 and 31 (referring to the Accused's liability for omissions in respect of planning, instigating, ordering, and/or aiding and abetting), and 88 (referring to omissions in the context of crimes against humanity) of the Indictment, and not to lead evidence on or argue the Accused's responsibility for failing to act, except to the extent that he is alleged to be criminally liable as a superior under Article 7(3) of the Tribunal's Statute.[25] The Accused submits that under international law an individual may not be held criminally responsible for any of the crimes alleged in the Indictment by failing to act, with the exception of his responsibility under Article 7(3);[26] thus, any reference in the Indictment to omission as a form of criminal liability, beyond its reference to superior responsibility, is *ultra vires* the Tribunal's jurisdiction.[27]

17. The Accused raises four general arguments to support his allegations. Firstly, he asserts that the Tribunal may not consider any form of responsibility or crime without first establishing its existence and availability in customary international law, and that there is a lack of *evidence* supporting the claim that "liability for omissions" has become recognised in customary international law—beyond superior responsibility—as a means of attributing criminal

[22] Response on Count 11, paras. 1–2.
[23] Reply on Count 11, para. 1.
[24] Reply on Count 11, para. 5.
[25] Motion on Omission Liability, para. 22; *see also* Indictment, paras. 30–31, 88.
[26] Motion on Omission Liability, para. 2.
[27] Motion on Omission Liability, para. 2.

responsibility to an individual in international criminal law.[28] Secondly, he claims that despite the references in the Tribunal's jurisprudence to the concept of omission liability in relation to aiding and abetting, planning, instigating, and ordering, all such examples are in fact references to positive acts (not omissions),[29] or to superior responsibility.[30] Thirdly, the Accused submits that superior responsibility, as set out in Article 7(3) of the Tribunal's Statute, "is *lex specialis* for omission liability in international criminal law" and that punishing someone for an omission must be limited to such recognised form of criminal responsibility, "or the *nullum crimen sine lege* principle will be violated".[31] Finally, the Accused argues that "it is for the Prosecution to establish the forms of liability upon which it intends to rely" and not for the Accused to prove the absence of the existence of such rules.[32]

18. In its Response on Omission Liability the Prosecution requests that the Accused's Motion be dismissed as the Tribunal's Appeals Chamber has confirmed that there can be criminal liability on the basis of omissions under customary international law, beyond the context of superior responsibility, and the Accused has shown no cogent reasons to depart from the Appeals Chamber's case-law.[33] The Prosecution argues that the Appeals Chamber's case-law recognising omission liability reflects the sources of customary international law,[34] and that the Accused has failed to show that such precedents "were wrongly decided".[35]

19. The Prosecution also claims that failure to act where there is a legal duty to act can entail liability under several of the modes of liability included in Article 7(1) of the Statute, and that a number of accused have been convicted by this Tribunal for committing a crime, for aiding and abetting, or for their contribution to a joint criminal enterprise, on the basis of omissions.[36] The Prosecution also submits that superior responsibility is "only one species of liability for omission", and that a superior's failure to act can lead to liability under Article 7(1) and 7(3), depending on whether there is a causal connection between the Accused's omission and the crime committed.[37] Finally, the Prosecution argues that "no violation of the *nullum crimen sine lege* principle can arise in finding liability for omission beyond superior responsibility under the ICTY Statute", as such liability has been "well established in customary international law", and,

---

[28] Motion on Omission Liability, paras. 2.1, 4–9.
[29] Motion on Omission Liability, paras. 2.2, 11.
[30] Motion on Omission Liability, paras. 12–16.
[31] Motion on Omission Liability, paras. 2.3, 19–20.
[32] Motion on Omission Liability, para. 2.4.
[33] Response on Omission Liability, paras. 1, 17.
[34] Response on Omission Liability, paras. 7–12.
[35] Response on Omission Liability, para. 7.
[36] Response on Omission Liability, paras. 2–4; *see also* Response on Omission Liability para. 5 referring to omissions in the case of ordering, planning, and instigating.
[37] Response on Omission Liability, para. 6.

in any case, it is for the Tribunal to define the contours of the separate modes of liability of Article 7(1) of the Statute.[38]

20. The Accused seeks leave to reply to the Prosecution's Response on Omission Liability in order to inform the Chamber of his rebuttal of the assertions and authorities relied upon by the Prosecution.[39] The Accused claims that the Prosecution has failed to meet its obligation to establish "by evidence" the existence of liability for omissions beyond superior responsibility in customary international law,[40] and that the references to the Tribunal's jurisprudence in the Response on Omission Liability reinforce the fact that liability for omissions has no basis in international law.[41]

E. Motion on Specific Intent Crimes

21. In the Motion on Specific Intent Crimes, the Accused argues that the allegations in Counts 1 (genocide), 2 (genocide), and 3 (persecution) of the Indictment should be dismissed in so far as they relate to the alleged criminal responsibility of the Accused by way of the third form of joint criminal enterprise liability, which does not require him to have the special intent necessary for commission of those crimes. The Accused further argues that the use of this form of liability to convict him (or any other accused) as a "principal perpetrator" of a special intent crime is not recognised by Article 7(1) of the Statute. In support, the Accused claims that in no international or domestic case has it ever been suggested that this could be done and, in fact, in those where the issue was considered, the opposite was found to be the case.[42] He acknowledges that the Appeals Chamber in *Brđanin* held, by majority, that convictions for genocide can be entered using the third form of joint criminal enterprise liability. However, he also points to what he calls a "dissent" by one of the members of the bench.[43] The Accused further claims that the Appeals Chamber in *Krstić* "implicitly disapproved" the majority's decision in *Brđanin*, and that scholars have been uniformly critical of the idea.[44] He observes that this Tribunal has never considered whether there is a customary law basis for using the third form of joint criminal enterprise liability to enter convictions for special intent crimes, and then analyses a number of international and domestic cases which he claims support his position.[45]

---

[38] Response on Omission Liability, para. 16.
[39] Reply on Omission Liability, para. 1.
[40] Reply on Omission Liability, para. 2; *see also* paras. 7–15 containing specific examples of such lack of evidence.
[41] Reply on Omission Liability, paras. 3–6.
[42] Motion on Specific Intent Crimes, paras. 1–5.
[43] Motion on Specific Intent Crimes, paras. 6–8.
[44] Motion on Specific Intent Crimes, paras. 9–11.
[45] Motion on Specific Intent Crimes, paras. 12–45.

22. In its Response on Specific Intent Crimes, the Prosecution argues that the Motion on Specific Intent Crimes should be dismissed because responsibility for such crimes falls reasonably within the third form of joint criminal enterprise as established under customary international law. The Prosecution also refers to the Appeals Chamber's specific ruling in *Brđanin* that this form of liability applies to specific intent crimes, and notes that there was no dissent, but rather a separate opinion, in that case.[46] The Prosecution further asserts that there is no need to look for evidence of *opinio juris* and state practice dealing with this specific issue since it has been established by the Appeals Chamber that the third form of joint criminal enterprise is part of customary international law and since this law, as it stands, is reasonably capable of applying to specific intent crimes.[47] In addition, the Prosecution claims that the Accused "erroneously conflates the mental element of a mode of liability and the *mens rea* of a crime," and emphasises the Appeals Chamber's finding that this form of responsibility is no different from other forms of responsibility which do not require proof of intent to commit a crime."[48] Finally, the Prosecution notes that the Appeals Chamber has upheld convictions for specific intent crimes, such as persecution and torture, pursuant to the third form of joint criminal enterprise, and disputes the Accused's interpretation of the *Krstić* Appeal Judgement, as well as other post World War II cases.[49]

23. The Accused seeks leave for his Reply on Specific Intent Crimes in order to address two "mistaken" responses by the Prosecution, namely that "its theory of liability does not need to be consistent with customary international law," and that "if it does, customary international law does not exclude that theory."[50] He argues that, in *Rwamakuba*, the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") rejected an argument that *Brđanin* implicitly established the "customary availability of [the third form of joint criminal enterprise] for all crimes, including specific intent crimes such as genocide and persecution."[51] The Accused then claims that the ICTR Appeals Chamber went on to establish that availability, but only did so for the first form of joint criminal enterprise liability.[52]

F. Motion on Superior Responsibility

24. In the Motion on Superior Responsibility the Accused requests that the Trial Chamber dismiss the second reference to Article 7(3) of the Statute in paragraph 35 of the Indictment in

[46] Response on Specific Intent Crimes, para. 1.
[47] Response on Specific Intent Crimes, paras. 3–7.
[48] Response on Specific Intent Crimes, paras. 8–10.
[49] Response on Specific Intent Crimes, paras. 11–12, 15–19.
[50] Reply on Specific Intent Crimes, para. 2.
[51] Reply on Specific Intent Crimes, paras. 5–6.
[52] Reply on Specific Intent Crimes, paras. 7–8.

which he is alleged to be responsible under Article 7(3) for his subordinates' violations of the same Article,[53] as "multiple superior responsibility" liability falls short of Article 7(3) of the Statute, is *ultra vires* the Tribunal's jurisdiction, and violates fundamental principles of criminal law.[54] The Accused notes that the Tribunal's case law regarding Article 7(3) requires "proximity" between a superior and a subordinate, which can be assured by two elements, namely, the superior's "effective control" over the subordinate, and the superior's "knowledge" of the subordinate's crime.[55] Due to this proximity requirement, argues the Accused, "a superior can only be held liable and punished for crimes in which his subordinate actively participated or crimes that were actually committed by a subordinate".[56] Thus, "effective control over the 'intermediate superior', who is directly subordinate to the superior, and knowledge of his failure to intervene do not trigger superior responsibility under Article 7(3) of the Statute".[57] According to the Accused, if the "multiple superior responsibility" concept were applied, he could then be held criminally responsible "for his failure to prevent or punish his subordinate who equally failed to prevent or punish crimes committed by his subordinate".[58] The Accused finally argues that a "superior cannot be held liable and punished for crimes in which his subordinate participated by way of an omission".[59]

25. In its Response on Superior Responsibility, the Prosecution again argues that the Accused fails to raise a proper jurisdictional challenge under Rule 72(A)(i) because his arguments deal with the contours of a form of responsibility, which is a matter for trial.[60] In the alternative, the Prosecution argues that a superior *can* be held responsible under Article 7(3) for his subordinates' failure to prevent or punish the commission of crimes by individuals under their effective control.[61] Referring to the Tribunal's jurisprudence, customary international law, and other sources, the Prosecution asserts that the references to crimes "committed" by a subordinate under Article 7(3) include any criminal conduct by a subordinate perpetrated through any of the modes of liability that are provided for under the Statute, including as a superior for crimes physically perpetrated by others under his command.[62] Furthermore, the

[53] Motion on Superior Responsibility, paras. 1, 20
[54] Motion on Superior Responsibility, paras. 2, 5–7, 12.
[55] Motion on Superior Responsibility, paras. 2.1, 2.2, 4–8.
[56] Motion on Superior Responsibility, para. 2.3.
[57] Motion on Superior Responsibility, para. 8.
[58] Motion on Superior Responsibility, para. 12.
[59] Motion on Superior Responsibility, para. 15; *see also* para. 14.
[60] Response on Superior Responsibility, paras. 1–5.
[61] Response on Superior Responsibility, paras. 8–14, 23.
[62] Response on Superior Responsibility, paras. 15–19, 27.

Prosecution adds that "a superior's criminal responsibility encompasses not only subordinates' active participation but also their omissions."[63]

26. The Accused seeks leave for his Reply on Superior Responsibility on the basis that it is necessary to refute the arguments raised by the Prosecution and that this will assist the Chamber in its deliberations. The Accused contests the Prosecution's argument that the Motion on Superior Responsibility is not a jurisdictional challenge. In addition, he argues that the Prosecution has failed to demonstrate that the concept of multiple superior responsibility existed under customary international law at the time of the offences alleged in the Indictment, or at all, and has also failed to point to a single case of this Tribunal where an accused was convicted for failing to prevent or punish a subordinate's failure to prevent or punish.[64]

III. Challenges to jurisdiction

27. The relevant part of Rule 72 of the Rules provides that:

> (A) Preliminary motions, being motions which
>
> (i) challenge jurisdiction;
>
> [...]
>
> shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66 (A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84.
>
> [...]
>
> (D) For the purpose of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:
>
> (i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute;
>
> (ii) the territories indicated in Articles 1, 8 and 9 of the Statute;
>
> (iii) the period indicated in Articles 1, 8 and 9 of the Statute;

[63] Response on Superior Responsibility, paras. 21–22, 26.
[64] Reply on Superior Responsibility, paras. 8–21.

(iv) any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute.

28. The Accused characterises each of the six Motions as raising jurisdictional challenges falling within Rule 72(D)(iv), while the Prosecution disputes that many of the issues raised by him should properly be considered as jurisdictional in nature. The Chamber will therefore first address this question.

29. In these Motions the Accused is not disputing that the Tribunal has jurisdiction over (a) persecution as an underlying offence of crimes against humanity, under Article 5 of the Statute; (b) the mode of liability known as the third form of joint criminal enterprise, under Article 7 of the Statute; (c) hostage-taking as an underlying offence of the crime "violations of the laws or customs of war", under Article 3 of the Statute; (d) the different modes of liability under Article 7(1) of the Statute; (e) specific intent crimes; or (f) the mode of liability known as superior responsibility respectively. Rather, his argument is that the manner in which these crimes and modes of liability are pled in the Indictment is erroneous as the Prosecution has wrongly conceived (i) what can amount to a form of persecution falling under Article 5(h); (ii) what the mental elements of the third form of joint criminal enterprise liability are; (iii) what the *actus reus* elements of the offence of hostage-taking are under customary international law; (iv) what the elements of the various modes of liability under Article 7(1) are and whether they require positive acts rather than omissions; (v) what the relationship between specific intent crimes and joint criminal enterprise is; and (vi) how the elements of superior responsibility under Article 7(3) can be established.

30. The Accused seeks to rely upon an Appeals Chamber decision in *Gotovina* in support of the position that a challenge to the elements of a crime under customary international law is properly considered as a jurisdictional challenge. However, the decision relied upon does not unequivocally support this contention. In that case, the appellant raised four grounds of appeal of a Trial Chamber decision, arguing that they appropriately challenged the jurisdiction of the Tribunal because they demonstrated that the indictment violated the principle *nullum crimen sine lege* by expanding definitions of crimes beyond customary law. The Appeals Chamber found, however, that none of the challenges brought was jurisdictional in nature. With regard to the first challenge, where the appellant had argued that there was no jurisdiction over deportation and forcible transfer unless the territory where they occurred was "occupied territory" at the time,[65] it stated:

[65] *Prosecutor v. Gotovina et al*, Case No. IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal against Decision on Several Motions Challenging Jurisdiction, 6 June 2007 ("*Gotovina* Decision on Jurisdiction"), para. 11.

> [T]he Appellant is not contesting that the International Tribunal has jurisdiction over [deportation and forcible transfer as crimes against humanity], which are charged in the Joint Indictment according to their definitions and elements under customary international law as set out in the jurisprudence of the International Tribunal. Rather, he argues that the interpretation of the definition for the *actus reus* of these crimes should be narrow and limited to displacement from occupied territory. As such, the Appellant may bring these arguments before the Trial Chamber to be considered on the merits at trial; however, they do not demonstrate the Tribunal's lack of subject-matter jurisdiction.[66]

Similar language is found in the Appeals Chamber's discussion of the second and fourth challenges.[67] From this the Accused appears to argue that, had Gotovina argued that deportation and forcible transfer were not charged in the indictment *in accordance with their elements under customary international law*, the Appeals Chamber *would* then have considered his challenge to be jurisdictional. However, the Appeals Chamber did not decide the point precisely because it did not consider the challenge to amount to a proper jurisdictional challenge. Indeed, in relation to the fourth challenge, which, like the current Motion on Foreseeability, was concerned with the applicable mental element of the third category of joint criminal enterprise, the Appeals Chamber stated as follows:

> To the extent that the Appellant submits that the Prosecution has failed to plead an element of this mode of liability properly, such an argument goes to pleading practice and the form of the indictment and is not a challenge to jurisdiction.[68]

31. Since the *Gotovina* Decision, the Appeals Chamber in *Tolimir* upheld a Trial Chamber finding that challenges of a similar nature to those here in issue related to "issues of law and evidence which can be properly advanced and argued during the course of trial."[69] In that case, the challenges in question related to the manner in which the crimes of genocide and conspiracy to commit genocide were charged in the indictment, and one of the arguments made by Tolimir was that "certain acts, because they are not presented by the Indictment as stemming from 'genocidal intentions' but rather as natural and foreseeable consequences of Joint Criminal Enterprises ('JCEs'), cannot be considered acts of genocide". Another challenge related to the issue of the applicability of the theory of joint criminal enterprise to establishing responsibility for genocide and conspiracy to commit genocide.[70] In other words, the issues raised were similar to those raised in the Motion on Specific Intent Crimes. The Appeals Chamber stated:

> Though at first glance somewhat related to subject-matter jurisdiction, Tolimir's assertions do not allege that he is charged with a crime outside the Tribunal's subject-

[66] *Gotovina* Decision on Jurisdiction, para. 15.

[67] *Gotovina* Decision on Jurisdiction, paras. 18 and 24.

[68] *Gotovina* Decision on Jurisdiction, para. 24.

[69] *Prosecutor v. Tolimir*, Case No. IT-05-88/2-AR72.1, Decision on Tolimir's "Interlocutory Appeal Against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion Concerning the Jurisdiction of the Tribunal", 25 February 2009 ("*Tolimir* Decision"), para. 10, citing Decision on Second Preliminary Motion on the Indictment Pursuant to Rule 72 of the Rules issued by Trial Chamber II on 1 October 2008, para. 37.

[70] *Tolimir* Decision, para. 7.

> matter jurisdiction. Genocide and Conspiracy to Commit Genocide, which are within the Tribunal's subject-matter jurisdiction, are still charged, *whatever the relationship between these crimes and JCEs, and whether or not the Prosecution has provided sufficient or correct details regarding the actus reus and mens rea.*[71]

This decision accords with the position taken in *Milutinović et al*, where the Trial Chamber stated that the accused Ojdanić had raised a claim which,

> does not raise the issue of the Tribunal's jurisdiction over the activities of a [joint criminal enterprise, JCE], but instead relates to the contours of JCE responsibility. Like challenges relating to the contours of a substantive crime, challenges concerning the contours of a form of responsibility are matters to be addressed at trial. The question at trial in relation to Ojdanić and each of his co-Accused—all of whom are alleged to be participants in the JCE—will be whether it is proved that each committed crimes through participation in the JCE.[72]

32. For these reasons, the Chamber finds that none of the Motions amounts to a challenge to jurisdiction within the terms of Rule 72(D)(iv). In addition, the Chamber considers it appropriate to say something further on the Motion on Specific Intent Crimes, namely that, even if the arguments brought by the Accused in that Motion *were* considered as proper challenges to jurisdiction, the Chamber would dismiss them, as there is clear Appeals Chamber authority to the effect that convictions for genocide, which is a specific intent crime, can be entered on the basis of the third form of joint criminal enterprise liability. In fact, contrary to the Accused's submission, the *Brđanin* Decision to that effect was unanimous. Judge Shahabudden issued a separate opinion in which he supported the majority's Decision clarifying that, in his view, the specific intent of the person accused of genocide via the third form of joint criminal enterprise could be shown through particular circumstances of that mode of responsibility. In other words, Judge Shahabudden was of the view that specific intent could be proved by foresight.[73] The Chamber also considers, contrary to the Accused's arguments, that the ICTR Appeals Chamber in *Rwamakuba* made its position clear on the availability in customary international law of *all three forms* of joint criminal enterprise liability to the crime of genocide:

> The Appeals Chamber holds that customary international law recognized the application of the mode of liability of joint criminal enterprise to the crime of genocide before 1992, and that in consequence the statement to that effect in Tadić Appeal Judgement was legally correct. Consequently, the [ICTR] has jurisdiction to try the Appellant on a charge of genocide through the mode of liability of joint criminal enterprise.[74]

---

[71] *Tolimir* Decision, para. 10 (footnotes omitted, emphasis added).

[72] *Prosecutor v. Milutinović et al*, Case No. IT–05–87–PT, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006, para. 23 (footnotes omitted).

[73] *Prosecutor v. Brđanin*, Case No. IT–99–36–A, Decision on Interlocutory Appeal, 19 March 2004, Separate Opinion of Judge Shahbudden, paras. 1–6.

[74] *Andre Rwamakuba v. Prosecutor*, Case No. ICTR–98–44–AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, para. 31.

33. Having reached the conclusion that none of the challenges raised in the Motions is jurisdictional, the Chamber considers that the issues raised in some of them fall to be addressed as allegations of defects in the form of the Indictment falling within Rule 72(A)(ii), and now addresses them from this perspective. Indeed in the Motion to Dismiss Paragraph 60(k), the Accused specifically presented a challenge to the form of the Indictment as an alternative basis for dismissal of that paragraph.

III. Defects in the Form of the Indictment

34. Article 18(4) of the Statute provides that, upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment "containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute." Article 21(4) states that the accused shall be entitled to minimum guarantees including a guarantee to be informed promptly and in detail of the nature and cause of the charge against him. Finally, Rule 47 deals in more detail with the submission of the indictment by the Prosecutor and provides, in paragraph (C), that this indictment shall set forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime with which the suspect is charged. The Appeals Chamber has repeatedly held that the Prosecution's obligation under Article 18(4) of the Statute and Rule 47(C) of the Rules to set out in the indictment a concise statement of the facts of the case and the crimes charged, must be interpreted in conjunction with the rights of the accused set out in Article 21(2) and Article 21(4)(a) and (b) of the Statute, which entitle the accused to be informed of the nature and cause of the charges against him, and to have adequate time and facilities for the preparation of his defence.[75]

35. Thus, the principal function of an indictment is to notify the accused in a summary manner of the nature of the crimes for which he is charged and to present the factual basis for the accusations.[76] The Prosecution is under an obligation to plead the material facts underpinning the charges in the indictment.[77] Whether a particular fact is a material one depends on the nature of the Prosecution's case, the decisive factor being the nature of the

---

[75] *See, e.g., Prosecutor v. Naletilić et al.*, Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić* Appeal Judgement"), para. 23; *Prosecutor v. Kvočka et al.*, Case No. IT–98–30/1–A, Judgement, 28 February 2005, ("*Kvočka* Appeal Judgement"), para. 27; *Prosecutor v. Blaškić*, Case No. IT–95–14–A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 209; *Prosecutor v. Kupreškić*, Case No. IT–95–16–A, Appeal Judgement, 23 October 2001 ("*Kupreškić* Appeal Judgement"), para. 88

[76] *Prosecutor v Blaškić*, Case No IT–95–14, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), 4 April 1997; *Prosecutor v Krnojelac*, Case No. IT–97–25, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 17; *Prosecutor v Brđanin*, Case No IT–99–36–T, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 18.

[77] *Prosecutor v Hadžihasanović*, Case No. IT–01–47, Decision on Form of Indictment, 7 December 2001, para. 12; *Kupreškić* Appeal Judgement, para. 88.

alleged criminal conduct charged, including the proximity of the accused to the relevant events.[78]

36. Accordingly, if the responsibility of the accused is invoked on the basis of joint criminal enterprise, the Prosecution must plead the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise.[79] The facts to be pleaded relating to the nature of his participation in the joint criminal enterprise will naturally depend on the legal requirements of that mode of responsibility, including the relevant mental element to be applied. Similarly, the facts to be pleaded relating to his alleged involvement in a particular crime will depend on the particular underlying offence(s) charged and the legal elements of that offence. Whether the identity of the alleged victims, as well as the place and approximate date of the alleged criminal acts, are "material", depends on the nature of the Prosecution case and is to be determined on a case-by-case basis, considering, *inter alia*, whether the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity, and the proximity of the accused to the alleged events.[80] Furthermore, it is established jurisprudence that the Prosecution should identify the victims to the extent possible.[81]

A. Motion to Dismiss Paragraph 60(k)

37. Article 5 of the Statute provides as follows:

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
> (b) extermination;
> (c) enslavement;
> (d) deportation;
> (e) imprisonment;
> (f) torture;
> (g) rape;
> (h) persecutions on political, racial and religious grounds;
> (i) other inhumane acts.

[78] *Kupreškić* Appeal Judgement, para. 89; *Prosecutor v Deronjić*, Case No. IT–02–61, Decision on the Form of the Indictment, 25 October 2002, para. 5.

[79] *Kvočka* Appeal Judgement, para. 28.

[80] See, *e.g.*, *Prosecutor v. Gotovina*, Case No. IT–06–90–AR73.3, Decision on joint Defence Interlocutory Appeal Against Trial Chamber's Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 26 January 2009 ("*Gotovina* Decision on Victims"), para. 17; *Naletilić* Appeal Judgement, para. 24; *Blaškić* Appeal Judgement, para. 210; *Kupreškić* Appeal Judgement, paras. 89–90.

[81] *Gotovina* Decision on Victims, para. 19; *Kupreškić* Appeal Judgement, para. 90; *Kvočka* Appeal Judgement, para. 28; *Blaškić* Appeal Judgement, para. 210.

38. The Appeals Chamber has repeatedly held that, while forms of persecution under Article 5(h) of the Statute need not necessarily themselves be considered as crimes in international law, those acts must be of equal gravity to the underlying offences listed in Article 5 of the Statute in order to amount to persecution, whether considered in isolation or in conjunction with other acts.[82] In determining whether such acts are as serious as the other enumerated underlying offences, the Appeals Chamber has further held:

> As explained above, it is not necessary that every individual act underlying the crime of persecution should be of a gravity corresponding to other crimes against humanity: underlying acts of persecution can be considered together. It is the cumulative effect of all the underlying acts of the crime of persecution which must reach a level of gravity equivalent to that for other crimes against humanity. Furthermore, the context in which these underlying acts take place is particularly important for the purpose of assessing their gravity.[83]

39. In its judgement in *Brđanin*, the Trial Chamber found that "the denial of [the rights to employment, freedom of movement, proper judicial process, and proper medical care] was of equal gravity to other crimes listed in Article 5 of the Statute".[84]

40. In its Judgement in *Krajišnik*, the Trial Chamber reviewed relevant case-law and considered as follows:

> [T]he various acts mentioned in ... the indictment [namely, (i) the denial of freedom of movement; (ii) the denial of employment through the removal from positions of authority in local government institutions and the police and the general dismissal from employment; (iii) the invasion of privacy through arbitrary searches of homes; (iv) the denial of the right to judicial process; and (v) the denial of equal access to public services], carried out on discriminatory grounds (henceforth to be understood as discriminatory in fact and carried out with discriminatory intent), and for which the general elements of crimes against humanity are fulfilled, constitute the crime of persecution when considered in conjunction with other acts.[85]

Consequently, the Chamber found:

> [T]he restrictive and discriminatory measures, namely the denial of employment, restriction on freedom of movement, violation of right to privacy and denial of equal access to public services, were part of the widespread and systematic attack against the Muslim and Croat civilian population. The Chamber therefore finds that all above acts

---

[82] *Prosecutor v. Brđanin*, Case No. IT–99–36–A, Appeal Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement"), para. 296; *Kvočka* Appeal Judgement, paras. 321–323. *See also Prosecutor v. Simić*, Case No. IT–95–9–A, Appeal Judgement, 28 November 2006, para. 177; *Naletilić* Appeal Judgement, 3, para. 574; *Blaškić* Appeal Judgement, para. 135; *Prosecutor v. Krnojelac*, Case No. IT–95–27–A, Appeal Judgement, 17 September 2003, paras. 199, 221.

[83] *Prosecutor v. Nahimana*, Case No. ICTR–99–52–A, Judgement, 28 November 2007 ("*Nahimana* Appeal Judgement"), para. 987.

[84] *Prosecutor v. Brđanin*, Case No. IT–99–36–T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement"), para. 1049.

[85] *Prosecutor v. Krajišnik*, Case No. IT–00–39–T, Judgement, 27 September 2006 ("*Krajišnik* Trial Judgement"), para. 741.

imposing restrictive and discriminatory measures against Muslims and Croats constitute persecution as a crime against humanity.[86]

41. The Appeals Chamber in *Brđanin* dismissed the argument that, as a matter of law, the denial of the rights to employment, freedom of movement, proper judicial process, and proper medical care fall outside the jurisdiction of the Tribunal as they do not rise to the level of serious violation of international humanitarian law.[87] The Appeals Chamber reached this conclusion considering that "this is Brđanin's only argument against the law which was stipulated by the Trial Chamber, and ... he does not allege that the Trial Chamber erred in fact where it found that the denial of the rights were [*sic*] of equal gravity to other crimes listed under Article 5 of the Statute".[88]

42. The Trial Chamber considers that the assessment of whether certain acts meet the sufficient gravity requirement for underlying forms of persecution involves two steps: (i) an assessment in the abstract of whether those acts *may* be considered to meet the equal gravity test as a matter of law, and (ii) an assessment of whether, in the light of the evidence presented at trial, those acts *did* meet the equal gravity test as a matter of fact. While agreeing with the Prosecution that the actual gravity of the alleged acts is a factual question that can only be determined at trial, the Chamber considers it necessary to examine whether the acts in question may meet the equal gravity test to amount to the underlying offence of persecution, a crime against humanity, to ensure that the form of the Indictment is adequate. Consequently, the Trial Chamber will address the Accused's submission that the acts alleged in paragraph 60(k) of the Indictment neither individually nor cumulatively meet the requirement of equal gravity.

43. The Trial Chamber notes the clear principle, applied in practice, and most clearly stated in *Nahimana*, that it is the "cumulative effect of all the underlying acts of the crime of persecution which must reach a level of gravity equivalent to that for other crimes against humanity".[89] Some of the forms of conduct listed in paragraph 60(k) of the Indictment were also alleged in *Brđanin*, and there the Trial Chamber, in a determination endorsed by the Appeals Chamber, concluded that, when considered together, they could satisfy the equal gravity test required to amount to persecution as a matter of law. In *Krajišnik* the Trial Chamber considered that forms of conduct virtually identical to those listed in paragraph 60(k) of the Indictment,[90] when considered in conjunction with the other alleged underlying persecutory acts pled, would be capable of constituting persecution. Having reviewed the terms of paragraph

[86] *Krajišnik* Trial Judgement, para. 790.
[87] *Brđanin* Appeal Judgement, paras. 295–297.
[88] *Brđanin* Appeal Judgement, para 297.
[89] *Nahimana* Appeal Judgement, para. 987.

60(k), the Chamber is satisfied that the forms of conduct set out therein, when considered together, are capable of satisfying the equal gravity test and thus of amounting to persecution in terms of Article 5 of the Statute. It follows that the Chamber is also satisfied that they may also do so when taken together with conduct pled in other sub-paragraphs of paragraph 60 of the Indictment. With regard to the Accused's argument that the acts in question cannot be combined to constitute a crime against humanity in the context of a joint criminal enterprise, the Chamber notes that in both of the above cases, the responsibility of the accused was based on joint criminal enterprise,[91] or acting "in concert with" other persons.[92] The question of who committed which of the acts in question where and when, and the question of whether such acts can be combined to constitute a crime against humanity are factual and legal matters to be determined at trial. The issue is not one of the jurisdiction of the Tribunal, but rather whether the terms of paragraph 60(k) of the Indictment are relevant to the charge of persecution, which on the foregoing analysis they clearly are.

44. As to the second argument of the Accused, that paragraph 60(k) should be dismissed because it is impossible for him to prepare a defence against these allegations, given their lack of specificity, the Chamber notes that persecution as a crime against humanity is alleged to have been committed in 28 geographical areas over a period of more than three years. Given the large scale and long duration of the alleged persecutory campaign, and considering the high ranking position of the Accused and the fact that the Prosecution does not allege that he physically perpetrated any of these crimes, the Chamber finds that the Prosecution has, in all the circumstances of this case, given adequate notice to the Accused of the case he has to meet. Where the precise identification of victims cannot be specified, a reference to their category or position as a group is sufficient,[93] and such a reference may also be enough to identify the people that physically perpetrated the alleged acts.[94] The Chamber considers that the acts listed in paragraph 60(k), together with the indication elsewhere in the Indictment that persecutions occurred within the listed municipalities and during the Indictment period is sufficient to inform the Accused clearly of the charges against him.

---

[90] *Cf. Prosecutor v. Krajišnik*, Case No. IT–00–39–PT, Consolidated Amended Indictment, 7 March 2002 ("*Krajišnik* Indictment"), para. 19(a).

[91] *Prosecutor v. Brđanin et al.*, Case No. IT–99–36–PT, Second Amended Indictment, 6 October 2004, para. 21ff.

[92] *Krajišnik* Indictment, para. 26.

[93] *Prosecutor v. Brđanin et al.*, Case No. IT–99–36–PT, Decision on Objections by Momir Talić to the Form of the Indictment, 20 February 2001, para. 22;, *Prosecutor v. Krnojelac*, IT–97–25–PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 55.

[94] *Prosecutor v. Krajišnik*, Case No. IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000, para. 9; Prosecutor *v. Kvočka et al.*, Case No. IT–95–30–PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 22.

B. Motion on Foreseeability

45. In light of the Appeals Chamber's views in *Gotovina* in relation to a similar challenge,[95] the Chamber considers that the Motion on Foreseeability can, and should in fact, be interpreted as a motion challenging the form of the Indictment under Article 18(4) and Rule 47(C). As explained in paragraph 10 above, the Accused has identified uncertainty in the Tribunal's jurisprudence relating to the mental elements of the third form of the joint criminal enterprise. Essentially, the question is what degree of foresight is required by an accused to satisfy the necessary standard before his liability can be established. While the question of whether the accused should foresee the commission of unplanned or deviatory crimes as possible or probable may seem to be rather theoretical, the accused in the adversarial system of the Tribunal is entitled to know in advance of trial the mental element that will apply to the question of his individual criminal responsibility. The Chamber notes the Prosecution's reliance on the test set out in *Vasiljević* but notes also the variety of language used to state the law in other cases. The Chamber is, therefore, minded to address this challenge now.

46. While the question of whether an accused ought to foresee the possibility rather than the probability of the commission of deviatory crimes lies at the heart of this issue, other requirements relevant to the necessary mental element have been discussed on various occasions, including in the original *Tadić* Appeal Judgement laying out the forms of joint criminal enterprise, with the result that the mental element has generally been defined as consisting of other sub-elements in addition to the actual foresight required of the accused. Chambers have typically identified objective and subjective elements in that requirement. The *Krajišnik* Trial Chamber, in its September 2006 Judgement, put the matter succinctly as follows:

> There are two requirements in this context, one objective and the other subjective. The objective element does not depend upon the accused's state of mind. This is the requirement that the resulting crime was a natural and foreseeable consequence of the JCE's execution. It is to be distinguished from the subjective state of mind, namely that the accused was aware that the resulting crime was a possible consequence of the execution of the JCE, and participated with that awareness.[96]

47. What exactly is meant by "a natural and foreseeable consequence" is not easy to divine. It may be seen as an attempt to restrict liability for deviatory crimes, to set bounds to the potential criminal responsibility. However, that possibility does not sit well with the way in which the objective and subjective elements were dealt with in *Kvočka et al.* There the Appeals Chamber affirmed that "an accused may be responsible for crimes committed beyond the common purpose of the systemic joint criminal enterprise, if they were a natural and foreseeable

[95] *See above* para. 29.

[96] *Krajišnik* Trial Judgement, para. 882.

consequence thereof".[97] It then clarified the requirement that the crime be a natural and foreseeable consequence of the joint criminal enterprise as follows:

> [I]t is to be emphasised that this question must be assessed in relation to the knowledge of a particular accused. This is particularly important in relation to the systemic form of joint criminal enterprise, which may involve a large number of participants performing distant and distinct roles. What is natural and foreseeable to one person participating in a systemic joint criminal enterprise, might not be natural and foreseeable to another, depending on the information available to them. Thus, participation in a systemic joint criminal enterprise does not necessarily entail criminal responsibility for all crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him.[98]

The emphasis was, therefore, on the foreseeability to the accused, which should be regarded as the "actual foresight" of that accused. The Appeals Chamber saw that as a restriction on what would otherwise be liability for consequences that were "natural and foreseeable". Viewed in this way, it is difficult to see what purpose is achieved by setting the requirement of the consequences being natural and foreseeable when ultimately the test applied in practice is that of the foresight of the accused himself.

48. The *Tadić* Appeal Judgement is the original source of these apparently distinct objective and subjective requirements. The requirements were expressed in a number of ways and from these it is necessary to distil the essential elements. In paragraph 220 the Appeals Chamber said the following:

> With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further—individually and jointly—the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose.[99] Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, *was aware that the actions of the group were most likely* to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems).[100]

---

[97] *Kvočka* Appeal Judgement, para. 86.

[98] *Kvočka* Appeal Judgement, para. 86.

[99] *Prosecutor v. Tadić*, Case No. IT–94–1–A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), para. 220.

[100] *Tadić* Appeal Judgement, para. 220 (emphases added).

49. In paragraph 228 the Chamber then summarised the position and specified the core mental elements even more succinctly. Having stated the requirement that the accused must intend to participate in the criminal purpose and to contribute to it, the Chamber continued:

> In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime *might be* perpetrated by one or other members of the group and (ii) the accused *willingly took that risk.*[101]

50. Taking these various statements together it is difficult to be sure that the foresight required is that of possibility or probability. There is plainly a difference between foresight that actions "were most likely to lead to that result" and foreseeability that "such a crime might be perpetrated". In applying their various statements to the facts of the case the Appeals Chamber ultimately made the following determination in paragraph 232:

> Accordingly, the only possible inference to be drawn is that [Tadić] had the intention to further the criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them. That non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the present case, foreseeable. [Tadić] was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took the risk.[102]

In this, their final word, the Chamber appeared to be saying that the consequences must be generally foreseeable but the particular accused must actually have foreseen them as probable and willingly took the risk in light of that knowledge.

51. The notion has been expressed on subsequent occasions in various different ways. For example, in *Krstić* the Appeals Chamber said:

> It is sufficient to show that he was aware that those acts outside the agreed enterprise were a natural and foreseeable consequence of the agreed joint criminal enterprise, and that the accused participated in that enterprise aware of the probability that other crimes may result.[103]

That statement combines probability and possibility in a rather unusual way.

52. In March 2004, in the *Brđanin* Decision on Interlocutory Appeal, the matter was put thus:

> [I]t is sufficient that the accused entered into a joint criminal enterprise to commit a different crime with the awareness that the commission of that agreed upon crime

[101] *Tadić* Appeal Judgement, para. 228 (emphases in original).

[102] *Tadić* Appeal Judgement, para. 232.

[103] *Prosecutor v. Krstić*, Case No. IT–98–33–A, Judgement, 19 April 2004, para. 150.

> made it reasonably foreseeable to him that the crime charged would be committed by other members of the joint criminal enterprise, and it was committed.[104]

The matter was put similarly in the *Milošević* Rule 98*bis* Decision and in the *Milutinović et al* Trial Judgement.[105]

53. However, in various cases the test is stated in terms similar to those of the *Brđanin & Talić* Decision on the Form of the Indictment of June 2001 as requiring that (i) the deviatory crime must have been a natural and foreseeable consequence of the execution of the joint criminal enterprise, and (ii) that the accused must be aware that the deviatory crime was a possible consequence of the execution of the joint criminal enterprise and willingly took that risk by participating in the joint criminal enterprise.[106]

54. Most recently the matter was considered by the Appeals Chamber in *Martić*, in which the Chamber explained:

> For a finding of responsibility under the third category of JCE, it is not sufficient that an accused created the conditions making the commission of a crime falling outside the common purpose possible; it is actually necessary that the occurrence of such crime was foreseeable to the accused and that he willingly took the risk that this crime might be committed.[107]

Here the emphasis is placed on the accused's own knowledge and state of mind. That is the core mental element required. It is what he foresaw that matters. However, having identified foresight by the accused as the appropriate test, the Trial Chamber did not clearly state whether that foresight must be of the possibility or the probability of the commission of deviatory crimes. While the use of the language "willingly took the risk that this crime might be committed" suggests possibility, it is not entirely clear that the Chamber was at that point identifying the degree of foreseeability.

55. This review of the jurisprudence of the Tribunal on the question of whether the test is one of probability or possibility leads the Chamber to two conclusions. Firstly, the *Tadić* Appeal Judgement required of the accused foresight that the deviatory crimes were likely to occur, that is that they would probably occur. Secondly, while subsequent jurisprudence has referred on various occasions to possibility and probability, there does not appear to have been a

---

[104] *Prosecutor v. Brđanin*, Case No. IT–99–36–A, Decision on Interlocutory Appeal, 19 March 2004, paras. 5–6.

[105] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004, para. 290; *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Judgement Volume 1 of 4, 26 February 2009 ("*Milutinović* Trial Judgement, Volume I"), para. 111.

[106] *See e.g. Prosecutor v. Brđanin and Talić*, Case No. IT–99–36–PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, paras. 28–31; *Blaškić* Appeal Judgement, para. 33; *Kvočka* Appeal Judgement, para. 83; *Prosecutor v. Stakić*, Case No. IT–97-24–A, Judgement, 22 March 2006, paras. 65, 87.

[107] *Prosecutor v. Martić*, Case No. IT–95–11–A, Judgement, 8 October 2008, para. 83.

clear rejection at any stage of the test set in *Tadić*. While the standard set there has been expressed in different ways on different occasions, it requires foresight by the accused that the deviatory crimes would probably be committed.

56. As for the objective requirement of the mental element standard, even though the Appeals Chamber in *Tadić* held that deviatory crimes must be a "natural and foreseeable" consequence of the criminal plan or purpose, the Chamber is, like the Appeals Chamber in *Kvočka*, of the view that the term "natural" carries a number of subjective connotations. For example, what is natural in one set of circumstances may not be so in another. For that reason, the Chamber considers that the more appropriate test is one of reasonably foreseeable consequences. In other words, in determining what an accused foresaw, it may be relevant to take account of what was foreseeable to any reasonable person in his position.

57. Rather than dismiss the allegations in the Indictment based on this mode of responsibility, the Chamber will allow the Prosecution to propose an amendment to correct this defect in the form of the Indictment.

C. Motion to Dismiss Count 11

58. There is no doubt that the taking of hostages is prohibited by common article 3 of the Geneva Conventions, and that breaches of common article 3 are covered by Article 3 of the Tribunal's Statute.[108] The Chamber notes that on its face common article 3 not only prohibits the taking of civilian hostages, but also of others who are "taking no active part in the hostilities". However, whether, as argued by the Accused, the victims of hostage-taking must be civilians, or must be detained unlawfully, are questions going to the elements of the crime. The Chamber, again in light of the Appeals Chamber's views in *Gotovina*, considers that this issue is a challenge to the form of the Indictment. The Chamber is also of the view that it is appropriate to deal with this issue in advance of the trial proceedings since the Chamber's determination could have a significant impact on the way in which the parties present their respective cases.

59. Despite the extensive and convoluted pleadings submitted by the Accused in relation to this issue in both his Motion and his Reply on Count 11, the Chamber is of the view that the matter is relatively simple. It has been held by the Appeals Chamber that the protections in common article 3 are now part of Article 3 of the Statute.[109] Furthermore, the Appeals Chamber has also found, relying on the International Court of Justice in the 1986 *Nicaragua* case, that

[108] *Prosecutor v. Tadić*, Case No. IT–94–1–AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision"), para. 89; *Prosecutor v. Blaškić*, IT–95–14–T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement"), para.147.

[109] *Tadić* Jurisdiction Decision, para. 89.

common article 3 of the Geneva Conventions applies to both international and non-international armed conflicts, thereby making the nature of the conflict irrelevant for the purposes of that provision.[110] Accordingly, the Accused's argument that the protections afforded by common article 3 were not part of customary international law in the context of the international armed conflict in Bosnia and Herzegovina is flawed, as is necessarily his argument that the Prosecution is attempting a counter-intuitive "rule migration" from the "relatively unregulated setting of internal armed conflict" to the "highly regulated context of international armed conflict".[111] Indeed, it has been said on many occasions before and after 1995 that common article 3 is a "minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts."[112] Thus, even accepting the Accused's argument that the Prosecution is attempting such "rule migration", the Chamber considers that there is nothing counter-intuitive in transposing what is widely considered as the very minimum protection afforded to persons taking no active part in hostilities into the context of international armed conflicts.

60. Two prior cases at this Tribunal have examined the offence of hostage-taking, namely *Blaškić* and *Kordić and Čerkez*. However, the Chambers there were concerned with allegations of taking civilians as hostages and, thus, they are not exactly on point as far as the status of those protected from hostage-taking under Article 3 is concerned. Nevertheless, common article 3 of the Geneva Conventions protects "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by ... detention, or any other cause."[113] Accordingly, the minimum protections outlined in common article 3, which include the prohibition of hostage-taking, also apply to persons who are *hors de combat* by virtue of detention. This was confirmed by the *Blaškić* Trial Chamber where convictions were entered for hostage-taking in relation to the detention of a large number of Bosnian Muslims, which the Chamber described as follows: "[a]lthough not all were necessarily civilians, all were persons placed hors de combat."[114] The Chamber notes that the UN personnel allegedly taken hostage in Srebrenica were, at the very least, rendered *hors de combat* by detention.

61. Moreover, *Blaškić* and *Kordić and Čerkez* provide a useful guide as regards the issue of whether unlawful detention is an element of the underlying offence of hostage-taking. In *Blaškić* the accused was charged with hostage-taking under Article 2(h), which is concerned

---

[110] *Tadić* Jurisdiction Decision, para. 102.

[111] Motion to Dismiss Count 11, paras. 7–8.

[112] Case concerning Military and Paramilitary Activities in and against Nicaragua, (*Nicaragua v. United States of America*), Merits, Judgment of 27 June 1986, para. 218; *Tadić* Jurisdiction Decision, paras. 102, 109; *Prosecutor v. Tadić*, Case No. IT–94–1–T, Decision on the Defence Motion on Jurisdiction, 8 August 1995, paras. 66–67.

[113] Common article 3(1) of the Geneva Conventions.

[114] *Blaškić* Trial Judgement, para. 708.

with taking of civilians as hostages as a grave breach of the Geneva Conventions, and Article 3. When addressing the former, the Chamber said the following:

> Within the meaning of Article 2 of the Statute, civilian hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death. However, as asserted by the Defence, detention may be lawful in some circumstances, *inter alia* to protect civilians or when security reasons so impel. The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage. The elements of the offence are similar to those of Article 3(b) of the Geneva Conventions covered under Article 3 of the Statute.[115]

62. As for Article 3, the Chamber referred to the definition of hostages provided in the commentary to common article 3 of the Geneva Conventions, namely that hostages are "nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces".[116] The Chamber then said the following:

> The definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the Statute, that is - persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death. The parties did not contest that to be characterised as hostages the detainees must have been used to obtain some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking.[117]

63. In *Kordić and Čerkez*, the Trial Chamber also looked at hostage-taking charges under both Articles 2(h) and 3 of the Statute. With respect to the former, it set out the elements as follows:

> Consequently, the Chamber finds that an individual commits the offence of taking civilians as hostages when he threatens to subject civilians, who are unlawfully detained, to inhuman treatment or death as a means of achieving the fulfilment of a condition.[118]

64. While looking at the elements of hostage-taking under Article 3, that Chamber noted the various categories of protected persons covered by common article 3, and held, relying on the *Blaškić* Trial Judgement, that the elements of the offence of taking of hostages under Article 3 of the Statute are essentially the same as those of the offence of taking civilians as hostage as described by Article 2 (h), namely that they are persons "unlawfully deprived of their freedom, often wantonly and sometimes under threat of death," and taken hostage in order to "obtain

---

[115] *Blaškić* Trial Judgement, para. 158.

[116] *Blaškić* Trial Judgement, para. 187.

[117] *Blaškić* Trial Judgement, para. 187.

[118] *Prosecutor* v. *Kordić* and *Čerkez*, Judgment, IT–95–14/2–T, 26 February 2001 ("*Kordić* Trial Judgement"), paras. 314–315.

some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking."[119]

65. In light of the above, the Chamber is of the view that unlawful detention is indeed an element of the offence of hostage-taking. The lawfulness of detention does not depend on the circumstances in which any individual comes into the hands of the enemy but rather depends upon the whole circumstances relating to the manner in which, and reasons why, they are held. Thus, the unlawfulness of detention relates to the idea that civilians or those taking no active part in hostilities are taken or held hostage not to ensure their safety or to protect them, but rather to gain an advantage or obtain a concession. Another circumstance that could potentially make a lawful detention unlawful are threats to kill and/or injure these individuals, or the actual use of violence against them. In *Blaškić*, convictions for hostage-taking were entered in relation to Bosnian Muslim hostages, some of whom were *hors de combat,* since their "detention could in no way be deemed lawful because its main purpose was to compel the [the Bosnian army] to halt its advance." In addition, the Chamber held that all the detainees were threatened with death.[120] In the present Indictment, Count 11 explicitly states that the UN personnel were taken hostage in order to compel NATO to abstain from conducting air-strikes against Bosnian Serb military targets. It also provides that these UN personnel was threatened with death and/or injury during their detention.[121]

66. For the reasons outlined above, the Chamber is of the view that there is no defect in the Indictment as far as Count 11 is concerned.

D. Motion on Omission Liability

67. The Chamber considers that the Motion on Omission Liability should also be interpreted as a motion challenging the form of the Indictment under Article 18(4) and Rule 47(C), in light of the Appeals Chamber's views in *Gotovina*. In effect, the Accused is arguing that paragraphs 30, 31, and 88 are defective by the inclusion therein of references to omissions. Moreover, the Chamber considers it appropriate to address the challenge now, so that both the Accused and the Prosecution can tailor their pleadings in this case accordingly.

68. Article 7(1) of the Statute provides as follows:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

---

[119] *Kordić* Trial Judgement, para. 319. *See also Blaškić* Appeal Judgement, paras. 638–639.

[120] *Blaškić* Trial Judgement, para. 708.

[121] Indictment, paras. 84, 86.

69. Although paragraph 30 refers to planning, instigating, ordering, and/or aiding and abetting through acts and *omissions*, it is clear, when read in context with paragraph 31, that such omissions only refer to the Accused's alleged individual criminal responsibility through instigation and aiding and abetting, and not through planning or ordering.[122] Consequently, the Chamber will only deal with the issue whether an accused can be held criminally responsible through aiding and abetting and instigation by omission.

70. The Appeals Chamber has repeatedly held that an accused may aid and abet, not only by means of positive action, but also through omission.[123] For example, in *Ntagerura et al.*, the Appeals Chamber found that an accused could be held liable for culpable omissions,[124] and repeated this approach in *Galić*.[125] The Trial Chamber in *Mrkšić et al.* held:

> While each case turns on its own facts, mere presence at the scene of a crime will not usually constitute aiding or abetting; however, where the presence bestows legitimacy on, or provides encouragement to, the actual perpetrator, that may be sufficient. For example, the presence of a superior may operate as an encouragement or support, in the relevant sense. Responsibility for having aided and abetted a crime by omission may arise, regardless of whether the accused's presence at the crime scene provided encouragement to the perpetrators, when the accused was under a duty to prevent the commission of the crime but failed to act, provided his failure to act had a substantial effect on the commission of the crime and he had the requisite *mens rea*.[126]

71. The Trial Chamber in *Milutinović et al.* confirmed this position, and concluded:

> [A]long with the "approving spectator" doctrine, [responsibility by aiding and abetting] also encompasses culpable omissions, where (a) there is a legal duty to act, (b) the accused has the ability to act, (c) he fails to act either intending the criminal consequences or with awareness and consent that the consequences will ensue, and (d) the failure to act results in the commission of the crime.[127]

72. The Chamber considers that the Tribunal's jurisprudence regarding liability for aiding and abetting through omissions is well established. The Accused has not shown that the Trial

---

[122] *See* Indictment, paras. 30–31, 88.

[123] *Nahimana* Appeal Judgement, para 482; *Prosecutor v. Stanislav Galić*, Case No. IT–98–29–A, Judgment, 30 November 2006 ("*Galić* Appeal Judgement"), para. 175, *Prosecutor v. Orić*, Case No. IT–03–68–A, Appeal Judgement, 3 July 2008, para. 43; *Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe*, Case No. ICTR–99–46–A, Judgement, 7 July 2006, paras. 334.

[124] *Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe*, Case No. ICTR–99–46–A, Appeal Judgement, 7 July 2006, para. 334; *see also Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe*, Case No. ICTR–99–46–T, Judgement, 25 February 2004, para.659.

[125] *Galić* Appeal Judgement, para. 175.

[126] *Prosecutor v. Mrkšić, Radić, and Šljivančanin*, Case No. 95–13/1–T, Judgement, 27 September 2007 ("*Mrkšić* Trial Judgement"), para. 553 (footnotes omitted); *see also Blaškić* Appeal Judgement, para. 47; *Prosecutor v. Aleksovski*, Case No. IT–95–14/1–T, Judgement, 25 June 1999, para 87; *Prosecutor v. Kunarac, Kovač, and Vuković*, Cases Nos. IT–96–23–T & IT–96–23/1–T, Judgement, 22 February 2001, para. 391; *Prosecutor v. Krnojelac*, Case No. IT–95–27–T, Judgement, 15 March 2002, para. 88; *Prosecutor v. Vasiljević*, Case No. IT–98–32–T, Judgement, 29 November 2002; para. 70; *Brđanin* Trial Judgement, para. 271; *Prosecutor v. Blagojević and Jokić*, Case No. IT–02–60–T, Judgement, 17 January 2005, para. 726; *Prosecutor v. Orić*, Case No. IT–03–68–T, Judgement, 30 June 2006 ("*Orić* Trial Judgement"), para. 283.

[127] *Milutinović* Trial Judgement, Volume I, para. 90.

and Appeals Chambers' findings in that regard have been wrongly decided, and thus the Chamber considers that an accused's omissions *may* entail criminal responsibility by way of aiding and abetting. Consequently, and considering that the language in paragraph 30 of the Indictment may be interpreted as encompassing omissions for all or *some* of the modes of liability contained therein, the Chamber finds that this particular paragraph is not defective.

73. Paragraph 31, on the other hand, refers specifically to omissions with regard to both instigation and aiding and abetting. As with aiding and abetting, the Chamber notes that there is Tribunal jurisprudence establishing that instigation as a mode of liability may occur if the physical element of intentionally prompting another to act in a particular way—either through positive acts or through *omissions*—is satisfied. The *Blaškić* Trial Chamber held that omissions *may* constitute instigating within the scope of Article 7(1) of the Tribunal's Statute, and explained that the prompting constituting instigation *may* occur through a culpable omission, and not only through positive acts.[128] The Trial Chamber explained that a military commander could be responsible as an instigator if, by not taking measures against subordinates who violate the law of war, he allows his subordinate units to continue to commit the acts. In such a case, the military commander would be held responsible under Article 7(1) by instigating and not under Article 7(3) if it was proven that there was a causal connection between the instigation and the perpetration of the act constituting a crime, and that the subordinates would not have committed the subsequent crimes if the commander had not failed to punish the earlier ones.[129]

74. A similar approach has been subsequently adopted by various Trial Chambers.[130] Specifically, the *Brđanin* Trial Chamber concluded that "[b]oth acts and omissions may constitute instigating, which covers express and implied conduct";[131] identical language was

---

[128] *Blaškić* Trial Judgement, para. 280.

[129] *Blaškić* Trial Judgement, paras. 338–339.

[130] *Prosecutor v. Stanislav Galić*, Case No. IT–98–29–T, Judgment, 5 December 2003 ("*Galić* Trial Judgement"), para. 168 (footnotes omitted), establishing that "[i]t has been held in relation to "instigating" that omissions amount to instigation in circumstances where a commander has created an environment permissive of criminal behaviour by subordinates"; *Orić* Trial Judgement, para. 283 (footnotes omitted), establishing that "[t]o the same degree as it is the case with instigating, aiding and abetting can be fulfilled by express or implied conduct as well as constituted by acts or omissions, provided that in the latter case, under the given circumstances, the accused was obliged to prevent the crime from being brought about"; *Mrkšić* Trial Judgement, para. 549; *see also Prosecutor v. Ramush Haradinaj et al.*, Case No. IT–04–84–T, Judgement, 3 April 2008, para. 141 (footnotes omitted), establishing that

> Article 7(1) covers first and foremost the physical perpetration of a crime or the culpable omission of an act that was mandated by law. Article 7 (1) also reflects the principle that criminal responsibility for a crime in Articles 2 to 5 of the Statute does not attach solely to individuals who commit crimes, but may also extend to individuals who contribute to crimes in the other ways referred to above. For an accused to be found liable for a crime pursuant to one of these modes of responsibility, the crime in question must actually have been committed. Furthermore, his or her actions must have contributed substantially to the commission of the crime. Liability may also attach to omissions, where there is a duty to act.

[131] *Brđanin* Trial Judgement, para. 269.

adopted by the *Limaj et al.* and the *Boškoski & Tarčulovski* Trial Chambers.[132] More recently, the *Milutinović* Trial Chamber held that an "accused's prompting may occur not only through positive acts, but also through omissions"[133].

75. Furthermore, the Appeals Chamber in the *Galić* case has affirmed that, in principle, an omission, where there is a legal duty to act, may lead to criminal responsibility under Article 7(1) of the Statute.[134] The *Galić* Trial Chamber had earlier found that the modes of responsibility under Article 7(1) of the Statute "may be performed though positive acts or through culpable omission".[135] Galić challenged the Trial Chamber's findings and argued that acts of persons accused under Article 7(1) of the Statute may not be acts committed by culpable omission, and that a positive action "which clearly indicates the participation in the unlawful action" is required for responsibility under Article 7(1) of the Statute.[136] The *Galić* Appeals Chamber, having established a general principle referred to above, nevertheless overturned the *Galić* Trial Chamber's findings with respect to *ordering* through an *omission*. However, it did not discuss other forms of liability under Article 7(1) through omissions, thus leaving undisturbed the Trial Chamber's finding that omissions may amount to instigations.[137]

76. The Accused has not shown any reason for the Chamber to depart from the Tribunal's jurisprudence. The Chamber acknowledges that, although it may be almost impossible in practice to distinguish between positive acts and omissions, and between responsibility through instigation by omission and superior responsibility, this does not mean that in all circumstances instigation by omission is impossible. The Chamber thus accepts that an omission *may* constitute instigation and considers that the inclusion of such text in paragraph 31 does not, in itself, render the Indictment defective.

77. As noted above, the Accused does not challenge the jurisdiction of the Chamber over instigation and aiding and abetting as forms of liability. Both are expressions which denote conduct which could consist in whole or in part of a failure to act, including in circumstances where there is a duty to act. Whether and to what extent failures to act or omissions can be said

---

[132] *Prosecutor v. Limaj et al.*, Case No. IT–03–66–T, Judgement, 30 November 2005, para. 514; *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT–04–82–T, Judgement, 10 July 2008, para. 399.

[133] *Milutinović* Trial Judgement, Volume I, para. 83.

[134] *Galić* Appeal Judgement, para. 175.

[135] *Galić* Trial Judgement, para. 168.

[136] *Prosecutor v. Stanislav Galić*, Case No. IT–98–29–A, Defence Appellant's Brief, 19 July 2004 ("*Galić* Defence Appeal Brief"), paras. 108–109, referring to Galić Trial Judgement, para. 168. Galić also challenged the holding of the Trial Chamber that "a superior may be found responsible under Article 7(1) [of the Statute] where the superior's conduct had a positive effect in bringing about the commission of crimes by his or her subordinates, provided the *mens rea* requirements for Article 7(1) responsibility are met" (*Galić* Trial Judgement, para. 169); *Galić* Defence Appeal Brief, para. 110.

[137] *Galić* Appeal Judgement, para. 176.

to amount to, or contribute to, instigating, or aiding and abetting in the execution of, a crime, can only be determined in light of the evidence actually led in the trial. Only then can that be determined in accordance with the ordinary English meaning of these expressions. The Chamber notes that the Prosecution pleads that the Accused instigated and aided and abetted in the execution of crimes by acts *and* omissions. Thus, the whole of the conduct, positive and negative, of the Accused will be considered by the Chamber before it determines whether his omissions were in fact an element in the instigation of, or aiding and abetting in, any crimes. It will be open to the Accused to argue then that any evidence relating to alleged failures by him to act do not have probative value in support of those modes of liability.

78. The Chamber is therefore satisfied that paragraphs 30, 31, and 88 of the Indictment are not legally defective, and dismisses the challenges to the Indictment raised in the Motion on Omission Liability.

E. Motion on Specific Intent Crimes

79. Having found that the Motion on Specific Intent Crimes is not a proper jurisdictional challenge, the Chamber also does not consider that it can be viewed as challenging the form of the Indictment.

F. Motion on Superior Responsibility

80. Having found that the Motion on Superior Responsibility does not raise issues of a jurisdictional nature, the Chamber also does not consider that it can be viewed as challenging the form of the Indictment. Rather, as found in *Perišić*, the issues raised in the Motion on Superior Responsibility are for determination on the evidence led at trial concerning the Accused's "effective control" over the persons involved in the commission of the crimes alleged in the Indictment.[138]

IV. Disposition

81. Parties are reminded that their automatic right of appeal is confined to challenges to jurisdiction, which include the determination whether or not any challenge is truly jurisdictional. Where the Trial Chamber has determined that a challenge characterised as jurisdictional is not in fact jurisdictional, but has nevertheless gone on to consider it as a challenge to the form of the Indictment, parties require certification to appeal the Chamber's determinations on the form of the Indictment.

[138] *Prosecutor v. Perišić*, Case No. IT–04–81–PT, Decision on Preliminary Motions, 29 August 2005, para. 31.

82. For all the reasons outlined above, pursuant to Rules 47, 54, and 72 of the Rules, the Chamber hereby:

(a) **GRANTS** to the Accused the extension of time to reply to the Prosecution Response on Superior Responsibility, as well as leave to reply on the same issue, and, therefore, accepts his Reply on Superior Responsibility filed on 20 April 2009.

(b) **GRANTS** to the Accused leave to reply to the Prosecution Responses on Paragraph 60(k), Foreseeability, Count 11, Omission Liability, and Specific Intent Crimes.

(c) **GRANTS**, in part, the Motion on Foreseeability, and **ORDERS** the Prosecution to propose an amendment to the Indictment, as discussed above in the section dealing with that Motion. The deadline for this amendment will be discussed at the next Status Conference scheduled for 6 May 2009.

(d) **DENIES** the Motions in all other respects.

Done in English and French, the English text being authoritative.

Judge Iain Bonomy
Presiding

Dated this twenty eighth day of April 2009.
At The Hague
The Netherlands

[Seal of the Tribunal]