SUD BOSNE I HERCEGOVINE СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Case No.: **X-KRŽ-06/200**

Date: **Delivered 16 February 2009**
Published 16 July 2009

Before: **Judge Mirza Jusufović, Presiding**
Judge Tihomir Lukes
Judge Phillip Weiner

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

ŽELJKO MEJAKIĆ, MOMČILO GRUBAN and DUŠKO KNEŽEVIĆ

SECOND INSTANCE VERDICT

Counsel for the Prosecutor's Office of Bosnia and Herzegovina:

Mr. David Schwendiman

Counsel for the Appellant Željko Mejakić:

Mr. Jovan Simić and Mr. Ranko Dakić

Counsel for the Appellant Momčilo Gruban:

Mr. Duško Panić and Mr. Goran Radić

Counsel for the Appellant Duško Knežević:

Mr. Nebojša Pantić and Mr. Milenko Đ. Ljubojević

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Sarajevo, 16 February 2009

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Appellate Division of Section I for War Crimes comprising Judges Mirza Jusufović, as the Presiding Judge, Tihomir Lukes and Phillip Weiner, as members of the Panel, with the participation of Legal Officer Neira Kožo as the Minutes-taker, in the criminal case against the accused Željko Mejakić, Momčilo Gruban and Duško Knežević, for the criminal offense of Crimes against Humanity in violation of Article 172(1)(a), (e), (f), (g), (k) and (h) of the Criminal Code of Bosnia and Herzegovina, all as read with Articles 29 and 180(1) of the Criminal Code of Bosnia and Herzegovina, deciding on the appeals filed by the Defense Counsel for the accused Željko Mejakić, attorney Jovan Simić, Appeal dated 6 November 2008, Defense Counsel for the accused Momčilo Gruban, attorney Duško Panić, Appeal dated on 5 November 2008, and attorney Goran Rodić, Appeal dated on 5 November 2008, and the Defense Counsel for the accused Duško Knežević, attorney Nebojša Pantić and Milenko Đ. Ljubojević, Appeal dated 31 October 2008, against the Court of Bosnia and Herzegovina Verdict Ref. number X-KR-06/200 dated 30 May 2008, at the Panel session held on 16 February 2009 and attended by the Prosecutor of the Prosecutor's Office of BiH, David Schwendiman, the accused Željko Mejakić and his Defense Counsel Jovan Simić and Ranko Dakić, the accused Momčilo Gruban and his Defense Counsel Duško Panić and Goran Rodić, and the accused Duško Knežević and his Defense Counsel Nebojša Pantić and Milenko Đ. Ljubojević, rendered the following

V E R D I C T

Partially granting the appeals filed by Defense Counsel for the accused Željko Mejakić, attorney Jovan Simić, Defense Counsel for the accused Momčilo Gruban, attorneys Duško Panić and Goran Rodić, and Defense Counsel for the accused Duško Knežević, attorneys Nebojša Pantić and Milenko Đ. Ljubojević and **modifying** the Court of Bosnia and Herzegovina Verdict Ref. Number X-KR-06/200 dated 30 May 2008 as follows:

- **with respect to the legal qualification of the criminal offence**, whereby the accused Željko Mejakić as the Chief of Security Guards at the Omarska Camp, Momčilo Gruban as the leader of one of the three police guard shifts in the Omarska Camp and Duško Knežević, who held no official position in the Omarska and Keraterm camps, are found guilty of having committed, by their

actions as described in the operative part of the First Instance Verdict, the criminal offense of Crimes against Humanity under Article 172(1)(a), (e), (f), (g), (k) and (h) of the Criminal Code of Bosnia and Herzegovina, all as read with Articles 29 and **180(1)** of the Criminal Code of Bosnia and Herzegovina;

- **with respect to the Sentencing Section related to the accused Momčilo Gruban,** whereby, pursuant to Articles 49 and 50 of the Criminal Code of Bosnia and Herzegovina, he is **sentenced to 7 (seven) years imprisonment** for the criminal offense of Crimes against Humanity under Article 172(1)(a), (e), (f), (g), (k) and (h) of the Criminal Code of Bosnia and Herzegovina, all as read with Articles 29 and 180(1) of the Criminal Code of Bosnia and Herzegovina; **and**

- with respect to the **credit to be given to the accused Momčilo Gruban for the time he spent in custody, whereby the accused shall be credited the time he spent in custody at the International Criminal Tribunal for the Former Yugoslavia** from 2 May 2002 until 20 July 2002, from 9 December 2002 until 11 December 2002, from 18 July 2005 until 8 May 2006 and onwards pursuant to the decisions of this Court.

In their other parts, the Appeals are dismissed as unfounded, and the First Instance Verdict upheld.

R e a s o n i n g

Procedural History:

First Instance Verdict:

1. By the Verdict of the Court of Bosnia and Herzegovina Ref. number: X-KR-06/200, dated 30 May 2008, the accused Željko Mejakić, Momčilo Gruban and Duško Knežević were found guilty of the following:
   - the accused Mejakić guilty of the criminal offense of Crimes against Humanity under Article 172(1) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), specifically: sub-paragraph a) depriving another person of his life (murder), sub-paragraph e) imprisonment (arbitrary and unlawful confinement of camp detainees), sub-paragraph f) torture (beatings and other physical assaults, sub-paragraph g) sexual violence (rapes and other forms of sexual abuse), sub-paragraph k) other inhumane acts (confinement in inhumane conditions, harassment, humiliation and other psychological abuse) and sub-paragraph h) persecution, all as read with Articles 29 and 180(1) and (2) of CC of BiH;

- the accused Gruban guilty of the criminal offense of Crimes against Humanity under Article 172(1) of CC of BiH, specifically: sub-paragraph a) depriving another person of his life (murder), sub-paragraph e) imprisonment (arbitrary and unlawful confinement of camp detainees), sub-paragraph f) torture (beatings and other physical abuse), sub-paragraph g) sexual violence (rapes and other forms of sexual abuse), sub-paragraph k) other inhumane acts (confinement in inhumane conditions, harassment, humiliation and other psychological abuse) and sub-paragraph h) persecution, all as read with Articles 29 and 180(1) and (2) of CC of BiH; and
- the accused Knežević guilty of the criminal offense of Crimes against Humanity under Article 172(1) of CC of BiH, specifically: sub-paragraph a) depriving another person of his life (murder), sub-paragraph f) torture (beatings and other physical abuse), sub-paragraph k) other inhumane acts (confinement in inhumane conditions, harassment, humiliation and other psychological abuse) and sub-paragraph h) persecution (all acts as described in Counts 3 and 5 of the Indictment), and as to Count 3 only per sub-paragraph g) sexual violence (rapes and other forms of sexual abuse), all as read with Articles 29 and 180(1) of CC of BiH.
- For the criminal offense described above the accused Željko Mejakić was sentenced to long-term imprisonment of 21 years, the accused Momčilo Gruban to 11 years imprisonment, and the accused Duško Knežević to long-term imprisonment of 31 years.

2. Based on the provision set forth in Article 56 of CC of BiH, in conjunction with Article 2(4) of the Law on Transfer of Cases from the International Criminal Tribunal for the Former Yugoslavia to the Prosecutor's Office of Bosnia and Herzegovina (Law on Transfer of Cases), the time that, according to decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Court of Bosnia and Herzegovina (Court of BiH), the accused spent in custody, specifically the accused Željko Mejakić from 1 July 2003 onwards, the accused Momčilo Gruban from 2 May 2002 until 17 July 2002 and from 21 July 2005 onwards, and the accused Duško Knežević from 18 May 2002 onwards, shall be credited towards the pronounced term of imprisonment.

3. In addition to that, pursuant to Article 188(4) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC of BiH), the accused persons were relieved of their duty to reimburse the costs of the proceedings, and the costs shall be reimbursed from within the budget.

4. Pursuant to the provision of Article 198(2) of CPC of BiH, the injured parties were instructed that they may take civil action to pursue their claims under property law.

Appeals by Counsel for the Accused:

5. The referenced Verdict has been appealed within the statutory deadline by counsel for all three accused. Counsel for the first accused, Željko Mejakić, appealed on the following grounds: essential violation of the provisions of criminal procedure, violation of the criminal code, erroneously or incompletely established facts of the case and the decision as to the sanctions, as well as the violation of the BiH Constitution and violations of the rules of the European Convention on Human Rights and Fundamental Freedoms (ECHR). The Appeal moved the Appellate Panel to revoke the First Instance Verdict and schedule a retrial, or else modify the Verdict by acquitting the accused Željko Mejakić of the charges.

6. Counsel for the second accused, Momčilo Gruban, filed appeals on the grounds of essential violation of the provisions of criminal procedure, violation of the criminal code, erroneously and incompletely established facts of the case and the decision as to the sanctions. Both Appeals moved the Appellate Panel to modify the challenged Verdict and acquit the accused Momčilo Gruban of the charges, or else revoke the Verdict and order a retrial.

7. Counsel for the third accused, Duško Knežević, also filed an Appeal on the grounds of essential violations of the provisions of criminal procedure (Article 297(1)(d) and (k) of CPC of BiH), violation of the criminal code (Article 298(d) of CPC of BiH) and erroneously or incompletely established facts of the case (Article 299 of CPC of BiH) and moved the Appellate Panel to grant the Appeal, revoke the First Instance Verdict and order a retrial.

8. The Prosecutor's Office of Bosnia and Herzegovina (the Prosecution) has filed a single response to all appeals mentioned above, where they submitted that the appeals filed by the accused persons against the First Instance Verdict were entirely unfounded and that therefore they should be dismissed pursuant to Article 310 of CPC of BiH. The Prosecution is of the view that the First Instance Verdict against the accused Željko Mejakić, Momčilo Gruban and Duško Knežević should be upheld without any modification.

9. At the session of the Appellate Panel held on 16 February 2009, pursuant to the provision of Article 304 of CPC of BiH, the parties gave a brief presentation of the appeals and the response to the appeals. The accused Željko Mejakić and Momčilo Gruban also filed with the Court their written presentations. Subsequently, the Defense for all the accused filed with the Court written submissions regarding the Prosecution Response to the Appeals from the First Instance Verdict.

10. Having evaluated the contested Verdict within the allegations made in the Appeal, the Appellate Division Panel has ruled as stated in the Enacting Clause due to the following reasons:

Essential Violations of the Criminal Procedure:

11. The Appellate Panel finds ill-founded the allegations made in the Appeal that there were grave violations of the criminal procedure provisions, more precisely, that the First Instance Verdict was grounded on the evidence it could not be grounded on /Article 297(1)(i) of the CPC of BiH/ and that the right of the Accused to defense was violated in the course of the proceedings /Article 297(1)(d) of the CPC of BiH/.

12. The Appeal filed by the Counsel for the accused Mejakić submits that the right of the accused to their defence was violated by the Court's failure to prepare and disclose a timely record of the trial.[1] Specifically the Appeal submits that transcripts for only fourteen of the one hundred hearings were prepared and distributed and that Article 253(2) of the CPC of BiH was violated as it states that:

> *"A record of the entire course of the main trial must be kept. If the course of the main trial was recorded in accordance with Article 155 of this Code, the transcript of the undertaken action shall, upon justified request of the parties and the defence attorney, be submitted to the parties and the defence attorney no later than three days from the day of the undertaken action in the main trial. The justifiability of the request shall be decided upon by the judge or the presiding of the Panel."*

13. Bearing in mind not only the above cited provision, but also other provisions of the CPC of BiH (Article 155 and other), the Appeals Chamber notes, however, that the record of a hearing need not be kept in the form of a transcript, as insisted upon in the Appeals, but may be audio or audio-visually recorded, and a copy of the recording delivered to the accused and their defense counsel.[2] In the instant case, the entire course of the first instance proceedings were both audio and video recorded. These recordings were available to the lawyers, as well as the Accused and they could review them or get a CD. Since these records may be easily obtained, are verbatim recording and contain the entire course of the proceedings, the Appellate Panel finds that the rights of the Accused were not violated because instead

[1] Mejakić Appellate Brief at paras. 121-132.
[2] See Article 155(1) of the CPC of BiH which states: *"As a rule, all undertaken actions during the criminal procedure shall be audio or audio-visual recorded…."*

of the transcripts they were delivered CDs with the entire course of the proceeding, also containing all details as prescribed by the CPC. Therefore, the arguments made in the Appeals that the First Instance Panel did not comply with the law are unfounded and as such could not be accepted.

14. Also unacceptable are the arguments made in the Appeal that the trial records are not reliable because the audio/videotapes are clear and verbatim recordings and are considered to be valid records. In addition to that, none of the Appeals identified any specific facts or incidents indicating that this alleged problem affected the rendering of a lawful and correct verdict. Accordingly, this assertion made in the Appeal is also dismissed as unfounded.

15. Also without merit are the assertions made in the Appeal by the Counsel for the first accused, that this is the only proceeding during which transcripts were not made, as opposed to all other trials. These assertions are entirely arbitrary, not proven by anything and in contravention of the actual proceedings of the Court, and therefore they must be dismissed.

16. The Defence claims that they were not provided with translated ICTY transcripts, with the exception of one translated page. To that end, the First Instance Panel issued Decision No: X-KRN-06/200 of 18 April 2007 and properly explained their reasons to dismiss the motion filed by the Defence to be provided with translated transcripts of testimonies given before the ICTY. It is explained in the Decision that by providing technically acceptable audio-video records in the Bosnian/Croatian/Serbian language of the testimonies given before the ICTY by the witnesses who would testify before the Court of BiH, the Prosecution satisfied its obligation to disclose the evidence. The Appellate Panel finds that the conclusion reached by the First Instance Panel is fair and reasonable, and the reasoning thereof entirely acceptable, bearing in mind at the same time that none of the Appeals identify any specific facts or incidents indicating that this position taken by the Court affected the rendering of a lawful and correct verdict. Accordingly, this assertion made in the appeal is dismissed as unfounded as well.

17. According to the submissions made in the Appeal filed by the Counsel for the accused Mejakić, the First Instance Panel erred by failing to list and consider three evidentiary items: (1) transcripts of the ICTY testimony of Mirko Ješić, (2) video footage of the layout of the rooms and toilettes, and (3) the investigative report of Christian Nielsen.[3] The Defense further submits that the respective evidentiary items were tendered into evidence and admitted by the Court during the main hearing.

[3] Mejakić Appellate Brief at paras. 155-157.

18. However, having examined the case file, the Appellate Panel notes that none of these three items were ever properly tendered into evidence by the Defense, and thus the First Instance Panel was not in any way required to consider them. Although the Appeal alleges that these items were admitted into evidence, the Appeal fails to identify any date or time during the trial when they were admitted.[4] Nor does counsel for the Accused ever mention or refer to these items during his closing argument.[5] The only reference to any of these materials (video footage of the layout of the rooms and toilette) is in his evidence proposal to the Trial Court, however, there too, the video footage is listed only as a potential exhibit. [6]

19. When examining this assertion from the Appeal, the Appellate Panel also took into consideration the fact that during the testimony of witness Zlata Cikota, the video footage was shown to the witness but she could not recognize the two rooms depicted therein. Specifically, she could not identify the first room depicted in the video as the place where she slept,[7] while the second room was not the bathroom where she had witnessed certain events.[8] However, upon the completion of her testimony, defence counsel failed to tender the video into evidence,[9] therefore it was not tendered into evidence. A possible reason for that is exactly the fact that the witness could not identify the footage in the video, which is why the footage lost its probative value.

20. The Appeals Chamber thus concludes that since the Accused has failed to establish that these items were admitted into evidence or even tendered by counsel, his allegation of error by the First Instance Panel is without factual basis. Therefore, this assertion had to be dismissed as unfounded as well.

21. It is also argued in the Appeals that the Accused were denied their right to a defence, since they were not allowed to cross-examine several witnesses at trial. It is also indicated that the defence teams of all the Accused did not, nor do they now, object to admitting the prior testimony of a witness who had died, but did object to admission of prior testimonies of the following witnesses: Ismet Dizdarević, Abdulah Brkić, Sifeta Sušić, Edin Ganić, K012, K021, and K031, since they believed there were no legal grounds to do so.

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[4] Ibid.
[5] See Mejakić Trial Hearing dated 22 May 2008.
[6] See *Proposal of the Defense Evidence for the Accused Željko Mejakić,* dated 3 December 2007, at Section B, para. 31.
[7] See Mejakić Trial Hearing dated 8 May 2007, Tape 2 of 2 at 49:58-50:08, 52:00 to 52:05 and 52:15.
[8] See Mejakić Trial Hearing dated 8 May 2007, Tape 2 of 2 at 1:16:24, 1:17:32, 1:17:56 and 1:18:20.
[9] Testimony of Witness Zlata Cikota dated 8 May 2007.

22. With respect to the objection mentioned above, the Appeals Panel notes that Articles 15 and 273 of the CPC of BiH, as well as Article 3 of the Law on the Transfer of Cases From the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Court in BiH provide the standards for the review of this issue. Article 15 of the CPC of BiH contains provisions relevant to free evaluation of evidence and it provides that it is:

> *"The right of the Court, Prosecutor and other bodies participating in the criminal proceedings to evaluate the existence or non-existence of facts shall not be related or limited to special formal evidentiary rules."*

23. Article 273 of the CPC of BiH defines exemptions from the immediate presentation of evidence and it reads as follows:

> *1) Prior statements given during the investigative phase are admissible as evidence in the main trial and may be used in direct or cross-examination or in rebuttal or in rejoinder and subsequently presented as evidence. The person must be given the opportunity to explain or deny a prior statement.*
>
> *2) Notwithstanding paragraph 1 of this Article, records on testimony given during the investigative phase, and if judge or the Panel of judges so decides, may be read or used as evidence at the main trial only if the persons who gave the statements are dead, affected by mental illness, cannot be found or their presence in Court is impossible or very difficult due to important reasons.*

24. Article 3 of the Law on Transfer of Cases provides that:

> *(1) Evidence collected in accordance with the ICTY Statute and RoPE may be used in proceedings before the courts in BiH.*
>
> *(2) The courts shall not base a conviction of a person solely or to a decisive extent on the prior statements of witnesses who did not give oral evidence at trial.*

25. Having examined the First Instance Panel's decision against these standards, the Appellate Panel finds that valid reasons existed supporting the admission of the statements given by those witnesses although they were not heard at the main trial. However, it should also be borne in mind that the First Instance Panel also noted that the Witness Support Section of The Registry attempted to contact those witnesses, who for various reasons would not be able to appear and testify before the Court of BiH. The First Instance Panel further noted that the witnesses, since they live abroad, were refusing to

travel to Bosnia and testify before the Court. Given that the Court could not take legal measures which would secure their presence, it was impossible to secure their testifying.[10] Also, the First Instance Panel was entirely correct to take into account the fact that these witnesses are suffering severe psychological and emotional after-effects as a consequence of their traumatic experience from the camp and that they are considered ''vulnerable witnesses'' pursuant to Article 11 on the Law of Protection of Witnesses. The First Instance Panel correctly found that these witnesses could be subjected to a difficult ordeal should they testify at the main trial.[11] Based on all these facts, the First Instance Panel correctly concluded that these witnesses were considered unavailable as ''their coming to the Court was impossible or made considerably difficult for important reasons.''[12]

26. Considering that the Defence did not oppose to admitting the testimony of the deceased witness – Ismet Dizdarević – the Appellate Panel finds no problematic issue relating to the introduction of his prior testimony, and based on the reasons previously discussed, this Panel finds that with respect to other witnesses as well legal or factual grounds exist justifying the position taken by the First Instance Panel and supporting their decision. Thus, this is not an action constituting a grave violation of the criminal procedure, as argued in the Appeals. On the contrary, the Appeals Panel is of the view that the First Instance Panel applied the proper standards to evaluate the matter. Moreover, it also had to be taken into account that the First Instance Panel considered the statements of these witnesses since they had been previously subjected to cross-examination before ICTY and they were corroborated by means of testimony of other witnesses who had been subjected to cross-examination in the case at bar.[13] The Appeals Panel thus considers the analysis done by the First Instance Panel to be reasonable and the conclusion logical, and therefore dismisses this assertion made in the appeal as unfounded.

27. In a related matter, the Appeals Panel concludes that the First Instance Panel acted properly in admitting the evaluation report drafted by expert witness Nicholas Sebire. This report, having previously been used before the ICTY,[14] was admissible pursuant to Article 6 of the Law on Transfer of Cases.[15]

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[10] Trial Verdict at pages 33-34.
[11] Ibid, at page 34; Article 11 of the Law on Protection of Witnesses authorizes the introduction of prior statements of a ''vulnerable witness'' if testifying before the Court ''would expose himself to significant emotional distress.''
[12] Trial Verdict at page 34 citing Article 273(2) of the CPC of BiH.
[13] Trial Verdict at page 34.
[14] See *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, 1 September 2004, at page 45, fn. 234.
[15] Article 6 provides that "(t)he statement of an expert witness entered into evidence in any proceeding before a Trial Chamber of the ICTY shall be admissible as evidence in domestic criminal proceedings whether or not the person making it attends to give oral evidence in those proceedings."

28. Counsel for the Accused Knežević submits that the First Instance Panel's authorization of the use of established facts violated the accused's right to a defence pursuant to Article 297(1)(d) of the CPC of BiH. The Appeal further claims that since he was not allowed to file an interlocutory appeal, the principles of immediacy and adversarial process were violated.[16] The Appeals Panel finds that while an interlocutory appeal was not permitted on this decision, the rights of the accused Knežević and others were still adequately protected as Knežević and others were entitled to appeal the contents of this Decision in their Appeals from the Verdict, which they did in the appeals filed by their Defence Counsel.

29. When deciding on this objection, the Appeals Panel also took into account the fact that the Accused and his Defence counsel in their Appeals have failed to explain how the respective First Instance Panel decision resulted in a violation of Article 297 of the CPC of BiH, or how it affected the rendering of a lawful and fair Verdict. Even though the Appeal claims that he was not able to contest any of the established facts, the Appeal fails to explain how this decision prevented from doing so. Nor does the Appeal identify any evidence or testimony that the accused and the defence teams were prevented from introducing as a result of the decision.

30. The Appeals Panel further finds that the First Instance Panel reviewed each of the proposed facts in accordance with the jurisprudence established by the ICTY.[17] The First Instance Panel also redacted two facts when contested by witness testimony. In his appeal, the Accused does not contest either the accuracy of any particular fact or the First Instance Panel's reasoning in support of their admissibility. Even though his sole argument concerns the lack of an interlocutory appeal, he has not explained how he was prejudiced by not being allowed to appeal at an earlier time.

31. The Appeals Panel thus concludes that the accused Knežević has failed to establish a violation of his right to a fair trial pursuant to Article 297(1)(d) of the CPC of BiH, which is also the case with the other two accused. Therefore, this assertion made by the accused in their appeal must be dismissed as unfounded as well.

32. The defence teams of all the accused also claim in their appeals that the contested Verdict is confusing and inconsistent with the presented evidence. Therefore, the Appellate Panel reviewed all Appeals on the basis of an essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC of BiH through a *prima facie* analysis of the Verdict.

[16] Knežević Appeals Brief at pages 1-2.
[17] Mejakić Trial Verdict at page 60.

In doing so, the Appellate Panel adhered to the following principles: that in the process of deciding on an appeal the Appellate Panel has the obligation to examine whether, on its face the wording is incomprehensible, internally contradictory or contradicted grounds, or has no grounds at all or did not cite reasons concerning the decisive facts; that the Appellate Panel will not consider whether the Trial Panel committed an error of fact or law as part of the analysis, but will only ensure that the Verdict formally contains all necessary elements for a well-reasoned and comprehensive verdict; and that the appellant must establish that the alleged formal error invalidates the Verdict. A non-essential violation does not invalidate the conclusion and reasoning of the Trial Panel and thus will not result in the revocation of the Verdict.[18]

33. The Appellate Panel notes that a review of the operative section of the Verdict indicates that it is sufficiently clear and lucid and is not in conflict with the analysis contained in the reasoning section. The Appeals Panel finds that the form and content of the Verdict comply with the provisions of the procedural code and that there were no violations of the law with that respect either or failures which, had they not been committed, would have resulted in a different verdict. An examination of the Verdict indicates that it initially describes the evidence, analyzes and evaluates it and only after all of that has been done, makes proper conclusions.

34. Even though the First Instance Panel does not evaluate the credibility of the evidence in every single incident, or after referring to every particular piece of evidence, it does not mean, as argued by the Appeals, that such evaluation of evidence was not performed. Specifically, in its discussion of the facts surrounding several incidents, the First Instance Panel describes the weaknesses in the testimony and credibility of particular witnesses.[19] Moreover, the First Instance Panel analyzes the evidence supporting each incident and explains reasons for its finding that an alleged crime occurred. In addition to that, it should be noted that the Verdict includes a section where it analyzes the credibility of witnesses as a group and explains the basis for its determination.[20] Although analysis and evaluation of every particular piece of evidence instead of groups of evidence is indeed more common, as pointed out in the Appeals, this Panel finds that the testimony of the witnesses and other evidence were after all properly evaluated, although the evaluation could have been more specific and detailed, and that this was done in a manner which can satisfy the necessary minimum of the standards of evaluation. In addition to that, it should be taken into account

[18] *Mirko Todorović et al*, supra at paras. 18-19.
[19] See e.g., Trial Verdict at pages 100 (killing of 12 men with the surname of Garibović); 102 (killing of Vehid Badnjević); 103 (death of Husein Crnkić); 121 (testimony of Emir Beganović); and 125 (the beating of 120 detainees transferred from the Keraterm Camp).
[20] Ibid, at page 234-235.

that, according to this Panel, the conclusions reached by the First Instance Panel based on that evidence were reached in a proper manner. Therefore, the allegations of the Appeal as to the absence of evaluation of evidence in the First Instance Verdict could not have been accepted as founded.

35. The described method of analyzing and determining the credibility of witnesses does not violate Article 14 of the CPC of BiH (Equality of Arms), also because the First Instance Panel treated the evidence of both parties equally and devoted equal attention to prosecution and defence evidence and did not omit a single fact that was important for rendering their decision.

36. Taking into account everything described above, the Appellate Panel finds that the trial of the accused was fair, and that it was in accordance with the CPC BiH and Article 6 of ECHR, and that the assertions in the Appeal alleging the opposite are unfounded.

Incorrectly or Incompletely Established Facts of the Case:

37. The defense teams of all the accused have raised a number of issues in their appeals concerning the established facts, arguing that the facts established by the First Instance Panel were incorrect or incomplete /Article 299(1) of the CPC of BiH/.

38. In the procedure of evaluating the merit of the allegations made in the Appeal about that and the existence of this ground for appeal, the Appellate panel took into account the standards of review that must be considered when such issues are raised on appeal. With respect to that the Appeals Chamber notes that:

> "{t}he standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness....The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond reasonable doubt. It is not any error of fact that will cause the Appellate Panel to overturn a Verdict, but only an error that has caused a miscarriage of justice, which has been defined as a grossly unfair outcome in judicial proceedings, as when an accused is convicted despite a lack of evidence on an essential element of the crime....In determining whether or not a Trial Panel's conclusion was reasonable, the Appellate Panel shall start from the principle that findings of fact by a Trial Panel should not be lightly disturbed. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and

> weighing the evidence presented at trial is left primarily to the discretion of the Trial Panel. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a Trial Panel....The Appellate Panel may substitute its own finding for that of the Trial Panel where a reasonable trier of fact could not have reached the original Verdict, the evidence relied on by the Trial Panel could not have been accepted by any reasonable tribunal of fact or where the evaluation of evidence is "wholly erroneous".”[21]

This approach and standards are accepted by this Panel too as reasonable and based on the law, and the Panel was guided by them when deciding on the Appeals filed in the instant case.

39. Appellate Panel also notes that the First Instance Panel was mindful at all times of the issues raised by the Defense regarding the credibility of the witnesses and those concerns were taken into account. On pages 188-189[22] of the Verdict, for example, the First Instance Panel considered the Defense arguments disputing the credibility of certain prosecution witnesses. The First Instance Panel analyzes the circumstances and provides reasons for the discrepancies between their current and previous statements. Specifically, the First Instance Panel noted that in the prior statements:

> “the witnesses mostly responded to the questions put to them so they did not have an opportunity to present everything they knew about the events that occurred during they stay in the camp. Besides, the statements given during the time of war, immediately following the detainees’ release from the camp, are mostly general in nature and do not comprise accounts of many events that the witnesses had an opportunity to testify about before this Court.”[23]

40. The First Instance Panel also considered the inconsistencies in testimonies identified in the Appeals and determined that the credibility of the witnesses was not affected.[24] Moreover, an appellate argument that witnesses cannot be considered credible if prior inconsistencies exist, is not sufficient ‘’to raise an issue concerning the reasonableness of the Trial Panel’s finding.’’[25]

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[21] *Mirko Todorović etal*, supra, at paras. 85-88.
[22] Trial Verdict at page 188.
[23] Ibid.
[24] The Appellate Panel recognizes that inconsistencies and contradictions in the witness testimony could have been reasonably expected, due to the passage of time, the serious trauma suffered by those witnesses, as well as the trauma experienced from having to recount those painful circumstances. See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, at paras. 142-143; and *Prosecutor v. Dragoljub Kunarac et al, Case No. IT-96-23 & 23/1-T, Judgment, 22 February 2001 at paras.564-565.*
[25] *Mirko Todorović et al*, supra, at para. 125

Therefore, since the First Instance Panel's analysis is reasonable and its conclusion logical, the Appeals Panel concludes that this ground of appeal is without merit.

41. The Appeal filed by the Defence Counsel for the accused Mejakić submits that the First Instance Panel ignored the testimonies of the witnesses for the Defence: Rajko Marmat, Milorad Stupar, Pero Rendić, Mirko Kobas, Radovan Kečan, Nada Markovski, Željko Grabovica, Mile Matijević, Boro Vučenović, Svetozar Krecelj, Branko Starčević, Živko Piljić, Stevo Petoš, Boško Matijaš, protected witnesses K050, K051, K052, K053, K054, K057 as well as the testimony of the accused Željko Mejakić. Having examined the Verdict, the Appellate Panel concluded that the First Instance Panel carefully analyzed the testimony of these witnesses and reasonably explained the basis of their conclusion. The First Instance Panel explained that:

> "{t}he defense witnesses gave a diametrically different account of events pertaining to a number of killings in the camp. Contrary to a great number of prosecution witnesses who testified about killings and bodies they used to see in the camp on a daily basis, especially around the White House, the defense witnesses stated that they saw neither killings nor dead bodies in the camp, that is, that they saw only a small number of bodies of killed detainees such as, for example, the testimony of Stevo Petoš, a former camp guard, who stated that he saw only one killing, that is, he saw only one body lying on the grass and that he saw no beatings or killings …. Such drastic contradiction between the testimonies of defense and the authentic and credible accounts of testimonies of prosecution witnesses with reference to all events and occurrences in the Omarska Camp leads the Court to conclude that the defense witnesses did not portray the events in the Omarska Camp in a realistic and reliable manner."[26]

42. The First Instance Panel also noted a certain predisposition or tendency on the part of these defense witnesses to refer to only a small number of deaths that were not disputed at all by the Defense, resulting in the First Instance Panel's further questioning of their credibility.[27] The Appellate Panel finds that the Appeals are basically arguing that it is inconceivable that the First Instance Panel did not accept as credible the testimony of these witnesses. The issue on appeal, however, is the reasonableness of the First Instance Panel's conclusion. The Appellate Panel is of the view that the First

[26] Trial Verdict at page 187-188.
[27] Ibid.

Instance Panel is in the best position to gauge the credibility of witnesses, which is what they did and provided adequate reasoning thereof. This panel notes that the First Instance Panel properly found the credibility of the defense witnesses to be lacking where witnesses (1) testified in a manner that is inconsistent with other evidence,[28] (2) modifying their testimony to be consistent with the defense strategy[29] and (3) were minimizing the extent of the activities that occurred at the Omarska Camp.[30] The Appellate Panel concludes that the First Instance Panel properly weighed and assessed the testimonies of defense witnesses and that its findings on the credibility of the defense witnesses were sufficiently supported and reasonable.

43. The fact that the First Instance Panel did not evaluate the evidence in the manner suitable for the Defense and did not specially analyze every single word and sentence uttered by the witnesses during their testimonies, either given before the ICTY, or at the main trial, does not make the First Instance Verdict deficient and incomplete, quite the opposite, it makes it clear and focused on the essential elements of the criminal offence the Accused are charged with.

44. The Appeals further argue that the First Instance Panel convicted the Accused of incidents where there was no eye-witness testimony. An examination of the case file indicates, however, that the First Instance Panel did not render conviction in such situations. Rather, criminal liability was found only when at least one direct witness either saw or heard the incident so that it could be concluded with certainty that relevant incident had occurred. Accordingly, this assertion made in the appeal is also dismissed as unfounded.

45. The Appeals filed by the accused also allege that it was impermissible to convict the accused of multiple crimes on the basis of testimony by only one witness. The witnesses concerned and related incidents were as follows: witness Fadil Avdagić (page 124 of the appealed Verdict) about the beating up of Dalija Hrnjić; witness K036 (page 126) about the murder of Velid Banjević; witness K022 (page 127) about the murder of Amir Cerić; witness K018 (page 131) about the murder of Miroslav Šolaja; witness Asmir Baltić (page 137) about the disappearance of 30 to 40 people from the camp and several men by the last name of Mešić; witness K042 (page 144) about the beating up of K042; witness Mustafa Puškar (page 156) about the beating up of Mustafa Puškar; witness K017 (page 157) about the beating up of K017;

[28] See *Prosecutor v Kvočka et al*, Case No. IT-98-30/1-A, Appeals Judgment, 28 February 2005, at para. 174, and *Mirko Todorović et al*, supra, at para. 96.
[29] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgment, 31 January 2005, at para. (the modification of testimony by defence witnesses to protect their interests was a factor supporting its rejection).
[30] Ibid, at para. 208 (one factor supporting the rejection of an artillery expert's testimony was due to the minimized the number of shells fired).

witness K040 (page 160) about the sexual abuse of K040; witness K05 (page 190), about the beating up of witness K05; witness K015 (page 194) about the beating up of witness K015; witness K08 (page 198) about the beating up of Amir Karačić, Josip Pavlović, Dijaz Sivac and others by Duško Knežević; witness K044 (page 202) about the beating up of a person called Katlak, beating up of Ismet Kljajić and Mesud Terarić; witness K08 (page 204) about the beating up of inmates from the village of Sivci; witness K010 (page 205) about the beating up of K010; witness K016 (page 205) about the beating up of K016; witness Enes Crljenković (page 209) about the beating up of Enes Crljenković; witness K044 (page 216) about the beating up of Meho Kapetanović; witness K029 (page 218) about the beating up of Mirsad Karagić; witness K029 (page 219) about the beating up of Suad Halvadžić.

46. Having examined the Verdict and the casefile, the Appellate Panel established that these witnesses had saw, heard, experienced or survived the circumstances relating to their testimony. Their testimony concerned injuries which they suffered or the death or severe injuries suffered by others: friends, acquaintances, fellow inmates or a close relative of the testifying witnesses. The First Instance Panel noted in their Verdict that some of these witnesses provided detailed accounts of the circumstances, testified with certainty and that certain incidents were corroborated by their testimony. The First Instance Panel also found that certain incidents were consistent with the overall situation at the camp. The Appeals Panel notes that the First Instance Panel's findings supporting the credibility of these witnesses were proper and reasonably substantiated their determinations of guilt.

47. The Appeals Panel notes that "{a} Trial Chamber may...convict an accused on the basis of a single witness...."[31] The Appellate Panel further notes that Article 15 of the CPC of BiH provides that the Court has the right "to evaluate the existence or non-existence of facts" which "shall not be related or limited to special formal evidentiary rules." This Panel thus reasons that evidence that is lawful, authentic and credible, may be considered sufficient to convict an accused even where its source is a single witness. The Appellate Panel concludes that since the First Instance Panel's findings were reasonable and supported by evidence from at least one witness, the Accused have failed to establish that no reasonable Panel could have arrived at this same conclusion.

48. In his Appeal, the Accused Mejakić submits that the First Instance Court erred in relying on the testimony of certain Prosecution witnesses who

[31] *Prosecutor v. Dario Kordić et al*, IT-95-14/2-A, Appeals Judgment, 17 December 2004, at para. 274, Accord *Strugar Appeals Judgment*, at page 10, fn. 57 and cases cited therein.

stated under oath that they had given false testimonies or had not spoken the truth before the ICTY.[32] The accused refers to the testimony of Nusret Sivac, Azedin Oklopčić, Izet Đešević, Saud Bešić, K035, K019 and K027, in support of the allegation. The Appellate Panel established that during cross-examination each witness was confronted with a prior conflicting statement.[33] In each of these situations the witness maintained that their current testimony was true and that the prior statement was incorrect or a mistake. Specifically, the witnesses indicated that they did not recall the earlier statements, that it was a mistake in translation or denied ever making the prior statement. The witnesses did not, however, state that they had previously lied or provided false testimony as argued in the Appeal, which is why these allegations can also not be accepted.

49. The Appeal correctly argues that the First Instance Panel is obligated to assess the "credibility of contradictory evidence."[34] However, having examined the case file and the First Instance Decision, this Panel is satisfied that the First Instance Panel reviewed the testimony of the witnesses and issued its determination as to credibility.[35] Thus, in dealing with credibility, conflicts and discrepancies in the testimony of certain Prosecution witnesses, the First Instance Panel noted:

> "the fact that some testimonies are discordant with reference to some information , such as the date and place of incidents it is obvious that the witnesses are unanimous regarding decisive facts related to a person's beatings or death, for instance. Certain discrepancies in witness testimonies with reference to a certain event are understandable given that the time distance, that is, the time span that passed between when the incident occurred and the date of the testimony, as well as a person's individual ability to place a certain event in a certain timeframe, as well as the ability to perceive and memorize the details of secondary importance that are related to a specific event….In evaluating each subjective evidence, both in isolation and in their mutual connection, the Court primarily had in mind the probative value of each particular witness, not the number of witnesses who testified about an incident….{T}he Court finds the discrepancies in witness testimonies understandable and insignificant, especially in those instances when several witnesses testified about one and

[32] Mejakić Appellate Brief, at paras. 96 and 797-804.
[33] Ibid, at paras. 96 and 797.
[34] Article 290(7) of the CPC of BiH. See also Article 280 (2).
[35] Trial Verdict at pages 187-189.

the same incident, which does not impact a particular witness's authenticity…."[36]

50. The Appeals Panel notes the First Instance Panel, recognizing the issue of conflicting evidence or discrepancies, utilized proper standards to evaluate the credibility of witnesses.[37] Moreover, having considered the nature of the inconsistencies, the First Instance Panel found the witnesses to be credible.[38] This finding is supported by the fact that the testimonies given by those witnesses were substantiated by testimonies by other witnesses. In their appeals, Counsel for the Accused have not addressed the reasoning used by the First Instance Panel but argue that the witnesses were not credible because of the cited inconsistencies. This argument, however, in its own, unsupported by facts and evidence indicating the opposite, is insufficient to raise an issue concerning the reasonableness of the First Instance Panel's finding. Therefore, the Appeals Chamber concludes that the accused has failed to establish that the First Instance Court's finding was not reasonable.

51. In their Appeals, Defence Counsel for the Accused Knežević note that the presented evidence did not establish that the accused Knežević was the perpetrator of the acts alleged in the Indictment. In that respect, the Appeals Panel notes that the First Instance Panel heard testimony from a number of witnesses in relation to the identification of the Accused as the perpetrator of crimes at both the Omarska and Keraterm camps. The Accused contested the issue of identification at trial and renews the matter on appeal.

52. With regard to actions of the third accused in the Omarska camp, the First Instance Panel relied in part upon the testimony of two witnesses who had known the Accused prior to the war.[39] They categorically claimed that the person who perpetrated the alleged crimes was the Accused Knežević. Specifically, Izet Đešević stated that the Accused was known to everyone as "Duća", worked as a waiter, resided in the Orlovci village and that his father's name is Mile.[40] The First Instance Panel also relied upon similar testimony from witness K022. This witness while in Omarska had sought information about the person named "Duća" who was treating the prisoners so cruelly. A detainee named Samir "Ešefin" told him that he knew Duća very well before the war. He was named Duća Knežević, from Orlovci, his

[36] Ibid. at page 188.
[37] See *Prosecutor v Dario Kordić et al*, case No. IT-95-14/2-T (where the Trial Court determined as credible the testimony of a witness who admitted to having previously provided a false statement)
[38] *Prosecutor v Simić et al.*, case No. IT-95-9-T, Judgment, 17 October 2003, at para. 22 (when discussing conflicts or discrepancies in testimony, the Trial Chamber reasons that "the lack of precision does not necessarily discredit their evidence, provided that the discrepancies relate to matters peripheral to the charges in the …indictment.")
[39] Trial Verdict at page 178.
[40] Ibid.

father's name was Milan and he was born in 1967.[41] In its findings on the issue of identification, the First Instance Panel found as significant that witnesses were able to provide correctly such personal characteristics as his father's name, residence, occupation and year of birth.[42]

53. Furthermore, with regard to the Omarska Camp, the First Instance Panel also relied upon the testimony of four more witnesses who had known the Accused prior to the war. These witnesses maintained that the person who committed the alleged crimes at the Keraterm camp was Duća Knežević.[43] Moreover, two other witnesses that had known the Accused prior to the war, testified that they had observed his visits to both prison camps. For example, Witness K055 even testified as to the Accused's correct year of birth,[44] place of birth[45] and occupation[46]. The witness further testified that they even played football together as the Accused was the goalkeeper on the local football team.[47] In its review of the testimony relating to identity, the First Instance Panel found significant the knowledge of witnesses as to the personal details or background of the Accused.[48] The First Instance Panel heard testimony that Duća Knežević, who was perpetrating crimes at the camps, wore a military uniform and would visit the camp with Žigić and others to beat prisoners.[49] There was also evidence confirming that the Accused was serving in the 43rd Motorized Brigade. The First Instance Panel found this evidence corroborative since the Accused would have been wearing a military uniform as a result of his military service.[50]

54. Witnesses further testified that Duća Knežević had lost a brother early in the war and was beating prisoners in an attempt to learn who had killed his brother.[51] Documentation introduced in the course of the evidentiary proceeding indicated that the Accused's brother Igor was killed early in the war[52]. The First Instance Panel also found this fact to be corroborative of witness testimony and indicated that beatings that occurred at both camps were "not a coincidence."[53]

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[41] Ibid.
[42] Ibid. at page 187.
[43] Ibid. at pages 179-180.
[44] Ibid, at page 181.
[45] Ibid.
[46] Ibid, at page 182.
[47] Ibid, at pages 179 and 187.
[48] Ibid, at pages 182 and 187.
[49] Ibid. at pages 180-181.
[50] Ibid, at page 184.
[51] Ibid, at page 183.
[52] Death Certificate for Igor Knežević, No. 04-202-7899/2006 dated 29 december 2006, Defense exhibit No. 202.
[53] Ibid.

55. In its determination, the First Instance Panel also considered the fact that in the Prijedor Municipality there were no other persons named Duško or Dušan Knežević that had a father named Mile or Milan or even the same year of birth, occupation or residence.[54]

56. It is correct that only one witness (K013) identified the Accused at trial, as claimed by the Defense Counsel for the Accused Knežević in his Appeal. However, the First Instance Panel considered the lack of in-court identifications and the effect of this factor on its findings and reasoned that the passage of time and the fact that the Accused had changed his appearance at the time of trial made it difficult to recognize him in the courtroom. In addition to that, the Court properly took into account the fact that the witnesses gave a unanimous description of … {the Accused's} physical appearance….[55]

57. The Appeals Panel finds that while the evidence of identification is deemed corroborative, it is not required pursuant to Article 85 of the CPC of BiH.[56] The Appeals Court further notes that the Trial Court properly weighed the lack of in-court identifications prior to arriving at its conclusion, that, in addition to this, they properly weighed and analyzed all of the identification evidence and provided logical reasons for its conclusion. On the other hand, the Appeal filed by the Defense Counsel for the Accused Knežević has failed to establish that no other reasonable panel could have arrived at this conclusion. Therefore, this assertion made in the appeal is dismissed as unfounded.

58. The Appellate Panel considers that the contested Verdict gives a completely clear, logical and convincing explanation, having previously analyzed and evaluated all the presented evidence concerning the identity of the Accused Duško Knežević.

59. Having reviewed the allegations in the Appeal related to the incorrectly or incompletely established state of the facts, this Panel found that the First Instance Panel established beyond doubt on the basis of the evidence presented at the main trial all decisive facts based on which it properly concluded that the Accused Željko Mejakić, the Accused Momčilo Gruban and the Accused Duško Knežević, with their participation, as described in the First Instance Verdict, substantially contributed to the establishment and maintenance of the system at the Omarska camp, and in the case of the third

[54] Ibid, at page 186.
[55] Ibid, contrast *Prosecutor v Fatmir Limaj et al,* case No. IT-03-66-T, Judgment, 30 November 2005, at para. 540 (where the physical descriptions of the Accused were considerably different).
[56] Compare *Prosecutor v Fatmir Limaj et al,* case No. IT-03-66-A, Appeals Judgment, 27 September 2007, at para. 27 (where the Appeals Court states that "no probative weight should be attached to in-court identifications").

Accused also the Keraterm camp, which means that the described acts satisfied all legal elements of the criminal offense of the Crimes against Humanity, in violation of Article 172(1) (a), (e), (f), (g), (k) and (h) of the CPC of BiH.

60. However, despite the fact that the First Instance Panel partially modified in its Verdict the state of the facts presented in the Indictment, this Panel also finds it necessary to make a correction with respect to the official positions held by the accused Željko Mejakić and Momčilo Gruban at the Omarska Camp, thus partly sustaining the objections by their Defense Counsel in that regard. Those corrections, however, given the different position taken by this Panel with respect to their command responsibility, are not that significant after all, since this panel finds both Accused responsible for all the acts as described in the Indictment on another ground – the ground of their acting within the joint criminal enterprise (the First Instance Verdict found them guilty on this ground for some actions only). In the process of making corrections with respect to the function of the accused in the Omarska camp, this Panel took into account that the objective identity does not have to be absolute, as some details that do not change the identity of the offense essentially may be omitted from or added to the description of facts. The basic orientation should be related to the elements of the criminal offense, that is, the defining elements that are not changeable if they are detrimental to the Accused, which is not the case here.

61. The basis for the conclusion of the Appellate Panel that the accused Mejakić held the position of the Chief of the Security Guards at the Omarska camp, and the accused Momčilo Gruban the position of a leader of one of the three shifts at the Omarska camp, shall be elaborated upon in the section bellow titled Command Responsibility. Although this correction bears no special significance from the aspect of the responsibility of the accused for the acts with which they are charged, since in any case they held leading positions and since all their actions, including the omission to undertake certain measures against their subordinates, were part of the Joint Criminal Enterprise, however, the above corrections had to be made in the interest of justice and the accused themselves. They will definitely affect the evaluation of the contribution each of the accused made to the maintaining of the system of abuse in the Omarska and Keraterm camps, more precisely contribution to the realization of the joint criminal enterprise and deciding on the criminal sanction.

Command Responsibility of the Accused Željko Mejakić and Momčilo Gruban:

62. The Defense Counsel for the Accused Mejakić and Gruban submit in their appeals that the First Instance Panel erroneously concluded that the

necessary legal requirements for command responsibility of both the Accused had been established.

63. The Accused Mejakić objects that the First Instance Panel erred in its conclusion as to the role held by the Accused at the Omarska Camp, that the evidence presented does not establish that the Accused served as either the "Chief of Security" or the de facto camp commander[57], that the First Instance Panel erroneously established a superior-subordinate relationship by including as subordinates groups or persons who were not his subordinates, that as a police officer he possessed supervisory authority over the members of the armed forces, guards from the Territorial Defense (TO), and also that he was a supervisor over the persons working at the camp (other than the guards) and over "most camp visitors"[58], that the Accused possessed effective control over all of the Omarska Camp guards, the persons working in the Camp and most of the visitors.[59] The Defense further objects that the First Instance Panel erred in its conclusion that he failed to prevent subordinates from committing serious crimes.[60]

64. The defense for the Accused Gruban submits that the First Instance Panel erroneously concluded that the Accused served as a Commander of one of the three guard shifts at the Omarska camp[61] and that by virtue of that function he had effective control over the guards in his shift as well as the guards that were members of the Territorial Defense.[62]

65. The Prosecution in its response to the appeals contends that the First Instance Panel did not err in its conclusion that the Accused Mejakić was liable on the basis of command responsibility. It argues that the testimony and documentary evidence support the finding that the Accused held a position of high authority in the camp and acted de facto as the camp commander. Moreover, the Prosecution alleges that the evidence established that it was his (Mejakić's) subordinates that committed the alleged crimes.[63]

66. The Prosecution also submits that the First Instance Panel did not err in its conclusion that the Accused Gruban was liable on the basis of command responsibility. Rather, they claim that an examination of the record supports the Court's conclusion that the Accused Gruban served as a commander of one of the guards shifts at the Omarska Camp and that he possessed

[57] Mejakić Appellate Brief, at paras. 233-489.
[58] Ibid, at paras. 286-290 and 451-458.
[59] Ibid, at paras. 451, 454-466.
[60] Ibid, at paras.
[61] Gruban Appellate Brief, at pages 5-23.
[62] Ibid, at pages 24-29.
[63] Prosecution Appellate Response Brief, at pages 18-22.

effective control over all of the guards in this shift, including those from the police and the Territorial Defense.[64]

The Accused Mejakić:

67. The First Instance Panel found that the Accused was responsible for certain crimes on the basis of the doctrine of Command Responsibility pursuant to Article 180(2) as read with Article 21(2) of the CC of BiH.[65] For one act in the Indictment (beating of detainee Saud Bešić), Mejakić was found guilty on the basis of individual responsibility, and for other acts, on the basis of Joint Criminal Enterprise. Therefore, the First Instance Panel found the accused Mejakić guilty on three different bases, and Gruban on two (on the basis of Command Responsibility and Joint Criminal Enterprise), which according to this Panel and according to the case law of this Court and the ICTY, is unreasonable and inappropriate. This is true because, if the existence of the Joint Criminal Enterprise has already been established and if it has been established that the Accused participated in it, then everything they did or failed to do, contributing thus to the purpose of that enterprise, falls within the criminal enterprise. In that case, responsibility on the basis of the Joint Criminal Enterprise, being the broadest form of responsibility, also sublimes everything else that would otherwise fall within the other two forms of responsibility – command and individual responsibility.

68. Elaborating on the command responsibility of Mejakić and Gruban, the First Instance Panel initially described the proper requisites established by the ICTY for determining criminal liability but then added its own version of command responsibility,[66] viewing it as entirely separate and isolated from the joint criminal enterprise and the responsibility on that basis. This wrong approach taken by the First Instance Panel resulted in the parallel existence of all three forms or bases of responsibility (individual, command responsibility and the responsibility on the basis of JCE) for what took place in the camp, which is unacceptable for the reasons given in the paragraph above.

69. The First Instance Court based its finding on the command responsibility of the first accused on the finding that the Accused Mejakić "held the formal position of the Chief of Security at Omarska camp and that he de-facto acted as the camp commander."[67] In its Reasoning, the First Instance Panel stated

[64] Ibid, at pages 24-29.
[65] Trial Verdict, at page 206-207.
[66] Ibid, at pages 207-208.
[67] Trial Verdict, at page 208.

that it based its conclusion on witness testimony and documentary evidence.[68]

70. An examination of the case file, in accordance with the standards that have been thus far established, indicates that there are no official documents indicating that the Accused Mejakić was appointed to either position. Nor were there any guards or camp personnel testifying that the Accused served in such positions.[69] The Prosecutor did not provide evidence indicating, beyond any reasonable doubt, that the Accused would regularly introduce himself or be introduced as either the Chief of Security or the Camp Commander.[70]

71. The First Instance Panel relied upon witness statements indicating that the Accused held a high-ranking position in the Omarska camp. The witnesses arrived at this conclusion based on their observations of the activities of the Accused and his relations with the guards. In that regard, the Trial Panel noted that the Accused supervised the work of the guards who referred to him as "commander, boss or warden". Moreover, some of the prisoners went to him with problems and referred to him as or believed him to be, the commander.[71]

72. The Appeals Chamber agrees with the First Instance Panel that this testimony demonstrates that the Accused served in a high or supervisory position at the Omarska camp. However, this Panel finds that this evidence alone does not establish beyond a reasonable doubt that the Accused served as either the Camp Commander or the Chief of Security. The Appeal filed by the Defense Counsel for the accused Mejakić correctly submits that the position of the Camp Commander includes much wider authority (over all segments), and that the position of the Chief of Security has an entirely different meaning than security guards, to which the First Instance Panel did not pay sufficient attention and attribute appropriate significance. An examination of the testimony indicates that the Accused was given various titles by the prisoners and even the guards.[72] These signs of respect are indicative of the Accused holding a supervisory position, but that does not automatically mean that the position was Chief of Security, or the Camp Commander. Serving in the capacity of Chief of Security would also result in his being addressed in this manner and being in a supervisory position.[73]

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[68] Ibid, at 208-211.
[69] Contrast, *Prosecutor v. Zejnil Delalić et al*, case No. IT-96-T, Judgment, 16 November 1998, at paras. 738, 745, 746, 748 and 762. (Hereinafter referred to as the *Delalić* Trial Judgment).
[70] Contrast, Delalić Trial Judgment, supra, at paras. 749-750.
[71] Trial Verdict, at pages 208-210.
[72] Contrast, *Delalić Trial Judgment*, supra, at page 750 (where "all the detainees" acknowledged that the accused Mucić was the prison-camp commander.).
[73] Compare *Mitar Rašević and Savo Todorović*, X-KR-06/275 (Ct. of BiH), Verdict of 28 February 2008 (where Mitar Rašević served as the commander of the prison guards).

73. The video evidence introduced at the main trial are also inconsistent as to the position held by the Accused.[74] This Panel concludes that as a result they do not provide definitive evidence as to the position held by the Accused Mejakić.

74. The Appeals Chamber therefore finds that the First Instance Panel's findings and conclusion that the Accused Mejakić served as the de facto camp commander or as the Chief of Security have not been proven beyond a reasonable doubt.

75. The Appeals Chamber finds, however, that the evidence establishes that the Accused Mejakić served in the position of Chief of (Police) Security Guards at the Omarska Camp. In his trial testimony, the Accused even confirmed serving in this capacity.[75] This finding is consistent with the evidence which indicates that the Accused is not superior to the TO and Army guards, the interrogators or maintenance staff, as submitted in the Appeal, but continued to exercise authority over the regular and reserve police officers who served at the Omarska Camp. The Appeals Chamber further notes that this role at the prison camp, although not the camp commander, still constitutes a position of authority at the camp.

Superior-Subordinate Relationship:

76. The First Instance Panel found that the guard service inside of the camp was comprised of the active and reserve police officers as well as members of the TO. The Trial Panel then concluded by implication that the TO guards were subordinates of the Accused Mejakić.[76]

77. In the case of *Prosecutor v. Mile Mrkšić et al*,[77] the Trial Chamber described the history of the TO. The Appellate Panel accepts it as relevant to the instant case. The description reads as follows:

> "Pursuant to the Law on All Peoples' Defense, the Territorial Defense, TO, was one of the two constituent elements of the armed forces of the former Yugoslavia, the other being the JNA.... Both the JNA and TO were subordinated to the Supreme Defense Council. This reflected the governing principle of singleness or unity of command, according to which, at all relevant levels, command must be exercised by one single person."

[74] See Exhibit 86A,video marked V000-0401, at 2:58, where Simo Drljača is introduced as the Camp Commander.
[75] See transcript of the trial in this case for 29 January 2008, pg. 37 (local version).
[76] Trial Verdict, at page 211.
[77] *Prosecutor v. Mile Mrkšić, et al*, case No. IT-95-13/1-T, Judgment, 27 September 2007, at paras. 83-84.

All of the above should be taken into account in the instant case as well.

78. Taking into account everything described above and having examined the record, the Appellate Panel concludes that the First Instance Panel's finding and conclusion that the Territorial Defense Guards were subordinate to the Accused Mejakić, is without any factual basis. Therefore, the Appeal filed by the defense of the accused Mejakić is founded in this part.

Effective Control – Mejakić:

79. The First Instance Panel stated in the operative part of the Verdict that the Accused Mejakić "had effective control over the work and conduct of all Omarska camp guards and other persons working within the camp, as well as most camp visitors…."[78] The Trial Panel then issues conflicting findings as it notes that the Accused did not have effective control "over the so-called 'Special Forces from Banja Luka'…" nor over the maintenance staff who worked at the Omarska Mine. The Trial Panel also finds that neither the groups of interrogators nor the soldiers or police that worked exclusively for them were subordinate to the Accused.[79]

80. The doctrine of command responsibility was explained, *inter alia*, in *Prosecutor v Enver Hadžihasanović et al*, (hereinafter the Hadžihasanović Trial Verdict). The Trial Chamber in that case noted that command responsibility:

> "presupposes that the Accused was a superior of the perpetrators of the crime at the time it was committed, i.e., that a superior subordinate relationship existed....{A} superior/subordinate relationship exists...when a superior exercises effective control over his subordinates, that is, when he has the material ability to prevent or punish their acts."[80]

81. The Hadžihasanović Trial Verdict then described:

> "several elements which make it possible to establish whether there is effective control including: the official position of an accused, even if actual authority, however, will not be determined by looking at formal positions only; the power to give orders and have them executed;...the authority to apply disciplinary measures, the authority to promote or

[78] Trial Verdict at page 2.
[79] Ibid. at page 212.
[80] *Prosecutor v Enver Hadžihasanović et al*, case No. IT-01-47-T, Judgment, 15 March 2006, at paras. 76-77.

remove soldiers; and the participation of the Accused in negotiations regarding the troops in question."[81]

82. Utilizing these criteria in this case, the Appeals Chamber will examine the issues raised on Mejakić's appeal. Initially, however, the Appeals Chamber notes that the Trial Panel does not identify the persons or groups that comprise the category of ''other persons working within the camp.'' This Panel presumes that the First Instance Panel may be referring to the kitchen or maintenance workers. However, with respect to the Maintenance workers, the Trial Panel states that the Accused had no effective control over the camp's maintenance workers. Whereas, with respect to the kitchen staff, the Trial Panel does not explain the basis or reasons in support of the Accused's effective control over them. Although based on the above it is beyond doubt that the Accused could not be superior to any persons other than the police guards in the Omarska camp, the Trial Panel nonetheless erroneously concluded that the Accused Mejakić served as *de facto* camp commander.

83. With regard to the TO Guards, the Appeals Chamber notes that the required superior-subordinate relationship was not established. As for effective control, the First Instance Panel's finding of effective control over this segment is not supported by relevant evidence.

84. With regard to the "camp visitors", the First Instance Panel has failed to demonstrate the existence of a superior-subordinate relationship (formal or informal) between the Accused Mejakić and the camp visitors. However, even according to Item 8 of the Order by the Head of the Prijedor PSS, Simo Drljača, dated 31 May 1992, issued in accordance with the Decision of the Crisis Staff (which practically established the Omarska Camp, at the time defined as a "temporary collection center"), the guards service had the duty to "prevent all uninvited persons to access and enter the collection center area, while applying the rules of guards service." It is beyond any doubt that the Accused Knežević, Žigić and others were not invited, but were not prevented from entering the camp and mistreating, abusing, killing etc. the inmates.

85. For these reasons, the Appellate Panel finds that evidence does not establish beyond any reasonable doubt that the Accused Mejakić exercised effective control over the TO members, interrogators, soldiers and camp employees, so that the defense appeal in that regard is well-founded.

86. The Appeals Chamber however finds that as the Chief of the Police Security Guards, the Accused Mejakić was a superior to the regular and reserve

[81] Ibid, at paras. 82-83.

police officers who served as guards at the Omarska Camp and had effective control of them. Being the Chief of the Police Security Guards, he certainly did have the power and authority to prevent his subordinates or punish them for the criminal offenses already committed against the camp inmates.[82] However, there was no evidence showing that the accused punished or disciplined any of his subordinates – police guards at the Omarska camp[83], which leads to the conclusion that the allegations in the Appeal, attempting to prove that he did not agree with the mistreating, abuse, killing and everything else that was going on in the camp, are unfounded. On the contrary, this Panel is of the view that his passive attitude toward everything his subordinates did and everything that happened in the camp clearly shows that he did very much agree with the camp system and that he supported it, both actively and passively, not doing anything that would lead to its prompt discontinuation and destruction (statements in the Report to Simo Drljača have neither such weight nor character for the camp system).

The Accused Gruban:

87. The First Instance Panel found that the Accused Gruban served as a Commander of one of the three guard shifts are the Omarska Camp.[84] The Accused does not dispute that there were three guard shifts,[85] but denies being a commander of any of them.[86]

88. The Appeals Chamber notes that in its Reasoning the Trial Panel relied upon the testimony of several witnesses in order to establish the Accused Gruban's position as a shift commander. However, the appeal submits that the witness testimony is conflicting and should not have been relied upon and that no credible evidence supports the Trial Panel's conclusions on that issue.

89. The Appeals Chamber concludes that almost two-thirds of the witnesses that testified about the activities of the Accused indicated that three shifts existed and that one guard shift had been named after him and was called "Čkalja's shift" (Čkalja is the nickname of the Accused Gruban). While the appellate claims indicate that a shift was named after him, since he was the only person known in that shift to the prisoners, the fact that the other shifts were named after their leaders constitutes circumstantial evidence supporting that

[82] Contrast *Krnojelac Trial Judgment* at paras. 97 and 102 (the Trial Chamber describes the extensive powers of the accused who served as a prison camp warden).
[83] Contrast *Delalić Trial Judgment* at para. 767 (the Trial Chamber describes the measures taken by Mucić to discipline guards).
[84] Trial Verdict at page 218.
[85] Gruban Appellate Brief at page 18.
[86] Ibid. at page 6.

the same case was with the Accused who commanded and led that particular guard shift.[87]

90. The Trial Panel also relied upon testimony from witnesses who stated that the Accused Gruban was one of the shift leaders at the Omarska Camp. Some of these witnesses based this conclusion on the fact that the Accused would issue orders or give assignments to the camp security guards.[88]

91. Witness K027 testified that the Accused was a guard shift leader. He explained that the camp guards told him that the Accused held that position. This witness also noted that the guards would receive orders from the Accused and that they would address him as "chief".[89]

92. The First Instance Panel also relied upon witness testimony indicating that the Accused, unlike the typical shift guard, did not have a fixed guard post but walked freely around the camp.[90] The Trial Panel noted that Witness K017 explained that shift leaders such as the Accused did not have guard posts but walked around the camp.[91] The Appeals Chamber notes that this privilege accorded to the Accused supports the finding that he held a position of authority in relation to the police guards in his shift.

93. The First Instance Panel also relied upon evidence that the Accused used one of the offices in the Administrative Building.[92] The Appeals Chamber finds this factor to be significant since this office was shared with the two other guard shift leaders.[93] It should be noted that the ICTY Judgment in the case of *Kvočka et al.* established that Mlađo Radić a/k/a "Krkan" and Milojica Kos a/k/a "Krle" were also shift leaders in the Omarska camp. It also had to be taken into account that none of the heard witnesses ever mentioned that any ordinary guards, which Gruban claims he was, used the office where "Krkan" and "Krle" sat.

94. The First Instance Panel further relied upon a comment by the Accused Mejakić indicating the powerful position held by the Accused Gruban.[94] In the course of the proceedings, Witness Kerim Mešanović testified about a conversation that he had with the Accused Mejakić. Mejakić referred him to

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[87] See *Prosecutor v. Sefer Halilović*, IT-01-48-T, Judgment, 16 November 2005, at para.149 (where the Trial Chamber mentions the ''Zulfikar Detachment'' which was commanded by Zulfikar Ališpago).
[88] See e.g., the testimony of witnesses K017, K027, K037, K041 and Azedin Oklopčić.
[89] Testimony of Witness K027 on 4 June 2007 at 02:07.
[90] Trial Verdict at pages 218-219.
[91] Ibid. at page 219.
[92] Ibid.
[93] Compare *Prosecutor v. Miroslav Kvočka et al*, IT-98-30/1-T, Judgment, 2 November 200,1 at paras. 481-482 and 513-516 (where the Trial Court found that the ability to move freely around the camp and the use of an office in the Administration Building were factors supporting a finding that an accused served as a guard shift leader).
[94] Trial Verdict at page 219.

the office of the commanders located in the administrative building and told Mešanović that if he had a problem and he (Mejakić) was not in the camp, Mešanović should go there and see Čkalja, Krkan or Krle for help.[95] The Appeals Chamber considers that this testimony not only places the Accused Gruban in the shift "commanders'" office in association with the other two shift "commanders" but also indicates that the Accused himself was a shift leader like the other two, and that he too was a person of authority who had the power to resolve problems.

95. The Appeals Chamber concludes that from all of the evidence as described above, the First Instance Court could have found beyond a reasonable doubt that the Accused Gruban served in the capacity of a police security guard shift commander at the Omarska Camp. In that regard, the allegations in the accused Gruban's Appeal that the First Instance Court erred in finding that he served as a guard shift commander, are founded. However, the fact that it was erroneously established that he had been a shift commander instead of shift leader is not critical for the establishment of responsibility of the second accused.

Effective Control – Gruban:

96. The First Instance Panel stated in the Operative Part of the Verdict that the Accused Gruban exercised effective control over the "guards and most camp visitors during his shift".[96] The First Instance Panel provided reasons thereof, which this Panel accepts as valid and based on presented evidence, finding the contrary allegations in the Appeal unfounded. Namely, even in his capacity as the shift leader, the Accused was the first man and the greatest authority for the guards – police officers on that shift in the absence of the superior Mejakić. Even in his capacity as the shift leader, he had the powers mentioned by the First Instance Panel. On the other hand, even with the specific assistance to a large number of individuals and with a far better relation with all inmates, the second accused also did nothing that would be critical to the urgent discontinuation and collapse of the camp system, nor did he stay out of the system as a proof that he actually did not support it and that he did not want its purpose to be met. This conclusion is also supported by the fact that the Trial Panel was unable to state that the accused undertook any specific act to punish his subordinates, or prosecute the uninvited visitors to the camp, who came there to mistreat and abuse the inmates and commit other acts as described in the Indictment.

97. The Appeals Chamber grants the Accused Gruban's appellate claims related to his position in the camp, but not the thesis about the non-existence of his

[95] Ibid. at page 219.
[96] Ibid. at page 5.

responsibility for the acts with which he is charged. In respect of the acts of which the accused Gruban was found guilty by the First Instance Verdict based on command responsibility (which is the subject of discussion in this Section of the Verdict), the Appellate Panel finds that the Accused Gruban, just like Mejakić, is responsible for those acts, which this Panel accepts were committed in a manner and at the time as described in the First Instance Verdict, on the basis of JCE and not on the basis of command responsibility. This position taken by this Panel resulted in the modification of the appealed Verdict in respect of the legal qualification of the committed criminal offenses.

Joint Criminal Enterprise at the Omarska and Keraterm Camps:

Generally:

98. In the First Instance Verdict, the First Instance Panel found the Accused Mejakić and Gruban, as well as Knežević, guilty of certain other crimes on the basis of systemic joint criminal enterprise liability pursuant to Article 180(1) of the CC of BiH.[97] The First Instance Panel concluded that all three Accused participated in a systemic JCE at the Omarska camp, and Knežević in the Keraterm camp as well. The First Instance Panel found the Accused Mejakić and Gruban guilty on that basis of those crimes it found were committed pursuant to that joint criminal enterprise and of which the Accused Mejakić and Gruban were not guilty under other forms of criminal liability, namely direct perpetration pursuant to Articles 29 and 180(1) of the CC of BiH and superior responsibility pursuant to Article 180(2) of the CC of BiH.

99. Accordingly, the Appellate Panel is required to consider whether the Accused's convictions may be sustained on the basis of systemic joint criminal enterprise liability pursuant to Article 180(1) of the CC of BiH.

100. In addition, the Appellate Panel notes that the Defense for all Accused have also appealed their convictions on the basis of their JCE liability. This Panel will therefore consider these appellate claims first, as they raise the initial issue of whether the First Instance Panel correctly found that the Accused were members of a systemic joint criminal enterprise and liable for the crimes committed pursuant to that systemic JCE.

[97] "Systemic" joint criminal enterprise liability is also referred to as "JCE 2" by the ICTY Appeals Chamber in *Tadić*, which identified three forms of JCE and characterized those forms as part of customary international law. *Prosecutor v. Duško Tadić*, IT-94-1-A, Judgment, 15 July 1999, paras. 185-226. Only the "systemic" form of JCE liability is at issue in the present proceeding.

1st Ground of Appeal – Application of Joint Criminal Enterprise Theory:

101. The Defense for the Accused argued in their appeals that the First Instance Panel committed an error of law in applying the systemic joint criminal enterprise theory as a form of criminal liability.

102. The Defense contended, first, that the joint criminal enterprise theory is not provided for as a form of criminal liability under the CC of BiH and, therefore, the Accused cannot be convicted of crimes on that basis.[98] Although admitting that Article 180(1) of the CC of BiH is identical to Article 7(1) of the ICTY Statute, and that joint criminal enterprise liability is incorporated in Article 7(1), the Defense argued that Article 180(1) of the CC of BiH may not be similarly interpreted nor can that interpretation be applied in the instant case.

103. The Defense objected, second, that the joint criminal enterprise theory was not provided for as a form of criminal liability under the applicable law at the time the crimes were committed, namely the 1977 Criminal Code of the Socialist Federal Republic of Yugoslavia (CC of SFRY).[99] The Defense further argued that, although the CC of SFRY provided for similar forms of liability, none of those forms of liability are equivalent to the systemic form of joint criminal enterprise liability. The Defense argued that, accordingly, the application of the joint criminal enterprise theory in the instant proceeding violates the principle of legality as enshrined in Article 3 of the CC of BiH, Article 3 of the CC of SFRY, and Article 7 of the ECHR. The Defense further argued that none of the current laws of BiH nor the applicable law of the SFRY in force at the relevant time permitted the direct application of customary international law.

104. The Appellate Panel concludes that the Defense for the Accused failed to establish that the First Instance Panel committed an error of law in applying systemic JCE liability and concluding that the Accused can be convicted on that basis.

105. The issues of the incorporation of systemic JCE liability into the CC of BiH and the application of the systemic JCE theory consistent with the principle of legality have been previously addressed in numerous verdicts of this Court and the ICTY, as well as in the First Instance Verdict and the Second Instance Verdict in the case against *Mitar Rašević and Savo Todović*,[100] therefore this Court has already taken a position on this issue several times

[98] Mejakić Appeal, para. 198; Gruban Appeal, pg. 32.
[99] Mejakić Appeal, paras. 199-211.
[100] *Mitar Rašević and Savo Todović*, X-KR-06/275 (Ct. of BiH), First Instance Verdict, 28 February 2008; *Mitar Rašević and Savo Todović*, X-KRŽ-06/275 (Ct. of BiH), Second Instance Verdict, 6 November 2008.

before. For that reason, the First Instance Panel did not want to reiterate it, but it just referred to it, which does represent a deficiency of the Verdict, as correctly pointed out in the Appeals. However, that deficiency was not of such significance so as to affect the validity of the contested Verdict.

106. In the Mitar Rašević and Savo Todović First Instance Verdict, the Panel concluded that the systemic form of joint criminal enterprise liability is incorporated in Article 180(1) of the CC of BiH and was part of customary international law at the time the offenses in that proceeding were committed.[101] Namely, this Verdict states that Article 180(1) of the CC of BiH is derived from and is identical to Article 7(1) of the ICTY Statute; that 180(1) became part of the CC of BiH after Article 7(1) had been enacted and interpreted by the ICTY to include, specifically, joint criminal enterprise as a mode of co-perpetration resulting in personal criminal liability.

107. It should also be taken into account that, from 1899 onwards, customary international humanitarian law has been expressly included in the humanitarian law treaties to which Bosnia and Herzegovina is a party through the so-called "Martens clause". This clause is included in the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Additional Protocol I"), and these conventions, including the protocols, are incorporated in the in the Constitution of Bosnia and Herzegovina (Article II(7) and Annex 1).

108. The First Instance Panel in that case further concluded that the application of joint criminal enterprise liability in that proceeding did not violate the principle of legality.[102] In respect to that, it is said that, since the joint criminal enterprise was part of the customary international law at the time the crimes were committed, the Accused were therefore subject to them.

109. The Appellate Panel in the same case confirmed these conclusions on appeal, more precisely, that the joint criminal enterprise undoubtedly represents an institution of the customary international law, which existed and was in application long before the Accused committed the crime in question, which leads to the conclusion that the principle of legality was not violated in any way.

110. This Panel agrees fully with the position taken in the First Instance and the Second Instance Verdict in *Mitar Rašević et al.* case, specifically that systemic JCE is a form of liability incorporated in Article 180(1) of the CC

[101] *Rašević and Todović* First Instance Verdict, pgs. 103-105.
[102] *Rašević and Todović* First Instance Verdict, pgs. 105-111.

of BiH, and that systemic JCE liability is a part of customary international law, which is part of the law of Bosnia and Herzegovina. This Panel considers this position to be reasonable, acceptable and based on law.

111. The Appellate Panel further concludes that the application of systemic JCE liability to the Accused does not violate the principle of legality.[103] Specifically, the Accused were subject to customary international law at the time the offenses were committed under the applicable law at the time. Systemic JCE liability was part of customary law at the time the offenses in this proceeding were committed, and it was reasonably foreseeable to the Accused at the time that they would be subject to prosecution for commission of crimes under systemic JCE liability.

112. Therefore, the Appellate Panel concludes that the Defense for the Accused Mejakić and Gruban failed to establish that the First Instance Panel violated the principle of legality and committed an error of law in applying systemic JCE liability and concluding that the Accused can be convicted on that basis. Accordingly, this appellate claim is dismissed as unfounded.

2nd Ground of Appeal – Convictions under Systemic JCE:

113. The Defense for the Accused Mejakić argued in their appeal that the First Instance Panel failed to provide reasons in support of its conclusion that the Accused was liable for certain crimes as a member of a systemic joint criminal enterprise.[104] In particular, the Defense argued that the Verdict "fails to provide the reasons as to the commission of the criminal offences and also the intent on the part of the Accused Mejakić with regard to the criminal offences as charged."[105] The Defense contended that the Verdict accordingly failed to cite reasons for the decisive facts in violation of Article 297(1)(k) of the CPC of BiH.

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[103] *See Streletz, Kessler and Krenz v. Germany* (Apps. Nos. 34044/96, 35532/97 and 44801/98), 22 March 2001, para. 105; *Kokkinakis v. Greece* (App. No. 14307/88), 25 May 1993, para 40; *Radio France v. France* (App. No. 53984/00), 30 March 2004, para. 20. The Constitutional Court of BiH, in interpreting *Kokkinakis v. Greece*, stated the requirements of Article 7 as to foreseeability as follows: "The European Court specifically emphasized that this requirement of Article 7 of the European Convention is met when an individual referred to in the relevant provision, if necessary, by means of the Court interpretation, can understand which criminal activities and mistakes can make him/her subject to criminal prosecution." *Abduladhim Maktouf*, AP- 1785/06 (Const. Ct. of BiH), Decision on Admissibility and Merits on the appeal from the Verdict of the Court of Bosnia and Herzegovina ("*Maktouf* Decision"), 30 March 2007, para. 63.

[104] The Accused Mejakić and Gruban were each convicted under systemic JCE for "for the criminal offenses committed by the interrogators and their assistants, the co-called 'Special Forces from Banja Luka', the staff of the Omarska Mine, and the crimes that were perpetrated during the two other shifts he was not in charge of. Also, the crimes perpetrated by unidentified perpetrators within the Omarska camp fall under this mode of liability. In addition to that, the general inhumane living conditions at the Camp also have to be included in the criminal responsibility of the Accused on the basis of his participation in the 'Joint Criminal Enterprise.'" Verdict, pgs. 216, 222.

[105] Mejakić Appeal, para. 101.

114. The Defense for the Accused Gruban objected that the First Instance Panel failed to provide reasons in support of its conclusion that the Accused was liable for certain crimes as a member of a systemic joint criminal enterprise. In particular, the Defense argued that the manner in which the First Instance Panel reasoned the Accused's criminal liability "cannot be considered as an explanation, because such a way of providing reasoning is inadmissible and unlawful in our legal system."[106] The Defense argued that the Verdict accordingly is incomprehensible in violation of Article 297(1)(k) of the CPC of BiH.

115. The Defense for the Accused Knežević in their appeal argued that the Verdict is incomprehensible and contradictory to the extent that the Accused was found guilty of certain crimes on the basis of systemic JCE liability.[107] In particular, the Defense argued that it was incomprehensible and contradictory that the Accused be found guilty for "the manner and the conditions in which the Camp was operational[…] [and] for the killings, beatings and other forms of physical violence of the detainees who were committed directly and personally by other persons."[108] The Defense contended that the Verdict accordingly is incomprehensible and contradictory in violation of Article 297(1)(k) of the CPC of BiH.

116. The Appellate Panel has previously noted that the Defense for the accused failed to establish that the Verdict was incomprehensible, contradictory, or did not state the reasons concerning decisive facts, including those related to JCE. Taking this into account, as well as the contents of the Appeals, it is necessary to examine whether the First Instance Panel properly, mindful of the evidence adduced, concluded that there exist all elements of the systemic joint criminal enterprise with respect to the accused Željko Mejakić, Momčilo Gruban and Duško Knežević, namely whether *actus reus* included a common goal to commit one or several specific criminal offenses, which is carried out through the organized system in place. Participation, required for the contribution to the common purpose of the system, does not have to be in the form of the actual commission of the underlying offense, under the condition that the participation of the accused actively contributed to the furtherance of the system. *Mens rea* requires personal knowledge of the organized system in place and its common criminal purpose and the willingness to contribute to that system.

117. This Panel notes that the contested Verdict clearly provided reasons concerning each Accused's intent to further the common purpose of the JCE

[106] Gruban Appeal, pg. 31.
[107] The Accused Knežević was convicted under systemic JCE "the entire system of the two camps and thereby for all the crimes committed in them, based on this mode of individual criminal responsibility." Verdict, pg. 224.
[108] Knežević Appeal, pgs. 2-3.

and the contribution of each Accused to the systemic JCE, thus clearly reasoning the *actus reus* and *mens rea* elements of JCE liability for each of the Accused.

118. With respect to the Accused Mejakić, the First Instance Panel established that the Accused actively participated in enforcing the system of ill-treatment at the Omarska Camp. In particular, the First Instance Panel found that the Accused contributed to the operation and maintenance of the systemic JCE by "exercis[ing] [a role of authority] through a wide range of organizational and supervisory functions and demonstrat[ing] his authority towards the guards, the guard shift leaders and visitors to the camp in a visible manner."[109] The First Instance Panel further found that the Accused knew of the systemic JCE and intended to further that system, reasoning that the Accused knew of the system and continued to play a significant role in the operations of that system.[110] The First Instance Panel, therefore, found that the Accused had the necessary *actus reus* and *mens rea* to be liable as a participant in a systemic JCE.

119. The Appellate Panel examined the following facts significant for the establishment of the contribution of the accused to the common criminal purpose: *de facto* or *de jure* position of the accused in the system[111], the scope of the criminal enterprise, length of his presence at the site of the system, effort to prevent criminal activity or hinder efficient functioning of the system, intensity of the criminal activity, type of activity actually carried out by him and the manner in which he performed his duties within the system.

120. In the opinion of the Appellate Panel, Mejakić's participation in the systemic joint criminal enterprise that existed at the Omarska camp was significant, and his contribution decisive. As one of the key persons in the camp, specifically as the Chief of Security Guards, by his actions during the establishment of the camp, together with Miroslav Kvočka, and later during the performance of his daily duties, the accused made a decisive contribution to the unhindered and efficient functioning of the Omarska camp with the goal to persecute non-Serb civilians in a manner as described in the Operative Section of the First Instance Verdict. As a person of authority, by his continued performance of duties and tasks at the camp and by his direct involvement in the maltreatment of the aggrieved party Saud Bešić, the accused instigated his subordinates to continue participating in the systemic joint criminal enterprise.

[109] Verdict, pg. 216.
[110] Verdict, pg. 217.
[111] Kvočka Appeals Judgment, paragraph 101.

121. The Appellate Panel notes that the findings of the First Instance Panel regarding the aforementioned were valid and reasonable. Accordingly, this Panel concludes that the Defense for the Accused Mejakić failed to show that the First Instance Panel erroneously found the Accused guilty as a participant in the systemic JCE at the Omarska Camp.

122. With respect to the Accused Gruban, the First Instance Panel established that this Accused also actively participated in enforcing the system of ill-treatment at the Omarska Camp. In particular, the First Instance Panel found that the Accused's participation was established by his "position of a shift leader at the Omarska Camp, in charge of a 12-hour guard shift that took turns with two other shifts[…] [and that] he exercised this role through a range of supervisory functions and demonstrated his authority towards the guards and visitors to the camp in a visible manner."[112] The First Instance Panel further found that the Accused knew of the systemic JCE and intended to further that system, reasoning that the Accused knew of the system and continued to play a significant role in the operations of that system.[113] The First Instance Panel specifically noted that the Accused's intent to further the system was independent of his motive. The First Instance Panel, therefore, found that the Accused had the necessary *actus reus* and *mens rea* to be liable as a participant in a systemic JCE.

123. The Appellate Panel accepts that it is not disputable that the accused Gruban tried to help some of the detainees at the Omarska camp. However, as stated in the contested Verdict as well, that help was given on an individual basis and was never meant to jeopardize the efficient running of the camp or the efficient management of the guards. On the contrary, the help given by him was given secretly. That is the reason why the accused was found guilty on those grounds, for he too supported the camp system and did not completely stay out of the system, which would have certainly been very difficult, but not impossible. He still had the possibility to choose, while the detainees could not leave the camp at will. The Panel will certainly take these acts of kindness into consideration when meting out the punishment, but they do not represent proof challenging Gruban's contribution to the systemic joint criminal enterprise at the Omarska camp. Namely, "shared criminal intent does not require the co-perpetrator's personal satisfaction or enthusiasm or his personal initiative in contributing to the joint criminal enterprise."[114]

124. The Appellate Panel concludes that the foregoing findings of the First Instance Panel were valid and reasonable. Accordingly, this Panel concludes that the Defense for the accused Gruban failed to show that the First

[112] Verdict, pg. 222.
[113] Verdict, pg. 222-223.
[114] Krnojelac Appeals Judgment, paragraph 100.

Instance Panel erroneously found the Accused guilty as a participant in the systemic JCE at the Omarska Camp.

125. With respect to the Accused Knežević, the First Instance Panel established that the Accused actively participated, as an "opportunistic visitor", in the systems of ill-treatment at the Omarska and Keraterm Camps, and that his participation was significant and thus satisfied the *actus reus* element of systemic JCE liability.[115] The First Instance Panel discussed the degree of the Accused's participation in detail, concluding that a person who "stands out in a way that his name becomes a synonym for the suffering of the detainees, as was the case with the name Duća for the inmates at the Omarska and Keraterm camps, did make significant contribution to the maintenance" of the systemic JCE.[116] The First Instance Panel further found that the Accused knew of the systemic JCEs and intended to further those systems, reasoning that the Accused knew of the system and continued to visit and commit crimes at both camps.[117] The First Instance Panel, therefore, found that the Accused had the necessary *actus reus* and *mens rea* to be liable as a participant in the systemic JCEs as an "opportunistic visitor".

126. With respect to that, the Appellate Panel finds that, although the accused Duško Knežević did not hold an official position at the Omarska and Keraterm camps, the camp in itself had its own purpose and goal and by his actions he furthered that purpose and goal every time he visited them. Consequences of the actions he took stayed in the camp, which represents another way in which the accused furthered the system of ill-treatment in these camps. In the instant case, this Panel particularly took into consideration the number of acts, the fact that he visited the camps with other persons, maltreated the detainees while aware that they were helpless and scared, that they were barely surviving, and he abused them in different ways (implements used are irrelevant). As the result of everything described above, the detainees mostly did not even attempt to escape from those camps, because they felt helpless.

127. The Appellate Panel therefore concludes that the findings of the First Instance Panel with respect to his role in the system were also reasonable, and that the Defense for the Accused Knežević failed to show that the First Instance Panel erroneously found the Accused guilty as a participant in the systemic JCE at the Omarska and Keraterm camps. Accordingly, this assertion made in the appeal is dismissed as unfounded.

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[115] *See generally Prosecutor v. Miroslav Kvočka, et al.*, IT-98-30/1-A, Judgment, 28 February 2005, para. 599.
[116] Verdict, pg. 224.
[117] Verdict, pg. 225.

Systemic JCE – Other Crimes:

128. The Appellate Panel then considered whether the Accused Mejakić and Gruban could be held liable pursuant to systemic JCE liability for the crimes of which the First Instance Panel erroneously convicted them on the basis of superior responsibility – command responsibility.

129. As the Appellate Panel has upheld the First Instance Panel's conclusions that the Accused had the necessary *mens rea* and *actus reus* for systemic JCE liability, the sole issue to be considered is whether the crimes of which the Accused were convicted under superior responsibility also were within the common purpose of the systemic JCE at the Omarska Camp and were in fact committed pursuant to and in furtherance of that common purpose.

130. The Appellate Panel considers that the First Instance Panel properly concluded that those crimes were committed pursuant to and in furtherance of that common purpose. This is evident from the First Instance Panel's conclusions with respect to the Accused Knežević. The First Instance Panel found the Accused Knežević responsible for "the entire system of the two camps and thereby for all the crimes committed in them, based on this mode of individual criminal responsibility [systemic JCE]."[118] The First Instance Panel accordingly found that the crimes committed at the Omarska Camp, including those at issue, were committed pursuant to and in furtherance of the common purpose of the systemic JCE in place at the Omarska Camp.

131. The Appellate Panel concludes that this finding of the First Instance Panel was reasonable. It was certainly open to a reasonable trier of fact, on the basis of the evidence before the First Instance Panel, to conclude that the crimes committed at the Omarska Camp, with which the accused Mejakić and Gruban have been charged, were all committed pursuant to and in furtherance of the systemic JCE in place at the Omarska Camp. The Appellate Panel notes in particular the sheer number of crimes committed on the premises and within the Omarska Camp, as well as the systematic and regular manner in which the crimes established were committed. Accordingly, the this Panel concludes that the First Instance Panel reasonably found that the crimes committed at the Omarska Camp, with which the accused Mejakić and Gruban have been charged, were all committed pursuant to and in furtherance of the systemic JCE in place at the Omarska Camp.

132. Furthermore, the accused Željko Mejakić and Momčilo Gruban, in a manner as described in the Operative Section of the First Instance Verdict, committed crimes and enabled other participants in the JCE to carry out

[118] Verdict, pg. 224.

their tasks and commit crimes, by ensuring by their contribution that the victims were in one place, helpless and weakened, always available to the members of JCE and uninvited visitors and unable both physically and mentally to resist the crimes committed against them. The accused cannot defend themselves by not personally participating in all activities, or committing all crimes necessary for the furtherance of the common purpose of the joint criminal enterprise. However, it is sufficient that the roles and positions of the accused contributed to the *actus reus* of some of the crimes and decisively contributed to the criminal purpose of the joint criminal enterprise at the Omarska camp as a whole.

133. This Panel is of the view that the proceedings entirely reliably and beyond any doubt established that the accused Željko Mejakić, Momčilo Gruban and Duško Knežević had committed the criminal actions in a manner, at the time and in locations as precisely stated in the Operative Section of the First Instance Verdict. The acts committed by the Accused were aimed at severely depriving the inmates of their fundamental rights, such as the right to life, liberty and security of the person, which is in contravention of both the national and international law. Witness testimonies that the First Instance Panel found credible and consistent clearly show that the victims of the killing, beating, offending and humiliation, committed by the Accused with a discriminatory intent, were non-Serb civilians detained in the Omarska and Keraterm camps, all with a view to collecting information, intimidating the victims and punishing them. In addition, the Accused had known some of the victims from before. Some of them were even very respectable and rich people in that area and for that reason were subjected to even more inhumane treatment.

134. The Accused, as members of the systemic JCE at the Omarska Camp, having actively participated in enforcing the system of ill-treatment at the Omarska Camp, with knowledge of the system and intending to further the system, are criminally responsible for all crimes committed pursuant to and in furtherance of the systemic JCE.

135. Contrary to the appellate claims of the Defense Counsel for the accused Željko Mejakić and Momčilo Gruban, the Appellate Panel finds that the claims according to which they did not agree with the crimes that were committed in the Omarska camp cannot serve as a basis to exempt those two Accused from responsibility for everything that was done. The reason for that is the fact that they did not do anything to stop further crimes, protect the detainees as a group and release the detainees they were in charge of. The common purpose to realize the joint criminal enterprise does not necessarily imply either personal effort and satisfaction, or personal initiative in rendering the relevant contribution to the common criminal plan.

136. The individual actions of the accused Željko Mejakić, and to a greater extent of the accused Momčilo Gruban, which might be defined as charitable acts, can in no way exculpate them for the other actions they undertook, which satisfy all important elements of the criminal offense they have been found guilty of. However, those charitable acts were correctly regarded as mitigating factors for the Accused. It is important to stress here that occasional helping to some detainees was never directed at jeopardizing the managing and functioning of the camp, but represented individual actions, which were conducted secretly and which never grew into an attempt to change the established system of abuse.

137. Accordingly, the Appellate Panel concludes that the Accused Mejakić and Gruban are guilty as participants in a systemic JCE for all crimes they were convicted of in the First Instance Verdict, including those they were convicted of under superior responsibility, and the accused Mejakić also for hitting Saud Bešić, of which he was convicted under individual responsibility.

Substantive Law:

138. The Appellate Panel also finds unfounded the arguments in the Appeals contesting the application of the substantive law , as well as the claims that instead of applying the CC SFRY, which was in effect at the time of the perpetration of the criminal offense, the First Instance Panel erroneously applied the CC of BiH, thus violating the principle of legality and the principle of time constraints regarding applicability, set forth in Articles 3 and 4 of the CC of BiH respectively.

139. With respect to the application of the substantive law, the First Instance Panel provided reasoning, which according to the Appeals is insufficient. This Panel finds that it is correct that the reasoning could have and should have been more detailed, but it still meets the minimum standard, especially if it is taken into account that this is a position that has been taken by the panels of this Court several times already, the one that has been publicly announced several times, and was subject of the review by the Constitutional Court of BiH, which upheld it in the Verdict to which the First Instance Panel refers (Abduladhim Maktouf case). For that reason the First Instance Panel was of the opinion that a detailed reasoning was redundant with regard to the substantive law, but what is most important is that this was an entirely correct position on the application of substantive law, and this Panel supports it entirely for the reasons given below.

140. First of all, it should be taken into account that the Operative Part of the contested Verdict clearly states that the criminal acts concerned were

committed at the time of the armed conflict in the Republic of Bosnia and Herzegovina within a widespread and systematic attack in the territory of the Prijedor Municipality during the period from 30 April 1992 to the end of 1992. It is beyond dispute that the CC SFRY, adopted in 1977, was in effect in that period.

141. Although entire Chapter 16 of the CC SFRY is entitled *Criminal Acts against Humanity and International Law*, not a single criminal act set forth in the CC SFRY is explicitly called crime against humanity.

142. However, in the period concerned, under Article 142(1) of the CC of SFRY[119], as a violation of international law effective at the time of war, armed conflict or occupation, it was punishable to order or commit against civilian population, *inter alia*, the following criminal acts: killings, inhuman treatment or illegal detention, which applies in the case at hand. Also, the CC SFRY does not contain a provision explicitly penalizing persecution as a crime against humanity, but *Racial and Other Discrimination*[120] was punishable under Article 154 of the CC SFRY.

143. In this respect, the discriminatory treatment of persons of non-Serb ethnicity, as the First Instance Panel correctly concluded several times, stems from the fact that the perpetrators of the criminal acts of torture and killings committed these acts with discriminatory intent because the detainees in the Omarska and Keraterm camps belonged to a different ethnicity and religion.

144. Although, at the time of the commission of the criminal acts, the maximum statutory punishment for the acts constituting a violation of Article 142(1) of the CC of SFRY was death penalty, which has been abolished in Bosnia and Herzegovina in the meantime with the ratification of Protocol 13 of the ECHR[121], Article 38(2) of the CC SFRY allows a court to impose a punishment of imprisonment for a term of 20 years for criminal acts carrying the death penalty.

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[119] The provision reads: "Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to **killings, torture, inhuman treatment**, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labor, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts…"

[120] Paragraph (1) of this Article reads: "Whoever on the basis of distinction of race, color, nationality or ethnic background violates basic human rights and freedoms recognized by the international community…"

[121] *Official Gazette of BiH -- International Treaties*, No. 8/03, dated 30 June 2003.

145. Pursuant to Article 142 of the CC SFRY, the criminal offense in question carried a sentence of imprisonment for a term not less than five years or the death penalty, whereas, pursuant to the Criminal Code now in effect, the same criminal offense carries a sentence of imprisonment for a term not less than 10 years or a long-term imprisonment. Having compared the respective sentences, the Court came to the conclusion that the sentence imposed by the current Code is, in any case, more lenient than the previous one, irrespective of the fact that the previous Code set forth the minimum duration of imprisonment to five years, because customary international law stipulates that death penalty is, in any case, a more stringent punishment than the one of long-term imprisonment. Also, under customary international law, it is an absolute right of a suspect not to be executed and a state is obliged to secure that right, which has indeed been done by the adoption of the new Code.

146. With respect to individual criminal liability, Chapter 2 of the CC SFRY, entitled *Criminal Conduct and Criminal Liability*, contains provisions concerning different modes of liability and its Article 22 pertains to complicity, which applies in the criminal case at hand.

147. In other words, the First Instance Verdict charges the Accused Mejakić, Gruban and Knežević that they committed the criminal acts as perpetrators and co-perpetrators, but this Panel established that the Accused were co-perpetrators in the criminal acts committed in the Omarska and Keraterm camps as part of the Joint Criminal Enterprise. That is why it is also necessary to define the important elements of **(co-)perpetration**.

148. Article 29 of the CC BiH sets forth: *"If several persons who, by participating in the perpetration of a criminal offense or by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offense, each shall be punished as prescribed for the criminal offense."*

149. It follows from this provision that co-perpetration is a mode of perpetration, which exists where several persons, who meet all the requirements requested for perpetrators, on the basis of a joint decision, knowingly and willingly, perpetrate a certain criminal offense in such a way that each of the co-perpetrators renders his contribution to the offense, which is substantial and without which the criminal offense would not have been perpetrated or would not have been perpetrated in the planned manner. Therefore, in addition to the joint action of several persons in the perpetration of a particular offense, it is also necessary that they are aware that the perpetrated offense represents a joint result of their action.

150. However, the CC SFRY, which was in effect at the time of the perpetration of the criminal offense concerned, sets forth: *"If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act."*

151. It follows from this legal definition that all persons who jointly perpetrated in a criminal offense by participating in the perpetration or in some other way, shall be punished, and that each of the co-perpetrators shall be punished with the punishment prescribed for the committed criminal act. Therefore, the accused participated in the perpetration of the criminal act he has been found guilty of.

152. Consequently, one notes a significant difference between the two cited legal definitions of the concept of "*co-perpetration*". It concerns the fact that the CC BiH gives a narrower definition of the concept of co-perpetration, as the participation that does not constitute an act of perpetration is now restricted to the **decisive** contribution to the realization of the criminal act, which is much more difficult to prove, whereas the previous Code required only establishing a general contribution to the joint consequence of the act. Therefore, in the opinion of the Appellate Panel, the CC BiH is more lenient to the perpetrator of a criminal offense in this respect, too, than was the CC SFRY.

153. It is also beyond dispute that, under the principle of legality, no punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offense by law or international law, and for which a punishment has not been prescribed by law (Article 3 of the CC BiH), while, pursuant to the time constraints regarding applicability, the law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the criminal offense, and if the law has been amended on one or more occasions after the criminal offense was perpetrated, the law that is more lenient to the perpetrator shall be applied (Article 4 of the CC BiH). The principle of legality is also stipulated by Article 7(2) of the ECHR and Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR).

154. However, Article 4a) of the CC BiH sets forth that Articles 3 and 4 of the CC BiH shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law. This is a direct takeover of the provisions of Article 7(2) of the ECHR and Article 15(2) of the ICCPR, which allows for an exceptional departure from the principles of Article 4 of the CC BiH and from the mandatory application of a more lenient law in the proceedings for the acts that constitute criminal offenses under international law. This is exactly the case in these proceedings against

the Accused Željko Mejakić, Momčilo Gruban and Duško Knežević, as it is a case of incrimination that includes a violation of the rules of international law. During the period relevant to the Indictment, crimes against humanity undoubtedly constituted a criminal offense, both from the aspect of customary international law and the aspect of "the principles of international law". In other words, it suffices for customary international law to encompass the conduct prohibited by Articles 172 and 173 of the CC BiH for it to serve as a basis for rendering the verdict in this case.

155. Also, customary international law and the inter-state treaties signed by the Socialist Federal Republic of Yugoslavia (SFRY) automatically became binding for Bosnia and Herzegovina, both when Bosnia and Herzegovina was part of the Socialist Federal Republic of Yugoslavia and when it became a successor state to the former Socialist Federal Republic of Yugoslavia. The Vienna Convention the on Succession of States in respect of Treaties from 1978, ratified by the Socialist Federal Republic of Yugoslavia on 18 April 1980, reads in Article 34 that any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed, unless the successor State otherwise agrees. In addition, on 10 June 1994, Bosnia and Herzegovina declared that, as a successor State, it was accepting all international treaties that were binding for the former Yugoslavia. In addition, Article 210 of the Constitution of the Socialist Federal Republic of Yugoslavia envisaged that international treaties were to be automatically implemented and directly applied as of the day of entering into force, without prior adoption of the relevant implementation regulations.

156. It follows from the aforesaid that Bosnia and Herzegovina, as a successor to the former Yugoslavia, ratified the ECHR and the ICCPR and that these international documents are binding for it. Given that they stipulate the obligation of trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law, which crimes against humanity undoubtedly are in accordance with the aforesaid, the claims in the Appeals that the trial and punishment for this criminal offense constitutes a violation of the *nullum crimen sine lege* principle are completely unfounded in the opinion of this Panel.

157. The Appellate Panel concludes, as the contested Verdict correctly stated, that the matter of legality of application of the 2003 Criminal Code in the proceedings before the Court of BiH has already been considered in detail and resolved by the Constitutional Court of Bosnia and Herzegovina in the

Decision in the Abduladhim Maktouf case[122]. This matter was also properly resolved in the First Instance Verdict against Dragoje Paunović[123] that the contested Verdict refers to, which was also upheld in the Second Instance Verdict in the said case[124].

158. Everything mentioned above is supported by the conclusion from the referenced Maktouf Verdict which says: *"In practice, legislation in all countries of former Yugoslavia did not provide a possibility of pronouncing either a sentence of life imprisonment or long-term imprisonment, as often done by the International Criminal Tribunal for the former Yugoslavia (the cases of Krstić, Galić, etc.). At the same time, the concept of the SFRY Criminal Code was such that it did not stipulate either long-term imprisonment or life sentence but death penalty in case of a serious crime or a 15 year maximum sentence in case of a less serious crime. Hence, it is clear that a sanction cannot be separated from the totality of goals sought* to be achieved by the criminal policy at the time of application of the law."[125]

159. *"In this context, the Constitutional Court holds it not possible to simply 'eliminate' a sanction and apply other, more lenient, sanctions, so that the most serious crimes would in practice be left inadequately sanctioned."*[126]

160. The Appellate Panel fully accepts the foregoing opinions of the BiH Constitutional Court and the positions this Court has taken regarding the application of the CC BiH, stated in the mentioned verdicts against other perpetrators, and finds them clear, reasonable and based on the law, and therefore applicable to this case.

161. Taking this into consideration, the Appellate Panel concludes that, given the established participation of the Accused in the JCE, the First Instance Panel erroneously applied the provision laid down in Article 180(2) of the CC BiH and found the accused Mejakić and Gruban guilty, on the basis of command responsibility, of the acts undertaken by their subordinates, and Mejakić also of one act undertaken by him personally (the beating of Saud Bešić) on the basis of individual responsibility. Since the Accused committed all the acts of which the First Instance Verdict found them guilty as part of the JCE, the Appeals of Defense Counsel for Mejakić and Gruban had to be partially granted and the First Instance Verdict modified with respect to the legal qualification of the offense. Modifying the contested Verdict in that part pursuant to Article 314 of the CPC of BiH, the Appellate Panel found the

[122] Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility and Merits, in the Abduladhim Maktouf case, No. AP 1785/06 dated 30 March 2007.
[123] *Dragoje Paunović* case, No. X-KR-05/16, First Instance Verdict, dated 26 May 2006.
[124] Ibid. Second Instance Verdict dated 27 October 2006.
[125] Constitutional Court of Bosnia and Herzegovina Decision in *Abduladhim Maktouf* case, paragraph 68.
[126] Ibid, paragraph 69.

accused guilty of the criminal offense of Crimes against Humanity in violation of Article 172(1) (a), (e), (f), (g), (k) and (h), all in conjunction with Articles 29 and 180(1) of the CC BiH.

162. In the case at hand, this Panel concluded that it was a matter of application of a wrong legal standard in the Verdict, hence the Appellate Panel rendered a different legal definition and, consequently, reconsidered the relevant factual findings in the contested Verdict. In that way the appropriate legal standard was applied to the evidence in the case file. Given the fact that the this Panel is satisfied with the accuracy of the state of the facts established by the First Instance Panel, the Appellate Panel revised the Verdict in terms of proper application of the law and then considered whether the imposed punishments were proportionate to the gravity of the offense, personality of the perpetrators and all other circumstances of the case.

Sentencing:

163. When reviewing the decision on the sentence insofar as contested by the Appeal, in relation to the accused Knežević pursuant to Article 308 CPC BiH, the Appellate Panel took into account the fact that the First Instance Panel took under advisement all circumstances bearing on the magnitude of punishment, as stipulated by Article 48 of the CC BiH. In other words, the contested Verdict took into account the statutory limits of the punishment for the relevant criminal offense, the purpose of punishment, and especially the degree of criminal liability of the Accused, the circumstances in which the offense was committed, the degree of danger to the protected object, the previous lives of the perpetrators, their personal circumstances and their conduct after the fact.

164. In terms of aggravating factors for the accused Željko Mejakić, the First Instance Panel considered the long duration of the difficult position of helplessness and fear of the detainees in the Omarska camp where the Accused was regularly present; a large number of victims; the circumstances in which the direct perpetrators committed the criminal acts and their cruel treatment of victims abusing their helplessness and fear; extremely serious consequences the detainees and their family members have suffered; the duration of the Accused's term in the camp, whereby he demonstrated determination and persistence in the commission of the criminal offense; his earlier experience as a professional police officer due to which he had a special public duty to enforce the law, which he failed to do. In terms of the mitigating factors for the Accused Željko Mejakić, the First Instance Panel considered the fact that the Accused is a family man, father of two children and has no prior convictions. The Panel also considered as mitigating that the Accused helped certain detainees in a few situations, as well as his proper conduct before the Court.

165. Having reviewed the aforesaid assessment of the First Instance Panel, the Appellate Panel found that, contrary to the allegations in the Appeals, the First Instance Panel gave an adequate assessment of all aggravating and mitigating circumstances given all the subjective and objective factors related to the criminal offense and the perpetrator. Consequently, the Appellate Panel too finds that the imposed sentence of long-term imprisonment for the term of 21 (twenty-one) years, towards which the time spent in custody is to be credited, represents a proportionate punishment that reflects the gravity of the criminal offense he has been found guilty of, also given the protected object endangered by the offense. Given the foregoing, the very duration of the punishment will make it possible to achieve the general and the specific deterrence aim set forth in Article 39 of the CC BiH, hence the allegations in the Appeals are inadmissible.

166. Also, with respect to the accused Momčilo Gruban, the First Instance Panel took into account the aggravating and the mitigating circumstances, and thus found that the duration of the presence of the Accused Gruban in the Omarska camp and his persistence in the commission of the criminal offense concerned, his consent to the mass crimes committed in the camp and a large number of victims who were helpless and afraid in the camp, subjected to everyday tortures and maltreatments, were the aggravating factors affecting the sentencing of the Accused. The First Instance Panel did consider as mitigating the fact that a certain number of witnesses mentioned that the Accused had helped some detainees and had not been violent towards them. In addition, the First Instance Panel also considered as mitigating the fact that the accused Momčilo Gruban had no prior convictions, that he is a family man and father of two children and that his conduct before the Court was proper. However, in the opinion of the First Instance Panel, the Accused selectively resolved specific situations, either on a personal basis or based on another relationship, knowing that the unlawful treatment of inmates in the Omarska camp was recurring and widespread. Thus, he demonstrated determination not to oppose such conduct openly and leave the camp, despite his awareness of the incidents that were taking place.

167. Contrary to this, the Appellate Panel considers that there are highly mitigating circumstances for the accused Momčilo Gruban, which outweigh the aggravating ones, but to which appropriate significance was not attached in the first instance sentence which, consequently, is too strict, as argued in the Appeal by the Defense Counsel. The Appellate Panel considers that the purpose of punishment can be achieved with the sentence of imprisonment for the term of 7 (seven) years towards which the time spent in custody should be credited. When meting out the punishment, the Appellate Panel had in mind that punishments are not imposed proportionate to the criminal

offense only, but also proportionate to the manner and the circumstances in which the offense was committed and the personality of the perpetrator. In the case at hand, the Accused tried with his actions to reduce the sufferings of the detainees and he indeed did so, about which many witnesses testified expressing their gratitude to the accused Gruban for everything he did for them during their detention.

168. Thus, witnesses Zlata Cikota[127], Asmir Baltić[128], Enes Kapetanović, Azedin Oklopčić[129], K050[130], K053[131], have all stated in their testimonies that "Čkalja's shift" was the best, the least severe, that they felt the safest during that shift and that they could have water, talk to each other or go to the bathroom, without being beaten by anyone. Witness K017 has testified that prisoner Blažević asked Čkalja to give him some pills for dysentery and that Čkalja gave him four pills, two of which Blažević gave to the witness. It should also be noted that Witness K017 thanked the accused Gruban for those pills in the courtroom.[132] Also, witness Enes Kapetanović has testified that Čkalja saved him. He stated: "*If it had not been for him, I would not be here today*".[133] This Panel also points out the testimony of witness K053 who stated that during his interment in Trnopolje, Čkalja came one day and a large group of people from Omarska gathered around him and applauded him, cheering *"Čkalja, Čkalja"*. This witness has explained through tears how Čkalja helped many prisoners. He stated: *"I wish they were all like Čkalja"*. He also said, referring to Čkalja, that he was sorry he (Čkalja) had to be tried.

169. This Panel is of the view that all the facts presented above indicate that, in the case of the accused Gruban, the purpose of punishment, from the specific and the general deterrence aspects, can also be achieved with the sentence of imprisonment for a term shorter than the one imposed by the First Instance Panel, hence in application of the provisions on sentence mitigation under Articles 49 and 50 of the CC BiH, this Panel sentenced the Accused Momčilo Gruban to imprisonment for the term of 7 years, that is, below the statutory limit.

170. In addition, the First Instance Panel found the following facts as showing the degree of criminal liability of the accused Duško Knežević: his persistence and determination in the commission of the crimes at issue, a large number of beatings resulting in the deaths of victims, the duration of

[127] See testimony of Zlata Cikota on 7 May 2007, at approx. 04:55.
[128] See testimony of Asmir Baltić on 28 February, at approx. 02:55.
[129] See testimony of Azedin Oklopčić on 11 June 2007, at approx. 01:53.
[130] See testimony of K050 on 5 March 2008, at approx. 45:30.
[131] See testimony of K053 on 11 April 2008, at approx. 24:00.
[132] See testimony of K017 on 14 March 2007, at approx. 04:50.
[133] See testimony of Enes Kapetanović on 26 April 2007, at approx. 31:10.

the period over which the Accused committed the acts as charged in two separate camps, his motives for the crimes, the circumstances in which he committed the crimes, treating the victims with utmost violence, abusing their helplessness, and the consequences he caused by the commission of criminal acts. Seen as a whole, these circumstances constitute a body of aggravating factors affecting the sentencing of the Accused. On the other hand, the First Instance Panel considered as mitigating for the accused Duško Knežević that he is a family man and a father of one child, that he has no prior convictions and that his conduct before the Court was proper.

171. The Appellate Panel deems that the First Instance Panel imposed the punishment on the accused Knežević correctly and that both the general and the specific deterrence aim can be achieved with the sentence of long-term imprisonment, that is, the term of 31 (thirty-one) years, hence the First Instance Verdict has been upheld in that part.

172. Like the First Instance Panel, when deciding on the punishments the Appellate Panel also took into account the duties the Accused performed in the camps, that is, that the Accused Željko Mejakić was the Chief of Security Guards in the Omarska camp and the Accused Momčilo Gruban the leader of one of the three guard shifts in the Omarska camp. The fact that the Accused Duško Knežević did not have an official duty in the Omarska and Keraterm camps does not diminish his responsibility, but, on the contrary, shows his willingness to commit criminal acts in an exceptionally cruel manner in order to harm the victims and make their already difficult lives in the camp even more difficult, whereby his conduct was not only unlawful, but also absolutely unacceptable from the human point of view.

173. The Appellate Panel wishes to stress that, when deciding on the punishments for the Accused, it reviewed the ICTY Judgments relative to the Prijedor region, that is, the Omarska and Keraterm camps, since the Appeals pointed at the violation of the principle of *"equality in punishment"* given much lower punishments pronounced by the ICTY for the same incidents. The Panel found the following and took it into account when meting out the punishment: that in the *Kvočka et al.* case, the accused Miroslav Kvočka (functional equivalent to deputy commander of guards service) was sentenced to 7 years of imprisonment, the accused Dragoljub Prcać (administrative assistant to the Omarska camp commander) to 5 years, Milojica Kos (a guard shift leader) to 6 years, Mlađo Radić (a shift leader in the Omarska camp) to 20 years, Zoran Žigić ("a visitor") to 25 years of imprisonment. In the *Sikirica et al.* case, the accused persons entered plea agreements on the basis of which the accused Duško Sikirica (security commander in the Keraterm camp) was sentenced to 15 years of imprisonment, the accused Damir Došen (a guard shift leader) to 5 years

and the accused Dragan Kolundžija (a guard shift leader in the Keraterm camp) to 3 years. In the *Predrag Banović* case (guard in the Keraterm camp), the Accused also entered a plea agreement and was sentenced to 8 years in prison. However, the Appellate Panel wishes to stress that it is necessary to evaluate all facts and circumstances, as well as the perpetrators, in each specific case and that verdicts in other cases cannot play a decisive role when meting out punishments, but can only serve as a control factor.

174. In addition to everything said above, it should also be borne in mind that the persons who lost their lives suffered a complete loss and that the suffering of the survivors is a long-lasting one. That is why it should also be borne in mind that the citizens of Bosnia and Herzegovina, that is, the community clearly shows that war crimes, irrespective of by which party and where they were committed, deserve condemnation and cannot go unpunished. However, it is necessary that the community understands that a legal solution is the best one and that justice is served.

Decision on Property Law Claims and Costs of the Proceedings:

175. With respect to the decision to refer the injured parties to take civil action to pursue their property law claims and to relieve the Accused of the duty to cover the costs of the proceedings, which will be covered from within the budget, the First Instance Panel provided clear and specific reasons, which this Panel entirely upholds as valid.

Decision on Custody:

176. The Appellate Panel did not make any corrections with respect to the time the accused Željko Mejakić and Momčilo Gruban spent in custody, because the Appeals did not point to that. However, the Appellate Panel did make certain corrections with respect to the accused Momčilo Gruban, as pointed out in his Appeal. Specifically, based on the information it received from the ICTY, this Panel established that the accused Gruban was in custody at the ICTY from 2 May 2002 until 20 July 2002, and then from 9 December until 11 December 2002, and from 18 July 2005 until 8 May 2006. Following the transfer of this case to the Court of Bosnia and Herzegovina for further action, the accused were in custody pursuant to the decisions of this Court, which was not contested by the accused. Based on the information received from the ICTY, the entire time the accused Gruban spent in custody at the ICTY was credited towards his sentence, which had originally been the intention of the First Instance Panel, only they had had inaccurate, or more precisely insufficient information. Having granted the Appeal of the Defense Counsel for the accused Gruban in that part too, this Panel needed to make that correction.

177. Based on the foregoing and pursuant to Article 310(1), as read with Article 314 of the CPC B-H, the decision as quoted in the Operative Part of the Verdict was rendered.

Record-taker:
Neira Kožo

Presiding Judge of the Panel
Judge Mirza Jusufović

LEGAL REMEDY: No appeal lies from this Verdict.