

59. Counts 11-15 of the indictment allege, *inter alia*, that the conditions under which the detainees were kept at the Foča KP Dom were inhumane. The accused complains that the generality of the allegations in the indictment that “the health of many detainees was destroyed” and that “some became suicidal, while others simply became indifferent as to what would happen to them” denies to him the opportunity of proving, for example, that this was no more than a consequence which typically manifests itself in detainees.⁶⁷

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60. There is, of course, no onus of proof upon the accused to prove anything, but even a complaint that the accused has been completely denied the opportunity of investigating the allegations must be rejected when the context in which these two allegations appear in the indictment:

5.32 During their confinement, the detainees were locked in their cells, except when they were lined up and taken to the mess to eat or to work duties. After April 1992, the cells were overcrowded, with insufficient facilities for bedding and personal hygiene. The detainees were fed starvation rations. They had no change of clothes. During the winter they had no heating. They received no proper medical care. As a result of the living conditions in the KP Dom, the health of many detainees was destroyed. Due to the lack of proper medical treatment, the 40-year old detainee, Enes Hadžić, died in April or May 1992 from a perforated ulcer.

5.33 Torture, beatings and killings were commonplace in the KP Dom prison. The detainees could hear the sounds of the torture and beatings. The detainees lived in constant fear that they would be next. The detainees kept in solitary confinement were terrified because the solitary confinement cells were generally known to be used for severe assaults. Because all detainees lived in a constant state of fear, some became suicidal, while others simply became indifferent as to what would happen to them. Most, if not all of the detainees, suffered from depression and still bear the physical and psychological wounds resulting from their confinement at KP Dom.

There is thus a clear causal connection asserted by the prosecution. That said, however, the allegations are insufficiently precise as to where and approximately when the torture, the beatings and the killings took place and who was individually responsible for that conduct (at least by reference to their category or position as a group). If the prosecution is able to do so, particulars as to who (other than Enes Hadžić) were the victims, should be supplied but, if the events themselves are sufficiently identified, the names of the victims are of less importance.

61. The prosecution is ordered to provide such particulars.

62. Both para 5.36 of the indictment expressly, and para 5.37 by implication, assert either individual responsibility or responsibility as a superior on the part of the accused for offences which took place in 1994 – that is, after the period from April 1992 to August 1993 limited by the general allegations in the earlier part of the indictment for such responsibility. The prosecution must

⁶⁷ Paragraph 27 of the Motion.

concede that, so far as *this* accused is concerned, these allegations are limited to that period ending August 1993.

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63. The accused also points to the absence of any identification of time in para 5.39 of the indictment (which falls within the same group of charges alleging enslavement as paras 5.36-37), and requires particulars.⁶⁸ The prosecution is directed to amend the indictment so as to provide such particulars.

VII Application for oral argument

64. In his Preliminary Motion on the Form of the Indictment, in his Motion to file a Reply to the prosecution's Response to the Preliminary Motion, and in a separate request following the filing of the prosecution's Further Response, the accused sought leave to make oral submissions. He did so because the Trial Chamber, in its Order for Filing of Motions,⁶⁹ ordered that there will be no oral argument on any motion unless specifically requested by counsel for either party and approved by the Trial Chamber, taking into account the need to ensure a fair and expeditious trial.

65. The general practice of the International Tribunal is not to hear oral argument on such motions prior to the trial unless good reason is shown for its need in the particular case. That general practice is soundly based upon the peculiar circumstances in which the International Tribunal operates, in that counsel appearing for accused persons before it invariably have to travel long distances from where they ordinarily practise in order to appear for such oral argument; counsel appearing for the prosecution are often appearing in other trials currently being heard; and the judges comprising the Trial Chamber in question are usually engaged in other trials at the time when the motion has to be determined.

66. Counsel for the accused has not identified any particular issues upon which he wishes to put oral arguments or explained why he was unable to put those arguments in writing. In his most recent request, Counsel for the accused has sought to justify oral submissions upon the basis that the prosecution's Further Response has failed to respond, or has responded in a contradictory and insufficient way, to the submissions which he had put in support of the accused's Motion. Insofar as that very general assertion may be accurate, it is well within the competence of the judges of the International Tribunal to see that fact for themselves.

⁶⁸ Paragraphs 28-29 of the Motion.

⁶⁹ The order is dated 17 June 1998.

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67. Having regard to the very extensive written submissions already put forward by counsel for the accused, and the need to ensure a fair and expeditious trial, the Trial Chamber is not persuaded of the need for oral argument in this case.

68. The application is refused.

VIII Disposition

FOR THE FOREGOING REASONS, Trial Chamber II decides that –

- (1) the Motion is granted, with regards to and as set out in paras 17, 28, 30, 39, 42, 46-48, 49-50, 51, 52, 55, 58, 60-61, 62 and 63 of this decision. The Prosecutor is directed to amend the indictment accordingly and to file and serve an amended indictment on or before 26 March 1999; and
- (2) the Motion is rejected, including the application for oral argument, with regards to and as set out in the remainder of this decision.

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

Done this 24th day of February 1999
At The Hague
The Netherlands

David Hunt
Presiding Judge

[Seal of the Tribunal]

PROSECUTION INDEX OF AUTHORITIES

ANNEX XII

Prosecutor v. Kvočka et al., Decision on Prosecution's Motion to Strike Portion of Reply, Case No. IT-98-30/1-A, Appeals Chamber (Pre-Appeal Judge), 30 September 2002

IN THE APPEALS CHAMBER

Before: Pre-Appeal Judge, Judge David Hunt

Registrar: Mr Hans Holthuis

Decision of: 30 September 2002

PROSECUTOR
v
Miroslav KVOCKA
Milojica KOS
Mladjo RADIC
Zoran ZIGIC
Dragoljub PRCAC

DECISION ON PROSECUTION'S MOTION TO STRIKE PORTION OF REPLY

Counsel for the Prosecutor:

Ms Susan L Somers for the Prosecutor

Counsel for the Defence:

Mr Slobodan Stojanovic for Zoran Zigic

I, Judge David Hunt, Pre-Appeal Judge,

NOTING Zoran Zigic's confidential "Motion to Present Additional Evidence", filed on 23 August 2002 ("Motion");

NOTING the "Prosecution's Response to Zoran Zigic's Motion to Present Additional Evidence", filed on 9 September 2002;

NOTING paragraphs 33 and 34 of Zigic's confidential "Reply to Prosecution's Response to Zoran Zigic's Motion to Present Additional Evidence", filed on 23 September 2002 ("Zigic's Reply"), where he refers to and summarises the statement of Faruk Hrnčić ("Hrnčić") a witness which he wishes to call;

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BEING SEISED OF "Prosecution's Motion to Strike Portion of Zigic's Reply to Prosecution's Response to Zoran Zigic's Motion to Present Additional Evidence", filed on 26 September 2002, whereby the prosecution requests that paragraphs 33 and 34 of Zigic's Reply be struck out on the basis that these two paragraphs go beyond the proper scope and ambit of a reply;

NOTING Zigic's "Reply to Prosecution's Motion to Strike Portion of Zigic's Reply to Prosecution's Response to Zoran Zigic's Motion to Present Additional Evidence", filed confidentially on 30 September 2002;

NOTING that Zigic complains in his Motion that certain alleged eyewitness to the murder of Becir Medunjanin for which he was convicted were not called at trial, although available, but he does not identify Hrnčić as one of those witnesses;

NOTING that Zigic submits in his Reply for the first time that the prosecution refused to help him at the trial to call five witnesses¹ and that he identifies in his Reply also for the first time that one of them, Hrnčić, should now be called "in the interests of justice";²

CONSIDERING that the letter of the prosecution's Senior Trial Attorney dated 25 October 2000 to which Zigic referred in his Motion was put forward by him as being itself evidence which he sought to have admitted in evidence;³

CONSIDERING, therefore, that paragraphs 33 and 34 of Zigic's Reply contain new material going beyond the scope of what is permissible to include in a reply;

HEREBY GRANT the motion and **ORDER** that paragraphs 33 and 34 be struck out of Zigic's Reply.

NOTING, however, that if he decides to pursue the matter further, Zigic may seek leave to add the content of those paragraphs to his original Motion. If he does so, the prosecution will have the right to file a further response to it.

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

Dated this 30th day of September 2002,
At The Hague,
The Netherlands.

David Hunt
Pre-Appeal Judge

[Seal of the Tribunal]

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- 1 - Motion, page 6 and letter annexed in the Motion.
 - 2 - Motion, page 2.
 - 3 - Letter annexed in the Motion.