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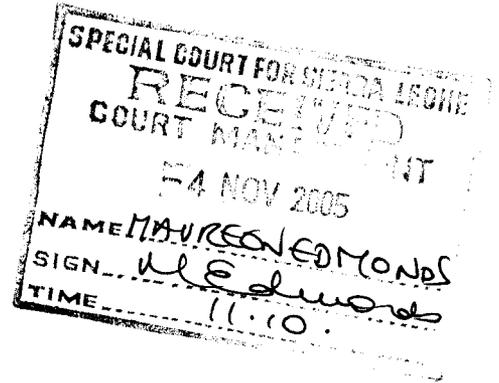
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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

Interim Registrar: Mr. Lovemore Munro

Date filed: 4 November 2005



THE PROSECUTOR

Against

**Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa**

Case No. SCSL-04-14-T

**PROSECUTION RESPONSE TO JOINT MOTION OF THE FIRST AND SECOND
ACCUSED TO CLARIFY THE DECISION ON MOTIONS FOR JUDGMENT OF
ACQUITTAL PURSUANT TO RULE 98**

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I. INTRODUCTION

1. The Prosecution files this Response to the “Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal pursuant to Rule 98”, filed on 27 October 2005 (“Motion for Clarification”).¹
2. The Defence requests clarification from the Trial Chamber “to determine whether Paragraph 25(g) of the Indictment is still in effect”.²
3. The Defence argues that as a result of the Trial Chamber’s Decision on Motions for Judgment of Acquittal,³ Paragraph 25(g) of the Indictment now contains no geographical locations. Therefore, it is the interpretation of the Defence that in effect this paragraph has been dropped from the Indictment and the Defence does not need to address ‘Operation Black December’ in the presentation of its case.
4. The Prosecution does not agree with this interpretation by the Defence. The Decision on Motions for Judgment of Acquittal does not lack clarity and the Motion for Clarification should therefore be dismissed.

II. ARGUMENT

5. Paragraph 25(g) of the Indictment, as it was worded prior to the Decision on Motions for Judgment of Acquittal, stipulated that:

“[...] between about 1 November 1997 and about 1 February 1998, as part of Operation Black December in the southern and eastern Provinces of Sierra Leone, the CDF unlawfully killed an unknown number of civilians and captured enemy combatants in road ambushes at Gumahun, Gerihun, Jembah and the Bo-Motoka Highway.”

6. Paragraph 24(f) of the Indictment states:

“In an operation called ‘Black December’, the CDF blocked all major highways and roads leading to and from major towns mainly in the southern and eastern

¹ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-477, “Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal pursuant to Rule 98”, 27 October 2005 (“Motion for Clarification”).

² Motion for Clarification, para. 10.

³ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-473, “Decision on Motions for Judgment of Acquittal Pursuant to Rule 98 and Separate and Concurring Opinion of Hon. Justice Bankole Thompson”, 21 October 2005 (“Decision on Motions for Judgment of Acquittal”).

- Provinces. As a result of these actions, the CDF unlawfully killed an unknown number of civilians and captured enemy combatants.”
7. The Trial Chamber held in its Disposition that, *inter alia*, there is no evidence capable of supporting a conviction against the Accused in respect of the offence of murder as crime against humanity, punishable under Article 2(a) of the Statute and murder as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute, in respect to Jembeh, Gumahun, Gerihun and the Bo-Matotoka Highway.
 8. The Defence reaches its interpretation of the Decision on Motions for Judgment of Acquittal on the basis that an indictment must make clear the capacity in which it is alleged the accused committed the offences and the material facts by which this will be established. The Defence argues that the geographical locations where crimes are alleged to have been committed are fundamental elements to be included in the Indictment. According to the Defence, Paragraph 25(g) now lacks the precision necessary for the Accused to prepare their defences effectively and efficiently.
 9. The Defence interpretation of the effect of the Disposition on the Indictment raises two questions in the Prosecution’s view: (1) whether Paragraph 25(g) has been dropped from the Indictment, and (2) if so, whether Operation Black December has been dropped from the Indictment. The Defence appears to confuse or merge what the Prosecution regards as two questions that must be considered in turn. Nonetheless, the Prosecution argues that both questions should clearly be answered in the negative and that no issue of interpretation arises.
 10. In relation to the first question – whether Paragraph 25(g) has been dropped from the Indictment - the Prosecution submits that the Disposition relates only to the specific locations mentioned, and does not cover all killings or other unlawful acts committed “as part of Operation Black December in the southern and eastern Provinces of Sierra Leone”.
 11. An accused is entitled to such particulars in an Indictment as are necessary to prepare his defence. However, in determining the required specificity, the proximity of the accused to the acts alleged is an important factor. As the ICTY Appeals Chamber held in the *Blaskic* case:

“There is a distinction between those material facts upon which the Prosecution relies which must be pleaded in an indictment, and the evidence by which those material facts will be proved, which need not be pleaded and is provided by way of pre-trial discovery. The Appeals Chamber reiterates that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. *A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in an indictment is the nature of the alleged criminal conduct charged. The materiality of such facts as the identity of the victim, the place and date of the events for which the accused is alleged to be responsible, and the description of the events themselves, necessarily depends upon the alleged proximity of the accused to those events, that is, upon the type of responsibility alleged by the Prosecution.* The precise details to be pleaded as material facts are the acts of the accused, not the acts of those persons for whose acts he is alleged to be responsible.”⁴

12. Where accused persons are charged, for example, with responsibility as superiors or as part of a joint criminal enterprise, their proximity to the physical acts of killing becomes more distant and it follows that less precision is required in relation to the particular killings, “and greater emphasis is placed upon the conduct of the accused person himself upon which the Prosecution relies to establish his responsibility as an accessory or a superior to the persons who personally committed the acts giving rise to the charges against him.”⁵
13. The Prosecution submits that Paragraph 25(g) of the Indictment, as it reads subsequent to the Decision on Motions for Judgment of Acquittal, and considered together with Paragraph 24(f) of the Indictment and the types of responsibility alleged in the Indictment as a whole, is sufficiently clear and precise for the preparation of the Defence case.

⁴ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, “Judgement”, 29 July 2004, para. 210, emphasis added.

⁵ *Prosecutor v. Galić*, Case No. IT-98-29-AR72, “Decision on Application by Defence for Leave to Appeal”, 30 November 2001, para. 15. For example, where superior responsibility is alleged, the material facts are: (1) the relationship between the accused and the others who did the acts for which he is alleged to be responsible; and (2) the conduct of the accused by which he may be found (a) to have known or had reason to know that the acts were about to be done, or had been done, by those others, and (b) to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them. See *Prosecutor v. Krajišnik*, Case No. IT-00-39 & 40, “Decision Concerning Preliminary Motion on the Form of the Indictment”, 1 August 2000, para. 9.

14. In relation to the second question – whether ‘Operation Black December’ has been dropped from the Indictment – the Prosecution submits that for the reasons provided above, ‘Operation Black December’ and individual criminal responsibility (in accordance with the Prosecution theories) for the crimes charged in the Indictment that may flow from that Operation, clearly remain part of the Indictment. The only exceptions are unlawful killings in the specific locations mentioned in the Disposition. The Prosecution refers, for example, to paragraphs 41, 48, 62, 93 and 102-109 of its Response to the Motion for Acquittal on behalf of Samuel Hinga Norman⁶ and paragraphs 42, 49, 82, 93, 99 of its Response to the Motion for Acquittal on behalf of Moinina Fofana⁷. In addition, ‘Operation Black December’ feeds into other counts of the Indictment such as those concerning terrorization of the civilian population and the use of child soldiers. For instance, Paragraph 28 of the Indictment states that “At all times relevant to this Indictment, the CDF, largely Kamajors, committed *the crimes set forth in paragraphs 22 through 27 and charged in counts 1 through 5, including threats to kill, destroy and loot, as part of a campaign to terrorize the civilian population of those areas and did terrorize those populations.*”
15. The Prosecution submits that a failure to address ‘Operation Black December’ would be at the Defence’s peril.

III. CONCLUSION

16. For these reasons, the Prosecution submits that the Decision on Motions for Judgment of Acquittal is clear and in no need of further clarification and that the Defence Motion for Clarification should be dismissed.

⁶ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-459, “Confidential Prosecution Response to Motion for Judgement of Acquittal of the First Accused Samuel Hinga Norman”, 18 August 2005.

⁷ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-460, “Confidential Prosecution Response to Fofana Motion for Judgment of Acquittal”, 18 August 2005.

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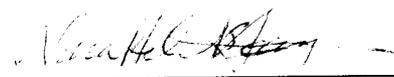
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For the Prosecution,



James C. Johnson



Nina Jørgensen

INDEX OF AUTHORITIES

Prosecutor v. Norman, Fofana, Kondewa, SCSL-04-14-T-477, “Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal pursuant to Rule 98”, 27 October 2005;

Prosecutor v. Norman, Fofana, Kondewa, SCSL-04-14-T-473, “Decision on Motions for Judgment of Acquittal Pursuant to Rule 98 and Separate and Concurring Opinion of Hon. Justice Bankole Thompson”, 21 October 2005;

Prosecutor v. Norman, Fofana, Kondewa, SCSL-04-14-T-459, “Confidential Prosecution Response to Motion for Judgment of Acquittal of the First Accused Samuel Hinga Norman”, 18 August 2005;

Prosecutor v. Norman, Fofana, Kondewa, SCSL-04-14-T-460, “Confidential Prosecution Response to Fofana Motion for Judgment of Acquittal”, 18 August 2005;

Prosecutor v. Blaškić, Case No. IT-95-14-A, “Judgement”, 29 July 2004;
<http://www.un.org/icty/blaskic/appeal/judgement/index.htm>

Prosecutor v. Galić, Case No. IT-98-29-AR72, “Decision on Application by Defence for Leave to Appeal”, 30 November 2001;
<http://www.un.org/icty/galic/appeal/decision-e/11130FI317059.htm>

Prosecutor v. Krajišnik, Case No. IT-00-39 & 40, “Decision Concerning Preliminary Motion on the Form of the Indictment”, 1 August 2000;
<http://www.un.org/icty/krajisnik/trialc/decision-e/00801FI513386.htm>