

**SPECIAL COURT FOR SIERRA LEONE**  
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# Special Court Investigator acquitted and discharged

By **Betty J. Milton**  
An investigator of the Special Court attached to the defence team of the ARFC-Brima Samura has been

found not guilty in the case of contempt of Court and has therefore been acquitted and discharged. In his ruling, the presiding judge

Pierre Boutet said "I find you not guilty of the offence." In a short interview with the investigator who was in a happy mood, Samura

said that he was alleged to have disclosed the identity of a protected witness within the confines of the Special Court building. "An independent counsel was called upon to investigate the contempt matter, wherein his finding resulted in me being charged with contempt of the Special Court." He continued, "today 26th October, I was found not guilty by the presiding judge of the trial chamber II - Pierre Boutet today I am a happy man. This is a clear indication that the Special Court is here for justice and that justice will

surely prevail in the trials." He went on "I must commend the calculated and well experienced judge - Pierre Boutet for giving justice where it is due. I must also commend the defence team for their relentless and expert knowledge as they stood behind me seeing me given justice." The investigator was charged with the offence of knowingly, disclosing the identity of a protected witness TF1-023 who was testifying in Court and was to continue with her evidence. This was

allegedly disclosed to the AFRC indictees wives, Margaret Fomba Brima - wife of Alex Tamba Brima, Neneh Binta Jalloh wife of Santigie Borbor Kanu, Esther Kamara friend of Alex Tamba Brima and Anifa Kamara wife of Brima Bazy Kamara on the 9<sup>th</sup> March 2005. Justice Pierre Boutet granted the wives of the indictees' conditional discharge on the 21st September. Brima Samura does not know whether he would be recalled to work after his acquittal for the offence.

## Guest Writer

Abdul Karim Bangura is a member of the American Bar Association and the author of the book "The Sierra Leone War Crimes Tribunal: A Study of the Role of the International Criminal Court in the Process of Reconciliation." He is also a member of the Sierra Leone Working Group.

# The Special Court Prosecutor's Divide and Conquer Strategies

"Experience over the early years of these (International Tribunals for the former Yugoslavia and Rwanda: ICTY and ICTR, respectively) Tribunals, in my judgment, leaves an open question whether international courts, and those who serve them as judges and prosecutors, have the will to take the steps and make the sometimes unpopular choices required when justice and due process, rather than convictions, are the overarching goals." (Larry A. Hammond)

The preceding remark is contained in a concluding statement in a testimony presented before the (US) House International Relations Committee on February 28, 2002. In his testimony, Larry Hammond replaced the divine qualities generally assigned to International Tribunals with a more realistic image that calls into play human forces such as politics, urging desire to find someone culpable, and the general assumption that culpability at whatever cost establishes justice. In a world of mounting internal skirmishes, there is that further assumption that meeting out convictions through any available measure establishes peace. Peace is definitely a state that is desired and leads to many positive qualities within any country. However, for a connection to exist between peace and justice in a post-conflict situation, justice has to be premised on a credible judicial process, and the integrity of the process must not be compromised at any point of its unfolding. Hammond served on an American Bar Association Task Force that was engaged in an effort to recommend rules to govern the prosecutions that might be brought at The Hague. He also served as Deputy Assistant Attorney General under Attorneys Griffin Bell

and Benjamin Civiletti during the Carter Administration.

The urge to convict is tied to factors such as meeting the perceived expectations of funding sources, available funding, desire to establish swift justice, and the expectation that the conviction serves as a deterrent to future War Crimes. Funding sources generally would like to see results. In situations wherein there are documented cases of *heinous human rights violations and war crimes*, nothing takes the place of convictions to bring about the general feeling that "justice" had been carried out and perpetrators will face punishment for their crimes. No God fearing individual would ever want to see *perpetrators of crimes* set free even on technical grounds. However, the perfect world situation that equates conviction to justice does not exist in all circumstances. In the absences of instruments such as the Hyde Amendment, enacted in 1997 to protect individuals from being arbitrarily indicted and pushed through the United States judicial process, the very factors that create the urge to convict may introduce measures that will subordinate justice to a compelling urge to convict. These measures are often introduced in both the overall structure of the proceedings and in the form of abridgements in what is commonly referred to as "due process of the law." At the ICTR trial, the court reversed itself after acquitting Barayagwiza, hence yielding to political pressure from the Rwandan Government that wanted Barayagwiza convicted. The trials of Kordic, Balaskic, Gotovina at the ICTY have created great concern within the legal profession over issues such as witness coaching, the

rights of the accused against witness protection, withholding evidence from the defense, and whether the prosecutors and judges do actually retain independence from each other. Here, we make a cursory probe into the Sierra Leone Special Court (SC) for elements that suggest an urge to convict against the need to preserve the credibility and integrity of international tribunals. We also look at the impact that some of these elements may have on peace-building operation.

The SC, unlike the ICTR and ICTY, is not an organ of the United Nations. It is the product of a treaty between the Sierra Leone Government and the United Nations to "try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996." The Sierra Leone Constitution stipulates certain procedural requirements before a treaty can be ratified by parliament. Based on a case before the Sierra Leone Supreme Court, these procedures were greatly compromised and in some cases completely ignored. If the allegations of impropriety prove to be true, then the United Nations and the Sierra Leone Government would have succeeded in establishing an institution of justice, the Special Court, on an illegal foundation. Such an illegal precedence will weaken the powers of the Sierra Leone Constitution and negate the claim that the Special Court is designed to restore the rule of law. Total disregard for existing laws and disrespect for constitutional provisions, we must not forget, were contributory factors to the mayhem Sierra Leone experienced for ten years.

Human Rights Watch (HRW), in a recent report (prepared around July 30, 2004), expressed some serious concern that greatly undermined "the Special Court's ability to uphold fair trial rights." HRW's concern was centered around (1) inadequate logistical support available to defense teams, (2) lump sum payment structure for defense teams, (3) lack of suitable candidates to serve as investigators and delays in their appointment, (4) insufficient training of defense counsel and investigators, and (5) inconsistent translation." HRW officials aptly remarked that based on their belief, "these issues could contribute to a perception that rights of the accused are not protected and equality of arms is not adhered to by the Special Court."

All the points of concern highlighted by HRW directly affect the ability of the defense team to mount a formidable defense on behalf of the accused. This in turn enhances the prosecutors' chances of obtaining a conviction. In the area of logistical support, for example, HRW observed after extensive investigation that: "The facilities provided by the Defense Office for defense teams have suffered from a lack of resources, which have hampered case preparation. For example, as of March 2004, nine defense teams, including more than twenty defense attorneys, were provided with only three rooms in one 'container' in which to work. The Defense Office includes two additional rooms, but they are designated for duty counsel and U.N. personnel. This set-up limits the ability of defense teams to conduct confidential meetings. While the Special Court will try nine defendants in three groups, the CDF, the RUF, and the AFRC cases, in addition to a possible trial of Charles Taylor: some defense strategies will undoubtedly involve implicating other defendants they are tried with, making the three room work space arrangement particularly problematic."

"Storage and access to fax and photocopiers remains an ongoing problem. Each team is provided with one medium-sized filing cabinet to store all documents for their case and no shelving to store materials. Although a template for the legal services contract defense teams enter into with the principal defender and the

Defense Office provides that defense counsel will be given "access to fax machines, photocopy machine, ink for printer, for the exclusive benefit of the Defense Teams," defense counsel in fact share use of one photocopier with other units of the court and there is no access to a fax machine. Defense counsel are provided with three computers per room to share among each other and, for a period of time around March 2004, there was no Internet access during business hours. Additionally, all defense teams are provided with only one vehicle to share among each other."

"This is contrasted with resources available to the OTP. Human Rights Watch was told, for example, that OTP office space consists of five containers, each OTP staff member has access to a computer, and storage includes filing cabinets, along with a separate location for storing evidence. During crucial stages of investigations, OTP staff had availability to vehicles, although at the beginning of 2004, due to budgetary restrictions, this was considerably cut back as well. One Special Court staff member argued that because the Defense Office is located within the Registry, it "does not have the same voice as [the] OTP in requesting [the] budget" and explained that "maybe the [Defense Office] is not considered as seriously as the OTP because [the] standard of proof is different." One defense counsel suggested that there has been "no real consideration of [defense]: OTP got all the money, defense was an afterthought." HRW further observed that the defense team is handicapped by "the lack of suitable candidates to serve as defense investigators and delays in their appointment." As of the preparation of the HRW report, the defense team had only one full-time investigator drawn from the Sierra Leone Police Force. The choice of a police investigator totally disregards the intricacies of the conflict and the adversarial relationship that existed between the police and some of the groups under indictment. Investigators for the prosecuting team, on the other hand, included both international and national investigators with years of experience in conducting investigation and collection of data."

Under the current legal system, prosecutors are responsible for

collecting information that is later used in leveling charges against individuals. With the approval of the judges, these are incorporated into the indictment document. The indictment document also contains a general description of environment within which the alleged crime occurred. During trial, the prosecutor is expected to mount an aggressive prosecution to obtain a conviction. It is not difficult to imagine the direction in which justice will be skewed if close alliance between judges and prosecutors exists as is reflective of the structure of both the ICTY and ICTR according to Hammond's testimony. The nature of the relationship between judges and prosecutors at the Special Court has to come from familiarity with the inner workings of the court. Hence, we will leave comments on this aspect of the Special Court to others with inner knowledge of the system. We will at this phase concentrate on one aspect of the system: that is, the indictment documents' impact on the peace-building process and how it contributes to the urge to convict. Considering the fact that the indictment documents have gone through many writings, revisions, and changes before arriving at the Civil Defense Force (CDF) Consolidated Indictment, the indictment process warrants specific attention. We will, therefore, concentrate on what we consider to be the most disturbing aspect of the indictment: the insidious injection of "tribe" into the trial.

As Malcolm X stated over 40 years ago, "The greatest weapon the colonial powers have used in the past against our people has always been divide-and-conquer." This aspect has emerged as one of the Special Court prosecutors' strategies. Tribalism or ethnic cleansing is the stereotypical factor behind all conflicts in Africa. Exploiting tribal differences proved to be a convenient system for the colonialists. Hence, we have the widely accepted phrases such as "divide and conquer" and "divide and rule." It is not immediately apparent how using the tribal factor could help the prosecution's position. However, let us consider the following. **To be contd**

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