SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before:	Hon. Justice Benjamin Mutanga Itoe, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Pierre Boutet
Registrar:	Robin Vincent
Date:	4th of February 2005

PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

RULING ON THE ADMISSION OF COMMAND STRUCTURE CHART AS AN EXHIBIT

Office of the Prosecutor:
Luc Côté
Lesley Taylor
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Defence Counsel for Issa Hassan Sesay:
Wayne Jordash
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Defence Counsel for Morris Kallon:
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NEIL GIBSON
16:52.

TRIAL CHAMBER I ("Trial Chamber I") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, Hon. Justice Bankole Thompson, and Hon. Justice Pierre Boutet;

SEIZED of the Oral Application by the Prosecution made on the 19th of January 2005 to have a Chart entitled "Command Structure TF1-071 April - December 1998" ("Chart") admitted as an exhibit during the testimony of Witness TF1-071 ("Application");

CONSIDERING that Defence Counsel for the three Accused, Issa Hassan Sesay, Morris Kallon and Augustine Gbao opposed the admission of the Chart as an exhibit;

NOTING that on the 21st of January 2005, Trial Chamber I delivered an oral Ruling ordering that the Chart could not be admitted as an exhibit at this stage;

NOTING that Trial Chamber I indicated at that time that a reasoned written Ruling on this matter would be delivered in due course;

NOTING Rule 85 of the Rules of Procedure and Evidence of the Special Court ("Rules");

THE TRIAL CHAMBER HEREBY ISSUES ITS REASONED WRITTEN RULING:

1. This is the Ruling of Trial Chamber I in support of the decision to deny the admission of the Command Structure Chart at this stage on the 21st of January 2005 during the testimony of Witness TF1-071.

2. During the examination-in-chief of Prosecution witness TF1-071, the Prosecution sought to have admitted in evidence as an exhibit a Chart entitled "Command Structure TF1-071 April - December 1998". The Witness testified that this document had been prepared by the Prosecution based on the information that he had provided to the Prosecution and that the Chart accurately reflected what he had told the Prosecution.[1]

3. Defence Counsel for all three Accused opposed the admission of this Chart as an exhibit on the grounds summarized below.

[1] *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Transcripts of the 19th of January 2005 at pp. 55-56.

4. Counsel for the First Accused, Sesay, submitted that the admission of the Chart violated the best evidence rule. He asserted that the best evidence would be obtained through the oral testimony of the Witness that could effectively be verified by cross-examination and not through the admission of a written document. Counsel also submitted that the admission of a Chart in this fashion would enable the Prosecution to bypass the prohibition on leading questions. Lastly, Counsel asserted that the Chart had not been properly disclosed as the Chart had just been received by the Defence but contained different information than that contained in the previously disclosed witness statements of TF1-071.

5. Counsel for the Second Accused, Kallon, submitted for his part that the Chart must be viewed as analogous to a statement made by a witness. Moreover, the Chart contains certain contentious issues which could be best elicited through *viva voce* testimony rather than by merely exhibiting the document. Counsel also submitted that the Prosecution had not complied with the normal disclosure rules applicable to witness statements pursuant to Rule 66(A)(ii).

6. Counsel for the Third Accused, Gbao, reinforcing the objection to the Chart, put forward four grounds in support, to wit, (i) that it lacked probative value and is self-serving not having been obtained in transparent circumstances, (ii) that its prejudicial effect outweighs its probative value, (iii) that it is actually a witness statement, and (iv) that it violates the best evidence rule.

7. In its Response, the Prosecution submitted that the best evidence rule is a dead rule, not applicable in international criminal law. Prosecution Counsel also pointed out that the Chart actually contained two different sections, one showing the command structure for "Headquarters Kailahun" and the other for "Battalion". With regard to the Defence submission on disclosure, the Prosecution argued it has fulfilled its continuing disclosure obligation by disclosing the Chart since it does not contain any new allegations but only a further amplification of information already disclosed to the Defence.

8. In their Replies, the Defence reiterated their previous submissions and noted that evidence concerning command structures is very incriminating and prejudicial.

9. Consistent with the practice of other international criminal tribunals, under the adversarial scheme of the Special Court for Sierra Leone, evidence is to be presented in court in the manner set out in Rule 85 of the Rules of the aforesaid Court. Accordingly, Rule 85(B) provides that:

> Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine him in chief, but a Judge may at any stage put any question to the witness.

10. Recalling that the Prosecution sought leave to produce the Chart as an exhibit in the course of the examination-in-chief of witness TF1-071, and that the Chamber's Oral Ruling refusing admission of the said Chart, at that stage, was predicated upon the sole ground that its reception in evidence then would violate the prohibition against leading questions asked in the course of examination-in-chief, the Chamber takes this opportunity to restate, in clear and explicit terms, its appreciation of the existing state of the law nationally and in the practice of international criminal tribunals.

11. Any such restatement of the law must begin with a definition of a "leading question." In *Black's Law Dictionary*, a leading question is defined in these terms:

> A question that suggests the answer to the person being interrogated: especially, a question that may be answered by a mere "yes" or "no"... [2]

12. It has long been settled that leading questions are generally prohibited in examination-in-chief or re-examination. *Phipson on Evidence* states the rule in these terms:

> Generally a party may not, either in direct or re-examination, elicit the facts of his case by means of leading questions - i.e. questions which suggest the desired answer, or which put disputed matters to the witness in a form permitting of a simple reply of "yes" or "no."[3]

13. *Cross on Evidence* observes that while it is often said that a leading question is one to which the response will be a "yes" or a "no", this is not necessarily true in all circumstances and it must always be considered if such a question either suggests a response or assumes the existence of disputed facts.[4]

14. Judge May notes that the "adversarial nature of international criminal trials is most pronounced in rules of presentation of evidence."[5] In this way, it is trite law that international

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[2] *Black's Law Dictionary*, 7th ed, Bryan A. Garner, Ed., (St. Paul: West Group, 1999) at p. 897.
[3] *Phipson on Evidence*, (London: Sweet & Maxwell, 1963) at p. 1522.
[4] D. M. Byrne, Q.C. and J. D. Heydon, *Cross on Evidence*, 3rd Australian Edition, (Melbourne: Butterworths Pty Ltd, 1986) at p. 387.
[5] Judge R. May and M. Wierda, *International Criminal Evidence*, (New York: Transnational Publishers, 2002) at pp. 143-144.

criminal practice has adopted the common law restrictions regarding leading questions as have been outlined above.[6]

15. The Chamber wishes to emphasise that the rationale behind the exclusionary rule as to leading questions is clearly the presumption that a witness is "favourable to the party calling him, who, knowing exactly what the former can prove, might prompt him to give only the advantageous answers."[7] The effect of such evidence, the Chamber notes, is that it "would be open to suspicion as being rather the prearranged version of the party then the spontaneous narration of the witness."[8]

16. The Chamber however notes that, like almost every general principle of law this rule of prohibition has never been inflexible. In the context of some national criminal law systems and the international criminal law system, exceptionally leading questions are permissible in, at least, five clearly-defined circumstances. Firstly, in respect of introductory matters. Secondly, as regards undisputed or non-contentious matters. Thirdly, in relation to identification of persons or objects. Fourthly, in assisting memory recollection. Fifthly, where a witness is called to contradict another as to expressions used by the latter.[9]

17. The Chart that the Prosecution has sought to enter into evidence details the alleged command structure of the RUF during the period of April to December 1998 in Kailahun, identifying the names and positions of alleged high-ranking members of the RUF. While some of the individuals and positions identified in the Chart had been referred to by the Witness during his examination-in-chief, the Witness had neither been asked nor provided specific, detailed information concerning the command structure of the RUF in that time and place.

18. Guided by the foregoing principles and after careful review of the contents of the Chart sought to be admitted in evidence as an exhibit by the Prosecution, the Chamber is satisfied that were the Prosecution to be allowed to introduce the Chart in evidence as an exhibit this would be both, in fact and in law, permitting the Prosecution to ask leading questions of the witness herein on disputed and contentious issues.

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[6] *Id.*, at p. 147. See also: *Prosecutor v. Galic*, International Criminal Tribunal for the Former Yugoslavia, IT-98-29-T, Transcripts of 1 November 2002, at pp. 14872-14874.
[7] *Phipson on Evidence*, *supra* note 7 at para. 1523.
[8] *Id.*
[9] *Id.*, paras 1523 and 1524.

19. While this finding definitively disposes of the present Application, this Chamber considers it instructive to make some additional comments regarding the other grounds which formed the basis of the Defence objection to the admissibility of the Chart in question.

20. Counsel for all three Accused persons relied upon the doctrine of the best evidence rule. They submitted that the Chart did not provide the best evidence in the case for the purpose for which it was sought to be tendered. The Chamber sees no merit in this submission for the reason that, generally, the best evidence rule, originating from the traditional common law, does "not formally apply to exclude evidence in international criminal trials."[10]

21. It was also submitted by the Defence that, if admitted in evidence, the prejudicial effect of the Chart would outweigh its probative value. As evidence seeking to incriminate the Accused persons (which is essentially and always the object of Prosecution evidence adduced against persons charged with criminal offences), the Chamber is not satisfied that its prejudicial effect outweighs its probative value. In our own appreciation, in no way does the evidence contained in the Chart alter in a prejudicial way, the incriminating quality of the evidence against the Accused persons.

22. Another Defence submission on the issue is that the Chart is analogous to a statement made by a witness, and that it is in violation of Rule 66, the Prosecution having failed to disclose it. Consistent with our *Decision on Disclosure of Witness Statements and Cross-Examination*,[11] we are of the opinion that the Chart can be considered a witness statement. Indeed, this particular Chart was later entered as an exhibit at the request of the Defence for the Accused Sesay and Gbao for the purpose of establishing a prior inconsistent statement.[12] This Chamber considers that it is not necessary, given the ruling of the Court in this matter, to address the remainder of the Defence arguments on this point.

23. Counsel for the Defence also submitted that the Chart is self-serving and had not been obtained in transparent circumstances.[13] This contention could not be sustained on the grounds that

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[10] Judge R. May and M. Wierda, *supra* note 5, p. 242.

[11] *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, *Decision On Disclosure of Witness Statements and Cross-Examination*, 16 July 2004.

[12] *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Transcripts of the 25th of January 2005 at pp. 44-46. A second chart, also part of a set of three prepared by the Prosecution for Witness TF1-071, was later admitted at the instance of Counsel for Gbao. At the time of their admission as exhibits, the Court specified that the charts were to be admitted for the limited purposes of establishing a prior inconsistent statement subject to the requirements that Counsel indicate the specific portions of the chart that were inconsistent and also that the cross-examination be restricted to that relevant to the particular Accused.

[13] Transcript, *supra* note 1 at pp. 79-80.

the notion of a document being self-serving and not having been obtained in transparent circumstances, as a ground of inadmissibility, given the existing state of the law, is nebulous.

FOR ALL THE ABOVE-STATED REASONS,

ORDERS that the Chart be not admitted as an exhibit at this stage.

Done in Freetown, Sierra Leone, this 4th day of February, 2005

Hon. Justice Pierre Boutet	Hon. Justice Benjamin Mutanga Itoe Presiding Judge Trial Chamber I	Hon. Justice Bankole Thompson

[Seal of the Special Court]