SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before:	Hon. Justice Bankole Thompson, Presiding Judge Hon. Justice Pierre Boutet Hon. Justice Benjamin Mutanga Itoe	
Registrar:	Mr. Lovemore G. Munlo, SC	
Date:	27th of November 2006	
PROSECUTOR	**Against**	**SAM HINGA NORMAN** **MOININA FOFANA** **ALLIEU KONDEWA** (Case No.SCSL-04-14-T)

Public Document

WRITTEN REASONED DECISION ON PROSECUTION MOTION FOR LEAVE TO CALL EVIDENCE IN REBUTTAL AND FOR IMMEDIATE PROTECTIVE MEASURES FOR PROPOSED REBUTTAL WITNESS

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

SEIZED OF the "Prosecution Motion for Leave to Call Evidence in Rebuttal and for Immediate Protective Measures for Proposed Rebuttal Witness", filed by the Office of the Prosecutor on the 13th of October 2006,[1] wherein they seek: 1) the Leave of The Chamber to call one witness in rebuttal at the conclusion of the Defence case; and 2) request immediate protective measures for this proposed rebuttal witness, if the first request is granted;[2]

MINDFUL OF the "Order for Expedited Filing", issued by The Chamber on the 13th of October 2006,[3] wherein The Chamber ordered that "any Response to the Motion shall be filed no later than Monday, the 16th of October 2006, at 4:00 p.m." and that "any Reply to the said Response shall be filed no later than Tuesday, the 17th of October 2006, at 4:00 p.m.";

MINDFUL OF the "Order to Prosecution to Disclose to the Defence, Interview Notes and Unredacted Statement of the Proposed Rebuttal Witness", issued by The Chamber on the 16th of October 2006;[4]

MINDFUL OF the "Confidential Prosecution's Disclosure of Interview Notes and Unredacted Statements of the Proposed Rebuttal Witness", filed by the Prosecution on the 16th of October 2006;[5]

MINDFUL OF and **CONSIDERING** all the submissions filed by the Parties in relation to this Motion filed by the Prosecution;[6]

MINDFUL OF the provisions of Article 17(4)(c) of the Statute and of Rule 26bis of the Rules of Procedure and Evidence guaranteeing the right of the accused to be tried fairly, expeditiously, and without undue delay;

PURSUANT to Rule 85(A)(iii) of the of the Rules of Procedure and Evidence of the Special Court ("Rules"); and

CONSIDERING the Oral Decision issued by the Chamber on this Motion on the 18th of October, 2006, refusing the Prosecution leave to adduce Rebuttal Evidence;

HEREBY ISSUES THE FOLLOWING UNANIMOUS WRITTEN AND REASONED DECISION:

FACTS

1. The Office of the Prosecutor, on the 13th of October, 2006, filed a Motion seeking the Leave of the Chamber to Call Evidence at the close of the case for the Defence, of One Witness in Rebuttal and for Immediate Protective Measures for that Proposed Witness.
2. The Chamber, on the 13th of October, 2006, issued an Order for Expedited Filing. Submissions were thereafter exchanged between the Parties in relation to the Prosecution's Application. After a deliberation on the submissions so presented, the Chamber, on the 18th of October, 2006, by a Unanimous Oral Decision, ruled that there were no merits in the Prosecution's Application. Accordingly, We dismissed the Motion. The Chamber, in that Oral Decision, indicated that 'a Written Reasoned Decision will be published in due course.'[7]
3. Pursuant to this ruling in that Oral Decision, The Chamber now issues the following Unanimous, Written and Reasoned Decision on the strength of the Submissions of the Parties.

BACKGROUND INFORMATION

4. The 3 Accused Persons in this case are charged, *inter alia*, with Murder, a crime against humanity, contrary to Article 2(a) of the Statute of the Special Court and with Other Violations of International Humanitarian Law, contrary to Article 3 of the Statute, and Article 3 Common to the Geneva Conventions of 12th August, 1949, and of Additional Protocol II of 8th June, 1977.
5. In order to establish the alleged Offence of Murder as charged, the Prosecution, as part of its case on this charge, adduced evidence to prove that the 3 Accused were involved in an alleged ritual and sacrificial killing in the Poro Bush in Talia Yawbeko, otherwise also known as Base Zero, of one Mustapha Fallon, a native of Kati Village.
6. After the Prosecution had closed its case, the Defence Team of the 2nd Accused called one Mohammed Fallon as a witness. In his testimony on the 27th of September, 2006, Mohammed Fallon testified that Mustapha Fallon was his brother and that he was killed in a battle in the town of Koribondo[8].
7. It is as a result of this testimony in favour of the Defence theory on the killing of Mustapha Fallon, that the Prosecution filed this Motion on the 13th of October, 2006, seeking the leave of this Chamber to adduce rebuttal evidence in order to counter the Defence evidence provided by Mohammed Fallon, one of the 2nd Accused's Defence Witnesses.

THE APPLICABLE LAW

8. Rule 85(A) of the Rules on which the Motion is brought provides as follows:

'Each Party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

(i) Evidence for the Prosecution;

(ii) Evidence for the Defence;

(iii) Prosecution evidence in rebuttal with leave of the Trial Chamber;

(iv) Evidence ordered by the Trial Chamber;'

9. Rule 89 of the Rules on the admissibility of evidence also provides as follows:

'(A) The Rules of evidence set forth in this Section shall govern the Procedures before the Chambers. The Chamber shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence.

10. Article 17(4)(c) of the Statute provides as follows:

In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

c.To be tried without undue delay.

11. Rule 26bis of the Rules of Procedure and Evidence provides as follows:

The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

PROPOSED REBUTTAL EVIDENCE

12. In Annex A of its Motion, the Prosecution summarises the evidence it seeks to adduce in rebuttal as follows:

‘Mohammed Fallon testified that his brother Mustapha Fallon was not killed at the Poro Bush near Talia Yawbeko[9] as indicated by Prosecution witness TF2-014 (SCSL 04-14-T Trial Transcript of 10th March, 2005, Page 54-59) Mr Fallon testified rather that his brother was killed in an attack on Koribondo (SCSL 04-14-T, Trial Transcript 27th September, 2006, Page 24 – 32)’[10]

13. This summary is, in effect, the evidence which the Prosecution argues, could not, with reasonable diligence, have been foreseen by the Prosecution.

14. On the other hand, the evidence in rebuttal proposed by the Prosecution is summarised, still in Annex A of the Motion, as follows:

‘TF2-225 will rebut the novel point in the evidence of Mohammed Fallon (27 September 2006 page 24-32) that Mustapha Fallon was killed in Koribondo by AFRC/RUF. TF2-225 will give evidence that he was a friend of Mustapha Fallon and accompanied Fallon to the Poro Bush near Talia. TF2-225 was present when Fallon was killed in that bush.’

15. This piece of evidence proposed in rebuttal, according to the Prosecution, relates to a new matter which surfaced from the testimony of 2nd Accused’s Defence Witness, Mohammed Fallon, at a time when it could not have been reasonably anticipated by the Prosecution that the Defence would actively seek to present evidence that Mustapha Fallon was killed in battle in Koribondo.[11]

STATE OF THE EVIDENCE BEFORE PROSECUTION’S APPLICATION TO CALL REBUTTAL EVIDENCE

16. The evidence of this alleged killing was provided on the 10th of March, 2005, by one Albert Nallo, TF2-014, a Prosecution witness who, in his testimony, gave details on how it was carried out. Mr Nallo had this to say in his evidence on the 10th of March, 2005.[12]

‘[...]Yes my Lord, I knew he was called Mustapha Fallon[...]Well, we killed him[...]Dr Allieu Kondewa and Chief Norman and Moinna Fofana; all were there[...]They laid him and they cut off his throat[...]In the Poro Bush when we were in Talia Yawbeko, known as Base Zero[...]I was there; I was standing there.’[13]

17. In response to the Prosecutor’s question whether he knew why he was killed, Nallo responded:

‘Very well, very well[...]Allieu Kondewa said that we needed human sacrifice[...]so as to protect the fighters[...]so as to make them invisible, and so we would have arranged the charm, so as to capture Koribondo, because we had attempted to go to Koribondo many times.’[14]

18. As to how Mustapha Fallon was chosen to be a sacrifice Nallo continued and said:

'[...]Well, the high Priest Dr Allieu Kondewa[...]said that the spirit with which he was dealing with, they had chosen Mustapha Fallon among the group as the sacrificial lamb. That was how Mustapha Fallon was chosen[...]the 2 brothers of Mustapha Fallon were there[...]all of them cam from Kati[...]They went and pleaded with Kondewa and Chief Norman that it was their brother. They said all of them came from the same home. They said they would intervene on his behalf so that he could be released. Kondewa said when his old spirits had laid hands on somebody he would never be released[...]After Mustapha Fallon had his throat cut,[...]We took his parts. The other body -- the male body -- was burnt to ash. The liver was cooked with some medicine, some herbs, which Chief Allieu Kondewa brought out and mixed with it. All of us ate that and we took an oath. We must not explain what had happened not even to the other Kamajors and Mustapha Fallon's people at Kati. So, Chief said -- so they told us all that if they asked for Mustapha Fallon let us tell them that he had been killed in Koribondo. Junisa left at once and went and told his people at Kali that "Well, your son has been killed at Koribondo[...]'.

19. Mr Nallo in his evidence continued and said:

'Mustapha Rogers, Momoh Rogers and Sheku Massaquoi -- Chief Norman gave them 300,000 Leones. Told them to have it so as not to explain how Mustapha Fallon died. In war anything can happen. He said if you go and explain outside and if somebody should cry, if that secret leaks, we will kill you because you have nowhere to go. You cannot go to Bo. As long as you are within the Kamajor zone I have the absolute power to get you wherever you are.'

20. In cross examination, this part of Mr. Nallo's evidence alleging that Mustapha Fallon was killed in the Poro bush was challenged by Court-Appointed Counsel for the 1st Accused, Hinga Norman, who put to him that no killing of Mustapha Fallon took place in Talia Yawbeko. Nallo rejected this suggestion. This indeed was the state of the evidence after Nallo had testified and up to when the Prosecution closed its case on the 14th of July, 2005.

21. We note that in the presentation of his Defence and in the course, not only of his Examination-In-Chief on the 31st of January 2006, but also in his Cross Examination by Mr Margai for the 3rd Accused on the 3rd of February, 2006, and also under Cross Examination by Mr Taverner on the killing of Mustapha Fallon, the Accused, Hinga Norman, denied any knowledge of someone called Mustapha Fallon or of the killing of a person by that name. He said he was only hearing of the killing of a person called M. Fallon there in Court. He also denied knowledge of ever knowing the Poro Bush in Talia even though he acknowledged that in every Mende Town, there is supposed to be a Poro Bush. Talia, from Norman's evidence, is a Mende Town.

22. At the close of the presentation of the case for the 1st Accused, Hinga Norman, the 2nd Accused who did not testify, called Witnesses on his behalf. The Defence Team of the 2nd Accused, Moinina Fofana, called one Mohammed Fallon, an alleged brother of the late Mustapha Fallon, to testify on his behalf. Mohammed Fallon, in his Examination-

In-Chief, agreed that his brother was killed but rejected and contradicted Nallo's version of the place where the killing took place and the circumstances surrounding his death. According to his version, his alleged brother was killed by the AFRC in a town called Koribondo which, from the evidence on the records, had allegedly been attacked at least 3 times by the Kamajors. In his testimony under cross-examination, Mohammed Fallon said he did not agree with Nallo's version which he characterised as a lie. He denied the suggestion made to him by the Prosecution that his evidence-in-chief was a misinformation.

23. It is as a result of this testimony by Mohammed Fallon which was called to contradict that of Mr Nallo, that the Prosecution, in accordance with the provisions of Rule 85(A)(iii) of the Rules of Procedure and Evidence, after closing its case on the 14th of July 2005, now seeks leave of this Chamber to call witness TF2-225 as a witness to rebut the contradictory evidence of Defence Witness, Mohammed Fallon, in relation to his narration on details relating to the death of Mustapha Fallon.

SUBMISSIONS OF THE PARTIES

Motion:

24. The Prosecution, in this Motion, seeks to call one witness to rebut a specific aspect of the evidence given by Defence Witness, Mohammed Fallon who testified that Mustapha Fallon was killed in battle in Koribondo and not ritually sacrificed in the Poro Bush in Talia Yawbeko as alleged by Prosecution Witness TF2-014, Albert Nallo.

25. The Prosecution argues that this evidence, which was in direct contradiction with that of Prosecution Witness TF2-014, is a significant issue that can be clarified by the evidence of the proposed rebuttal witness. The Prosecution adds that this would help the Trial Chamber 'to determine the guilt or innocence of all the Accused by the hearing of specific probative evidence.'[15] They submit that 'the version of events as narrated by Mohammed Fallon could not, with reasonable diligence, have been foreseen by the Prosecution'[16]**,** and that 'the proposed rebuttal evidence relates to a significant issue that is of probative value.'[17]

26. The Prosecution further argues that 'although this witness, in previous interviews with the Prosecution, declared some knowledge of events surrounding Mustapha Fallon's death in Talia, he did not reveal to the Prosecution, the extent of his knowledge including that relating to the relationship between Mohammed Fallon and Mustapha Fallon, until a 28th July, 2006 interview after the close of the case for the Prosecution.'[18]

27. The Prosecution in effect, is affirming that this evidence was not available to it before the 28th of July, 2006, when the rebuttal witness made a statement on this piece of evidence and that it only became available after it had closed its case on the 14th of July, 2005.

28. The Prosecution adds that it 'has attempted to obtain the cooperation of the proposed rebuttal witness many times' and that 'it is only recently that he has agreed to testify freely on behalf of the Prosecution'.[19]

29. It contends 'that the rebuttal evidence will not cause any significant delay and will assist the Court in properly assessing this area of contested testimony'.[20]

30. On the Law that is applicable on this subject, the Prosecution concedes the following grounds, although it argues strenuously that they do not adversely affect the case it is making. These grounds include:

1. That Rule 85(A)(iii) does not create an entitlement for the Prosecution to call rebuttal evidence.[21]
2. That as was stated by the Trial Chamber of the ICTY in the *Delalic et al* case, the admissible rebuttal evidence 'must relate to a significant issue arising directly out of the Defence evidence which could not reasonably have been anticipated.'[22]
3. That, as was held in the case of *The Prosecution v Limaj*,[23] rebuttal evidence may not be called by the Prosecution merely because its case has been met by contradicting evidence or in order to reinforce its case-in-chief.

31. The Prosecution however submits that 'a Trial Chamber has a wide discretion to admit, limit or preclude rebuttal evidence depending on the circumstances of the case and bearing in mind, the necessity to proceed expeditiously'.[24]

32. To support this proposition, the Prosecution relies on the dictum of the ICTY Trial Chamber Decision in the case of *The Prosecution v Oric*[25] which it cited extensively.

Response:

33. The Defence, on the following submissions, invites the Chamber to dismiss the Prosecution's Motion.

- That the Prosecution have been in contact with the Proposed Rebuttal Witness since the 25th of October, 2003, and that the Proposed Witness alleged that Mustapha Fallon was killed in the Poro Bush at the behest of the 3rd Accused in the presence of the 1st and 2nd Accused.

- That in that Statement, the Proposed Rebuttal Witness gives a long and comprehensive account of the alleged killing.[26]

- That this proposed evidence has been available to the Prosecution since the 25th of October, 2003, long before they opened and indeed closed their case.

- That the said Witness was not called by the Prosecution as part of its case-in-chief.

- That 'the evidence of the Proposed Witness was essentially corroborative of Nallo's evidence and that Rogers could at one stage have been called by the Prosecution as part of its case-in-chief.'[27]

- That 'the Prosecution is under a duty to adduce all evidence critical to proving its case by the close of its case and that it is only where a new issue is raised in the course of the Defence case

that rebuttal evidence may be contemplated.'[28]

- That in the current case, 'the Prosecution were on clear notice that Nallo's alleged description of the killing of Mustapha Fallon was in dispute and that this was clearly put to Nallo in cross examination by Counsel for the 1st Accused.'[29]

- That 'the Prosecution cannot call additional evidence merely because its case has been met by certain evidence to contradict it.'[30] The Defence in this regard, argues that the Prosecution in the current case is simply seeking to adduce the proposed evidence because the evidence of Nallo has been contradicted by the Defence evidence and further, that Nallo's evidence was disputed by the Defence during his cross examination. The Defence then concludes 'that 'meeting' of Nallo's assertion by a contradictory version of events does not, in and of itself, give rise to a prosecutorial right to call rebuttal evidence.'[31]

- That 'evidence which goes to a matter that forms a fundamental part of the case which the Prosecution is required to prove in relation to the charges brought in the indictment should be brought as part of the Prosecution's case-in-chief and not in rebuttal.' [32]

- That 'the standard for admissibility of rebuttal evidence is that such evidence must relate to a significant issue arising directly out of the Defence evidence which could not reasonably have been anticipated.'[33]

- That 'only highly probative evidence on a significant issue in response to Defence evidence and not merely evidence which reinforces or fills gaps in the Prosecution's case-in-chief, will be permitted in rebuttal and that evidence on peripheral and background issues will be excluded.'[34]

Reply:

> 34. The Prosecution in reply again relies on a statement in a Decision of the Trial Chamber of the ICTY in the *Oric* case. We take the option to cite it here in the interests of our assessment of the arguments raised by the Parties. The Chamber had this to say in that statement:

'In a system where, as in this Tribunal, at the pre-trial stage the Prosecution is limited in the number of witnesses it can produce and time in which it needs to conclude its case, a rigid application of the characteristically high or strict standard of admissibility for rebuttal evidence may consequently encourage or even compel the prosecution to seek to admit an over-abundance of evidence in its case-in-chief in order to avoid the risk of foreclosure of evidence deemed critical by the Prosecution at the rebuttal stage of the proceedings, and that a flexible application of the standard of admissibility is preferred by the Trial Chamber as it might avert such an undesirable approach in conducting trials before the Tribunal'[35]

The Prosecution submits:

- That ‘it clearly needs to be selective in the evidence that it brings in a trial and that if trials are to be conducted efficiently, its selection of evidence should take into account, the degree to which particular issues are in dispute.’[36]

- That even after the Prosecution’s witness list has been finalised, it will still be possible at that stage, if necessary, for the Prosecution to apply to add further witnesses to the Prosecutions witness list during the course of the Prosecution’s case if that were necessary to counter an alternative version of events put by the Defence that the Prosecution could not have reasonably anticipated.[37]

35. It is the Prosecution’s case in this motion that no such alternative version was provided to it during the cross examination of Prosecution witnesses by the Defence even though the Prosecution, in another breath, admits that under the procedures in force, there is no obligation on the Defence to provide this information to the Prosecution which, in these circumstances, is left to anticipate what it considers will likely be the more contentious issues in the case.

- That ‘it is irrelevant to an application to call rebuttal evidence, whether or not the proposed rebuttal evidence was previously known or available to the Prosecution but rather, whether the evidence is being called to rebut Defence evidence that could not have been reasonably anticipated by the Prosecution during the Prosecution case.’[38]

36. That ‘it could not have been reasonably anticipated by the Prosecution during the Prosecution case that the Defence would actively seek to present evidence that Mustapha Fallon was killed in battle in Koribondo.’[39]

CHAMBER’S ASSESSMENT OF THE CONTENT OF REBUTTAL WITNESS’ STATEMENT AND HIS PROPOSED TESTIMONY

37. Following the Prosecution’s Motion to call Witness No. TF2-225, the Proposed Witness, to rebut the evidence of Mohammed Fallon, the Prosecution, on the 16th of October 2006, further filed and disclosed to the Defence, Interview Notes and Unredacted Statements of the proposed Rebuttal Witness.

38. This filing brought into light, the fact that the Proposed Rebuttal Witness has since been in contact with the Prosecution, and certainly before the 25th of October 2003 when he made a statement to Prosecution. We observe that this statement was obtained by the Prosecution, 8 months before the Prosecution opened its case against the 3 Accused Persons on the 3rd of June, 2004.

39. This lengthy and detailed statement[40] contains facts and information concerning the 3 Accused Persons including a graphic description of the alleged killing of Mustapha Fallon which, according to him, took place at night in the Poro Bush in Talia Yawbeko in his presence and in the presence of the 3 Accused Persons.[41]

40. In that statement, the Proposed Witness alleges that an amount of Le300.000 was given by 1st Accused to them with instructions that they should tell anybody who asked for Mustapha Fallon that he was killed in the Koribondo attack.[42]
41. We also note that the Prosecution, again on the 5th of December, 2003, had a further contact with this same Witness and recorded a statement from him.[43] That statement, like the earlier one of the 28th of October, 2003, also contains material which the Prosecution could also have used to their advantage.
42. We therefore find that the statement of the 28th of July, 2006, which the Prosecution is alleging contained the first revelation of the facts and which it is now relying on to buttress the application to call rebuttal evidence, is only the 3rd in a series of statements and contacts that the Prosecution had with TF2-225, the Proposed Rebuttal Evidence Witness.
43. In these circumstances, it is necessary for us to examine the nature and content of the Rebuttal evidence the Prosecution is seeking to be admitted so as to enable us to determine whether it satisfies the legal standard that is required and that We have set out for purposes of exercising our discretion under Rule 85(A)(iii) of the Rules, to grant or to deny the Prosecution's application.

DELIBERATION
THE LEGAL STANDARD

44. The Chamber observes that although Rule 85(A)(iii) of the Rules respectively set out the sequence for the presentation of evidence and recognises the possibility of the Prosecution adducing evidence in rebuttal, it does not set out the conditions under which such evidence could be admitted. Rather, it leaves it to the discretion of the Trial Chamber.
45. In the exercise therefore of our discretion to grant or to refuse an application for leave to adduce rebuttal evidence, the Chamber should, like in the exercise of our inherent discretionary judicial powers, do so judicially, in the overall interests of justice, and in total regard to and respect of the rights of the Parties without of course losing sight of the imperatives and necessity to conduct the proceedings expeditiously.
46. While therefore conceding to the Prosecution, their legal right and entitlement to seek the leave of the Chamber to adduce rebuttal evidence after the presentation of the case for the Defence, We reiterate here that We remain guided in the process by those fundamental principles and conclude that for such evidence to be admitted, it must, in our considered opinion, and those of some judicial precedents of the ICTY and the ICTR, fulfil the following conditions:

1. It must be relevant to the fact or facts in issue.
2. It must have probative value in the determination of the issue or issues under consideration[44], and in particular, in the process of assessing the innocence or culpability of the Accused.[45]
3. It must relate to a significant issue arising from the Defence case for the first time.

4. Such evidence must have arisen '*ex improviso*' to the extent that no human ingenuity could reasonably have anticipated, or foreseen the possibility of its being adduced by the Defence.[46]

5. It must be evidence which did not exist before the closure of the case for the Prosecution or that of the Defence or that even if it existed, the Prosecution could not, even by the exercise of reasonable diligence, have come into its possession for purposes of adducing it during the examination in chief of its witnesses.[47]

6. That the calling of evidence in rebuttal is not a ploy to reopen its closed case with a view to curing certain perceived defects or shortcomings in the case for the Prosecution.

7. That it is not being called merely to confirm or reinforce the Prosecution's case[48] or because its case has been met by certain evidence to contradict it,[49] and further, that evidence cannot be called on a collateral issue relating to the credibility of the witnesses.

8. That the granting of leave to adduce the evidence in rebuttal will not in any way violate the principles that underlie the doctrine of equality of arms and of fundamental fairness nor would it unduly delay the proceedings[50] thereby compromising the statutory obligation of ensuring a fair and expeditious trial without putting in jeopardy, or violating the statutory rights of the Accused.

47. In the domain of rebuttal evidence, it is a cardinal principle of law that for such evidence to be admissible, the party seeking to adduce it must, like Lord Tindal C.J. laid down in the case of *Rv. Frost*,[51] make a showing that such evidence relates to 'a matter arising *ex improviso* which no human ingenuity can foresee'. This is therefore be limited to cases where evidence which is called in rebuttal is directed to facts which are set up for the first time by the evidence for the defence. Indeed, as a general principle of practice, and as was held in the case of *Rv. Miliken*,[52] 'all evidentiary matter that the Prosecution intends to rely upon as probative of guilt should be adduced before the close of their case if it be then available.'

48. A corollary to the TINDAL C.J.'s, which is also a well tested Principle of Law, as far as a Judges prerogative goes on this subject which we mention here by analogy for purposes of this decision, is that a Trial Judge has the power to call a witness not called by either the Prosecution or the Defence without their consent if he considers that course necessary in the interests of justice. However, as was held in the case of *Rv Harris*,[53] applying the test laid down by Lord Tindal, the Judge should not call such a witness after the evidence for the Defence is closed, except in a matter arising '*ex improviso* which no human ingenuity could foresee' and only where no injustice or prejudice could be caused to the defendant.

49. In fact, We observe that the solid base on which these legal principles are founded and applied, underlies an equally consecrated common law principle that was enunciated in the case of *Bersin*,[54] that there must, at a certain stage, be an end to any litigation. This principle, as reflected in Article 17(4)(c) of the Statute of the Special Court, in criminal matters and within the context of this Motion, underscores the necessity to dispose of cases in an expeditious manner with a view to avoiding undue delays in trying Accused Persons and unnecessarily prolonging trial proceedings, imperatives which would certainly be violated if we were to grant this Prosecution's Motion.

DELAY IN THE PROCEEDINGS

50. Furthermore, if We were to grant this application, We think that We would have opened the door to an interminable process in the sense that We would have triggered new proceedings in which We should, and ought to, as a matter of law, and consistent with the principles of equality of arms and of fundamental fairness, obligatorily grant to the Defence, on Our Own motion, if not at their behest, the right, not only to cross examine this rebuttal witness, but also, if it so expresses the desire, to allow it to call additional evidence to rebut or to contradict the Proposed Rebuttal Witness's evidence. This course of action will open possibilities to our being confronted with further applications of this nature and or of others from either the Prosecution or from the Defence.

51. Even though the Prosecution, in support of its vested interests, argues that the granting of this application will not unduly delay the proceedings, We are of the opinion, and We so do hold, that granting this rebuttal Motion has the potential of unreasonably and unnecessarily prolonging and delaying these proceedings. In this regard We did, in our Decision on a similar situation when determining an application for leave to amend an indictment in the *Prosecution v. Sesay, Kallon and Gbao* have this to say:

"The crucial consideration in this process, in our opinion, is one of timing. The question to be asked is whether the application for amendment is brought at a stage in the proceedings where it would not prejudice the rights of the Defence to a fair and expeditious trial and furthermore, whether it is made in the overall interests of justice rather than its having the effect of giving an undue advantage to the Prosecution, thereby putting in jeopardy, the doctrine of equality of arms between the Prosecution and the Defence.' [55]

52. This Chamber, again in disposing of and considering a similar issue,[56] still relating to an application by the Prosecution to amend and indictment, took this same stand and reiterated this same principle. We today, have no cause to shift grounds on this view which We reiterate and confirm by analogy, in the instant case.

53. In the *Delalic et al.* case,[57] the Trial Chamber of the ICTY, in similar circumstances, also gave consideration, to an issue which it considered was necessary to justify the exercise of its discretion to admit what in that case, was classified as 'fresh evidence'. These, according to that Sister Chamber, included:

- (i) The 'advanced stage of the trial', i.e. the later in the trial that the application is made, the less likely the evidence will be admitted;
- (ii) The delay likely to be caused by reopening of the Prosecutions' case, and the suitability of an adjournment in the overall context of the trial; and
- (iii) The probative value of the evidence to be presented.

CHAMBER'S JUDICIAL REASONING

54. In order to arrive at a fair determination of the issue and arguments raised in this motion, We would like to state, for the record, that it is our view that the statutory burden of proof that lies on the Prosecution, obligates it not only to establish the guilt of the Accused beyond all reasonable doubt, but also equally imposes on it, on the other hand, a corresponding obligation and duty of ensuring that all the relevant evidence on which the proof of guilt is or will be based, is presented before the Chamber with due diligence, preferably, before the closure of its case and before the opening of the case for the Defence.

55. This approach, We believe, insulates the Prosecution from possible testimonial and evidentiary surprises which, if raised by the Defence, would necessarily oblige it to resort to seeking leave to adduce rebuttal evidence. It is indeed common knowledge that Tribunals, because of rules inherent in the due process, are generally very weary to grant applications of this nature. The justification for this judicial attitude is based on considerations such as the evidence either being available to the Prosecution at the time of the presentation of its case, or could indeed, through the exercise of reasonable diligence, have been anticipated, obtained, and adduced by the Prosecution in the course of the presentation of its case-in-chief, or at the latest, before proceeding to close it.

56. We are of the opinion that the threshold to be placed on the obligation and duty imposed on the Prosecution to act with due diligence in assembling, preparing and presenting its case, and this, preferably before it closes it, should be high in order to avoid or limit applications of this nature which are reserved for very deserving situations and circumstances that the law warrants.

57. On this subject, We refer to and adopt the dictum of the Trial Chamber of the ICTY again in the case of *Delalic et al*[58] in which the Chamber had this to say:

‘The essence of the presentation of evidence in rebuttal is to call evidence to refute a particular piece of evidence which has been adduced by the defence. Such evidence is therefore limited to matters that arise directly and specifically out of defence evidence. Where the evidence sought to be introduced in rebuttal is itself evidence probative of the guilt of the accused, and where it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it, then generally speaking the Trial Chamber will be reluctant to exercise its discretion to grant leave to adduce such evidence. The Prosecution thus, cannot call additional evidence merely because its case has been met by certain evidence to contradict it.’

58. We take this view because the Prosecution, in its submissions, makes it clear that the justification they rely on to secure the granting of this application is premised on the fact that it did not, and could not anticipate the eventuality that Mohammed Fallon would be giving evidence that the alleged killing of Mustapha Fallon took place in Koribondo, and not, as alleged by its witness, Mr Nallo, in the Poro Bush in Talia Yawbeko. To quote the Prosecution’s submission in this regard on which it relies to justify its Motion ‘it could not have been reasonably anticipated by the Prosecution during the Prosecution’s case that the Defence would actively seek to present evidence that Mustapha Fallon was killed in battle in Koribondo’.[59]

59. It sounds judicially strange to us as a Chamber, for the Prosecution, not to expect or anticipate that the evidence it adduces to sustain its case would be met with serious

challenges from the Defence at any stage of the proceedings and at every available opportunity. It would equally be strange for the Prosecution to entertain a comfortable feeling that where such an eventuality occurs, it can seek a recourse to the rebuttal option which the Court would ordinarily and so readily grant. This should not and cannot be the case on a subject of this nature where the Chamber has to pattern its decisions on a case by case basis and depending on the particular circumstances of each case.

60. In fact, in the context of a judicial contest, the contrary attitude should constitute the posturing of the Prosecution. It should expect these surprises and place itself at all times on a permanent alert and in a disposition to anticipate, respond to, and resist a constantly assailing Defence, with a view to warding off or containing these normal and conventional procedural surprises that are vital and important components of the art of advocacy.

61. It is indeed inconceivable to imagine that a prosecution, conducted with the expected traditional diligence, can discount, not expect, or not anticipate such an alleged surprise, especially where it concerns and touches on such a potentially contentious allegation in which the 3 Accused Persons are alleged to have carried out a ritual murder of an individual and stand indicted not only for it but for other alleged killings, as well.

THE NATURE AND CONTENT OF THE PROPOSED REBUTTAL EVIDENCE

62. In order to arrive at a fair determination of this Motion, it is necessary for us at this stage, to examine the nature and content of the proposed rebuttal evidence in order to advise ourselves in arriving at the decision as to whether or not it fulfils the legal criteria We have enunciated, the most important of them being that it should be evidence on a new issue which has arisen *ex improviso* and related to facts that could not, by the exercise of reasonable diligence, have been foreseen or anticipated by the Prosecution and furthermore, that this proposed evidence is not just an attempt or a ploy by the Prosecution to reopen its case so as to reinforce an important and strategic aspect of it which it perceives or considers may have been contradicted or discredited by the evidence adduced by the Defence.

63. In this regard, We would like to seek recourse to the Decision of the Trial Chamber of the ICTY in the Semanza Case[60], where it was held and We quote:

‘Where, however, a new issue is raised in the Defence case that the Prosecutor could not reasonably have anticipated, a Common Law Judge has the discretion to permit the Prosecutor to bring rebuttal witnesses. Rebuttal is not permitted merely to confirm or reinforce the Prosecutor’s case, or to deal with collateral issues. Rebuttal is permitted when it is necessary to ensure that each party has an opportunity to address issues central to the case.’

64. In the present case and as we have already observed, there is in fact no new fact which is central to it that has arisen for the first time in the Defence case. We observe from the Schedule A of the Prosecution’s Motion that the evidence which it intends to call in rebuttal is not new but merely a bid to confirm and to reinforce its case that

Mustapha Fallon was killed, as Nallo, one of their witnesses had testified, not in battle in Koribondo, but in the Poro Bush in Talia Yawbeko.

65. We also would like to observe in this regard, that the piece of evidence relating to the Defence's thesis that Mustapha Fallon was killed in Koribondo is not a new matter that has arisen '*ex improviso'*. It is indeed very clear, and we do so find, that the Prosecution knew about this version of the evidence because it was placed at its very door steps by Mr Nallo in his testimony on the 10th of March, 2005[61], and even long before that and much earlier, in the October 25, 2003 Statement that the Proposed Rebuttal Witness provided then to the Prosecution, and recently disclosed to the Defence and to Us, following the Order of this Chamber.

66. Based on the foregoing considerations, We do conclude that the Prosecution had knowledge of the Koribondo battle front version of the killing of Mustapha Fallon since the 25th of October 2003, indeed, quite a long time before the commencement of the Prosecution's case and particularly, from Mr Nallo's testimony on the 10th of March, 2005, and that it had all the time to make decisions on the status and place to be accorded to the Proposed Witness in the strategic planning of these proceedings before opening the Prosecution's case on the 3rd of June 2004 and closing it on the 14th of July, 2005.

67. In the Motion before us, what We are able to decipher and do find as a matter of fact, that in seeking leave to adduce rebuttal evidence, the Prosecution, from the summary it has provided in Annexure A of its Motion, is only seeking to reopen its case with a view to contradicting the Defence evidence of Mohammed Fallon and to reinforce Mr Nallo's version. This strategy, in Our opinion, is procedurally wrong. It indeed constitutes an attempt, as the Prosecution itself admits,[62] to have incorporated in the records, at an impermissible stage and time frame, a corroborative version of Mr Nallo's allegations, which because it was, as We have found, clearly available to them earlier on in the process for use during the conduct of their case-in-chief, and therefore, fails to qualify to be legally categorised and characterised as rebuttal evidence.

68. In this regard, We note that the Prosecution has submitted that the Defence did not put it on notice at any time in the proceedings, and particularly during their cross examination of Albert Nallo, that they disputed the latter's version of the killing of Mustapha Fallon nor did they suggest to Nallo that he was killed in battle in Koribondo as alleged by the Defence Witness, Mohammed Fallon. The Prosecution in so submitting, seems to suggest that to avoid surprises, the Defence should disclose its strategies to it. Such a submission, in Our opinion, is both practically unrealistic and legally meretricious.

ALLEGED ABSENCE OF REBUTTAL FACTS UNTIL THE 28TH OF JULY, 2006 STATEMENT BY THE PROPOSED REBUTTAL WITNESS

69. Briefly stated, the Prosecution's submission is that it could not, up to and when it closed its case, have anticipated that the Defence would seek to adduce evidence that Mustapha Fallon was killed in battle in Koribondo and not in the Poro Bush in Talia Yawbeko. The Prosecution goes further to say that even though the Proposed Witness who it now seeks to call in rebuttal, in his interviews with the Prosecution and to quote them, 'declared some knowledge of the events surrounding Mustapha Fallon's death in

Talia Yawbeko, he did not reveal to the Prosecution, the extent of his knowledge, including in relation to the relationship between Mohammed and Mustapha Fallon until a 28 July 2006 interview after the close of the Prosecution's case'.[63]

70. We would like to observe from the facts on the records, that this statement by the Prosecution is not only untrue but disingenuous on the face of it in the light of the detailed revelations in the Proposed Rebuttal Witness's Statement made to the Prosecution and dated the 25th of October, 2003, and this, long before the shorter, and We would say, uneventful statement of the 28th of July, 2006, on which the Prosecution is now relying. We in fact note that no explanation has been offered by the Prosecution as to why they did not, in that submission, make any specific mention of or reference to either the very detailed and comprehensive statement of the 28th of October, 2003, and that which followed on the 5th of December, 2003, which were already in its possession and whose facts, it certainly had or should have used long before the Prosecution's case opened on the 3rd of June, 2004.

71. If therefore, as the Prosecution now contends, the evidence of this Proposed Witness was necessary to corroborate Nallo's evidence, which basically is the purpose that this rebuttal application is seeking to achieve, they should have called him as a witness at the appropriate time when presenting the Prosecution's case, or used that or those statements and the facts contained therein in one way or the other, to the Prosecution's advantage in the course of conducting its case-in-chief or its cross examination of the Defence Witnesses.

72. What we do find here, is an attempt to remedy some perceived lapses on the part of the Prosecution. It is Our opinion that leave to call rebuttal evidence cannot be granted in such circumstances because it does not meet the standard and has the potential of curing, to the detriment and prejudice of the rights of the Accused, the possible or perceived defects which could have been averted by the Prosecution within a permissible time frame.

73. Having regard to the above, We reject the Prosecution's submission 'that it is irrelevant to an application to call rebuttal evidence whether or not the proposed rebuttal evidence was previously known to the Prosecution'[64] as ill conceived, misguided and indeed a misleading statement of Law. We accordingly reiterate that the exercise of the Chamber's discretion to grant an application to call rebuttal evidence, can only be properly grounded on the showing that the evidence arose *ex improviso* during the presentation of the case for the Defence, and that the Prosecution neither knew of its existence nor could it reasonably have anticipated, through the exercise of ordinary human ingenuity, that the Defence will adduce such evidence.

74. As we have mentioned earlier[65], it is our finding that what the Prosecution is attempting to do here is to invoke the rebuttal procedure to reopen and reinforce its case. In Our opinion, the doctrine of fundamental fairness and of equality of arms would be defeated if We were ever minded to grant this application, unless we correspondingly grant to the Defence, a right, not only to cross examine the Proposed Witness but also, and in addition, to exercise its right to call further witnesses to buttress the alleged Koribondo based version of the killing of Mustapha Fallon. This, to our mind, will occasion a delay in the proceedings and thereby jeopardise and violate the rights of the Accused Person to a fair and expeditious trial as we have already indicated[66], because, and we do emphasise, that there must be finality to the process.

ADMISSIBILITY UNDER RULE 89(C) OF THE RULES OF PROCEDURE AND EVIDENCE

75. The Prosecution in its submissions has also urged us to admit this proposed evidence in the light of the provisions of Rule 89(C) of the Rules of Procedure and Evidence. However, even though this proposed evidence might be relevant, We are of the opinion, and We do so hold, that the said evidence, notwithstanding the submissions by the Prosecution in this direction, cannot, given the facts and circumstances of this Motion which we have highlighted, examined, and analysed, be admitted even under the very broad and apparently largely permissive[67] provisions of Rule 89(C) of the Rules of Procedure and Evidence which grants The Chamber, the discretion 'to admit any relevant evidence'.

76. We adopt this stand because taking such a course will, in Our view, be in violation of settled and well established legal principles and the jurisprudence on the subject of admissibility of rebuttal evidence. Accordingly, and for the reasons that we have advanced earlier on, we dismiss this legal proposition advanced by the Prosecution.

CHAMBER OBSERVATIONS

77. We have also noted that there was a mention by Mr Nallo in his testimony and in the Proposed Rebuttal Witness's detailed Statement of the 25th of October, 2003, which he made to the Prosecution, of an amount of Le300.000 allegedly having been given to this Proposed Witness and other individuals by the 1st Accused with firm instructions, after the alleged killing at night of Mustapha Fallon which they say they witnessed and was allegedly coupled with a threat from the 1st Accused, for them to say, if they were ever asked, that Mustapha Fallon was killed in the Koribondo attack.

78. We conclusively find that these facts were to the knowledge and in the possession of the Prosecution, and constituted sufficient notice to the Prosecution that the death of Mustapha Fallon as alleged and narrated by Nallo, was going to be contested on the strength of these facts which were not in the least, new. In these circumstances, the Prosecution cannot credibly contend, as it now seeks to do, that it could not have anticipated these facts before opening its case or indeed, soon after the close of Mr Nallo's testimony before the Chamber, on the 15th day of March, 2005.

79. It is on this score that We accordingly, given the circumstances of this case, dismiss as misconceived and untenable, the legal thesis and argument canvassed by the Prosecution, 'that it is irrelevant to an application to call rebuttal evidence, whether or not the proposed rebuttal evidence was previously known or available to the Prosecution, but rather, whether the evidence is being called to rebut the Defence evidence that could not have been reasonably anticipated by the Prosecution during the Prosecution Case'[68], and further, 'that it could not have been reasonably anticipated by the Prosecution during the Prosecution case that the Defence would actively seek to present evidence that Mustapha Fallon was killed in battle in Koribondo.'[69]

80. It is Our view, that granting this Motion to adduce rebuttal evidence on arguments which We consider ill-conceived, and unconvincing, and according any approval or

credence to such a theory would amount to overturning a tested long-standing traditional and settled principle on the admissibility of rebuttal and new evidence which was laid down, as We have earlier stated, in 1829 by Lord Tindal C.J. in the case of *Rv Frost*[70] and which still applies with full force as a basic first principle on this subject in current Municipal and International Judicial practices in matters relating to criminal procedure, practice, and evidence.

CONCLUSION

81. The focus of the case the Prosecution has been making to secure Our leave for the requests it has made in this Motion is, as We understand it, that the evidence to the effect that Mustapha Fallon was killed at the battle front in Koribondo is new and has taken them by surprise. They indicate that they never knew or expected that the Defence would put forward this version of an incident which, from their perspective, took place in the Poro Bush in Talia Yawbeko.

82. We entertain no hesitation nor do we have any reserves to arrive at the conclusion that the facts on the record do not, and cannot, justify a finding in this direction to warrant our granting this Motion because the legal standard for granting it has not been met. It is Our finding, notwithstanding the Prosecution's submissions, that the evidence sought to be adduced in rebuttal does not qualify as such under that rubric because it is not new and further, that it did not arise *ex improviso* in that it indeed could, through the exercise of reasonable diligence, have been expected or anticipated by the Prosecution during the conduct of their case-in-chief and in any event, before proceeding to close it.

83. In the light of the foregoing analysis and considerations, We are of the opinion, and We do so hold, that the Prosecution, in its submissions on the facts and on the law to support their Motion, has not met with the required legal standard to warrant Our exercising Our discretion in their favour under Rule 85(A)(iii) of the Rules of Procedure and Evidence,to grant the leave they are seeking, to adduce the proposed Rebuttal Evidence.

84. It is our decision therefore, that the Motion be dismissed and that in the circumstances, there is no necessity or justification to examine the 2nd arm of the Motion on the Protective Measures for the proposed Witness which now becomes meaningless as it automatically lapses.

The Chamber **HEREBY** denies the Motion as lacking in merit; and

ACCORDINGLY ORDERS that it is dismissed.

Done in Freetown, Sierra Leone, this 27th day of November 2006.

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

[Seal of the Special Court for Sierra Leone]

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[1] SCSL-04-14-T-715.
[2] *Ibid*., para. 1.
[3] SCSL-04-14-T-716.
[4] SCSL-04-14-T-718.
[5] SCSL-04-14-T-719.
[6] SCSL-04-14-T-717, "Fofana Response to Prosecution Motion for Immediate Protective Measures for Proposed Rebuttal Witness", filed by Court Appointed Counsel for the Second Accused on the 16th of October, 2006 ("Fofana 1st Response"); SCSL-04-14-T-720, "Confidential Defence Response to Prosecution Motion for Leave to Call Evidence in Rebuttal", filed by Counsel for Fofana on the 16th of October, 2006 ("Fofana 2nd Response"); SCSL-04-14-T-721, "Confidential Prosecution Reply to Defence Response to Prosecution Motion for Leave to Call Evidence in Rebuttal and for Immediate Protective Measures for Proposed Rebuttal Witness", filed by the Prosecution on the 17th of October 2006 ("Reply").
[7] Transcript of 18th October, 2006, p. 2, lines 20-21.
[8] Also spelt as Koribundo and Koribundu.
[9] Transcript of 27th September, 2006, p. 49, lines 1-5.
[10] Motion, Annex A, p. 11.
[11] Reply, para. 15, lines 4-7.
[12] Transcript of 10th March , 2005, p.p. 54-60 and Transcript of 14th of March, 2005, p. 43.
[13] Transcript of 10th March, 2005, p.p. 54-56.
[14] Transcript of 10th March, 2005, p. 56
[15] Motion, p. 4, para. 8.
[16] Motion, p. 5, para. 9.
[17] Motion, para. 11.
[18] Motion, para. 12, lines 1-6.
[19] Motion, para. 12, line 6.
[20] Reply, para. 11.
[21] Motion, para. 3.
[22] Motion, para. 4.
[23] *Prosecutor v. Limaj et al.* Case No. IT-03-66, "Decision On Prosecution's Motion To Admit Rebuttal Statements Via Rule 92bis", dated 7th July, 2005.
[24] Motion, para. 5.
[25] *Prosecution v. Oric*, Case No. IT-03-68, Decision On The Prosecution Motion With Addendum And Urgent Addendum
To Present Rebuttal Evidence Pursuant To Rule 85(A)(iii), dated 9th February 2006.

[26] *The Prosecution v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, Prosecution's Disclosure Of Interview Notes And Unredacted Statements Of The Proposed Rebuttal Witness, p.p. 19401- 19409, dated 16th of October, 2006.
[27] Response, p. 4, para. 18
[28] Response, p. 4, para. 19(ii)
[29] Response, p. 6, para. 25
[30] Response, p. 7, para. 31(iv)
[31] Response, p. 8, para. 32
[32] Response, p. 4, para. 19(i)
[33] Response, p. 5, para. 19(iv)
[34] Response, p. 5, para. 19(v)
[35] *Prosecution v. Oric*, Case No. IT-03-68, "Decision On The Prosecution Motion With Addendum And Urgent Addendum
To Present Rebuttal Evidence Pursuant To Rule 85(A)(iii)", p. 4, dated 9th February, 2006.
[36] Reply, p. 2, para. 3.
[37] Reply, para. 5.
[38] Reply, p. 5, para. 14, Lines 4 – 5.
[39] Reply, p. 6, para. 15.
[40] *The Prosecution v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, "Prosecution's Disclosure Of Interview Notes And Unredacted Statements Of The Proposed Rebuttal Witness", p.p. 19397-19412, dated 16th of October, 2006.
[41] *The Prosecution v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, "Prosecution's Disclosure Of Interview Notes And Unredacted Statements Of The Proposed Rebuttal Witness", p.p. 19404-19409, dated 16th of October, 2006.
[42] *The Prosecution v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, "Prosecution's Disclosure Of Interview Notes And Unredacted Statements Of The Proposed Rebuttal Witness", p.p. 19408, dated 16th of October, 2006.
[43] *The Prosecution v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, "Prosecution's Disclosure Of Interview Notes And Unredacted Statements Of The Proposed Rebuttal Witness", p.p. 19413, dated 16th of October, 2006.
[44] *Prosecution v. Oric*, Case No. IT-03-68, "Decision On The Prosecution Motion With Addendum And Urgent Addendum
To Present Rebuttal Evidence Pursuant To Rule 85(A)(iii)", dated 9th February, 2006.
[45] *The Prosecutor vs Ntagerura*, Case No. ICTR-99-46-T, "Decision On The Prosecutor's Motion For Leave To Call
Evidence In Rebuttal Pursuant To Rules 54, 73, And 85 (A) (iii) Of The Rules Of Procedure And Evidence", dated
[46] Lord Tendal Rv Frost
[47] *Prosecution v. Delalic et al*, Case No. IT-96-21, "Appeals Judgement", dated 20th February, 2001.
[48] *Prosecutor v. Semanza*, Case No. ICTR-97-20-T "Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence", dated 27th March, 2002.
[49] *Prosecution v. Delalic et al*, Case No. IT-96-21, "Appeals Judgement", dated 20th February, 2001.
[50] *Prosecution v. Delalic et al*, Case No. IT-96-21, "Appeals Judgement", dated 20th February,

2001.
[51] (1839) 4 State Tr NS 85 at 386, Halsbury's Laws Of England, Vol. 11 Para 294.
[52] (1969) 53 Cr. App. Rep. 330
[53] *Rv Harris* [1927] 2 KB 587
[54] *[1912] CPD 969*
[55] *The Prosecution v. Sesay, Kallon and Gbao,* Case No. SCSL-04-15-T, Decision on Prosecution Request for Leave to Amend Indictment, p. 10, para. 27, dated 6th February, 2004.
[56] *The Prosecution v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, Decision on Prosecution Request for Leave to Amend Indictment, dated 20th May, 2004.
[57] *Delalic et al,* Case No. IT-96-21-A, "Appeals Judgement", dated 20th February, 2001.
[58] *Supra*, note 58.
[59] *Supra*, note 39.
[60] *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, "Decision on Defence Motion for Leave to Call Rejoinder Witnesses",
30 April 2002; para. 5.
[61] Transcript of 10th March, 2005, Evidence of Nallo, p. 58, para. 19, lines 12-18
[62] Reply, para. 15, lines 8 and 16.
[63] Motion, p. 5, para. 12, line 13-17.
[64] Reply, para. 14, lines 3-5.
[65] See para. 72 of this Decision
[66] See para. 51 of this Decision
[67] *Prosecution v. Norman, Fofana and Kondewa,* Case No. SCSL-04-14-T, Fofana Appeal Against Refusing Bail Decision,
11th of March, 2005, paras 22-24 & 29.
[68] Reply, para. 14, lines 4 and 5.
[69] Reply, para. 15 lines 4-7.
[70] *Supra*, Note 46.