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SCSL-03-01-PT
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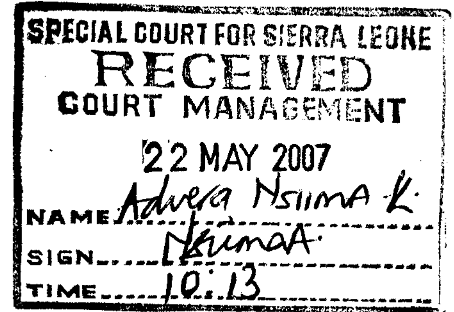
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone



Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty

Acting Registrar: Mr. Herman von Hebel

Date filed: 22 May 2007

THE PROSECUTOR **Against** **Charles Taylor**

Case No. SCSL-03-01-PT

PUBLIC

PROSECUTION'S MOTION FOR AN ORDER ESTABLISHING GUIDELINES FOR THE CONDUCT OF TRIAL PROCEEDINGS

Office of the Prosecutor:

Ms. Brenda J. Hollis
Ms. Ann Sutherland

Defence Counsel for Charles Taylor:

Mr. Karim A. A. Khan
Mr. Roger Sahota

I. INTRODUCTION

1. Pursuant to Rules 26 *bis*, 54 and 73 of the Rules of Procedure and Evidence ("Rules"), the Prosecution files this motion for an order establishing guidelines with respect to the manner in which the trial proceedings will be conducted.

2. Issues of trial management were discussed at the recent Pre-Trial Conference held on 7 May 2007.[1] The requested guidelines discussed below were not addressed at the PTC.

II. APPLICABLE LAW

3. Rule 54 of the Rules provides that a Judge or a Trial Chamber may, at the request of either party, or of its own motion, issue such orders as may be necessary for the conduct of the trial. Such orders relating to trial practices may assist the Trial Chamber in ensuring that the trial is conducted in a fair and expeditious manner, in accordance with the Statute and the Rules, with full respect for the rights of the accused, and due regard to the protection of victims and witnesses.[2]

III. SUBMISSIONS

4. Trial efficiency, trial fairness and the administration of justice throughout the trial can be better served if the parties are aware from the beginning of the trial of the rules that the Chamber will apply, including, but not limited to the admitting or excluding of evidence, particularly documentary evidence. In this regard, the Prosecution respectfully submits that it would be appropriate for the Chamber to set out guidelines for the parties in relation to the manner in which it expects the trial proceedings to be conducted. Any guidelines set would, of course, remain subject to future variation by the Chamber as the trial progresses.

(1) Oral Motions

5. Motions may be made by the parties, either orally or in writing. When an oral motion is made, the opposing party or parties may be invited to respond orally at that time, or may be granted a time limit in which to file a written response or make oral submissions.

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[1] Pre-Trial Conference 7 May 2007 ("PTC"), Transcript ("T."), 39-48 (witness lists and exhibits).

[2] Article 26 of the Statute of the Special Court for Sierra Leone ("SCSL"). Article 17 of the Statute of SCSL (rights of the accused) and Rule 75 of the Rules of Procedure and Evidence (measures for the protection of victims and witnesses).

(2) The presence of the Accused during proceedings

6. The Accused shall be present at all proceedings unless the Trial Chamber permits otherwise. The Accused must provide the Chamber with compelling reasons for any absence. The Chamber shall determine if the Accused has presented sufficient justification to be excused. Upon being excused by the Chamber to attend, the Accused shall waive his right of attendance in writing. Counsel may provide the waiver to the Chamber upon specific instructions to do so from the Accused.

(3) Court Record

7. A copy of the draft transcript shall be provided to the parties by the Court Management Section ("CMS") at the end of each day's hearing. The parties shall provide proposed transcript corrections to the Transcript Co-ordinator within 48 hours. CMS shall establish procedures for the preparation of the correction of the transcript.

(4) Recording of use of time

8. A system by which the use of time may be monitored shall be established and implemented by the CMS. Such a system shall record time used: (a) by the Prosecution for its examination-in-chief; (b) by the Defence for cross-examination; (c) by the Prosecution for re-examination; (d) by the Judges for putting questions to the witnesses; and (e) for all other matters, including procedural matters. Regular reports on the use of time shall be compiled by the CMS for use by the Trial Chamber and the parties.

(5) Leading questions

9. Counsel conducting the direct examination of the witness is entitled to lead the witness on non contentious matters and may use leading questions as a transition from one topic to another.
10. Where a witness appears to be having difficulty communicating his evidence, with leave of the court, counsel may resort to one or more leading questions in order to assist the witness.

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(6) Marking of Exhibits

11. When a document or other material is first introduced, CMS shall assign, on the direction of the Trial Chamber, an exhibit number with the appropriate letter prefixing it (see below) and the following words "for ID" (.e.g "P1 for ID", "D1 for ID"). When the so marked exhibit is admitted into evidence by the Trial Chamber, then the words "for ID" will be deleted from the CMS master exhibit log.
    (i) The letter "P" shall precede the exhibit number of Prosecution exhibits.
    (ii) The letter "D" shall precede the exhibit number of Defence exhibits.
    (iii) The letter "C" shall precede the exhibit number of Trial Chamber exhibits.[3]

12. A document or other material marked "for ID" shall not be considered by the Chamber in their deliberations.

(7) Disclosure of material for use in cross-examination

13. A list of documents or other material to be used by a party when cross-examining a witness shall be disclosed at the commencement of the cross-examination of the witness. At the time of providing the list, the party shall also provide copies of any documents or other material as determined by the Trial Chamber in the PTC.[4] It is the responsibility of the party referencing or otherwise using a document to ensure that the required number of copies of the documents or other material are available for use in court.[5]

(8) Admission of evidence

14. The Rules favour a flexible approach to the issue of admissibility of evidence, leaving the issue of weight to be determined by the Trial Chamber during its final deliberations, in the context of the trial record as a whole.[6] The threshold standard for the admission of evidence shall not be set excessively high.[7]

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[3] The *Prosecutor v. Brima et al.* case has "P" and "D" preceding exhibit numbers, the *Prosecutor v. Norman et al.* and *Prosecutor v. Sesay et al.* cases do not.
[4] The parties shall provide 9 copies of exhibits to CMS. See Pre-Trial Conference, T. 48, lines 9-11.
[5] *Ibid.*
[6] *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-AR65, Fofana – Appeal Against Decision Refusing Bail, App. Ch., 11 March 2005 ("*Fofana* Appeals Decision"), paras 22-24, 26, 29; *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, Tr. Ch., 23 May 2005 ("*Gbao* Ruling"), para. 4.
[7] *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, Tr. Ch., 19 January 1998, para. 20.

15. Hearsay is admissible under Rule 89(C).[8] Such evidence is admitted to prove the truth of its contents, if the Trial Chamber is satisfied that it is reliable for that purpose.[9] The Trial Chamber shall consider the probative value of hearsay evidence at the end of the trial when weighing and evaluating the evidence as [a] whole, in light of the context and nature of the evidence itself, including the credibility and reliability of the relevant witness.[10]

16. With respect to documentary or other material, a party who objects to the admission of a proposed exhibit shall specify its reasons for doing so. Where objections are raised on grounds of authenticity, the Trial Chamber may admit documents and other material unless its admission would bring the administration of justice into serious disrepute.

17. In general, books (and other similarly lengthy documents) shall not be admitted into evidence in their entirety, but only those portions shall be admitted that the Trial Chamber considers it appropriate to admit in light of the submissions of the parties.

18. Documentary evidence may be tendered either through a witness or by the parties.[11]

19. Where a party wishes to present passage(s) of a document or other material to a witness, it shall provide the relevant passage(s) of the document or other material to the witness and, if the witness has not previously reviewed the passage(s), give the witness time to review the passage(s) prior to putting questions on the substance of the relevant text.

20. The fact that the Trial Chamber may, at some point in the course of the proceedings, rule against the admissibility of some particular document or other piece of evidence shall not prevent that ruling being reversed at a later stage.[12]

21. The "best evidence rule" shall be applied in the determination of matters before this Trial Chamber.[13] This essentially means that the Trial Chamber shall rely on the best evidence available in the circumstances of the case and parties are directed to regulate the production of their evidence along these lines. What is the best evidence will, of

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[8] *Prosecutor v. Brima et al.*, Decision on Joint Defence Evidence to Exclude All Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 85, 24 May 2005 ("*Brima* Decision"), para. 12; *Fofana* Appeals Decision, para. 29.

[9] *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, Fofana – Decision on Application for Bail Pursuant to Rule 65, Tr. Ch., 5 August 2004, para. 52, citing *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Decision on Prosecutor's Appeal on Admissibility of Evidence, App. Ch., 16 February 1999, para. 15.

[10] *Brima* Decision, para. 15.

[11] *See e.g.*, *Prosecutor v. Halilović*, case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of interview of the Accused from the Bar Table, App. Ch., 19 August 2005, para. 14.

[12] *Gbao* Ruling, para. 9.

[13] *Fofana* Appeals Decision, para. 24.

course, depend on the particular circumstances attached to each document and to the complexity of this case and the investigations which preceded it.[14]

(9) Admission into evidence of a prior statement of a testifying witness

22. Prior statements of a witness should not be tendered, in whole or in part, into evidence merely because relevant portions thereof have been read out on the record.

(10) Reference to prior testimony or statements of a witness

23. If a party wishes to refer to a witness' statement(s) or transcript(s), the party shall not paraphrase or interpret what a witness or other individual has previously testified or stated. Such interpreting or paraphrasing increases the risk of mischaracterising the prior testimony or statement and unnecessarily lengthens the trial record. The party shall quote from the transcript or statement. The quote shall be restricted to the part of the transcript that is directly relevant to the question while keeping the excerpt in context of the previous line of questioning. Furthermore, when referring to a prior testimony or statement, the party shall provide exact page references to the transcript or statement in question. The party shall ensure that sufficient copies of the transcript or statement are provided as determined by the Trial Chamber in the PTC.[15]

(11) Refreshing the memory of a witness using a prior statement or testimony

24. Prior statements or testimony of the testifying witness, whether in evidence or not, may be used to refresh a witness's memory both during examination-in-chief and during cross-examination.[16] The witness shall be shown the statement or testimony and, if necessary, be permitted to read the same, and may then be asked questions anew based on a refreshed memory. Where the witness is unable to read the statement or testimony, if necessary, the witness will be excused from the courtroom and an interpreter shall read the statement or testimony to the witness.

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[14] *Prosecutor v. Martić*, Case No. IT-95-11-T, Decision Adopting Guidelines on the Standard Governing the Admission of Evidence, Tr. Ch., 19 January 2006.
[15] Pre-Trial Conference, T. 48, lines 9-11 (9 copies of exhibits to CMS).
[16] *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-AR73.2, Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness, App. Ch., 2 April 2004, p. 2, referring to *Prosecutor v. Simić et al.*, Case Nos. IT-95-9-AR73.6 & IT-95-9-AR73.7, Decision on Prosecution Interlocutory Appeals on the Use of Statements not Admitted into Evidence Pursuant to Rule 92*bis* as a Basis to Challenge Credibility and to Refresh Memory, App. Ch., 23 May 2003 ("*Simić* Appeals Decision"), paras 18, 20.

(12) Scope of cross-examination

25. Cross-examination shall be restricted to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness.[17] However, cross-examination must still be conducted within some reasonable limits.[18] The Trial Chamber shall disallow improper or unfair questions, including those which constitute harassment or intimidation of the witness.[19]

26. The Trial Chamber may, in the exercise of its discretion, permit the opposing party to enquire into additional matters,[20] as on direct examination. In such instances, the calling party may cross-examine the witness on those portions of the testimony. The opposing party shall disclose the general areas of the additional matters it seeks to enquire into at the commencement of the cross-examination of the witness.

27. As a matter of good practice, and in accordance with principles of criminal law, each party is under a duty to "put its case"[21] to witnesses for the opposing party.[22] The

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[17] ICTR Rule 90(G)(i) and ICTY Rule 90(H)(i).

[18] *Prosecutor v. Kraijšnik*, Case No. IT-00-39-T, Decision on Cross-Examination of Milorad Davidović, Tr. Ch., 15 December 2005, para. 9. In that case the Trial Chamber, by recalling its duty to protect witnesses set out in Article 22 of the Statute, retained the discretion to disallow a question or sustain an objection against a question in cross-examination where, in the Trial Chamber's view, it constituted an unwarranted attack on a witness. An example of such an attack was the allegation by the cross-examining party that a witness had engaged in serious criminal conduct, without showing reasonable grounds to do so at the time the allegation was made. A similar solution is found in the practice of the ICTR, *see Prosecutor v. Bagosora*, Case No. ICTR-96-7-T, Oral Decision on Cross Examination, Tr. Ch., 9 May 2005, T. 27-28, where the judges agreed with the holding set forth in the common law textbook, *Archbold,* whereby "questions which affect the credibility of a witness by attacking his character that are not otherwise relevant to the actual inquiry ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is well founded or true."

[19] Pursuant to Rule 75(C) of the Rules.

[20] ICTR Rule 90(G)(iii) and ICTY Rule 90(H)(iii).

[21] The rule known as the "*Browne v. Dunn* rule" says that a cross examiner cannot rely on evidence that is contradictory to the testimony of the witness without putting the evidence to the witness in order to allow them to attempt to justify the contradiction. (*Browne v. Dunn* (1893) 6 R. 67, H.L.). Lord Hershell explained it as this:

> "My Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."

[22] ICTR Rule 90(G)(ii) and ICTY Rule 90(H)(ii). *See Prosecutor v Brđanin & Talić*, Case No. IT-99-36-T, "Decision on 'Motion to Declare Rule 90(H)(ii) Void to the Extent that it is in violation of Article 21 of the Statute of the International Tribunal' by the Accused Radoslav Brđanin and on 'Rule 90(H)(ii) Submissions" by the Accused Momir Talic", 22 March 2002, for an analysis of the foundations, purpose and scope of the Rule. With respect to the principle of "putting your case", an ICTR *Akayesu* Trial Chamber held that "[t]his is a rule in Common law, but it is also simply a matter of justice and fairness to victims and witnesses, principles

cross-examining party shall be required to put to a witness the nature of its case that is in contradiction to the witness's evidence.[23] In this regard, the cross-examining party is required to put the *substance* of the contradictory evidence and not every detail that the party does not accept.[24]

(13) Length of cross-examination

28. Absent a showing of good cause, cross-examination shall not exceed the time allotted for the examination-in-chief. In most instances, the cross-examining party shall be limited to 60% of the time allotted for the examination-in-chief,[25] unless there are particular circumstances requiring that the cross-examination be extended. Such circumstances include situations where the witness is an expert witness or where fairness to the Accused so requires. The Trial Chamber shall entertain a certain amount of flexibility in this regard.

(14) Maintaining the record

29. Counsel shall conduct the trial in a manner that contributes to a clear unambiguous record. Conduct that contributes to a clear record may include (a) one party speaking at a time; (b) describing demonstrative gestures, and measurements for the record; (c) clearly identifying exhibits put to the witness including size, colour and any labelling characteristics; (d) asking the witness to clarify the use of pronouns; and (e) providing

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Statute of the International Tribunal' by the Accused Radoslav Brđanin and on 'Rule 90(H)(ii) Submissions" by the Accused Momir Talic", 22 March 2002, for an analysis of the foundations, purpose and scope of the Rule. With respect to the principle of "putting your case", an ICTR *Akayesu* Trial Chamber held that "[t]his is a rule in Common law, but it is also simply a matter of justice and fairness to victims and witnesses, principles recognised in all legal systems throughout the world." *Prosecutor v. Akayesu*, Case No.ICTR-96-4-T, Trial Judgment, 2 September 1998 ("*Akayesu* Trial Judgement"), para. 46 (footnote omitted); In *Prosecutor v Krajisnik*, Case No. IT-00-39-T, it was noted by the Presiding Judge that the background to Rule 90(H)(ii) was that it would be unfair to a witness not to have the opportunity to respond to a party's case, being unaware of what that case would be. T. 21428, 15 March 2006.

[23] *Akayesu* Trial Judgement, para. 46; *Prosecutor v Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, App. Ch., 23 May 2005, para. 26.

[24] See also *Prosecutor v Orić*, Case No. IT-03-68-T, Decision on Partly Confidential Defence Motion Regarding the Consequences of a Party Failing to Put its Case to Witnesses pursuant to Rule 90(H)(ii), Tr. Ch., 17 January 2006.

[25] In the *Krajišnik* case, the Trial Chamber requested the parties to limit the time devoted to the cross examination to 60 per cent of the time employed in the examination in chief. *See Prosecutor v. Krajišnik*, Case No. IT-00-39-T, 23 April 2004, T. 2652. However, the Trial Chamber interpreted the "60 per cent practice" with a certain degree of flexibility. *See* in this regard, *ibid.*, 27 May 2004, T. 3068-3069. In particular, under the 89 (F) procedure which drastically reduces the examination-in-chief the Trial Chamber has admitted derogation from the "60 per cent practice", *ibid.*, 3 September 2004, T. 5421. In *Milošević*, after the prosecution case, an order was issued on the use of time in the defence case. In that order, the judges stated that 60 percent of the time allocated to the Accused to present his case in chief would be allocated to the Prosecution for cross-examination during the Defence case, *Prosecution v. Milošević*, Case No. IT-02-54-T, Third Order on the Use of Time in the Defence Case and Decision on Prosecution's Further Submissions on the Recording and Use of Time During the Defence Case, Tr. Ch., 19 May 2005.

the spelling of new terms for the record either at the time or by list form to the court reporter where new terms or places are anticipated in the witness' testimony.

(15) Violations of protective measures

30. Reported violations of protective measures shall be promptly dealt with pursuant to the provisions of Rule 77 (B) and (C) of the Rules.[26]

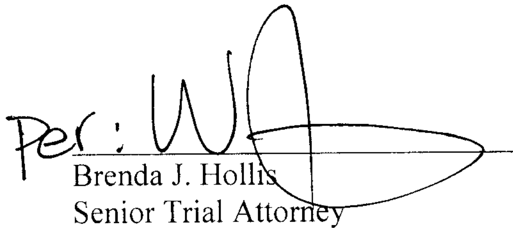
IV. CONCLUSION

31. For the reasons set out above, the Prosecution requests that the Trial Chamber issue an order establishing guidelines to govern the manner in which the trial proceedings will be conducted.

Filed in Freetown,

22 May 2007

For the Prosecution,



Brenda J. Hollis
Senior Trial Attorney

[26] Rule 77(B) and (C) of the Rules:

(B) Any incitement or attempt to commit any of the acts punishable under Sub-rule (A) is punishable as contempt of the Special Court with the same penalties.

(C) When a Judge or Trial Chamber has reason to believe that a person may be in contempt of the Special Court, it may:

(i) deal with the matter summarily itself;

(ii) refer the matter to the appropriate authorities of Sierra Leone; or

(iii) direct the Registrar to appoint an experienced independent counsel to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings. If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may issue an order in lieu of an indictment and direct the independent counsel to prosecute the matter.

LIST OF AUTHORITIES

SCSL - *Prosecutor v. Taylor* – Case No. SCSL-03-01-PT

Pre-Trial Conference, 7 May 2007, Transcript of Proceedings.

SCSL – Other Cases

Prosecutor v. Brima et al. – Case No. SCSL-04-16

Prosecutor v. Brima et al., Decision on Joint Defence Evidence to Exclude All Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 85, Tr. Ch., 24 May 2005 ("*Brima* Decision").

Prosecutor v. Norman et al. – Case No. SCSL-04-14

Prosecutor v. Norman et al., Case No. SCSL-04-14-AR65, Fofana – Appeal Against Decision Refusing Bail, App. Ch., 11 March 2005 ("*Fofana* Appeals Decision").

Prosecutor v. Norman et al., Case No. SCSL-04-14-T, Fofana – Decision on Application for Bail Pursuant to Rule 65, Tr. Ch., 5 August 2004.

Prosecutor v. Sesay et al. – Case No. SCSL-04-15

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, Tr. Ch., 23 May 2005 ("*Gbao* Ruling").

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Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Decision on Prosecutor's Appeal on Admissibility of Evidence, App. Ch., 16 February 1999.

http://www.un.org/icty/aleksovski/appeal/decision-e/90216EV36313.htm

Prosecutor v Brđanin & Talic, Case No. IT-99-36-T, "Decision on 'Motion to Declare Rule 90(H)(ii) Void to the Extent that it is in violation of Article 21 of the Statute of the International Tribunal' by the Accused Radoslav Brđanin and on 'Rule 90(H)(ii) Submissions" by the Accused Momir Talic", Tr. Ch., 22 March 2002.

http://www.un.org/icty/brdjanin/trialc/decision-e/020322.pdf

Prosecutor v. Delalić et al., Case No. IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, Tr. Ch., 19 January 1998.

http://www.un.org/icty/celebici/trialc2/decision-e/80119EV21.htm

Prosecutor v. Halilović, case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of interview of the Accused from the Bar Table, App. Ch., 19 August 2005.

http://www.un.org/icty/halilovic/appeal/decision-e/050819.htm

Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-AR73.2, Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness, App. Ch., 2 April 2004.

http://www.un.org/icty/hadzihas/appeal/decision-e/040402.htm

Prosecution v. Krajišnik, Case No. IT-00-39-T, Decision on Cross-Examination of Milorad Davidović, Tr. Ch., 15 December 2005.

http://www.un.org/icty/krajisnik/trialc/decision-e/051215.htm

Prosecutor v. Krajišnik, Case No. IT-00-39-T, Tr. Ch., Transcript page 2652, 23 April 2004.
Prosecutor v. Krajišnik, Case No. IT-00-39-T, Tr. Ch., Transcript page 3068-3069, 27 May 2004.
Prosecutor v. Krajišnik, Case No. IT-00-39-T, Tr. Ch., Transcript page 21428, 15 March 2006.

http://www.un.org/icty/transe39/040423IT.htm
http://www.un.org/icty/transe39/040527IT.htm
http://www.un.org/icty/transe39/060315ED.htm

Prosecutor v. Martić, Case No. IT-95-11-T, Decision Adopting Guidelines on the Standard Governing the Admission of Evidence, Tr. Ch., 19 January 2006.

http://www.un.org/icty/martic/trialc/decision-e/060119.htm

Prosecution v. Milošević, Case No. IT-02-54-T, Third Order on the Use of Time in the Defence Case and Decision on Prosecution's Further Submissions on the Recording and Use of Time During the Defence Case, Tr. Ch., 19 May 2005.

http://www.un.org/icty/milosevic/trialc/order-e/050519.htm

Prosecutor v Orić, Case No. IT-03-68-T, Decision on Partly Confidential Defence Motion Regarding the Consequences of a Party Failing to Put its Case to Witnesses pursuant to Rule 90(H)(ii), Tr. Ch., 17 January 2006.

http://www.un.org/icty/oric/trialc/decision-e/060117-2.htm

Prosecutor v. Simić et al., Case Nos. IT-95-9-AR73.6 & IT-95-9-AR73.7, Decision on Prosecution Interlocutory Appeals on the Use of Statements not Admitted into Evidence Pursuant to Rule 92*bis* as a Basis to Challenge Credibility and to Refresh Memory, App. Ch., 23 May 2003 ("*Simić* Appeals Decision").

http://www.un.org/icty/simic/appeal/decision-e/030523.htm

ICTR

Prosecutor v. Akayesu, Case No.ICTR-96-4-T, Judgment, Tr. Ch., 2 September 1998 ("*Akayesu* Trial Judgement").

http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm

Prosecutor v. Bagosora, Case No. ICTR-96-7-T, Oral Decision on Cross Examination, Tr. Ch., 9 May 2005, T. 27-28.

http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/090505.htm

Prosecutor v Kajelijeli, Case No. ICTR-98-44A-A, Judgement, App. Ch., 23 May 2005.

http://69.94.11.53/ENGLISH/cases/Kajelijeli/judgement/appealsjudgement/index.pdf

National Law

United Kingdom

Browne v. Dunn (1893) 6 R. 67, H.L.

Browne v. Dunn (1893) 6 R. 67, H.L.

9406

The Rule in *Browne v Dunn*

The High Court has emphasised the need for care on the part of a trial judge in directing a jury to attribute significance to the failure of counsel to put an aspect of his client's case to a witness on the other side, especially where it is otherwise apparent that the proposition which is not put is in issue.[1]

> **The defendant gave evidence that [the complainant's injury was the result of a fall rather than having been inflicted by him]. That proposition was not put to the complainant. In other words, she was not asked to comment on whether that was the case. The result is that she has not had the opportunity to respond to the suggestion [she injured herself in a fall], and you do not have the benefit of the evidence she might have given had she been asked.**

Where further direction warranted.[2]:

> **It is a rule of practice in both civil and criminal trials that if one party is going to assert a different version of events from the other, witnesses for the opposing party who are in a position to comment on that version should be given, by the cross-examiner, the opportunity to do so. That has not occurred. The failure to ask the complainant questions about [the fall] which the defendant says occurred may be used by you to draw an inference that he did not give that account of events to his counsel. That in turn may have a bearing on whether you accept what the defendant said on the point. However, before you draw such an**

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1 *MJW v The Queen* (2005) 80 ALR 329; *R v MAP* [2006] QCA 220.

2 *Foley* [2000] 1 Qd R 290 suggests that the basic direction as to the absence of evidence, and the direction as to inferences, are to be given only in exceptional cases: *Peter John Burns* (1999) 107 A Crim R 330, a recent application of *Foley*.

inference you should consider other possible explanations for the failure of counsel to put questions about [a fall] to the complainant.

In preparation for trial, usually counsel would be given his client's instructions: that is, what his client has to say about the matter in written form taken by his solicitor, or in oral form by what his client says when they meet, or both. Counsel then uses that information from his client to ask questions of the opposing side's witnesses. However, communication between individuals is seldom perfect; misunderstandings may occur. The solicitor or the barrister may miss something of what their client is telling them. In the pressures of a trial, counsel may simply forget to put questions on an important matter. You should consider whether there are other reasonable explanations for the failure to ask the complainant [whether there was such a fall]. You should not draw any inference adverse to the defendant's credibility unless there is no other reasonable explanation for that failure.

The rule concerns the failure of a cross-examiner to challenge the evidence of a witness on some point, followed by the attempted making of assertions or calling of evidence to show that the witness should not be believed.[3] Considerable caution is required in applying it in criminal trials, since there may be any number of reasons for oversight, including counsel's error.[4] The rule applies against the prosecution.[5] Rebuttal evidence may be permitted.[6]

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3 *Browne v Dunn* (1893) 6 R 67, 70, 76. See also Cross, *On Evidence*, Aust ed. [17435] ff.

4 *Birks* (1990) 19 NSWLR 677; *Manunta* (1990) 54 SASR 17 .Caution should also be exercised in deciding whether to give a direction where the party who called the witness who was not cross-examined does not complain: *McDowell* [1997] 1 VR 473.

5 *Walter Berkley Hart* (1932) 23 Cr App R 202 shows the prosecution stands to be embarrassed by the rule in *Browne v Dunn* as much as the defendant. At 206, the Court of Appeal commented on a "remarkable feature of the case", that three defence alibi witnesses were not cross-examined.

6 In particular, the witness treated unfairly may be recalled and given the opportunity to make appropriate comment. In *Payless Super Barn (NSW) Pty Ltd v Ogara* (1990) 19 NSWLR 551, 556 Clarke JA said that the trial judge "may, for example, require the relevant witness to be recalled for further cross-examination before allowing the contradictory evidence to be given or he may decline to allow the party in default to address upon a particular subject upon which the opposing party was not cross-examined."