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To What Extent Is ICTY Rule 90(H)(Ii), ICTR Rule 90(G)(Ii), Or The Rule From Browne V. Dunn, Followed In The Laws Of Different Nations?

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE SPECIAL COURT FOR SIERRA LEONE

ISSUE FOUR:

TO WHAT EXTENT IS ICTY RULE 90(h)(ii), ICTR RULE 90(g)(ii), OR THE RULE FROM *BROWNE V. DUNN*, FOLLOWED IN THE LAWS OF DIFFERENT NATIONS?

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue[1]

The Special Court for Sierra Leone ("SCSL") is an international tribunal dedicated to prosecuting war crimes that occurred in Sierra Leone since November of 1996. Many of the provisions and principles of the Rules of Evidence and Procedure of the SCSL ("Rules of the SCSL") are similar to the Rules of Evidence and Procedure of both the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). However, there exist certain variations between the rules of the tribunals, including the procedure for cross-examining witnesses. This memorandum analyzes the difference between the SCSL's approach to cross-examination and the approach outlined in Rule 90(h)(ii) of the ICTY and Rule 90(g)(ii) of the ICTR. In addition, this memo compares the principles behind Rule 90(h)(ii) of the ICTY and Rule 90(g)(ii) the ICTR to the laws of different nations and outlines the consequences of a breach of the rules.

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[1] Question Four: In some national legal systems, there is a rule to the effect that:

> "the cross-examining party should put as much of her own case as concerns the witness to her. Thus, if the cross-examining party intends to adduce evidence which contradicts evidence given by the witness, she should put her version to the witness, so that the witness may have the opportunity of explaining the contradiction."

A rule to this effect is now found in Rule 90(H)(ii) of the Rules of Procedure and Evidence of the ICTY (introduced only on 17 November 1999)(Rev. 17 of the Rules) and Rule 90(G)(ii) of the Rules of Procedure and Evidence of the ICTR (introduced only on 23 May 2003). No similar provision is contained in the Rules of the SCSL.

To what extent is this principle applied in different national legal systems?

In legal systems that do not apply this rule, why is it not applied?

In legal systems that do apply the rule, what are the consequences of a breach of the rule? That is, if the defence seeks to introduce evidence to contradict a version of events given by a prosecution witness, in circumstances where the defence did not put its version of events to the prosecution witness in cross-examination, is the consequence (i) that the defence is precluded from adducing evidence of its contradictory version of events at all; (ii) that the weight that the court gives to the defence evidence will take into account the defence's failure to put its version of events to the prosecution witness; (iii) that the prosecution will be entitled to recall the prosecution witness, so that the prosecution witness will have the opportunity of commenting on the defence version of events; or (iv) some other consequence?

B. Summary of Conclusions

1. The Principle of Allowing Witnesses to Explain Discrepancies Between Their Testimony and the Cross-Examining Party's Version of Events is a Principle Applied In Most Common Law Nations.

There is a rule in many nations to the effect that when cross-examining counsel's version of events contradicts a witness's testimony, the witness should have the opportunity to explain the discrepancy. This concept arises from a British decision, *Browne v. Dunn*, which is still followed in the United Kingdom today.

Other common law nations such as Canada, Australia, South Africa, New Zealand, New Guinea, Barbados, Hong Kong, and the island nations of the South Pacific also apply the rule in general situations involving discrepancies between a witness's testimony and the version presented by the cross-examining counsel. These countries generally apply this rule in a flexible manner that takes into consideration the circumstances of individual cases. In addition, some common law nations such as Canada and Australia have codified portions of the rule in the nations' statutes.

2. Nations That Do Not Apply the Principle Are Either Civil Law Nations or Nations That Consider the Principle Contrary to Professional Privilege and Prosecutorial Onus.

As cross-examination by counsel is an adversarial concept, the rule does not apply in civil law countries that follow the inquisitorial tradition. In addition, the United States stands alone among common law countries that do not follow the rule in all situations. The U.S. does have its own similar statutory rule in limited situations involving "prior inconsistent statements" and witness "bias." However, the opportunity for witnesses to explain discrepancies between their testimony and the version of events

presented by the cross-examining counsel exists only in these two limited situations in the United States.

Because no United States court has officially reviewed *Browne v. Dunn*, it is unclear exactly why the U.S. does not follow the rule. Possible reasons include the opinions that the rule is contrary to dominant principles of U.S. law, including professional privilege and the prosecutorial onus.

3. In Legal Systems That Do Apply the Principle, the Consequences For a Breach Vary and Depend Upon the Discretion of the Judge.

The flexible application of the rule from *Browne v. Dunn* that most common law countries apply allows for a variety of possible consequences for breach of the rule. These consequences include exclusion of contradictory evidence, limitations on the weight of the evidence, the recall of witnesses to the stand, and complete disregard for the rule; as well as other alternatives such as allowing a party to re-open its case, instructions to the jury on the breach, and limitations on counsel on addressing the court.

4. The Principle of Allowing Witnesses to Explain Discrepancies Between Their Testimony and the Cross-Examining Party's Version of Events is not Customary International Law.

Customary international law can evolve out of the diplomatic relations between states, the practice of international organs, and state laws that are recurrent in practice both materially and psychologically. The rule from *Browne v. Dunn* does not qualify as customary international law because only a minority of nations follow the rule and the rule is not state practice. In addition, the rule is not relevant to diplomatic relations or the status, powers, and responsibilities of international organs.

II. FACTUAL BACKGROUND

The relevant provisions in the Rules of the SCSL concerning cross-examination of witnesses state only that the "Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to: (i) Make the interrogation and presentation effective for the ascertainment of the truth; and (ii) Avoid the wasting of time."[2] Although they have been amended six times, the Rules of the SCSL do not yet contain a provision similar to Rule 90(h)(ii) of the Rules of the ICTY.

A. Rule 90(h)(ii) of the ICTY and Rule 90(g)(ii) of the ICTR

Rule 90(h)(ii) of the Rules of Procedure and Evidence of the ICTY ("Rules of the ICTY") decrees:

> In cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.[3]

The ICTR incorporated an identical rule under Rule 90(g)(ii) of the Rules of Procedure and Evidence of the ICTR ("Rules of the ICTR").[4] This rule was not a part of the

[2] Special Court for Sierra Leone, *Rules of Procedure and Evidence*, Rule 90(f), http://www.sc-sl.org/scsl-procedure.html (accessed April 20, 2004). Reproduced in the accompanying notebook at Tab 4.

[3] John A. Ackerman and Eugene O'Sullivan, *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia*, 437 (Kluwer Law International 2000). *See also* http://www.un.org/icty/basic/rpe/IT32_rev22.htm#90 (accessed April 20, 2006) for the full text of the Rules of Procedure and Evidence of the ICTY. Reproduced in the accompanying notebook at Tab 27.

[4] International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, Rule 90(g)(ii), http://65.18.216.88/ENGLISH/rules/260503/amend13.pdf (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 3.

original draft of the Rules for either tribunal, but was added to their current language after consideration by the respective courts.[5]

The basic meaning of both the ICTY's Rule 90(h)(ii) and the ICTR's Rule 90(g)(ii) is that witnesses should have the opportunity to explain discrepancies between their testimony and the version put forth by the cross-examining counsel. This opportunity applies to both defense and prosecution witnesses and applies equally among different types of witnesses.

Prior to November of 1999, the Rules of the ICTY did not contain such a provision allowing explanation by witnesses during cross-examination.[6] However, during the 21st Plenary Session, the judges of the ICTY reviewed the ICTY Rules of Procedure and Evidence and determined that, among others, Rule 90 required amendment. In a press release following the 21st Plenary Session, the court stated, "In order to limit the recalling of witnesses and clarify the limits of the cross-examination, rule 90(H) has been amended and now requires that the cross-examining party puts its case to the witness where the witness' evidence contradicts that case."[7] This amendment occurred in response to delays in trials and confusion over the proper methods of cross-examination. The court explained that the amendments and additions

[5] Rule 90 of the ICTY was amended in November of 1999 and Rule 90 of the ICTR was amended in May of 2003, as indicated in the text of "Question Four" (reproduced in footnote one).

[6] Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Tribunal for the Former Yugoslavia*, 265, n. 693, (Transnational 1995). Reproduced in the accompanying notebook at Tab 31.

[7] United Nations Press Release, *Communiqué de presse, The Hague*, 8 December 1999, JL/P.I.S./453-E, "Amendments and Additions to the Tribunal's Rules of Procedure and Evidence Adopted at the 21st Plenary Session," §7, http://www.un.org/icty/pressreal/p453-e.htm. Reproduced in the accompanying notebook at Tab 41.

to the Rules during the 21st Plenary Session were "aimed at speeding up the proceedings and making more efficient use of court time." [8]

That the ICTY follows Rule 90(h)(ii) is apparent from a recent ruling on a motion by the defense in *Prosecutor v. Naser Oric*.[9] The ruling, entitled, "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)," addressed the defendant's complaint that the prosecution repeatedly failed to follow the procedure of Rule 90(h)(ii) in cross-examining defense witnesses. Specifically, the defense claimed that it was necessary for "the Prosecution to put to every Defence witness all documents and prior testimony, which is or could be interpreted by the Trial Chamber as contrary to that witness' testimony."[10] The ICTY disagreed, finding that Rule 90(h)(ii) applied, but required presentation of "the *substance* of the contradictory evidence" and not "every detail that the party does not accept."[11] The court declined to further issue abstract guidelines on the subject, stating that courts should examine the issue only on a case-by-case basis.[12]

[8] *Id.* [¶ 1].

[9] *Prosecutor v. Naser Oric*, Case No. IT-03-68-I "The 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)," http://www.un.org/icty/cases-e/index-e.htm (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 17.

[10] *Id.* [¶ 3].

[11] *Id.* [¶ 5].

[12] *Id.* [¶ 9].

B. The Origin of the Rule

The rule that a cross-examining party should present its version of events to a witness in order for the witness to have the opportunity to explain contradictions originated in British caselaw. The rule, referred to by scholars as the "Warning of Refutation,"[13] came into being with the British case, *Browne v. Dunn* ("*Browne*"), in 1893. Although *Browne* was never codified in British statutory law, the courts of Britain, and subsequently many of Britain's common law colonies, immediately incorporated *Browne* into their common law and continue to follow the rule today.[14]

Browne v. Dunn was a civil defamation action brought before the House of Lords, alleging that the defendant made allegations against the plaintiff for the sole purpose of antagonizing the plaintiff.[15] Witnesses for the defendant were not cross-examined on certain key issues, including the prosecution's version of events, and the jury found for the plaintiff.[16] Lord Herschell responded with the now-famous words:

> 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…My Lords, I have always understood that if you intend to impeach a witness you are bound…to give him an

[13] M.I. Aronson, *Litigation Evidence and Procedure*, 651 (Butterworths 1979). Reproduced in the accompanying notebook at Tab 28.

[14] Wikipedia, "*Browne v Dunn",* http://en.wikipedia.org.wiki/Browne_v_Dunn (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 43.

[15] F. Paul Morrison and Christopher A. Wayland, *Browne v. Dunn and Similar Fact Evidence- Isles of Change in a Calm Civil Evidence Sea*, [¶ 23], (McCarthy 2003), http://www.mccarthy.ca/pubs/publication.asp?pub_code=1340, (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 37.

[16] *Id*. [¶ 24].

> 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 it is essential to fair play and fair dealing with the witness. [17]

Lord Halsbury concurred with Lord Herschell's opinion, stating, "[t]o my mind nothing would be absolutely more unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice and to give them an opportunity of explanation…" [18] Lord Morris concurred with the other Lords, but added a caution that it is not necessary in every instance "that you should take him through the story which he has told…giving him notice by the questions that you impeached his credit."[19] Courts interpret Morris' statement not as a disagreement with Lords Halsbury and Herschell, but to refer only to those instances where a witness's story is "incredible" and "romancing" in character.[20]

British courts continue to follow the rule in *Browne v. Dunn* today, as evidenced by recent cases such as *Kapgold Limited and Another v Colonia Insurance Company*, a case in which the prosecution did not properly cross-examine witnesses at trial.[21] The *Kapgold* court opined that when fraud is alleged it must be "distinctly put to the person

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[17] Gilles Renaud, *The Rule in* Browne v. Dunn: *Should It Be Undone?*, 6 GONZ. J. INT'L L. (2002-03) [§ 2, ¶ 3], http://www.accross.borders.com (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 38.

[18] *In a Matter of an Arbitration Between: Community Health Care Workers Union, and Community Lifecare, Inc., Re: Application of the Rule in* Browne v. Dunn *to Evidence in Shift Premium Grievances; and Re Responsibility for Cost of Photocopying Documents,* 2001 C.L.A.S.J. LEXIS 2522; 2001 C.L.A.S.J. 616632; 65 C.L.A.S. 77 at 15, (citing *Browne v. Dunn* 6 Eng. Rep. 67, H.L. 1893, at 76-77). Reproduced in notebook in Tab 8.

[19] *Id.* at 16-17, (citing *Browne v. Dunn, supra* n. 18, at 79).

[20] *Id.* at 16.

[21] *Kapgold Limited and Another v Colonia Insurance Company,* Limited Court of Appeal (Civil Division) (Transcript: Association) [¶ 32], http://w3.lexis.com/lawschoolreg/researchlogin04.asp, (November 9, 1990). Reproduced in the accompanying notebook at Tab 12.

charged with fraud, assuming he is called as a witness." This idea is so fundamental to British case law that the court continued by adding, " [i]f authority is needed for so obvious a proposition, it is to be found in *Browne v Dunn*."[22]

C. The Rationale Behind *Browne* and Rule 90(h)(ii) of the ICTY Rules of Procedure and Evidence

Lord Herschell clearly stated in his opinion in *Browne v. Dunn* that the rationale behind allowing witnesses to explain discrepancies between their story and that of the cross-examining party is fairness towards the witnesses. Herschell states that the rule 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."[23] Gilles Renaud, in "*The Rule in* Browne v. Dunn*: Should it be Undone?"* explains that the rule serves to protect witnesses in that it "was predicated on a rule of fairness that prevents the 'ambush' of a witness."[24]

Fairness towards witnesses was similarly a central theme in the drafting and amendment processes of the Rules and Procedure of the International Criminal Tribunal for the Former Yugoslavia. Numerous provisions exist in the Rules that serve to protect witnesses, who are typically the victims of horrendous war crimes.

As such witnesses are "the lifeblood of ICTY trials," the creators of tribunals such as the ICTY have a high interest in implementing rules of procedure that will encourage witness participation. [25] In addition, recognition of special difficulties faced

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[22] *Id.* [¶ 32].

[23] See *Browne v. Dunn* 6 Eng. Rep. 67 (H.L. 1893). The case is not reproduced in the accompanying notebook as the author was unable to obtain a copy from the obscure reporting service.

[24] Renaud, *supra* n. 17, [§ 8, ¶ 3].

by witnesses traumatized by horrific events is an important factor considered by the creators of tribunals, whose goals are to determine the truth of criminal allegations.[26]

The importance of a rule such as Rule 90(h)(ii) of the Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia is evidenced by the Tribunal's affirmation of the Rule in their *Decision on "Motion to Declare Rule 90(H)(ii) Void to the Extent it is in Violation of Article 21 of the Statute of the International Tribunal" by the Accused Radoslav Brdjanin and on "Rule 90(H)(ii) Submissions" by the Accused Momir Talic"* in 2002.[27] Judges Agius, Janu and Taya responded to the defendants' claim that the Rule violates the accused's rights, including the right to remain silent and attorney-client confidentiality, by rejecting the motions of the accused. In their opinion, the judges stressed that "rule 90(H)(ii) was adopted to serve fairness in the conduct of trial proceedings"[28] in the Tribunal. The Trial Chamber added that it is "a rule of fairness not only because it serves to enable the witness to comment upon the contradictory version, but also to give the trier of the fact (in this case

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[25] Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, 41 (University of Pennsylvania Press 2005) (citing Patricia M. Wald, *Dealing with Witnesses in War Crimes Trials: Lessons from the Yugoslav Tribunal*, Yale Human Rts. and Dev. L. J. 5 (2002): 219). Reproduced in the accompanying notebook at Tab 33.

[26] An example of a "special difficulty" faced by victims of war crimes is that the violence of an event can effect a witnesses' recollection of details surrounding an event. Studies indicate that witnesses find it more difficult to recall facts surrounding traumatic incidents than less traumatic ones. Stover, *supra* n. 25, at 9, (citing B.R. Clifford and J. Scott, *Individual and Situation Factors in Eyewitness Testimony*, J. App. Psych. 63 (1978): 352-359). Reproduced in the accompanying notebook at Tab 33.

[27] *The Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No. IT-99-36-T, "Decision on 'Motion to Declare Rule 90(H)(ii) Void to the Extent it is in Violation of Article 21 of the Statute of the International Tribunal' by the Accused Radoslav Brdjanin and on 'Rule 90(H)(ii) Submissions' by the Accused Momir Talic," (2002), http://Judicial Supplement 31 bis - The Prosecutor v_ Radoslav Brdjanin and Momir Talic - Case No_ IT-99-36-T Ruling on protest against 90hii.htm (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 18.

[28] *Id*. [¶ 11].

the Trial Chamber) the opportunity to more accurately judge the credibility of the contradictory version."[29]

D. The Status of the Rule from *Browne* and Controversy Surrounding the Rule

The rule from *Browne v. Dunn* appears in its entirety as a codified rule only within the Rules of the ICTY and the ICTR. In those common law nations that follow *Browne*, the rule is generally one of case law, not statute.[30] In addition, most nations that follow *Browne* consider the rule to be more of a standard for practice than an "absolute Rule."[31] Those nations recognize a judge's ability to "dispense with it altogether" in appropriate situations.[32]

In addition, the rule is generally widely misunderstood. An Australian judge attributes the confusion over the application and meaning of *Browne* to the fact that it was published in an obscure series of law reports[33] and remarks that "reliance upon the rules said to be enshrined in that decision seems often to be attended more with ignorance than with understanding." [34] Canadian judge Gilles Renaud asks, "Is there a

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[29] *Id.* [¶ 11].

[30] Some exceptions include statutory rules regarding "prior inconsistent statements" in both Canada and the U.S., a statutory rule concerning witness "bias" in the U.S., and a statutory rule that is "mirrors part of *Browne"* in Australia. These statutes are discussed at further length at notes 83-93 and the accompanying text.

[31] Christopher Hilkson, *Cross-examining the expert witness*, The Continuing Legal Education Society of British Columbia (December 2001) [§4, ¶ 3], www.cle.ba.ca /CLE/Analysis/Collection/01 -5026201-crossexamination.htm (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 36.

[32] Morrison and Wayland, *supra* n. 15, at [¶ 18].

[33] *Browne v. Dunn* only appears in "The Reports", an English reporting service that was only published between 1893 and 1895, and is very difficult to obtain.

[34] *Allied Pastoral Holdings PTY LTD v. Federal Commission of Taxation*, 44 A.L.R. (Australian Law Reports) 607 [¶ 67], http://w3.lexis.com/lawschoolreg/xlinklogin04.sp?key=4108abe 253b26f2b941015199 cd842&ORIGINATION_CODE=00086&autosubmit=yes&pp=002&com=

more misunderstood rule of evidence/procedure/trial tactics than this Rule?" and notes that despite its obscurity, the decision in *Browne v. Dunn* is nevertheless frequently cited. [35]

In addition to the controversy over whether *Browne* is, in fact, a rule, and the difficulties in locating and understanding the rule, a controversy known as the "Trial Lawyer's Dilemma" occurs in those common law countries that follow the rule.[36] An Australian legal scholar describes the dilemma as a "calculated risk" that can affect the weight of the disputed evidence before the jury.[37] The scholar explains:

> Yet we suspect that most trial lawyers have also found themselves in situations where it would in their judgment, be unwise to cross-examine a witness on contradictory evidence. It may be, for instance, that the lawyer knows full well that the witness will deny the evidence and will take advantage of the opportunity afforded by the question to tell his or her story yet again. It may also be that the witness' story is so manifestly incredible that the most effective manner of dealing with it is, to use the colourful language of the English Court of Criminal Appeal, with a "raised eyebrow" and nothing more.[38]

A Canadian judge explains another problematic effect of the rule by saying that the practice of having to "slog through a witness's evidence-in-chief putting him on notice of every detail that the defence does not accept…is rarely the tactic of choice."[39] An Irish

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2%2c%202&powernav=on&searchtype=get&search=1%20N.S.W.L.R.%201&topframe=on (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 5.

[35] Renaud, *supra* n. 17, [§2 ¶ 2].

[36] Morrison and Wayland, *supra* n. 15, at [¶ 15]..

[37] *Id*. [¶ 17].

[38] *Id*. [¶ 16].

[39] Renaud, *supra* n. 17, [§15 ¶ 2].

jurist adds that this practice is a "shocking waste of time" in situations where the witness's account of events bears no resemblance to the version of the cross-examining counsel.[40]

III. LEGAL ANALYSIS

A. To What Extent is the Principle Applied in Different Legal Systems?

With the notable exception of the United States, most countries that follow the common law tradition continue to use the rule from *Browne v. Dunn* today. Although some common law countries follow *Browne* in limited or "flexible" ways, for the most part nations continue Britain's tradition of broadly finding the rule "as true in a civil case as it is in a criminal prosecution; and…as true where [the allegation] is relied on by way of defence, as it is when [the allegation] is the basis of the statement of claim."[41]

1. Canada

Although the topic is controversial in Canada, the rule from *Browne v. Dunn* is a recognized principle of Canadian law.[42] The rule entered Canadian law in 1909, when the Supreme Court of Canada endorsed the *Browne* holding in *Peters v. Perras*.[43] More recently, the Supreme Court addressed the rule from *Browne v. Dunn* for a second time,

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[40] *Id.* [§ 15, ¶ 1]

[41] Morrison and Wayland, *supra* n. 15, [¶ 54].

[42] *Modi v. Paradise Fine Foods*, "Interim Decision of the Ontario Human Rights Commission" 2005 HRTO 19, (June, 2005), at 3, including a citation to *R. v. Purba*, O.J. No. 2603 (2004), ¶ 32. Available at: http://www.hrto.ca (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 11.

[43] *Id*. at 3.

adopting a more flexible version of the rule in *Palmer and Palmer v. The Queen.*[44] This flexible rule remains the standard today, although the rule varies slightly between criminal and civil cases.

In *Palmer and Palmer v. The Queen,* the trial judge found guilty a defendant charged with conspiracy to traffic heroin, despite the fact that the Crown had not cross-examined the accused as to certain theories upon which the court rejected the defendant's evidence.[45] On appeal, the defendant relied on *Browne v. Dunn* to argue that because the Crown failed to cross-examine the defendant on essential points, the trial judge should have accepted the defendant's version of events. The Court of Appeal rejected the defendant's argument, stating that, "the effect to be given to the absence or brevity of cross-examination depends upon the circumstances of each case."[46] The Supreme Court agreed, confirming a flexible application of *Browne* in criminal cases in that the effect of a failure to cross-examine is a matter of weight only.[47]

The flexible standard has carried over to civil cases with one important variation. In the recent civil case, *Stewart v. Canadian Broadcasting Corporation,* an Ontario judge recognized that "[c]ivil actions result in much greater disclosure of the factual issues than takes place in a criminal prosecution."[48] In civil cases, therefore, the discretion should be applied differently, with the responsibility upon parties to deal with

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[44] *Palmer and Palmer v. The Queen,* (1979), 50 C.C.C. (2d) 193. Reproduced in the accompanying notebook at Tab 14.

[45] *Id.*

[46] *Id*. at 212.

[47] *Id*. at 212.

[48] *Stewart v. Canadian Broadcasting Corp.*, 150 D.L.R. (4th) 24, 1997 D.L.R. LEXIS 1473, at 184. Reproduced in the accompanying notebook at Tab 22.

adverse evidence while testifying in chief, rather than waiting to be confronted with the evidence in cross-examination.[49]

In addition to the application of *Browne v. Dunn* in both criminal and civil cases, Canada has codified certain principles of *Browne* in sections 10(1) and 11 of the Canada Evidence Act. These sections prescribe rules for cross-examination of witnesses on previous statements made in writing and prior inconsistent statements. The rules provide as follows:

> 10(1) On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness' attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.
> 11. Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement. [50]

These rules "parallel in many respects the traditional understanding of the 'rule' in *Browne v. Dunn*."[51] In addition, application of Rules 10 and 11, like the rule from

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[49] *Id.*

[50] Canada Evidence Act, Rules 10-11, R.S.C. 1985, c. C-5, s. 10 and R.S.C. 1985, c. C-5, s. 11. Reproduced in the accompanying notebook at Tab 1.

[51] See Morrison and Wayland, *supra* n. 15, [¶ 44].

Browne, is flexible, and is subject to the judge's discretion.[52]

An example of a decision based on a rule of the Canada Evidence Act is the case *Regina v. Pargelen*.[53] In *Pargelen,* a defendant convicted of sexual assault appealed the decision of the trial court on the basis that the trial judge violated Rule 11 of the Canada Evidence Act. The defendant's allegations of a violation of the rule centered on the fact that the trial judge accepted the testimony of the complainant and rejected that of the accused. The defendant argued that because the complainant's testimony involved a prior inconsistent statement and the Crown failed to confront the accused with the complainant's contradictory evidence, the court should have barred the testimony.

The Pargelen court agreed that The Crown did not comply with the notice requirements in Rule 11 of the Canada Evidence Act, but found that the failure to comply strictly with Rule 11 was not fatal to the conviction. The court pointed out that although Crown counsel did not strictly comply with Rule 11, the defendant was "given some notice of what M might say in Crown counsel's cross-examination" and "the interests of fairness were largely met by the cross-examination."[54] The court's decision therefore applied the "flexible" approach to the rule in *Browne* to the statutory requirements set out in Rule 11 of the Canada Evidence Act.

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[52] *Id*. [¶ 53].

[53] *Regina. v. Pargelen*, 31 O.R. (3d) 504. Reproduced in the accompanying notebook at Tab 20.

[54] *Id*. at 506.

2. Australia

The exact point at which Australia officially adopted *Browne v. Dunn* is unclear; however, legal scholars indicate that "*Browne v Dunn* was always understood, at least in a general sense" in Australian law.[55] This "general" Australian understanding of *Browne* appears to be similar to Canada's "flexible" approach in terms of deference to the discretion of a judge and acknowledgement that the rule varies according to the circumstances of each case.

The case *Pay Less Superbarn v. O'Gara* illustrates the approach of Australian courts.[56] *Pay Less Superbarn* involved a failure by the defense counsel to cross-examine a plaintiff on her testimony concerning a "slipping" accident at a supermarket.[57] A witness for the defense gave contradictory testimony, claiming that the cause of the "slipping" did not exist.[58] The trial court held that the court should not admit the evidence due to a violation of the rule in *Browne*. On review, the Court of Appeals agreed, saying, "Although I regard the denial of a party's right to call admissible and relevant evidence as an extreme step and a consequence which will not normally attend a breach of the rule in *Browne*, I find it difficult to conclude in this case that the trial Judge has been shown to have exercised his discretion erroneously."[59] The appeals court

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[55] Justice Rolfe, *The Rule in Browne v. Dunn*, Aust. Const. L. Nsltr. Issue 29, at 4, http://www.amor-smith.com/pracproc/03-115.htm (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 39.

[56] *Pay Less Superbarn (NSW) Pty Limited v O'Gara*, (1990) 19 NSWLR 551 at 555. Reproduced in the accompanying notebook at Tab 15.

[57] *Id*. at 552.

[58] *Id*. at 553.

[59] *Id.* at 555.

emphasized that "different situations will call for different remedies" and "a decision will, in each case, involve a balancing of competing considerations and lies essentially within the discretion of the trial Judge."[60]

In addition to adopting *Browne* in case law, Australian law includes a provision in the Uniform Evidence Act that closely resembles the rule in Brown.[61] The provision, however, calls for consequences of a breach of the rule only in the form of witness recall.[62] Section 46 of Australia's uniform Evidence Acts "mirrors part of the rule in *Browne v Dunn*, but does not replace it."[63] The rule states:

> (1) The court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if the evidence concerned has been admitted and:
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> > (a) it contradicts evidence about the matter given by the witness in examination in chief; or
> >
> > (b) the witness could have given evidence about the matter in examination in chief.[64]

The Australian Law Reform Commission emphasized that it was not their intention that Section 46 displace the common law in relation to possible remedies for a breach of the

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[60] *Id.* at 554

[61] Rolfe, *supra* n. 54, at. 4.

[62] Australian Law Reform Commission, "*Examination and Cross-Examination of Witnesses*" §5.135, http://www.austlii.edu.au/au/other/alrc/publications/dp/69/05.html (accessed April 20, 2006). Reproduced in accompanying notebook at Tab 34.

[63] *Id*. at §5.139.

[64] *Id*. at §5.138.

rule in *Browne v Dunn.*[65] The Australian Law Reform Commission stated that "it was not possible or appropriate for evidence legislation to address issues such as comments that may be made based on inferences drawn from a failure to comply with the rule" and therefore the Commission only incorporated a legislative provision allowing judicial discretion to permit parties to recall witnesses who should have been cross-examined.[66] Despite the confusing overlap between *Browne v. Dunn* and Section 46 of the Uniform Evidence Act, The Commission does not report "any significant difficulties" with the legislative approach.[67]

3. South Africa

South Africa is another nation that adopted the rule in *Browne* and continues to follow it "in substantially the same form."[68] Like other nations that follow *Browne*, the rule in South Africa is not an absolute rule in that it is "not to be applied in a mechanical way, but always with due regard to all the facts and circumstances of each case."[69] South African courts consider the rule to be "elementary and standard practice" that serves to promote fairness in the law.[70]

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[65] *Id*. at §5.139.

[66] *Id*. at §5.139.

[67] *Id*. at §5.134.

[68] *President of the Republic of South Africa and others v South African Rugby Football Union and others* (CCT16/98) 2000 (1) SA 1; 1999 (10) BCLR 1059; [1999] ZACC 11 (10 September 1999), [¶ 62], http://www.commonlii.org/za/cases/ZACC/1999/11.html (accessed April 20, 2006). Reproduced in accompanying notebook at Tab 16.

[69] *Id*. [¶ 65].

[70] Renaud, *supra* n. 17, [§ 6, ¶ 5].

An unusual South African case involved an allegation that the President of South Africa "had not put his mind" to the establishment of a commission created to investigate racial discrimination in South African rugby teams. The case *President of the Republic of South Africa v. South African Rugby Football Union* was an appeal based on a failure to cross-examine the President on key issues.[71] The initial ruling by the trial court found that there was no violation of *Browne*, as the President "probably had notice beforehand of any such point."[72] The Constitutional Court of South Africa responded:

> [The rule's] proper observance is owed to pauper and prince alike. In the case of the President of this country there is an added dimension ...He, as head of state, is representative of all the people. That being so, the rule needs to be observed scrupulously.[73]

The court went on to consider the trial transcript carefully, ultimately concluding that the President had not had notice of the contradictions between his testimony and the version put forward by the opposing party.[74] The court held, therefore, that the trial court's "misdirection seriously affects the weight to be attached to the Judge's findings..."[75]

4. Other Common Law Nations

Most other common law nations, particularly those that were at one point colonized by Britain without subsequent colonization by another nation, have also

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[71] *President of the Republic of South Africa*, *supra* n. 67, [¶ 59].

[72] *Id*. [¶ 67].

[73] *Id*. [¶ 65].

[74] *Id*. [¶ 75].

[75] *Id*. [¶ 75].

adopted *Browne* and continue to follow the rule today. Nations such as New Zealand[76], New Guinea,[77] Barbados,[78] Hong Kong,[79] and the South Pacific[80] island nations continue to cite *Browne* in their case law and apply the rule in a substantially similar way as the other Commonwealth tradition nations.

B. In Legal Systems That Do Not Apply *Browne*, Why is it Not Applied?

The legal systems of most nations fall within the two major legal traditions of common law and civil law. Common law jurisdictions support an adversarial system, which "relies on the skill of the different advocates representing their party's positions and not on some neutral party, trying to ascertain the truth of the case." [81] In contrast, the inquisitorial system generally applies in civil law jurisdictions and involves a judge, or a group of judges, who are actively involved in investigating and determining the

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[76] *See Peter Thomas Mahon v. Air New Zealand* [1981] 1 N.Z.L.R. 618 for an example of New Zealand case law involving application of *Browne*. Reproduced in the accompanying notebook at Tab 13.

[77] *See State v. Simon Ganga* [1994] PNGLR 323 for an example of New Guinea case law involving application of *Browne*. Reproduced in the accompanying notebook at Tab 21.

[78] *See Boyce v. The Queen* (unreported) C.A. B'DOS. SUIT NO. 35 OF 2001, [2003] BBSC 13 for an example of Barbados case law involving application of *Browne*. Available at http://www.commonlii.org// cgi-bin/disp.pl/bb/cases/BBSC/2003/13.htm (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 6.

[79] *See Wah Hing Fat Realty Company, Ltd. v. The Commissioner of Inland Revenue*, HCIA000007/2001 H.K. Bd. Rev. Vol. 17, http://www.gov.hk/bor/eng/pdf/ judgment/v17_3rd.pdf, (accessed April 21, 2006) for an example of Hong Kong case law involving application of *Browne*. Reproduced in the accompanying notebook at Tab 25.

[80] *See Ferrieux v. Banque Indosuez Vanuatu Ltd* [1990] VUSC 1; [1980-1994] Van LR 462 for an example of Vanuatu (South Pacific) case law involving application of *Browne*. Reproduced in the accompanying notebook at Tab 7.

[81] Wikipedia, "*Adversarial System,*" http://en.wikipedia.org.wiki/Adversarial_system (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 42.

facts of a case.[82] The inquisitorial system does not include cross-examination by counsel of the type required for fulfillment of the rule in *Browne*, as it is simply inconsistent with the style of adjudication. As cross-examination is an adversarial concept, the majority of nations that do not follow *Browne* are civil law nations employing the inquisitorial system.

1. The United States

Although *Browne* is an adversarial concept, it is not embraced by all nations that follow the common law tradition. The United States is an example of a nation that has not incorporated *Browne* into its common law. In fact, it does not appear that the Supreme Court has ever even considered *Browne* or an equivalent rule in its decisions.[83]

Although the United States has not adopted *Browne* into its case law, it has established two rules of evidence that require explanation to witnesses by a cross-examining attorney in limited situations. These rules of evidence concern only the "prior inconsistent statements" of witnesses and witness "bias." Unlike the rule in *Browne*, they are specific to these two categories of cross-examination and do not apply to witness testimony in general.

a. Prior Inconsistent Statements

The rules governing "prior inconsistent statements" are defined in Rule 613 of the Federal Rules of Evidence:

> (a) Examining Witnesses Concerning Prior Statement. In

[82] Wikipedia, "*Inquisitorial System,*" http://en.wikipedia.org.wiki/Inquisitorial_system (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 46.

[83] This author was unable to locate references to the case *Browne v. Dunn* (or its equivalent holdings in other nations) in the case law of either U.S. Federal or State cases.

> examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
> (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.[84]

Under the Federal Rules, therefore, the cross-examining counsel must present a witness with extrinsic evidence that contradicts the witness's version of events if the evidence relates to a statement that the cross-examining counsel finds inconsistent with the witness's current statements. The Rule does not require that the impeaching party offer the extrinsic evidence without questioning the witness first; however at some point, "the witness must be afforded the opportunity to explain or deny the statement and opposing counsel must be afforded the opportunity to question the witness about it."[85]

An example of the application of the U.S. rule regarding "prior inconsistent statements" is the case *United States v. Young*, a criminal case based on cocaine distribution charges.[86] In *Young*, the prosecution protested the admission of a defense witness's testimony regarding a prior inconsistent statement of a prosecution witness. The prosecution argued that under Federal Rule of Evidence 613(b), the court should not

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[84] Fed. R. Evid. 613(a) - (b). *See also* Steven Goode and Olin Guy Wellborn III, Courtroom Evidence Handbook, 2005-2006 Student Edition, (West 1995) at 194. Reproduced in the accompanying notebook at Tab 30.

[85] Fed. R. Evid. 613(b). *See also* Steven Goode and Olin Guy Wellborn III, Courtroom Evidence Handbook, 2005-2006 Student Edition, (West 1995) at 194-197 for "*Author's Comments (6) Foundation requirement- Extrinsic evidence of prior inconsistent statement*." Reproduced in the accompanying notebook at Tab 30.

[86] *United States v. Young*, 86 F.3d 944 (1996) at 949. Reproduced in the accompanying notebook at Tab 24.

have barred the defense witness's testimony because the court did not ask the prosecution witness to explain or deny his prior statement.[87] The court denied the prosecution's protest on the grounds that the "foundational prerequisites of Rule 613(b) require only that the witness be permitted - at some point - to explain or deny the prior inconsistent statement."[88] In this case, the witness did deny his prior statement during cross-examination. The court went on to say that it "may have been preferable" if counsel had questioned the witness directly on the witness's earlier inconsistent statement, but the fact that the statement was explained "at some point" in the proceeding made the defense witness's contrary testimony admissible.[89] The court also added that had the witness not explained himself during cross-examination, the prosecution could have recalled their witness to give him another opportunity to explain the discrepancy.[90]

b. Bias

The rules governing "bias" are defined in Rule 607 of the Federal Rules of Evidence. Rule 607 states that "The credibility of a witness may be attacked by any party, including the party calling the witness."[91] The concept of "bias" relates to Rule 607 as it describes "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favour or against a

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[87] *Id.* at 948.

[88] *Id.* at 949.

[89] *Id.* at 949.

[90] *Id.* at 949.

[91] Fed. R. Evid. 607, *see also* Steven Goode and Olin Guy Wellborn III, Courtroom Evidence Handbook, 2005-2006 Student Edition, (West 1995) at 167-173 for "*Author's Comment: (5) Bias- Procedure and extrinsic evidence*." Reproduced in the accompanying notebook at Tab 30.

party."[92] Under the rules concerning bias and witness impeachment, the Federal Rules note that "several courts of appeals have indicated that the impeaching party must afford the impeached witness the opportunity to admit or deny facts or statements manifesting the bias."[93] In addition, if bias is to be proved through a prior inconsistent statement, the impeached witness must be given the opportunity to explain any contradictions as under the Federal Rule of Evidence 613(b).[94]

2. Rationale For Exclusion of the Broader Rule in *Browne* from U.S. Law

Although "prior inconsistent statements" and "bias" cover two small aspects of the cross-examination of witnesses, cross-examination in general in the United States does not require that cross-examining counsel allow explanation of contradiction by the witness. A precise reason for the fact that the United States has not adopted *Browne v. Dunn* or a similar rule has not been articulated by U.S. courts; however, other factors may shed light on the difference between the U.S. and other common law countries in this regard.

Factors that may contribute to the absence of the *Browne* rule in United States law may lie in the opinions that *Browne* is an "alien concept" that is "contrary to legal professional privilege and the prosecution onus."[95] The U.S. members of the defense

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[92] Fed. R. Evid. 607, *see also* Steven Goode and Olin Guy Wellborn III, "*Author's Comment: (3) Bias-Generally*," at 167-168, (citing *United States v. Abel*, 469 U.S. 45, 52, 105 S.Ct. 465, 469, 83 L.Ed.2d 450, 1984). Reproduced in the accompanying notebook at Tab 30.

[93] *Id*. at 169.

[94] *United States v. Marzano*, 537 F.2d 257, at 265. Reproduced in the accompanying notebook at Tab 23.

[95] Bar Brief, *A Report From the Hague*, NSW Bar Assoc. N.L., at 2, http://www.nswbar.asn.au/ database/bar_brief/documents/ BB116_000.pdf (April, 2004). Reproduced in the accompanying notebook at Tab 35.

counsel for the ICTY raised these concerns in an attempt to resist the amendment of Rule 90 of the Rules of the ICTY.[96]

a. Legal Professional Privilege

"Legal professional privilege" is the Australian terminology for what the U.S. calls "attorney-client privilege." The privilege is a rule that allows an attorney to resist the giving of information, or the production of documents, which would reveal confidential communications between the client and the attorney that were made for the purpose of giving or obtaining legal advice.[97] In the United States, the "attorney-client privilege" is of supreme importance, as "without the privilege, candid disclosure from client to lawyer will be chilled; the adversary system will function less effectively, and societal interests in justice will be ill served."[98]

b. The Prosecution Onus

The "prosecution onus" referred to by the U.S. members of the ICTY defense counsel refers to the burden of proof that is placed on the prosecution in criminal proceedings. In U.S. criminal cases, if the burden is not met by the prosecution, a defendant will not be found guilty.[99] The fact that the burden may shift to a witness,

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[96] *Id*. at 2.

[97] PriceWaterhouseCoopers, *Legal Advice Privilege,* http://www.pwcglobal.com/extweb/manissue.nsf/docid/B9A592B1F5A45F95CA2570D600089761# (December, 2005). Reproduced in the accompanying notebook at Tab 40.

[98] Deborah L. Rhode and David Luban, *Legal Ethics*, (4th Ed. Foundation Press 2004) 242. Reproduced in the accompanying notebook at Tab 32.

[99] Wikipedia, "*Burden of Proof*," http://en.wikipedia.org/wiki/Burden_of_proof (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 44.

who may also be a defendant, to explain inconsistencies in the versions of events is one that is a foreign concept in U.S. law. The Federal Rules of Criminal Procedure in the United States do not contain a requirement that the burden of proof must switch to the defendant for general purposes of explaining a difference in the version of events of the defendant and the prosecution.[100] Occasions where the "prosecution onus" is lifted and the burden is switched to the defendant are rare, due to a strong emphasis on the presumption of innocence in U.S. criminal law. [101]

C. In Legal Systems That Do Apply the Principle, What Are the Consequences of a Breach of the Rule?

Neither *Browne v. Dunn* nor Rules 90(h)(ii) of the ICTY and 90(g)(ii) of the ICTR prescribe a set consequence for a breach of the rule that a witness should be able to explain discrepancies between their testimony and the version presented by the cross-examining counsel.[102] The effect of a breach, therefore, is subject to the judge's discretion and "depends on the circumstances of each case."[103] As a result, there exists a wide variety of possible consequences for a breach.

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[100] "Witnesses and Evidence", 18 USCS §3481-3510. Reproduced in the accompanying notebook at Tab 2.

[101] Wikipedia, "*Burden of Proof*", supra n. 98.

[102] *In a Matter of Arbitration Between Community Health Care Workers Union and Community Lifecare Inc.*, 2001 C.L.A.S.J. LEXIS 2522; 2001 C.L.A.S.J. 616632; 65 C.L.A.S. 77, at 24. Reproduced in the accompanying notebook at Tab 8. *See also* the Rules of Procedure and Evidence for the ICTY and the ICTR for the text of the rules, which do not include direction as to consequences of breach.

[103] *Id*. at 24.

1. Exclusion of Contradictory Evidence

The most obvious, yet most disputed, consequence of a breach of the rule from *Browne* is that the judge may deny admissibility of evidence that contradicts the witness's testimony.[104] A British court explains, "That the application of the rule may result in the exclusion of otherwise admissible evidence is something which has to be accepted" to prevent the cross-examining party from obtaining an unfair advantage by omissions.[105]

McAvoy v. Goodyear Tyre & Rubber Company is a British case in which the defendant appealed the trial court's decision to exclude defense testimony as a result of a breach of the *Browne* rule.[106] The plaintiff in *McAvoy* sued the defendant for damages for a case of "industrial dermatitis" he contracted while working for the defendant.[107] During the initial trial, the defendants called a safety officer as a witness, and the officer testified that he gave lectures to employees on hand-washing.[108] This testimony contradicted the plaintiff's testimony that another individual gave the safety lecture and that the lecture did not include instructions on hand-washing.[109] On cross-examination of the plaintiff, the defense did not put their contradictory version of events to the

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[104] Australian Law Reform Commission, "*Examination and Cross-Examination of Witnesses*" [3.41] (citing J. Anderson, J. Hunter, and N. Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002), §46.10), http://austlii.edu.au/au/other/alrc/publications/issues/28/03.html (accessed April 20, 2006). Reproduced in accompanying notebook at Tab 34.

[105] *McAvoy v. Goodyear Tyre & Rubber Company*, (1972) NI 217, [¶ 13]. Reproduced in the accompanying notebook at Tab 10.

[106] *Id.* [¶ 7].

[107] *Id.* at "Introduction."

[108] *Id.* [¶ 1].

[109] *Id.* [¶ 9].

plaintiff for explanation and the trial court therefore excluded the testimony of the officer under the rule in *Browne*. [110] On appeal, the Court of Appeal affirmed the trial court's decision to exclude the evidence, justifying the position on the basis that exclusion of the evidence prevented an unfair advantage by the defense.[111]

2. Effect on Weight, Rather Than Admissibility

A Canadian judge comments on the decline in rulings resulting in exclusion of evidence by saying, "While total rejection of the contradictory evidence might theoretically remain an option, the reality of modern jurisprudence appears to be that a failure to adhere to the rule 'goes to weight rather than admissibility'.[112] A Canadian scholar concurs that the modern trend is towards weight, saying that it is "usually not the admissibility," but the weight, that a breach of the rule should affect.[113]

Regina v. McNeill is a Canadian case that ruled on the practical consequences of the defense counsel's failure to confront Crown witnesses with contradictory evidence.[114] The court recognized that although "there may be other permissible ways of rectifying the problem," the options of witness recall or jury instruction as to weight of the

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[110] *Id.* [¶ 10].

[111] *Id*. [¶ 13].

[112] *Modi v. Paradise Fine Foods*, "Interim Decision of the Ontario Human Rights Commission" 2005 HRTO 19, (June, 2005) at 3-4 (including a citation to: *R. v. Purba*, O.J. No. 2603 (2004), ¶ 32), http://www.hrto.ca (accessed April, 2006). Reproduced in the accompanying notebook at Tab 11.

[113] Morrison and Wayland, *supra*, n. 15, [¶ 68]. Note that the authors make it clear that prior inconsistent statements receive different treatment under Canadian law, and failure to abide by the rules may affect admissibility.

[114] *Regina v. McNeill*, 144 C.C.C. (3d) 551. Reproduced in the accompanying notebook at Tab 19.

evidence "generally prove to be the fairest and most effective solutions."[115] The judge stated that in the event that witness recall is impracticable, "the jury should be told that in assessing the weight to be given to the uncontradicted evidence, they may properly take into account the fact that the opposing witness was not questioned about it."[116]

After finding that the defense counsel did not properly confront the prosecution witness with the defense counsel's contradictory version of events, the judge in *McNeill* ruled on the trial court's instructions to the jury on the matter. The judge determined that the trial court's instructions were deficient because the court did not explain to the jury that the defendant should not be responsible for the defense counsel's oversight and the weight of the evidence should be considered accordingly.[117]

3. Recall of Witnesses to the Stand

If a judge feels that the witness's contradictory version of events is important to the case, the judge may recall the witness to the stand for further testimony.[118] If the witness is available for recall, the judge must determine whether recall is appropriate[119]. In the event that recall is appropriate, the witness will have the opportunity to accept or decline the invitation to return to the stand. An acceptance will solve the issue of

[115] *Id.* [¶ 50].

[116] *Id.* [¶ 49].

[117] *Id.* [¶¶ 52-53].

[118] Australian Law Reform Commission, "*Examination and Cross-Examination of Witnesses*", *supra* n. 103, § 3.41.

[119] *Joseph Modi v. Paradise Fine Foods, supra* n. 111, at 4.

breach, and denial will result in "the implication …that the effect of the violation is spent." [120]

In an interim decision by the Human Rights Tribunal of Ontario in *Joseph Modi v. Paradise Fine Foods, Ltd.*, the court faced a decision as to whether recall of a witness was appropriate.[121] The case involved an allegation of unequal treatment of a customer at a grocery store, and required that the complainant and another witness testify as to matters relevant to the alleged discrimination.[122] Subsequent to testimony by the store's butcher, which completely contradicted the testimony of the complainant and the second witness, counsel for the Commission argued that the defendant's counsel had violated the rule in *Browne* because they had neglected to present the contradictory version to the complainant and the second witness.[123]

The judge, faced with the decision as to the consequence of the defendant's breach, weighed what he felt were "compelling reasons that [the witnesses] should not be subject to recall."[124] Consideration involved the economic hardship of requiring both the complainant and the second witness to return, and the fact that the second witness had been subject to harassment by an agent of the defendant's counsel.[125] The judge found that the difficulties faced by the second witness were greater than those faced by

[120] *Id.* at 4.

[121] *Id.* at 4.

[122] *Id*. at 4.

[123] *Id*. at 4.

[124] *Id*. at 5.

[125] *Id*. at 5.

the complainant, and ruled separately on whether the parties should return.[126] The judge concluded that the complainant should have the opportunity to return, whereas hardships faced by the witness outweighed the benefits of his return.[127]

4. Discretion to Disregard the Rule

Often cases arise where a breach of the *Browne* rule occurs and judge makes a decision that there will be no consequences of the breach. In effect, a trial judge may dispense with the rule altogether.[128]

In the Australian case *Jarc v. The Queen*, a court ruled on a complaint of a *Browne* violation by acknowledging, yet dismissing, the error.[129] In *Jarc*, a medical expert for a defendant underwent extensive cross-examination about the basis of his opinions because the prosecuting counselor felt that the expert was acting as an advocate of the defendant.[130] The defense protested the cross-examination because the prosecution called the witness only to give evidence on a limited basis and did not inform the witness that he was being questioned based on a theory of an assumption of partiality. The defense brought one if its grounds for appeal on the fact that the trial

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[126] *Id*. at 4,5.

[127] *Id*. at 6.

[128] Morrison and Wayland, *supra* n. 15, at 3.

[129] *Jarc v. The Queen*, [2002] NTCCA 6, No. CA 22 of 2000, [¶ 23). Reproduced in the accompanying notebook at Tab 9.

[130] *Id*. [¶ 27].

judge had not directed the jury that they should take into account the Crown's failure to cross-examine under the *Browne* rule.[131]

The *Jarc* court found that "it is not always necessary to put to a witness that he is partial," and opined that *Browne* is a rule of "broad substance" rather than a "rigid rule" and circumstances of each case are determinative of the consequences.[132] The court ultimately ruled that "notwithstanding the meticulous dissection of the transcript by [defense counsel] to identify matters relied upon by the Crown which may not expressly have been brought to the attention of [the witness], [the court is] unable to agree that there was any unfairness to the appellant arising from the prosecutor's treatment," thereby disregarding all of the possible consequences of a breach of *Browne*.[133]

5. Other Alternatives to Denying Admissibility

Another alternative consequence is that the judge may "allow a party to re-open its case to lead evidence to rebut the contradictory evidence or corroborate the evidence in chief of the witness."[134] A judge may also instruct the jury either that a) the cross-examining party did not challenge the witness's evidence when they should have,[135] or that b) the evidence of a witness should be regarded as a "recent invention" because counsel that called the witness should have cross-examined the opposing party on those

[131] *Id.* [¶¶ 47-50].

[132] *Id.* [¶ 53].

[133] *Id.* [¶ 54].

[134] Australian Law Reform Commission, "*Examination and Cross-Examination of Witnesses*", *supra* n. 103, §3.41, (citing J. Gans and A. Palmer, *Australian Principles of Evidence*, 2nd ed, 2004, at 64).

[135] *Id.* § 3.41, (citing J. Anderson, J. Hunter, and N. Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts*, 2002, § 46.10).

issues.[136] Another possible approach to a violation of *Browne* is for the court to direct that "it is not open to counsel, in address, to make such suggestion [that the witness's evidence is untrue]. [137]

The potential consequences for a breach of the rule in *Browne* are numerous as they are dependent upon the discretion of the judge and molded by the circumstances of individual cases. Although the consequences vary depending upon the circumstances of each case, they are "all related to the central object of the rule, which is to secure fairness."[138]

D. Is *Browne* applicable to the SCSL as Customary International Law?

According to the legal scholars, customary international law arises from practices that have evolved in roughly three different scenarios:

> *(a) Diplomatic relations between states….*
> *(b) Practice of international organs.* The practice of international organs, again whether by conduct or declarations, may lead to the development of customary international law concerning their status, or their powers and responsibilities….
> *(c) State laws, decisions of state courts, and state military or administrative practices.* A concurrence, although not a mere parallelism, of state laws or of judicial decisions of state courts or of state practices may indicate so wide an adoption of similar rules as to suggest the general recognition of a broad principle of law….[139]

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[136] *Id.*

[137] *Xiu Zhen Huang v. Rheem Australia Pty Ltd, Australian Industrial Relations Commission* PR95493 [¶ 22], http://www.airc.gov.au/fullbench/PR954993.htm (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 26.

[138] *Id.* [¶ 22].

In addition, those practices must be recurrent both materially and psychologically, in the sense that the nations must believe that the practice is a compulsory rule.[140]

The rule from *Browne v. Dunn* does not fall within any the categories of practice from which customary law may arise. Although a number of different common law nations follow *Browne*, the majority of nations are based on civil law and do not entertain the rule.[141] Furthermore, even if most nations did follow *Browne*, it is clear that the status of the rule is not one of "concurrence," as there is controversy surrounding the rule and there are wide variations in application. The rule also has not become customary international law through the practice of international organs. Once again, the majority of international organs do not support the rule, and even if they did, the practice of international organs relates to international law only in terms of their status, powers, and responsibilities.

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[139] Barry E. Carter, Philip R. Trimble, Curtis A. Bradley, *International Law*, (4th Ed Aspen, 2003) 121-122, (citing I.A. Shearer, *Starke's International Law*, 31-35, 11th ed., 1994). Reproduced in the accompanying notebook at Tab 29.

[140] *Id*. at 122.

[141] Wikipedia, "*Civil Law (Legal System)*," http://en.wikipedia.org/wiki/Civil_law_%28legal_ system%29 (accessed April 20, 2006). Reproduced in the accompanying notebook at Tab 45.

VI. CONCLUSION

Although the principle of granting a witness the opportunity to explain contradictions between the witness's testimony and the version presented by the cross-examining counsel is not customary international law, it is an important rule in the laws of many nations. The principle, which originated in the British case *Browne v. Dunn*, was adopted by many nations that follow the common law tradition. Most nations that do not follow the rule generally do not because they cannot, as the rule is not compatible with the civil law system of adjudication. Common law nations that do not follow *Browne*, such as the United States, do follow similar rules, albeit only in very limited circumstances.

For those nations that follow the rule, the rationale behind the rule is one of fairness to witnesses. It is an obvious proposition to some that a fair trial should afford witnesses the opportunity to explain discrepancies between their testimony and the theory of the adverse party. To disallow this explanation would prejudice the witness by allowing the cross-examining counsel to control the witness's testimony. A possible result is a compromise of the court's ultimate search for the truth.

In international war crimes tribunals it is particularly important that witness testimony be as accurate and as fairly obtained as possible. Not only are the interests in protecting witnesses high in the setting of war crimes tribunals, but the ramifications of the verdicts on international law are great. It is therefore essential that international tribunals conduct trials as fairly and accurately as possible.

The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda incorporated a rule based on the principles in *Browne* into their respective Rules of Evidence and Procedure. Although scholars from both common law and civil law countries were involved in drafting the Rules of Procedure and Evidence for the two tribunals, it is interesting to note that the tribunals did not incorporate the *Browne* rule into their law until years after the first drafts were complete. It appears that the addition of the rule from *Browne* was not an afterthought, however, but a response to the tribunals' need to speed up proceedings, make efficient use of court time, and treat witnesses fairly. The tribunals have followed and upheld the relevant rules since the rules were incorporated.

Whether such a rule should be included in the Rules of Procedure and Evidence of the Special Court for Sierra Leone is debatable. Although there is no evidence that Sierra Leone courts have taken a position on the rule of *Browne v. Dunn*[142], the former British colony is familiar with the common law tradition. In addition, it is conceivable that the circumstances that favored incorporation of the rule into the laws of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda may ultimately favor its incorporation into the laws of the Special Court for Sierra Leone.

[142] This author was unable to find Sierra Leone case law discussing *Browne v. Dunn* or similar principles.