

**Issue #24- A Comparative Analysis of the Alibi Rule**

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## TABLE OF CONTENTS

Table of Sources.....	iii
Statement of the Issue.....	1
I. Introduction.....	1
II. Comparative Legal Analysis of the Alibi Rule.....	3
A. Triggering Act and Stage of Prosecution When it Must Occur.....	3
B. Notice Information.....	10
C. Sanctions for Failure to Comply with Notice Requirements.....	15
D. Variations in the Classification of the Alibi Rule.....	19
III. Comparison of the Weight Afforded When Parties Fail to Comply with Alibi Rule .....	21

## TABLE OF SOURCES

### Procedural Rules

1. Federal Rules of Criminal Procedure, Rule 12.1 Notice of Alibi (United States).
2. Rules of Evidence and Procedure, Rule 67 Reciprocal Disclosure of Evidence (ICTR).
3. Rules of Evidence and Procedure, Rule 67 Reciprocal Disclosure (ICTY).

### Statutes

1. Crimes Act 1900 S405A (Australia-New South Wales).
2. Criminal Justice Act 1967, Ch. 80, s.11 (England).

### Cases

1. *United States v. Hutton*, 558 F.2d 1265 (6th Cir. 1977).
2. *R. v. Sullivan*, 1 QB 253 (1971).
3. *Regina v. Heuston, Heuston, and Heuston*, 1996 NSW LEXIS 3707.
4. *Cleghorn v. Her Majesty the Queen*, 1995 Can. Sup. Ct. LEXIS 59 (1995).
5. *Cloutier v. The Queen*, 34 C.R. 60 (1960).
6. *S. v. Zwayi*, 1997 SACLX LEXIS 56.
7. *United States v. Saa*, 859 F.2d 1067 (2d Cir. 1988).
8. *The Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A.
9. *United States v. Ortega-Chavez*, 682 F.2d 1086 (5th Cir. 1982).
10. *United States v. Barron*, 575 F.2d 752 (9th Cir. 1978).

### Books

1. Emmins, Christopher J., *A Practical Approach to Criminal Procedure* 39 (4<sup>th</sup> ed. 1990).

2. Knoops, Geert-Jan, Defenses in Contemporary International Criminal Law 224 (2001).
3. Virginia Morris & Michael P. Sharf, The International Criminal Tribunal for Rwanda 544-547 (1998).
4. Virginia Morris & Michael P. Sharf, An Insider's Guide to the International Criminal Tribunal of the Former Yugoslavia 182 (1995).

**Miscellaneous**

1. *Construction and Application of Rule 12.1, Federal Rules of Criminal Procedure, Requiring Upon Written Notice, Exchange of Names and Witnesses to be used to Establish or Rebut Defendant's Alibi*, 42 A.L.R. Fed. 878 (1979).

**ISSUE #24-** *Prepare a comparative study on national/domestic legislation regarding the defense of alibi. Examine notice requirements, if any, and the resulting remedies or effects if the defense fails to comply with the notice requirements. Specifically address the issue of appropriate weight to be afforded alibi evidence if alibi defense is not noticed in a timely fashion. Review all applicable ICTR and ICTY case law regarding alibi defense and resulting remedy for failure of the defense to timely notice the alibi defense.*

## **I. Introduction**

Rules governing the alibi defense are necessary in order to achieve the basic ends of an accurate and fair criminal trial.<sup>1</sup> Tribunals primarily designed for the prosecution of war crimes have adopted this view of natural systems of justice that a “fair trial” is highly important.<sup>2</sup> Specifically, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has designed

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<sup>1</sup> Knoops, Geert-Jan, *Defenses in Contemporary International Criminal Law* 224 (2001)(TAB 1).

<sup>2</sup> *Id.* at 225.

a rule<sup>3</sup> to govern the admission of alibi defenses in order to achieve fairness for both the defendant and the prosecution.<sup>4</sup>

Another reason that supports the existence of alibi rules is the goal of most justice systems to ensure accuracy of the factfinder in order to uphold the moral integrity of international criminal law.<sup>5</sup> “The rules must work, and should not become an unwieldy obstacle to the achievement of international criminal justice... [and] uphold the highest standards of criminal justice and fairness.”<sup>6</sup>

Each country has their own way of enforcing the alibi rule, beginning with how the rule was created, i.e. through statutes, procedural rules, or caselaw. They all have required specific elements that must be followed in order to make an alibi defense admissible: the notice

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<sup>3</sup> ICTY Rules of Evidence and Procedure, Rule 67 Reciprocal Disclosure(TAB 9):

- (A) As early as reasonably practicable and in any event prior to the commencement of the trial:
  - (i) the Prosecutor shall notify the defence(sic) of the names of the witnesses that the Prosecutor intends to call in proof of the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with paragraph (ii) below;
  - (ii) the defence shall notify the Prosecutor of its intent to offer:
    - (a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;
    - (b) any special defence, including that of diminished or lack of mental responsibility; in which case notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.
- (B) Failure of the defence to provide notice under this Rule shall not limit the right of the accused to testify on the above defences.
- (C) If the defence makes a request pursuant to Rule 66(B), the Prosecutor shall be entitled to inspect any books, documents, photographs, and tangible objects which are within the custody or control of the defence and which it intends to use as evidence at the trial.
- (D) If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that party shall immediately disclose that evidence or material to the other party and the Trial Chamber.

<sup>4</sup> Knoops at 224 (TAB 4).

<sup>5</sup> *Id.* at 222.

<sup>6</sup> *Id.* at 222-223 (quoting speech by Judge Louise Arbour, Chief Prosecutor of the ICTY and ICTR to the ISISC meeting on Comparative Criminal Justice System dd. 18 December 1997).

requirements, the sufficiency of notice, and the choices the court may make when admitting alibi evidence. The requirements within the rule vary widely among different nations. Another difference among the various nations to be discussed, is the fact that some treat the Alibi rule as a special and very important rule; however some nations only consider it a part of the discovery.

## **II. Comparative Legal Analysis of the Alibi rule.**

Most countries have detailed provisions of how an alibi rule should be properly admitted in order to uphold the fairness and accuracy of the trial. The provisions contain directions as to what is the proper stage of a trial that an alibi defense may be admitted, what information is necessary in order for notice of an alibi to be proper, and what are the sanctions for those parties that do not follow the standards set in these rules. Each country's alibi rule will be discussed in order of how impeding they are on the parties to a trial, beginning with the most restrictive and ending with those countries that have more relaxed restrictions.

### **A. Triggering Act and Stage of Prosecution When it Must Occur**

The first provision contained in most countries' alibi rule is the requirement of who will trigger the rules governing the defense of alibi and when that act must be performed. This section will discuss the varying stages at which different countries require the beginning of the alibi process. The more strict nations require that the notice of an alibi defense be made earlier in the prosecution, while the more lenient nations do not require a specific time.

Beginning with the most constricting alibi rule, the time and triggering requirements for notice of an alibi defense in the courts of the United Kingdom<sup>7</sup> are the most restrictive on the

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<sup>7</sup> Criminal Justice Act 1967, Chapter 80, s.11:

11 Notice of alibi

(1) On a trial on indictment the defendant shall not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi.

(2) Without prejudice to the foregoing subsection, on any such trial the defendant shall not without the leave of the court call any other person to give such evidence unless-

(a) the notice under that subsection includes the name and address of the witness or, if the name or address is not known to the defendant at the time he gives the notice, any information in his possession which might be of material assistance in finding the witness;

(b) if the name or the address is not included in that notice, the court is satisfied that the defendant, before giving the notice, took and thereafter continued to take all reasonable steps to secure that the name or address would be ascertained;

(c) if the name or the address is not included in that notice, but the defendant subsequently discovers the name or address or receives other information which might be of material assistance in finding the witness, he forthwith gives the notice of the name, address or other information, as the case may be; and

(3) The court shall not refuse leave under this section if it appears to the court that the defendant was not informed in accordance with rules under [section 144 of the Magistrates' Courts Act 1980] (rules of procedure for magistrates' courts) of the requirements of this section.

(4) Any evidence tendered to disprove an alibi may, subject to any directions by the court as to the time it is to be given, be given before or after evidence is given in support of the alibi.

(5) Any notice purporting to be given under this section on behalf of the defendant by his solicitor shall, unless the contrary is proved, be deemed to be given with the authority of the defendant.

(6) A notice under subsection (1) of this section shall either be given in court during, or at the end of, the proceedings before the examining justices or be given in writing to the solicitor for the prosecutor, and a notice under paragraph (c) or (d) of subsection (2) of this section shall be given in writing to that solicitor.

(7) A notice required by this section to be given to the solicitor for the prosecutor may be given by delivering it to him, or by leaving it at his office, or by sending it in a registered letter or by the recorded delivery service [or by first class post] addressed to him at his office.

(8) In this section--

"evidence in support of an alibi" means evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

"the prescribed period" means the period of seven days from the end of the proceedings before the examining justices [or, where a notice of transfer has been given under of the giving of that notice].

(9) In computing the said period a Sunday, Christmas Day, Good Friday, a day which is a bank

defendant to be discussed.<sup>8</sup> The defense must raise his defense at or soon after the time he is formally charged. It is required that the defense submit notice of an alibi defense in court during or at the end of the committal proceedings.<sup>9</sup> The rule also allows for the defendant, or his counsel, to alternatively submit their notice of an alibi defense with seven days from the end of the committal proceedings.<sup>10</sup> The statute gives great discretion to the government when presenting evidence to refute an alibi defense by subjecting it “to any directions by the court as to the time it is to be given” but only requiring it to “be given before or after evidence is given in support of the alibi.”<sup>11</sup>

The ICTR<sup>12</sup> and the ICTY Rules of Evidence provide a guideline similar to the United Kingdom, where the defendant must make certain disclosures in order to give notice of his

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holiday under the Bank Holidays Act 1871 in England and Wales or a day appointed for public thanksgiving or mourning shall be disregarded.

<sup>8</sup> EMMINS, 39.

<sup>9</sup> *Id.*

<sup>10</sup> EMMINS.

<sup>11</sup> Criminal Justice Act of 1967, Ch. 80, s. 11 (Eng.)

<sup>12</sup> Rule 67: Reciprocal Disclosure of Evidence

Subject to the provisions of Rules 53 and 69:

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

(i) The Prosecutor shall notify the defence of the names of the witnesses that he intends to call to establish the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-Rule (ii) below;

(ii) The defence shall notify the Prosecutor of its intent to enter:

(a) The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

intention to use an alibi.<sup>13</sup> Rule 67 requires that the prosecution request for the particulars of the defense's possible alibi defense "[a]s early as reasonably practicable and in any event prior to the commencement of the trial."<sup>14</sup> However, this information would be in rebuttal of the defendant's notice to enter a alibi defense.<sup>15</sup> It appears that with the lack of a specific time requirement expressed within the rule, the ICTR and ICTY courts have great discretion in determining what amount of time would be "reasonably practicable," however it is required that notice takes place prior to the commence of the trial.

The United States<sup>16</sup> has a similarly structured alibi rule with detailed triggering instructions and time requirements, however the burden is on the defendant to trigger an alibi

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(b) Any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

(B) Failure of the defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.

(C) If the defence makes a request pursuant to Rule 66 (B), the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial.

(D) If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.

<sup>13</sup> ICTR and ICTY, Rules of Evidence and Procedure, Rule 67: Reciprocal Disclosure of Evidence.

<sup>14</sup> *Id.* at 67(A).

<sup>15</sup> *Id.* at 67(A)(ii)(a).

<sup>16</sup> Fed. R. Crim. Pro. Rule 12.1  
Rule 12.1. Notice of Alibi

(a) Notice by defendant. Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the government a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.

(b) Disclosure of information and witness. Within ten days thereafter, but in no event less than ten days

defense.<sup>17</sup> Once the defendant gives notice of his intention to use an alibi defense, the prosecution must request, in writing, the particulars of the intended alibi.<sup>18</sup> The Federal Rules of Criminal Procedure then require that a defendant provide the particulars to the government within ten days of receiving their request.<sup>19</sup> The Congressional intent of this rule was to uphold the fairness of the trial because it forces the parties to continuously cooperate with each other, in addition to the initial time requirements for disclosure of witnesses.<sup>20</sup>

Although the plain language of the alibi rule in the United States imposes specific procedural and time constraints upon the parties, courts have become increasingly discretionary in their rulings to what constitutes a sufficient amount of time.<sup>21</sup> Courts have allowed for changes

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before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(c) Continuing duty to disclose. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party or the other party's attorney of the existence and identity of such additional witness.

(d) Failure to comply. Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

(e) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.

(f) Inadmissibility of withdrawn alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with such intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

<sup>17</sup> Fed. R. Crim. Pro. Rule 12.1(b)(2).

<sup>18</sup> Fed. R. Crim. Pro. Rule 12.1(a)(1).

<sup>19</sup> Fed. Rules Crim. Pro. Rule 12.1(a)

<sup>20</sup> See Advisory Committee Notes for Fed. R. Crim. Pro. 12.1.

<sup>21</sup> 42 ALR FED 886.

to the time requirements but they are consistently found in favor of the government, for example, requiring a defendant to provide an alibi defense within 4 days of receiving the prosecutions request.<sup>22</sup> In *United States v. Hutton*, 558 F.2d 1265 (6th Cir. 1977), the court allowed the government to send a request for intent to use an alibi defense on the second day of a three day trial. In turn, the courts still play a part in the enforcement of the alibi rule even though it is expressed through procedural rules.

Following the intermediate level of requirements for the notice of an alibi to be given is Canada. Here the primary goal of the courts is to enforce the rule governing alibi evidence to “guard against surprise alibis fabricated in the witness box which the prosecution is almost powerless to challenge.”<sup>23</sup> In *Cleghorn v. Her Majesty the Queen*<sup>24</sup>, the Supreme Court of Canada advanced well established law that disclosure of a defense of alibi “should be given in sufficient time to permit the authorities to investigate.”<sup>25</sup> The court held that when weighing the timeliness and sufficiency of alibi defense notice, courts must determine if the authorities could have conducted a proper investigation based on the notice.<sup>26</sup> The court held that the defendant does not have to prove the elements of his alibi defense beyond a reasonable doubt, as the prosecution must.<sup>27</sup>

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<sup>22</sup> 42 ALR Fed 884 (citing *United States v. Singletary*, 562 F.2d 1058 (1977)).

<sup>23</sup> *Id.*

<sup>24</sup> 1995 Can. Sup. Ct. LEXIS 59.

<sup>25</sup> *Cleghorn*, (citing *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13)

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

The next two countries to be discussed can be classified in a group that has minimal restrictions in terms of time and triggering acts. The first country, Australia, under the Crimes Act 1900 S405A<sup>28</sup>, states that “there is no time specified as to when the directions contemplated by [it] must, or may, be given.”<sup>29</sup> The general rule in this country is that the defense is required to only reveal his intention to raise an alibi defense at the time of his case in chief.<sup>30</sup> The

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<sup>28</sup> S405A of the Crimes Act 1900:

(1) On a trial on indictment the defendant shall not without the leave of the Court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi.

(2) Without prejudice to subs(1), on a trial on indictment the defendant shall not without the leave of the Court call any other person to give evidence in support of an alibi unless: (a) the notice under that subsection includes the name and address of the person, or, if the name or address is not known to the defendant at the time he gives the notice, any information in his possession which might be of material assistance in finding the person; (b) if the name or the address is not included in the notice, the Court is satisfied that the defendant before giving the notice took and thereafter continued to take, all reasonable steps to secure that the name or the address would be ascertained; (c) if the name or the address is not included in the notice, but the defendant subsequently discovers the name or address or receives other information which might be of material assistance in finding the person, he forthwith gives notice of the name, address or other information, as the case may be; and (d) if the defendant is notified by or on behalf of the Crown that the person has not been traced by the name or at the address given by the defendant, he forthwith gives notice of any information which might be of material assistance in finding the person and which is then in his possession or, on subsequently receiving any such information, forthwith gives notice of it.

(3) The Court shall not refuse leave under this section if it appears to the Court that on the committal for trial of the defendant he was not informed by the committing justice of the requirements of subs(1), subs(2) and subs(5), and the statement in writing of the committing justice that the defendant was so informed shall be evidence that the defendant was so informed.

(4) Any evidence tendered to disprove an alibi may, subject to any direction by the Court, be given before or after evidence is given in support of the alibi.

(5) Any notice purporting to be given under this section on behalf of the defendant by his solicitor shall, unless the contrary is proved, be deemed to be given with the authority of the defendant.

(6) A notice under this section shall be given in writing to the Director of Public Prosecutions, and may be given by delivering it to the Director or by leaving it at his office, or by sending it in a registered letter or by certified mail addressed to him to his office.

(7) In this section: 'evidence in support of an alibi' means evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission; 'the prescribed period' means the period of ten days commencing at the time of the committal of the defendant for trial.

<sup>29</sup> *Id.*

<sup>30</sup> Heusten, 1996 NSW LEXIS 3707, \*28.

prosecution is further burdened under Australian law by not being allowed to offer rebuttal of an alibi defense if it could have been reasonably foreseen that the defendant intended to raise the defense.<sup>31</sup>

Similar to Australia, South Africa allows for judicial discretion to determine the actions and amount of time necessary to give proper notice of an alibi defense. The South African High Court held in *S v. Zwayi* held that the defendant must present his intention to offer an alibi defense, however most courts do not provide exactly when that disclosure must take place.<sup>32</sup> The Court held that giving notice of an alibi at a late stage in a trial would unfairly burden the plaintiff by not allowing them to fully prepare for the defense, but the court would still allow the defense because it would also hurt the defense.<sup>33</sup>

## **B. Notice Information**

The alibi rules that have been discussed also provide requirements for the sufficiency of the information contained within the notice given by either party. This section will discuss the differences between the nations in specifying what is substantively necessary for proper notice. The discussion will include each country's reliance on the details of the alibi, information about the witnesses supporting the alibi, and the other information necessary to give proper notice of an alibi.

The country with one of the most detailed rules defining what is sufficient in terms of the information given in the notice of an alibi defense is the United States. The rule provides that the

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at \*18.

<sup>33</sup> *Id.*

prosecution first must request the defense's intention to offer an alibi defense by stating the time, date, and place at which the alleged offense was committed.<sup>34</sup> The defendant is then required to provide "the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such an alibi."<sup>35</sup> The first two parts of Rule 12.1 allows the court to require the defendant to initialize the process and the prosecution to maintain a duty to disclose the information necessary to protect the defendant's rights at trial.<sup>36</sup>

In this jurisdiction, the rules and statutes designed by the legislature are often reviewed through applicable cases in the country's courts.<sup>37</sup> The courts in the United States have expanded the sufficiency section of the alibi rule by determining cases that are not explicitly covered within the rule's language.<sup>38</sup> In *United States v. Saa*, 859 F.2d 1067 (2nd Cir. 1988), the Court held that the government's letter to the defendant did not adequately request information about the defendant's alibi because the government did not adequately state the time, place, and date of the alleged offense. The government in the case referred to the necessary elements of the alibi request, however since it was only done through notes made by the government, and not in the formal request the Court did not uphold it.<sup>39</sup>

Rule 12.1 was amended December 1, 2002 in an effort to restyle to Federal Rule of Criminal Procedure, in turn making "them more easily understood and to make style and

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<sup>34</sup> Fed. R. Crim. Pro. Rule 12.1(a).

<sup>35</sup> Federal Rules of Criminal Procedure (1974) Rule 12.1 Notice of Alibi

<sup>36</sup> 42 ALR FED 878, 881

<sup>37</sup> See generally USCS Fed Rules Crim Proc R 12.1. Interpretative Notes and Decisions

<sup>38</sup> See *id.*

<sup>39</sup> See *United States v. Saa*, 859 F.2d 1067 (2nd Cir. 1988).

terminology consistent throughout the rules.”<sup>40</sup> The only substantive changes to the general sections of the rule are when either party provides the names and addresses of witnesses to be used for the alibi or a rebuttal, the party must also provide the witnesses phone number.<sup>41</sup> The Advisory Committee “believed that requiring such information would facilitate locating and interviewing those witnesses.”<sup>42</sup>

The distinct duties of both parties stated under the US’s alibi rule are similar to the rules of the ICTR and the ICTY. The defense must enter its intention to use an alibi defense by specifying the place or places at which he claims to have been.<sup>43</sup> The defendant must also provide the names and addresses of witnesses.<sup>44</sup> Once notice has been received by the prosecution, they must provide a detailed list of the witnesses that he intends to call to establish guilt of the accused.<sup>45</sup> Both parties have the duty to continue to disclose any information that they may found during or prior to the trial.<sup>46</sup>

In contrast with the United States and the ICTR and ICTY, the other countries to be discussed do not require the same sufficiency of notice in order for an alibi defense to be offered. England requires only the names and addresses of the witness that would support his alibi defense, or if that information is not available, “any information in his possession which might

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<sup>40</sup> USCS Fed Rules Crim Proc R 12.1. “Notes of Advisory Committee on 2002 amendments.”

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Rule 67(A)(ii)(a)

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 67(A)(i).

<sup>46</sup> *Id.* at 67(D).

be of material assistance in finding the witness.”<sup>47</sup> The English alibi statute also includes that if the defendant does not provide the information needed for proper notice and then later discovers that information, he has a duty to disclose that information immediately.<sup>48</sup> Notice of an alibi should also contain information as to where the defendant was at the relevant time.<sup>49</sup> The prosecutor’s duty to disclose evidence to disprove an alibi may be given before or after evidence is given with in support of the alibi.<sup>50</sup>

With language similar to the Criminal Just Act in England, the Crimes Act in Australia provides that the defendant will not adduce evidence in support of his alibi without leave of court, unless he gives notice of the particulars of his alibi. The particulars include the name and address of the witness the defendant intends to call in support of his alibi or any other information that could help procure the name and address of the witness.<sup>51</sup> The statute further requires that the defendant continue to give this information to the prosecution in the case that he discovers more after the initial disclosure.<sup>52</sup> The language of the New South Wales’s legislation is quite similar to the language of the English Criminal Justice Act of 1967; however the New South Wales legislation appears to give more discretion to the presiding judge.<sup>53</sup> For instance in *Heusten*, the Supreme Court of New South Wales held that the prosecution may request further

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<sup>47</sup> Criminal Justice Act 1967, Ch. 80, s. 11.

<sup>48</sup> *Id.* at 11(d).

<sup>49</sup> *Supra* FN36.

<sup>50</sup> Criminal Justice Act of 1967, Ch. 80 s. 11.

<sup>51</sup> *Id.* at 27-28.

<sup>52</sup> *Id.* at 28.

<sup>53</sup> *Id.* at 31.

notice of an alibi after the close of the defendant's case, even though that the general rule is for the jury to be excused before rebuttal evidence would be admitted.<sup>54</sup>

Other countries have allowed a great amount of discretion in the determination of whether certain disclosures are sufficient notice for an alibi defense. Under Canadian law, an alibi defense is sufficient when it is given with "sufficient particularity to enable the authorities to meaningfully investigate."<sup>55</sup> Courts have held that disclosure by the defendant is not necessary in order for the notice to be sufficient, in fact a third party individual may make the disclosure.<sup>56</sup> For instance, if a third-party witness through interviews following an incident discloses information concerning an alibi, it is considered sufficient disclosure of the defendant's alibi.<sup>57</sup>

It has also been held in Canada that the sufficiency of the notice of an alibi defense is quite different than the burden placed on the prosecution to meet certain elements in order to prove the guilt of the accused.<sup>58</sup> The court held that the defendant must only present evidence to the prosecution that is sufficient to prove "a balance of probabilities in favor of the alibi."<sup>59</sup>

#### South Africa

In South Africa, the Court in *Zwayi* held that it was sufficient that the defendant testified that he was not present at the place of the incident on the date that it occurred, but the lack of other evidence goes directly to the weight afforded to the defense.<sup>60</sup> The court reasoned that the

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<sup>54</sup> *Id.* at 33.

<sup>55</sup> *Id.* at \*9 (citing *R. v. Ford* (1993), 78 C.C.C. (3d) 481 at 504-505.)

<sup>56</sup> *Id.* at \*10.

<sup>57</sup> *Id.*

<sup>58</sup> *Cloutier v. The Queen*, 34 C.R. 60, 61(Practice Note) (1960)

<sup>59</sup> *Id.* (citations omitted).

<sup>60</sup> *S. v. Zwayi*, 1997 SACL R LEXIS 56, \*16.

details of the alibi should be provided in order to constitute proper notice, otherwise the defendant's alibi is just a bare denial.<sup>61</sup> The court did note that in order to establish an alibi defense "the accused does not bear the burden of proving that [it] was true."<sup>62</sup>

### **C. Sanctions for Failure to Comply with Notice Requirements**

When a party fails to give proper notice, either procedurally or substantively, they may be subject to sanctions by the court. Most countries have sanctions that could severally inhibit the use of an alibi defense or the prosecution's rebuttal, however, most jurisdictions allow for judicial discretion when determining the admissibility of either party's evidence. This section will discuss the specific provisions that each country enforces when a party fails to comply with the notice requirements.

The language of the English statute provides for harsh sanctions which include the defendant not being able to provide his evidence to the jury. The language of the Criminal Justice Act of 1967 states that an individual can only adduce the evidence of his alibi defense with leave of the court, if he does not comply with the notice requirements.<sup>63</sup>

Although the language presents a harsh remedy for one that does not comply with the requirements of the Act, courts following the statute's enactment have provided for the use of discretion.<sup>64</sup> The court in *R. v. Sullivan*, 1QB 253 (1971), stated that the "aim of the legislation was not to limit the time the defense had to 'exercise their ingenuity for the purpose of inventing an alibi' but to insure that the prosecution have enough warning of an alibi to check on its

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<sup>61</sup> *Id.* at \*17.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at s.11(1).

<sup>64</sup> *Supra* FN36 at 132-133.

genuineness and secure the attendance at court of any witness who might be able to disprove it.”<sup>65</sup>

Interestingly, Section 3 does not allow the court to excuse the jury members, unless there is a clear showing that the defendant is aware of his notice requirements.<sup>66</sup> However, if it is found that the defendant had knowledge of his requirements and failed to comply with them, he is subject to full sanctions. A court also may dispense with the warning if they determine that, based on the charge, an alibi defense is unnecessary.<sup>67</sup> Even when a magistrates court determines the alibi evidence warning to be unnecessary, the Crown court, must give the chance for this type of evidence to be produced, even if the defendant has not provided the necessary notice required by the statute.<sup>68</sup>

#### Australia

Similar to the English statute, the language employed in the New South Wales provides that a judge cannot allow the defendant to present evidence without leave of the court.<sup>69</sup> Discretion allows the judge to determine whether the proper notice was given and determine how the court should utilize the evidence. One important example of the level of discretion possessed by a judge in this jurisdiction is when the defendant presents an alibi defense through direct testimony of his own and concurring witnesses, the prosecution most likely will not be allowed to bring out evidence to rebut the alibi, if it is determined that the prosecution could have

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<sup>65</sup> *Supra* FN36 at 132-133 (citing *R. v. Sullivan*, 1QB 253 (1971)).

<sup>66</sup> *Id.* at s.11(3).

<sup>67</sup> *Supra* FN36.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

reasonably foreseen the defense.<sup>70</sup> That rule was a longstanding principle of the New South Wales Court prior to the ratification of Crimes Act 1900 S405A, but even when the statute was held to overturn the principle, a court held that the principle should stand to ensure that the defendant is not “unfairly prejudiced.”<sup>71</sup>

The United States provides in Rule 12.1 the consequences for the failure to comply with the notice requirements; however the language of this section and the subsequent section do not express a distinct remedy available to the courts.<sup>72</sup> In 12.1(d) the rule states that “the court *may* exclude the testimony of any undisclosed witness offered by such party as to the defendant’s absence from or presence at, the scene of the alleged offense.”(emphasis added).<sup>73</sup> The provision further states that failure to comply with the specific notice requirements is not reason to exclude the defendant’s testimony.<sup>74</sup> The use of the word *may* does not direct the court to a specific remedy, but instead, it allows the court great discretion, especially with the language in 12.1(e), where “the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule” with the show of good cause.<sup>75</sup>

Other rules-based jurisdictions, such as the ICTR and the ICTY also provide a significant amount of discretion to be used through the section of their alibi rule concerning a party’s failure to comply with the other requirements.<sup>76</sup> The language of Rule 67(B) expressly states that

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<sup>70</sup> *Id.* at \*30 (citing *Killick v. The Queen*, 147 CLR at 569).

<sup>71</sup> *Id.* (citing *Blewitt v. The Queen*, 62 ALJR 503, 506).

<sup>72</sup> Federal Rules of Criminal Procedure. 12.1(d), 12.1(e).

<sup>73</sup> *Id.* at 12.1(d).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 12.1(e).

<sup>76</sup> *See* Rule 67(B).

“[f]ailure of the defense to provide such notice under this Rule shall not limit the right of the accused to rely on the above defenses.”<sup>77</sup> Not only does this section not provide a remedy for the court to rely on when a party does not comply, but it appears to state that even though compliance is expected, if the defendant does not comply, his defense is still given full weight under the law.<sup>78</sup>

An example of great discretion given to the courts is displayed by Canada. In that jurisdiction, the courts use great discretion to determine what should be done with the evidence if one of the parties does not comply with the rule. The general rule only provides that a court may draw an adverse inference upon the evidence based on a failure to comply with the sanctions.<sup>79</sup> It was held that “improper disclosure can only weaken alibi evidence; it cannot exclude the alibi.”<sup>80</sup> In turn, the courts, similar to the decision made in *Cleghorn v. Her Majesty the Queen*<sup>81</sup> can deal with noncompliance by still allowing the evidence and having the judge determine what weight will be afforded to it on an individual case basis.

Another jurisdiction that allows a large amount of discretion to be used by the court is South Africa. Caselaw examined did not discuss any specific remedies that could be used by a court when determining how alibi evidence will be used when the defendant does not comply with the rules of proper notice.<sup>82</sup> However, it was reasoned in *Zwayi* that by admitting evidence after the prosecution has presented their case, the defendant would only be adversely affecting

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<sup>77</sup> *Id.*

<sup>78</sup> *See Id.*

<sup>79</sup> *Id.* (citing *Russell v. the King*, 67 C.C.C. 28, 32 (1936)).

<sup>80</sup> *Id.*

<sup>81</sup> 1995 Can. Sup. Ct. LEXIS \*59 (1995).

<sup>82</sup> *See generally Id.*

his own case, because it would lower the value to be accorded the alibi.<sup>83</sup> In contrast, the court held that the government would, probably be more adversely affected by not being able to have the opportunity to cross examine witnesses in support of the alibi, in order to prove it false.<sup>84</sup> The discretion held by a judge in this jurisdiction, as exemplified in *Zwayi*, provides remedies for noncompliance to be enforced on an individual case basis.

#### **D. Examples of Variations in the Classification of the Alibi Rule**

Some jurisdictions provide plain language in their respective statute for how the alibi rule is treated in relation to other rules. For instance, unlike some jurisdictions the United States has explicitly defined the rule for alibi, and they have not just included it as a part of an all inclusive reciprocal disclosure rule. Although the alibi rule is not just “lumped” into a reciprocal disclosure rule, it still requires proper reciprocal disclosure beginning with notice to be made by the defendant.<sup>85</sup>

Although the alibi rules of the ICTR and the ICTY are similar to that of the United States, the manner in which the tribunals treat this rule is very different.<sup>86</sup> These organizations incorporate this rule in the general provisions that require reciprocal disclosure between the parties they do not treat the alibi rule as a separate provision. This is evident by the name given to rule 67 in both, the ICTR and the ICTY, “Reciprocal Disclosure of Evidence” and “Reciprocal

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> USCS Fed. Rules of Crim. Proc. R. 12.1. “Notes of Advisory Committee on 2002 Amendments.”

<sup>86</sup> *See generally* ICTR and ICTY Federal Rules of Evidence and Procedure, Rule 67.

Disclosure,” respectively.<sup>87</sup> Other proof that these organizations include the alibi rule with overall disclosure rules is the fact that they begin the rule by requiring the prosecution to “notify the defense of the names of the witnesses that he intends to call to establish the guilt of the accused.”<sup>88</sup>

Courts in these jurisdictions have also made decisions that further develop the rule concerning the use of the alibi rule within the duty of both parties to maintain reciprocal disclosure throughout the proceeding.<sup>89</sup> The Supreme Court of the United States held that the only time the government must provide a list of rebuttal witnesses they plan to use during the trial, is when the proper notice has been given from the defendant about his intention to use the alibi rule, maintaining the US’s practice of separating the alibi rule from rules of reciprocal disclosure.<sup>90</sup> As stated before the ICTR has taken a different approach to the use of the alibi rule within reciprocal disclosure, which is exemplified in *Kayishema et al.* when the court held that Rule 67(A)(ii) only “applies at the level of case-preparation, [and it] only governs the reciprocal disclosure of evidence.”<sup>91</sup> They determined that “the purpose of entering a defen[s]e of alibi or establishing it at the stage of reciprocal evidence is only to enable the Prosecutor to consolidate evidence of the accused’s criminal responsibility with respect to the crimes charged.”<sup>92</sup>

England’s Criminal Justice Act of 1967 presents another type of reciprocal disclosure used by some nations. The language of the statute contains a lack of reciprocal disclosure duty

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at Rule 67(A)(i).

<sup>89</sup> See generally *United States v. Ortega-Chavez*, 682 F.2d 1086 (5th Cir. 1982).

<sup>90</sup> *Id.*

<sup>91</sup> *Supra* FN52.

<sup>92</sup> *Id.* at 111.

placed on the prosecution.<sup>93</sup> Differing from other jurisdictions, the prosecution duty to provide information they plan to use to rebut any alibi evidence is not held to be as important as the defendant's duty.<sup>94</sup> England does not even specifically provide within the language of their alibi rule, that the prosecution has any duty of furnishing the defendant with any relevant information.<sup>95</sup> The overall construction of the statute supports the contention that the alibi rule was solely designed to prevent "the prosecution being taken by surprise by an alibi defense."<sup>96</sup>

### **III. A Comparison of the Weight Afforded When Parties Fail to Comply With Alibi Rule.**

The alibi rule in most jurisdictions allows for great discretion to be used by the judge hearing an individual case, in turn it is necessary that one must look to the caselaw of those jurisdictions to determine the standard level of weight that is afforded to alibi evidence when the party admitting it did not comply with the rules.

Beginning in the United States, one of the most widely known alibi rule cases directly discusses the weight that should be afforded evidence admitted by a party that did not comply with the proper notice requirements. In *US v. Barron*, 575 F.2d 752 (9th Cir. 1978), the district court did not allow the admission of any alibi evidence after the defendant had failed to satisfy the requirements of the notice of alibi rule. The Court held that the district court's ruling was proper because the defendant had been afforded as much time as possible to submit the notice of alibi, but chose not to because he did not trust his court appointed lawyer.<sup>97</sup> The court justified its

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<sup>93</sup> See generally Criminal Justice Act of 1967, Ch. 80, s. 11

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Supra* FN36.

<sup>97</sup> *United States v. Barron*, 575 F.2d 752, 757 (9th Cir. 1978).

holding by stating “the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial.”<sup>98</sup> When the court determined that for the rule to be best enforced sanctions must be enforced, they advanced a precaution to courts to only apply sanctions when necessary and “only after a careful weighing of the interest of the defendant in a full and fair trial against the interests of avoiding surprise and delays.”<sup>99</sup>

In England, it has been held that the discretion used by a court, when notice is not sufficiently given, must be exercised judicially.<sup>100</sup> The fact that notice was not given according to the well established rules of the alibi rule, does not mean that the judge is justified in excluding all of the evidence.<sup>101</sup> It is well established that a court should determine a preliminary question before granting leave of the court for the defendant to present the evidence for an alibi defense.<sup>102</sup> The court should determine “whether the prosecution have had, or could by means of an adjournment be given, sufficient opportunity to investigate the defense allegations.”<sup>103</sup> It has been held that instances where leave was properly granted was “where the prosecution can prove to the judge’s satisfaction that the information in the notice is spurious or useless.”<sup>104</sup>

There has also been the instance where the court itself did not take action against the defendant for not timely admitting notice of an alibi; however the acts of not being proper in its

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<sup>98</sup> *Id.* at 757.

<sup>99</sup> *Id.*

<sup>100</sup> *Supra* FN36 at 132-133.

<sup>101</sup> *Supra* FN36.

<sup>102</sup> *Supra* FN36

<sup>103</sup> *Supra* FN36

<sup>104</sup> *Supra* FN36

notice of an alibi.<sup>105</sup> In *Rossborough*, the defendant failed to properly run the alibi after giving notice to it prior to trial.<sup>106</sup> When at trial, the prosecution took advantage of the defendant not using the alibi properly and exposed the evidence being used for the alibi and the fact that the witnesses provided by the defendant were not cooperative to the police investigating the crime after their names and addresses were furnished.<sup>107</sup> Although tactics have been designed to combat improper notice of the alibi rule, courts in England have held that it would be more acceptable to give notice outside the time constraints of the rule than to present an inaccurate notice.<sup>108</sup>

In Australia it has been held that the decisions of the court must lie with an individual judge that is determining the use of the alibi evidence based on the specific facts of the case, not the rigid, inflexible rules presented by the statute.<sup>109</sup> It was held that a court must look to the fairness of the trial when deciding what weight will be afforded the evidence.<sup>110</sup> Considerations that may be made by the court include the possible inflated importance of evidence tendered by the government after the defense has completed their case or the weight of the evidence if the defendant were to admit after the completion of the government's case.<sup>111</sup> Which ever consideration is made by the judge, the discretion the court uses to weigh the evidence of an alibi

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<sup>105</sup> *Supra* FN36 (citing *R. v. Rossborough*, 81Cr. App. R 139 (1985)).

<sup>106</sup> *Supra* FN36

<sup>107</sup> *Supra* FN36

<sup>108</sup> *Supra* FN 36

<sup>109</sup> *Regina v. Heuston, Heuston, and Heuston*, 1996 NSW LEXIS 3707.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at \*31-32.

that was improperly noticed must be based on the fundamentals of fairness because there is no distinct language determine what is proper notice and how it should be used.<sup>112</sup>

The caselaw based jurisdictions, such as South Africa and Canada, also allow for great discretion by the justices seeing an individual case.<sup>113</sup> Canada and South Africa appear to authorize a court to use any remedy that is necessary to uphold the standards of fairness and justice within the criminal trial.<sup>114</sup> In conclusion, the goals of developing a fair trial within domestic systems should be integrated into the development of international tribunals because “it is . . . fair to subject international criminal law to analysis in terms of the judicial values of domestic systems.”<sup>115</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> *See generally* notes 75, 82.

<sup>114</sup> *Id.*

<sup>115</sup> *Supra* note 3 at 224-225.