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Alibi Defense Notice Requirments And Remedies For Failure

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CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW

INTERNATIONAL WAR CRIMES PROJECT

RWANDA GENOCIDE PROSECUTION

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR

ISSUE: # 29 ALIBI DEFENSE
NOTICE REQUIRMENTS AND REMEDIES FOR FAILURE

Prepared by Erin Marks
Fall 2002

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I. Introduction and Summary of Conclusions

A. Issue Presented

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 the 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.

B. Summary of Conclusions

Alibi notice rules compel a defendant to offer information regarding the defense of alibi in order to allow the prosecution time to investigate the alibi contention. Since the alibi notice requirement serves to protect the interests of the prosecutor from surprise at trial, courts must take measures to assure proper compliance. When a defendant fails to comply with the notice-of-alibi rules, the standards must also factor the rights of the defendant to a fair and expeditious trial with the interests of the prosecution. Judicial jurisdictions throughout the world have developed an assortment of notice-of-alibi requirements and instituted various methods for remedying non-compliance. Treatment of pre-trial defense discovery for alibi spans from elaborate balancing tests to no notice requirement at all. Rule 67 of the Rules of Evidence and Procedure contains the notice-of-alibi provisions for the International Criminal Tribunal for the former Yugoslavia

(“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR.”)¹ It, however, does not expressly provide any direction on issues of non-compliance.

The ICTR must enunciate a standard to ensure the effectiveness of the notice rule and to uphold the adequate protection of both the rights of the defendant and the interests of the prosecution. The ICTR must consider the implications of the proscribed remedy on the interests of the state in a fair and fully prepared trial and the rights of the accused to a fair and complete defense. The most appropriate remedy for non-compliance in line with the Tribunal’s established proceedings would ideally entail a neutral scheme. A method in line with the Tribunal’s previous determinations lies with an advancement of the particulars of “good cause” shown to activate Rule 67(B). The ICTR can rely on U.S. case law, which has set forth several tests and methods of evaluating and establishing “good cause” in relation to notice-of-alibi rules. If the court finds good cause for failure to provide notice, then the defendant can present alibi evidence. If the defendant cannot convince the judge on good cause, then the alibi evidence must be excluded. The ICTR, however, may not accept a remedy involving total exclusion of alibi evidence. As an alternative, granting a continuance allows presentation of alibi evidence in due time and supports an unbiased scheme. To punish a defendant, the Tribunal could additionally issue criminal sanctions. Criminal sanctions, harsher than continuance, would allow the court to force the defendant to serve jail time for defiance of the notice requirement without interfering in the case at hand. These remedies used together would achieve the greatest balance available and aid the ICTR in conducting a fair, just, and efficient trial.

¹ See discussion *infra*. Parts G, H.

II. Factual Background

Message from Kofi Annan *Secretary-General of the United Nations*

The International Criminal Tribunal for Rwanda delivered the first-ever judgment on the crime of genocide by an international court. This judgment is a testament to our collective determination to confront the heinous crime of genocide in a way we never have before. I am sure that I speak for the entire international community when I express the hope that this judgment will contribute to the long-term process of national reconciliation in Rwanda. For there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and rule of law.²

The mandate of the Tribunal to prosecute individuals for acts of genocide, crimes against humanity, and war crimes serves to build peace and promote reconciliation through accountability. The rules governing the Tribunal include a Statute annexed to Security Council Resolution 955 as well as Rules of Procedure and Evidence and Rules for Defense Counsel adopted by the Judges on July 5, 1995.³ The Prosecutor has responsibility for the full investigation and prosecution of the alleged perpetrators⁴, yet must respect the defendants' right to a fair and expeditious trial. The notion of equality of arms is laid down in Article 20 of the Statute. Specifically, Article 20(2) states, "the accused shall be entitled to a fair and public hearing."⁵ Article 20(4) further provides, "the accused shall be entitled to the following minimum guarantees, in full equality."⁶

² Quote available at < www.ictt.org.> [Reproduced in accompanying notebook at Tab 1].

³ Prosecutor v. Kayishema and Ruzindana, IT-95-1-T paragraphs 1-3 (21 May 1999) *Judgment*. [Reproduced in accompanying notebook at Tab 2].

⁴ *Id.* at paragraph 5.

⁵ *Id.* at paragraph 55.

Defendants are entitled to the right to a legal counsel and the right to have adequate time and facilities to prepare his or her defense.⁷ Several defendants raise the defense of alibi to maintain innocence in alleging their absence from the scene of the crime. Rule 67 of the Rules of Evidence and Procedure indicates that a defendant wishing to assert the alibi defense must provide the prosecution with adequate notice.⁸ When the defense fails to file such notice, the interests of the prosecution and the rights of the defendant clash.

III. Legal Analysis

“Alibi” literally means “elsewhere.”⁹ A defendant offering an alibi defense asserts that he/she was in a different location at the time of the crime to maintain innocence. Alibi defenses provide defendants with the means to surprise and outmaneuver prosecutors at the last minute of trial.¹⁰ During the course of trial, surprise prevents the prosecution from adequately preparing its presentation of the case or proper cross-examination questions for the alibi witnesses. To avoid abuse and further the interests of the state in conducting adequately prepared trials, jurisdictions have promulgated notice-of-alibi requirements.¹¹

Alibi notice rules compel a defendant to offer information regarding the defense of alibi in order to allow the prosecution time to investigate the alibi contention. Such

⁶ *Id.*

⁷ *Id.*

⁸ *See* discussion *infra*. Parts G, H.

⁹ Lori Ann Irish, *Alibi Notice Rules: The Preclusion Sanction*, 51 U. CHI. L. REV. 254, note 1 (1984.) [Reproduced in accompanying notebook at Tab3].

¹⁰ *Id.* at 254.

¹¹ *Id.* at 255.

information may include names and addresses of the alibi witnesses and documents material to the whereabouts of the defendant at the time of the crime. Since the alibi notice requirement serves to protect the interests of the prosecutor from surprise at trial, courts must take measures to assure proper compliance. When a defendant fails to comply with the notice-of-alibi rules, the standards must factor the rights of the defendant to a fair and expeditious trial with the interests of the state. More specifically, the rights of the defendant at issue include the right to a full and fair defense, the right to avoid self-incrimination, the presumption of innocence, and the equality of arms. In determining a remedy to promote compliance and deal with non-compliance, courts must carefully balance the interests of the state with the rights of the accused.¹²

Judicial jurisdictions throughout the world have developed an assortment of notice-of-alibi requirements and instituted various methods for remedying non-compliance. Some courts choose to exclude any evidence in support of alibi when a defendant fails to give the requisite notice. Alternatives to preclusion include granting a continuance of the trial to give the prosecution time to investigate the alibi evidence, prohibiting further pre-trial discovery, instructing the jury on the credibility of the alibi evidence, allowing the jury to draw adverse inferences from the lack of notice¹³, and imposing criminal or contempt sanctions on the defendant.¹⁴

¹² In the case of the ICTR, which has a function in the peace building and reconciliation process, additional considerations counsel against imposition of harsh sanctions for non-compliance.

¹³ Rather than jury instructions, the ICTR chambers could announce a general rule that they will give somewhat less weight to alibi testimony where there has not been compliance with the notice requirement similar to the *Tadic* case ruling on video link testimony.

¹⁴ *Id.* at 276.

Each alternative for remedying failure to provide notice-of-alibi has strong and weak points. Exclusion disallows alibi evidence in a very clear and straightforward manner. Even though exclusion is a very well-defined rule, it may impose undue harshness on the defendant in circumstances where lack of notice can be reasonably justified or where the definition of alibi evidence is foggy. By choosing exclusion, the interests of the state in administrative efficiency clearly dominate the rights of the accused to a complete defense.¹⁵ Giving the court discretion to instruct the jury or evaluate the facts of the case to determine a remedy resolves the issues stemming from standardized and rigid rules, yet takes away the luxury of predictability. Flexible rules open to interpretation will also be suspect to grounds for appeal. Alternatively, allowing for a continuance favors the interest of the state in presenting a well-prepared fully investigated case against the defendant and upholds the rights of the defendant, but may not give any effect to the notice requirement and may instead give rise to abuse. Nevertheless, the ICTR must choose some method to remedy non-compliance in order to give effect to the notice-of-alibi standard. The ICTR must therefore consider the implications of the proscribed remedy for non-compliance with a notice-of-alibi rule on the interests of the state and the rights of the accused.

The following discussion outlines the legislative requirements and case law interpretations of several jurisdictions throughout the world pertaining to notice-of-alibi

¹⁵ The issue of fairness is of utmost importance to the Tribunals. The legacy of Nuremburg has suffered criticism based on its supposed bias for the prosecution and alleged ignorance of the rights of the defendant. The Tribunals in Yugoslavia and Rwanda must largely favor the rights of defendants to maintain legitimacy and avoid criticism and attack in the future. *See* MICHAEL P. SCHARF, *BALKAN JUSTICE*, 11-13 (Carolina Academic Press 1997.) [Reproduced in accompanying notebook at Tab 4].

rules. The legislative requirements illustrate the varying techniques used to gather pre-trial information from the defense in order to prevent the prosecution from experiencing undue surprise at trial. Some of the statutes include measures for remedy in case of non-compliance. Case law interpretations, however, best illustrate the methods adopted to deal with failure to provide notice and lend insight into the decision-making process of interpretation. The following discussion will begin with the jurisdictions imposing the harshest penalties for non-compliance and follow with jurisdictions applying more flexible remedies.

Finally, the discussion will consider the treatment by the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) of the alibi defense, its notice requirements, and remedies for non-compliance. Rule 67 of the Rules of Evidence and Procedure contains the notice-of-alibi provisions for the ICTY and ICTR.¹⁶ The existence of the notice-of-alibi rule alone shows the Tribunals’ respect for the interests of the prosecution. The rule also protects the right of the defendant to a complete defense through section B.¹⁷ It, however, does not expressly provide any direction on issues of non-compliance. Cases coming out of the Tribunals address the failure to disclose and shed light on how to consider non-compliance. The cases demonstrate the Tribunals’ attitude in favor of the defendant’s right to a fair trial, full defense, and speedy judgment. The ICTR must enunciate a standard to ensure the effectiveness of the notice rule and the adequate protection of both the rights of the defendant and the interests of the prosecution. The most appropriate

¹⁶ See discussion *infra*. Parts G, H.

¹⁷ See *infra*. note 87.

remedy for non-compliance in line with the established proceedings must therefore follow a path of neutrality.

A. Malaysia

Malaysia imposes the harshest penalties on defendants who fail to comply with the notice-of-alibi rule. To prevent the defendant from acting mischievously by fabricating an alibi, Malaysia relies on a notice-of-alibi statute.¹⁸ Such notice is a condition precedent for the presentation of evidence in support of alibi. Malaysian courts have the freedom therefore to exclude such evidence.¹⁹ This policy deviates from other countries in that it obligates total compliance rather than giving discretion to the court. Section 402A of the Criminal Procedure states:

- 1.) Where in any criminal trial the accused seeks to put forward a defense of alibi, evidence in support thereof shall not be admitted unless the accused shall have given notice in writing thereof to the PP at least ten days before the commencement of trial;
- 2.) The notice required by subsection (1) shall include particulars of the place where the accused claims to have been at the time of the commission of the offense with which he is charged together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.²⁰

“If a trial court having considered the evidence put forward by the defense holds that such evidence amounts to evidence in support of alibi for which no notice under S402A of the Criminal Procedure Code has been given, then he has no discretion in the

¹⁸ Public Prosecutor v. Ho Jin Lock, 3 M.L.J. 625, 1999 M.L.J. LEXIS 712, 70 (July 31, 1999). [Reproduced in accompanying notebook at Tab 5].

¹⁹ *Id.* at 71-72.

²⁰ *Id.*

matter but to exclude such evidence.”²¹ The *Lim* court deciphered the elementary difference between a bare denial and an alibi defense. The claim “I did not do it. I was not there. I was elsewhere,” constitutes a bare denial.²² To raise alibi, the defense must disclose an alternative location and what he/she was doing at the time of the committed offense.²³ Evidence stemming from a bare denial is always admissible, while evidence of alibi must be disclosed in compliance with the notice-of-alibi rule.²⁴ Exclusion by the trial court of the totality of the defense’s evidence in *Lim*’s trial constituted error because the evidence partially supported a denial and partially furthered an alibi defense.²⁵

Malaysian courts have also labored over the definition of “evidence in support of alibi” due to the measure that such evidence must be excluded without prior notice.²⁶ Defendants who fail to give the requisite notice contend that the evidence at issue is not in support of alibi, but rather something else. Where such evidence refers to a day or time different from that specified in the initial charge or where a charge is amended during the trial with reference to the date, time, or place set out in the original charge, the defense must disclose according to the notice-of-alibi rule, or face the exclusion of such

²¹ *Chin Keon Lim v. Public Prosecutor* (hereinafter “PP”), 497 M.L.J.U. 1, 2 (1995) citing *Ku Lip See v. PP* 1 M.L.J. 194, 196 (1982). [Reproduced in accompanying notebook at Tab 6].

²² *Lock*, 3 M.I.L.J. at 77.

²³ *Id.*

²⁴ *Lim*, 497 M.L.J.U. at 2 citing *Vasaan Sing v. PP* 3 M.L.J.

²⁵ *Lim*, 497 M.L.J.U. at 3-4.

²⁶ *Lock*, 3 M.I.L.J. at 73.

evidence.²⁷ Otherwise, a factual analysis must give direction regarding the exclusion or allowance of the submission of evidence in seemingly ambiguous cases.²⁸ A factual inquiry determining whether particular evidence supports an alibi defense entails a consideration of the nature of the offence, the particulars given in the indictment, the materiality of the amendment, and the type of alibi evidence to be presented.²⁹

The Malaysian approach mandating exclusion is not appropriate for the ICTR. It heavily favors the interests of the prosecution, while sacrificing the rights of defendants. Adopting this approach would compromise the integrity of the ICTR in conducting fair and just trials. Therefore, mandatory exclusion cannot remedy issues of non-compliance with notice-of-alibi rules in the ICTR.

B. United States

The United States' federal law includes a detailed notice-of-alibi requirement in its Federal Rules of Criminal Procedure. Several U.S. states have alibi notice requirements as well. Federal and state courts offer various interpretations of the notice-of-alibi rule and have crafted an assortment of methods to handle non-compliance. Such methods generally take into account the right of the defendant to a fair trial and complete defense with the right of the prosecutor to a fair trial and well-prepared prosecution. Further, courts have to consider the defendant's constitutional privilege to avoid self-incrimination under the fifth-amendment and right to due process under the fourteenth-amendment. The legislation and case law pertaining to the alibi defense and its notice

²⁷ Lock, 3 M.I.L.J. at 73-74.

²⁸ *Id.* at 74.

²⁹ *Id.*

requirements has evolved throughout time to respect the rights of both sides in a criminal trial.

The Federal Rules of Criminal Procedure include a specific provision detailing the reciprocal requirements of notice for alibi evidence as well as instruction on what to do when either party fails to comply. The U.S. federal notice-of-alibi requirement³⁰ provides in pertinent part:

(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 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.

(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.

³⁰ FED. RULE. CRIM. P. 12.1 (2002). [Reproduced in accompanying notebook at Tab 7].

(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.

Several states have similar notice-of-alibi rules. Cases scrutinizing state notice standards set forth the theoretical principles behind the rules requiring notice of alibi. Case law interpretations provide further insight into the remedies for failure to comply with notice requirements. The U.S. Supreme Court has also spoken about the constitutionality of state alibi notice requirements with respect to the fifth- and fourteenth amendments. A snapshot into some key issues arising in state legislation and jurisprudence regarding notice of alibi follows to explore the rights involved in presenting the alibi defense as well as possible remedies for failure to comply.

The discussion will begin with an overview of two U.S. Supreme Court cases that have examined the constitutionality of notice-of-alibi rules. These cases guide the proper construction of the notice-of-alibi rules in the U.S. The discussion follows with an examination of Ohio, Michigan, and Kansas case law offering instruction on how to remedy notice-of-alibi non-compliance. Ohio provides a general rule about the admissibility of evidence in situations of non-compliance for the interests of justice. Michigan gives a helpful test to determine when to allow alibi evidence without pre-trial notice. Finally, Kansas sets forth a seven- part check list to determine when good cause can alleviate the notice-of-alibi requirement and justify the admissibility of alibi evidence. These cases illustrate several avenues the ICTR may follow to remedy notice-of-alibi non-compliance in line with the established ICTR proceedings.

In *Williams v. Florida*, the U.S. Supreme Court upheld the constitutionality of Florida's notice-of-alibi rule.³¹ The Florida rule requires a defendant to submit information during pre-trial discovery regarding the intention to rely on the alibi defense.³² The prosecution must then provide the defendant with the witnesses to be offered in rebuttal of such defense.³³ The stipulated sanction for failure to comply is the exclusion at trial of the defendant's alibi evidence, or of the prosecution's rebuttal evidence.³⁴ The state designed the notice-of-alibi rule "to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."³⁵ This notice-of-alibi requirement complies with the United States Constitution as it does not infringe on a defendant's fifth-amendment right to avoid self-incrimination, or fourteenth-amendment right of due process.³⁶ The privileges afforded by the fifth-amendment do not include allowing the defendant to wait until the end of the prosecution's case to announce the nature of the defense.³⁷

The U.S. Supreme Court returned to the subject of notice-of-alibi rules in *Wardius v. Oregon*. Following *Williams*, the constitutionality of alibi notice requirements rests on

³¹ *Williams v. Florida*, 399 U.S. 78 (1970). [Reproduced in accompanying notebook at Tab 8].

³² *Id.* at 80.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 82.

³⁶ *Id.* at 86.

³⁷ *Id.* at 85.

“whether the defendant enjoys reciprocal discovery against the State.”³⁸ The *Wardius* Court reversed an Oregon trial court’s refusal to permit a defendant’s presentation of alibi evidence because the defendant failed to give notice according to the statute. The Supreme Court found the Oregon notice-of-alibi statute unconstitutional because the lack of reciprocity violated fourteenth amendment due process guarantees.³⁹

To begin examination of U.S. state laws, the Ohio notice-of-alibi rule, Crim. Rul.

12.1 states:

Whenever a defendant in a criminal case proposes to offer testimony to establish an alibi on his behalf, he shall, not less than **seven** days before trial, file and serve upon the prosecuting attorney a notice in writing of his intention to claim alibi. The notice shall include specific information as to the place at which the defendant claims to have been at the time of the alleged offense. If the defendant fails to file such written notice, the court may exclude evidence offered by the defendant for the purpose of proving such alibi, unless the court determines that in the interest of justice such evidence should be admitted.

The notice requirement serves to protect the prosecution from false and fraudulent alibi claims often presented immediately before trial to ambush the prosecution and prevent it from investigating the credibility and reliability of any alibi witnesses.⁴⁰ The interests of justice may require admission of untimely filed alibi testimony “if the alibi testimony does not surprise or otherwise prejudice the

³⁸ *Wardius v. Oregon*, 412 U.S. 470, 471 (1973). [Reproduced in accompanying notebook at Tab 9].

³⁹ *Id.*

⁴⁰ *City of Hamilton v. Rose*, 2001 Ohio App. LEXIS 1918, 19 (May 24, 2002) (holding that the failure of counsel to file a notice of alibi did not indicate a deficient performance, per se, as such omission was a trial tactic) citing *State v. Clinksdale*, 1999 Ohio App. LEXIS 6453, 4 (Dec. 23 1999). [Reproduced in accompanying notebook at Tab15].

prosecution's case and if the defense operated in good faith when it failed to give proper notice of the alibi defense."⁴¹

The notice-of-alibi statutes in Michigan, MCL 768.20(1); MSA 28.1043(1), provide that a defendant must notify the prosecutor of the intention to present alibi testimony and raise the alibi defense at least **ten** days before commencement of trial. If a defendant fails to comply with the notice-of-alibi requirements, the trial court has discretion to exclude alibi testimony.⁴² In *Travis*, the court adopted the test from *U.S. v. Meyers* for a judge's exercise of discretion for the Michigan notice of alibi statute.⁴³ Under the *Meyers* test, when deciding whether to allow alibi witnesses despite a notice violation a judge must consider prejudice, the reason for nondisclosure, the extent to which the harm from nondisclosure was mitigated by subsequent events, the weight of the evidence against the defendant and other relevant factors.

As exclusion of such evidence is a severe remedy, courts need to weigh the competing interests and allow exclusion only in the most egregious cases.⁴⁴ The purpose of the notice statute is to avoid unfair surprise at trial.⁴⁵ Notice-of-alibi statutes further

⁴¹ *State v. Smith*, 50 Ohio St. 2d 51, 53-54 (1977). [Reproduced in accompanying notebook at Tab 10].

⁴² *People v. Travis*, 443 Mich. 668, 679; 505 N.W. 2d 563 (1993). [Reproduced in accompanying notebook at Tab 11]. *See also* *People v. Bieri*, 2000 Mich. App. LEXIS 2376, 12-13 (Mich. Ct. App. May 9, 2000). [Reproduced in accompanying notebook at Tab 12].

⁴³ *Travis*, 443 Mich. at 683-84. *See also* *U.S. v. Meyers*, 550 F. 2d 1036 (5th Cir. 1977). [Reproduced in accompanying notebook at Tab 13].

⁴⁴ *People v. Meritt*, 396 Mich. 67, 82; 238 N.W. 2d 31 (1976). [Reproduced in accompanying notebook at Tab 14].

liberal discovery by ensuring that both parties have the maximum amount of information before trial and are not taken by surprise during trial.⁴⁶ Courts must therefore analyze the right of the prosecutor to investigate the merits of the alibi balanced with the right of the defendant to produce witnesses in deciding to exclude alibi evidence.⁴⁷

The notice-of-alibi rule in Kansas requires a defendant to provide notice in writing of an intention to raise the alibi defense stating the alternative location and the witnesses in support of such proposition.⁴⁸ Notice must be served on the prosecutor at least **seven** days before commencement of the trial.⁴⁹ In order for the trial court to allow the late endorsement of an alibi witness, a defendant must demonstrate good cause for the delay. Good cause does not stem from a defendant's ignorance of the witness' names with knowledge of their addresses. The *Gibson* court refused to recognize good cause in the delayed discovery of an alibi witness until the morning of trial.⁵⁰ Given the ease with which an alibi can be fabricated, the notice-of-alibi requirement serves to protect the State from such 11th hour defenses.⁵¹

⁴⁵ *Travis*, 443 Mich. at 675-76.

⁴⁶ *Wardius*, 412 U.S. at 473.

⁴⁷ *Bieri*, 2000 Mich. App. LEXIS 2376 at 14-15.

⁴⁸ K.S.A. § 22.3218(1) and (2). [Reproduced in accompanying notebook at Tab 17].

⁴⁹ *Id.*

⁵⁰ *State v. Gibson*, 52 P. 3d 339, 351 (2002). [Reproduced in accompanying notebook at Tab 16].

⁵¹ *Id.* at 350-51.

Unless the defendant gives notice to the effect of alibi, the court may exclude such evidence within its sound discretion.⁵² The Supreme Court of Kansas in *Bright* established guidelines for trial courts to consider in deciding the admissibility of witnesses called to the stand without the necessary pre-trial disclosure.⁵³ If a defendant fails to comply with the disclosure rules compelling pre-trial notice of defense witnesses, but seeks to call such witnesses at trial, courts should adhere to the following directions:

- 1.) Inquire why the witness or witnesses were not disclosed;
- 2.) Determine when the witness first became known to defense counsel, and whether the nondisclosure was willful or inadvertent;
- 3.) Determine whether the proposed testimony is trivial or substantial, whether it goes to an important or minor issue;
- 4.) Determine the extent of prejudice to the State, and the importance of the witness to the defense;
- 5.) Determine any other relevant facts;
- 6.) Grant the State a recess if prejudice can be avoided or reduced by such action; and
- 7.) Avoid imposing the severe sanction of prohibiting the calling of the witness if at all possible. This should be viewed as a last resort.⁵⁴

The defendant in *Bright* sought to introduce four witnesses at trial without first having complied with the disclosure rules. In deciding that the trial court did not

⁵² *State v. Claibourne*, 262 Kan. 416 (1997). [Reproduced in accompanying notebook at Tab 18].

⁵³ *State v. Bright*, 229 Kan. 185, 194 (1981). [Reproduced in accompanying notebook at Tab 19].

⁵⁴ *Id.*

commit reversible error by excluding the witnesses, the *Bright* Court relied on the strength of the State's case and the complete failure of the defendant to offer disclosure or explain his non-compliance.

The legislation and jurisprudence out of the United States demonstrate many options the ICTR can adopt in remedying non-compliance with the notice-of-alibi requirement. Rule 67 closely resembles the U.S. federal and state criminal procedure rules. The reciprocity requirement mandated by the U.S. Supreme Court, for example, is present in the ICTR Rule 67. The U.S. rules, however, clearly define sanctions for non-compliance. In addition, U.S. case law has evolved to include a well-structured set of guidelines to govern situations of non-compliance with the notice-of-alibi regulation. The good cause standards set forth in the *Bright* case out of Kansas fit especially well with the established proceedings of the ICTR and would appropriately build upon the principles of the ICTR. The only problem is that the ICTR may not embrace the concept of exclusion in any case, which is the remedy of last resort in the *Bright* test. U.S. legislation and case law nevertheless provide an array of procedures to remedy non-compliance with notice-of-alibi rules that would easily correspond with the proceedings and principles of the ICTR.

C. Canada

Canada uses a more lenient approach to sanction defendants who fail to provide pre-trial notice-of-alibi. Canadian courts first compel defendants to comply with a notice-of-alibi requirement. Failure to disclose particulars of the alibi defense opens the door for the jury to draw an adverse inference. Where the prosecution submits evidence

in proof of a fabrication or concoction of an alibi story by the defendant, the jury may infer guilt. Several Canadian cases further illustrate the method of the Canadian courts in handling non-compliance with the notice-of-alibi requirement.

The following statute comes from the Criminal Procedure Rules of the Supreme Court of the Northwest Territories and lends insight into the Canadian standard:
Disclosure by defense:

- (1) While the accused is not required to make disclosure of its case where the accused intends to call evidence, it is expected that sufficient information will be disclosed for the prosecutor to understand what the substance of the defense case will be.
- (2) Without limiting the generality of sub-rule (1), the accused is expected to disclose particulars respecting the following:
 - a. An alibi defense, including the names of any witnesses to the alibi, if not previously disclosed.⁵⁵

Expounding on the above legislation, several cases out of Canada follow an indistinguishable guideline for failure to notify on the defense of alibi. Failure to notify without evidence of fabrication leads to either a weakened defense or an adverse jury inference about the weight of the evidence. Failure to notify with independent evidence of concoction leads to an inference of guilt. In *R. v. Hibbert* the accused appealed on grounds that the trial judge erred in telling the jury they could infer guilt from a disbelieved alibi when there was no extraneous evidence of fabrication or contrivance.⁵⁶

⁵⁵ Criminal Procedure Rules of the Supreme Court of the Northwest Territories Part 14, Section 85, *Disclosure by Defense*. [Reproduced in accompanying notebook at Tab 20].

⁵⁶ *R v. Hibbert*, 2002 S.C.C.D. LEXIS 57; [2002] S.C.C.D. 260.80.25.00-01, 2 (April 25, 2002). [Reproduced in accompanying notebook at Tab 21].

The court conceded that the instructions on alibi were defective.⁵⁷ “[I]t is open to the trial judge to direct the jury that proof the alibi has been fabricated is evidence of guilt provided there exists extrinsic or independent evidence of fabrication. The mere rejection of alibi evidence does not, however, lead to an inference that the alibi was fabricated.”⁵⁸ In the absence of some evidence of concoction, a disbelieved alibi has no evidentiary value and cannot constitute positive incriminating evidence. Thus, the court found an error in the jury instructions.⁵⁹

In another case, the court refused to recognize evidence as alibi evidence because it lacked specificity and indicated the wrong time. The defendant in *R v. Cleghorn* appealed a conviction on drug charges. At trial, he asked the court to recognize a conversation his mother had with the police as notice-of-alibi.⁶⁰ The court noted that improper disclosure of alibi could weaken the defense and allow the jury to draw an adverse inference.⁶¹ Failure to disclose, however, could not prompt an exclusion of the alibi defense altogether. Pre-trial alibi disclosure allows prosecution and police sufficient time to investigate the alibi evidence.⁶² In this case, the court found vague and ambiguous the statement to police by appellant's mother allegedly constituting notice-of-

⁵⁷ *Id.*

⁵⁸ *R v. Letourneau*, 87 C.C.C. 3d 481 (1994). [Reproduced in accompanying notebook at Tab 22].

⁵⁹ *Id.* at 3.

⁶⁰ *R v. Cleghorn*, 15 T.L.W.D. 1522-010; 1995 T.L.W.D. LEXIS 5871 (1995). [Reproduced in accompanying notebook at Tab 23].

⁶¹ *Id.*

⁶² *Id.*

alibi. It furthered no meaningful investigation on the part of the police. Moreover, the timing specified by the accused mother did not correspond to the time of the offense. The conversation therefore failed to put police on notice as to the alibi, as it lacked the assertion that the accused was not present at the time and location of the crime.⁶³

Finally, this last case illustrates a situation where the court instructs the jury on its ability to infer guilt due to independent evidence of fabrication. At trial in *R v. Hinde*, the accused failed to notify the police or the Crown about his intention to offer a witness as evidence of alibi.⁶⁴ The accused, however, denied having been at the scene of the crime and testified he was with two other people, one who died and the other who moved away. The trial court convicted the accused for breaking and entering, assault, and uttering a threat.⁶⁵ The judge instructed the jury to give less weight to any evidence in support of alibi and suggested the jury could infer guilt upon a conclusion that the alibi evidence was fabricated due to the failure of the defense to provide adequate pre-trial notice.⁶⁶

On appeal of his conviction, the accused contended that the trial judge erred in his instructions on the issue of alibi. Defendant's evidence presented at trial amounted to an alibi defense even though he merely asserted he was elsewhere. The appellate court held that the trial judge could have said anything about the late disclosure of alibi and that he did not err in giving the instruction.⁶⁷ However, the instruction regarding an inference of

⁶³ *Id.*

⁶⁴ *R v. Hinde*, 52 W.C.B. (2d) 143; 2001 W.C.B. LEXIS 4356, 2 (2001). [Reproduced in accompanying notebook at Tab 24].

⁶⁵ *Id.*

⁶⁶ *Id.* at 2-3.

guilt stemming from a false alibi was erroneous given the absence of evidence of concoction. Nevertheless, the jury did not believe any of the accused's evidence leaving the inference of guilt from presentation of a false alibi a moot point.⁶⁸

Since the ICTR lacks the jury element, application of the Canadian standard would require alteration. The judge residing over the trial chamber in the ICTR would either give less weight to the alibi evidence introduced without pre-trial notice or adopt and adverse inference of guilt depending on independent evidence of fabrication. This procedure supports the rights of the defendant by avoiding the imposition of harsh penalties for good faith failures to provide pre-trial notice-of-alibi. The element allowing an inference of guilt when lack of notice accompanies independent evidence of fabrication, however, substantially quashes the notion of a fair trial for the defendant. To convict as guilty based on the fabrication of an alibi ignores the principles and procedures guaranteeing a fair trial for the defense. The sanction is too harsh for the ICTR, as it would instigate unnecessary controversy about the fairness to defendants.

D. United Kingdom

Next, law out of the United Kingdom ("U.K.") offers a more lenient approach in remedying non-compliance with notice-of-alibi rules. The following discussion will begin with an examination of the legislation covering notice-of-alibi. U.K. legislation comprehensively covers the process to follow with regard to alibi evidence. Such notice must detail the particulars of the evidence including the logistical information about the alibi witnesses and any other material information about them. The statute expressly

⁶⁷ *Id.* at 2.

⁶⁸ *Id.* at 3.

stipulates on how to handle a failure to give pre-trial notice-of-alibi. If the defendant fails to comply, the court has discretion to make comments or draw inferences where appropriate. The discussion will follow with an overview of a few U.K. cases that have considered the issue of non-compliance with the notice-of-alibi rule. Analysis of U.K. case law involving the alibi defense and its notice standards illustrates reluctance on part of U.K. courts to exclude alibi evidence or even give less weight to such evidence in the event of non-compliance. Finally, application of U.K. policies and procedures to those of the ICTR will complete the analysis of U.K. law regarding notice-of-alibi and non-compliance.

U.K. legislation requiring the accused to serve notice of its intention to offer alibi evidence at trial is very extensive. The rule first requires a defendant to give the court and the prosecutor a written defense statement setting out the general nature of the defense, the issues unsettled with the prosecutor, and the rationale for such issues.⁶⁹

With respect to the alibi requirements, the act maintains:

(7) If the defense statement discloses an alibi the accused must give particulars of the alibi in the statement, including:

(a) the name and address of any witness the accused believes is able to give evidence in support of the alibi, if the name and address are known to the accused when the statement is given;

(b) any information in the accused's possession which might be of material assistance in finding any such witness, if his name or address is not known to the accused when the statement is given.

(8) For the purposes of this section evidence in support of an alibi is evidence tending to show that by reason of the presence of the accused 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

⁶⁹ Criminal Procedure and Investigations Act 1996, Ch. 25, § 5 (Eng.) Butterworths U.K. Statutes (2002). [Reproduced in accompanying notebook at Tab 25].

have been committed at the time of its alleged commission.

(9) The accused must give a defense statement under this section during the period which, by virtue of section 12, is the relevant period for this section.⁷⁰

If the defense fails to comply with the notice-of-alibi requirement,⁷¹ the court may make such comment as appears appropriate or draw inferences as appear proper in deciding the defendant's guilt. If the accused puts forward a defense different from that spelled out in the defense statement, the court shall take into account the extent of the difference between defenses and the extent of any justification.⁷² A conviction, however, cannot rest solely on an inference allowed under this section.⁷³

An overview of U.K. case law contemplating the aforementioned regulation brings light to a few issues stemming from this relaxed approach. The following survey of cases will demonstrate the unwillingness of U.K. courts to exclude alibi evidence and shed

⁷⁰ *Id.*

⁷¹ Criminal Procedure and Investigations Act 1996, Ch. 25, § 11 (Eng.) Butterworths U.K. Statutes (2002). [Reproduced in accompanying notebook at Tab 26]. Following are the specifics laid out in the statute regarding the situations involving faults in disclosure.

(1) This section applies where section 5 applies and the accused . . .

(e) at his trial adduces evidence in support of an alibi without having given particulars of the alibi in a defense statement given under section 5, or

(f) at his trial calls a witness to give evidence in support of an alibi without having complied with subsection (7)(a) or (b) of section 5 as regards the witness in giving a defense statement under that section.

(2) This section also applies where section 6 applies, the accused gives a defense statement under that section, and the accused . . .

(d) at his trial adduces evidence in support of an alibi without having given particulars of the alibi in the statement, or

(e) at his trial calls a witness to give evidence in support of an alibi without having complied with subsection (7)(a) or (b) of section 5 (as applied by section 6) as regards the witness in giving the statement.

⁷² *Id.*

⁷³ *Id.*

light on a few issues of decided distinction. Of notable importance is the dilemma arising from charges of a continuing nature. U.K. courts have decided that evidence introduced to maintain innocence against charges of a continuing nature does not constitute alibi evidence. Consequently, the notice-of-alibi statute is inapplicable to charges of a continuing nature. The following paragraphs will overview two cases that have dealt with alibi and crimes of a continuing nature and one that has denied exclusion as a remedy for non-compliance. Overall, these cases demonstrate the reluctance of the U.K. to impose harsh sanctions for failure to provide pre-trial notice-of-alibi.

Counsel for the accused failed to present notice of alibi before commencement of trial in *R v. Benyon*.⁷⁴ The accused was charged on an indictment with seven counts of indecent assault over several years between 1991 and 1997.⁷⁵ His representation of counsel changed once before trial. His first attorney considered the alibi defense and its notice requirements. The second attorney, who conducted the trial, did not advise the accused of the alibi defense or alibi notice requirement.⁷⁶ After presentation of evidence, the judge released the jury to discuss the alibi defense with counsel. Counsel for the accused admitted his late realization that the case revolved around alibi. The judge consequently discharged the jury and called a mistrial.⁷⁷

⁷⁴ *R v. Benyon*, Transcript: Smith Bernal, 2-3 (C.A. 1999). [Reproduced in accompanying notebook at Tab 27].

⁷⁵ *Id.* at 2.

⁷⁶ *Id.*

⁷⁷ *Id.* at 3.

Further, the judge reserved the question of wasted costs. The issue in determining wasted costs boiled down to the negligence of counsel; whether any competent counsel in the same situation would have advised his client before trial about the alibi defense and its notice requirements.⁷⁸ The court explained that “asserting a continuous offense that could take place on any number of days at any time over a substantial period at some undefined place . . . seems to us unlikely to be an alibi case. . . .”⁷⁹ Accordingly, the judge should not have declared negligence and wasted costs were to be assumed by the public.⁸⁰

Several other cases out of the U.K. deal with defendant’s failure to provide notice-of-alibi. The defendant in *R v. Hassan* appealed an order by the court to exclude evidence for lack of pre-trial notice-of-alibi.⁸¹ At trial, the court found defendant guilty for living on the earnings of prostitution.⁸² Police observation of the prostitute and her apartment occurred for several weeks. When the police arrived with a search warrant and knocked on the door, they saw a man escaping the apartment. The police identified the defendant as the escapee.⁸³ The defendant, however, sought to introduce evidence that he was elsewhere at the time of the police approach and could not have been the man

⁷⁸ *Id.* at 6.

⁷⁹ *Id.* at 8.

⁸⁰ *Id.* at 8-9.

⁸¹ *R v. Hassan*, 54 Cr. App. Rep. 56 (1969). [Reproduced in accompanying notebook at Tab 28].

⁸² *Id.* at 3.

⁸³ *Id.* at 4.

escaping the apartment. The Crown objected to such evidence because it amounted to “evidence in support of alibi” for which defendant failed to give the requisite notice.⁸⁴ The court exercised its discretion under the notice-of-alibi rule and decided to exclude the alibi evidence.⁸⁵

On the appellate level, the court recognized the difficulties arising from the application of notice-of-alibi requirements to offenses of a continuing nature.⁸⁶ The court asserted that the notice-of-alibi statute contemplates the commission of an offense at a particular place and time.⁸⁷ Defendant sought to introduce evidence that he was not the man the police saw leaving the apartment. Even if the supposed alibi evidence proved that he was in an alternate location on the particular day in question, evidence introduced by the Crown could have ultimately proven his guilt given the continuous nature of the alleged offense. The appellate court found that the notice-of-alibi rule did not apply due to the floating nature of the charge and decided that the trial court erred by excluding such evidence.⁸⁸

The court in *Nangle* gave a full alibi direction⁸⁹ despite the failure of the accused to offer notice-of-alibi. The accused appealed his conviction of robbery and burglary based

⁸⁴ *Id.* at 5.

⁸⁵ *Id.*

⁸⁶ *Id.* at 6.

⁸⁷ *Id.* at 6.

⁸⁸ *Id.*

⁸⁹ *R v. Nangle*, 144 S.J.L.B. 281 (C.A. 2000). [Reproduced in accompanying notebook at Tab 29].

on the failure of his legal advisers to serve notice-of-alibi.⁹⁰ The defendant lied at his trial going along with a scheme introduced by his counsel.⁹¹ He offered evidence amounting to a specific alibi in the course of his evidence-in-chief completely different from anything he stated previously in his discussions with the Crown to further a “wait and see” trial tactic.⁹² Because he was unsure what his ex-girlfriend would say at trial, defendant and his counsel decided to “wait and see.” Consequently, the court found “he was an unsatisfactory witness in many respects.”⁹³ Since the judge gave a full alibi direction, the defendant received exceptionally fair treatment and the appeal was denied.⁹⁴

Thus, U.K. courts generally refuse to exclude alibi evidence for lack of pre-trial notice. The approach of avoiding exclusion may seem attractive to the ICTR given its need to uphold the rights of the defendants in all situations. Allowing the judge full

The judge instructed:

Let me mention the defense raised by the defendant of alibi. It’s a Latin word meaning elsewhere as some of you may know. The defendant says that he was not at the scene of the crime when it was committed. I will go into a little more detail as to how he told us that in due course, but I say this to you . . . as the prosecution have to prove that the defendant’s guilt so that you are sure of it, he does not have to prove that he was elsewhere at the time. On the contrary the prosecution have a duty to disprove the alibi ... Can I say this even if you conclude that the alibi is false, that does not of itself entitle you to convict the defendant. It’s a matter which you may take into account but you should bear in mind that an alibi is sometimes invented to bolster a genuine defense. So that is what I say to you about alibi. *Id.* at paragraph 59.

⁹⁰ *Nangle*, 144 S.J.L.B. at paragraph 6.

⁹¹ *Id.* at paragraph 48.

⁹² *Id.* at paragraphs 31-33.

⁹³ *Id.* at paragraph 49.

⁹⁴ *Id.* at paragraph 50.

discretion to determine a remedy for non-compliance, however, would give rise to abuse in the form of “wait and see” trial tactics, numerous appeals by defendants claiming injustice, and criticism by outsiders questioning fairness. Moreover, the U.K. approach views crimes of a continuing nature unfit for application of the alibi defense. The notice rule therefore is essentially inapplicable to defendants charged with crimes of a continuing nature. For the ICTR, this perspective would completely disable the notice-of-alibi rule given the continuing nature of war crimes. Generally, defendants must evidence a pattern for conviction of war crimes to stand. Specifically, war crimes in Rwanda occurred over several months. By adopting the U.K. approach the ICTR would achieve its goal to uphold the rights of defendants in any event, but would deny ICTR decisions illustrating a desire to give effect to Rule 67 and ignore the interests of the prosecution in a fair trial free from surprise. Thus, the U.K. method to handle non-compliance with notice-of-alibi diverges too sharply from the policies and procedures important to the ICTR.

E. Scotland

Under Scottish law, defense counsel must disclose any plea of the defense of alibi ten days prior to the commencement of trial. The defense must then provide the prosecution with a list of the alibi witnesses three days prior to trial.⁹⁵ Scottish law goes further by requiring the accused to submit to an examination, in the presence of counsel, by the prosecutor.⁹⁶ The “judicial examination” serves three purposes:

⁹⁵ See Brian Edward Maud, *Article: Reciprocal Disclosure in Criminal Trials: Stacking the Deck Against the Accused, or Calling Defence Counsel’s Bluff*, 37 ALBERTA L. REV. 715, 720 (1999). [Reproduced in accompanying notebook at Tab 30].

- 1.) To permit the accused an early opportunity to challenge the prosecution's case and to state his or her position in relation to the charge;
- 2.) To give the prosecution an early opportunity to hear the accused's explanation and to prevent the subsequent fabrication of false defenses; and
- 3.) To allow the accused an opportunity to challenge the accuracy or fairness of the alleged statements obtained by the police.⁹⁷

Scottish law thus requires the defendant to produce and provide extensive information about the defense during the pre-trial stage. If the defendant or any defense witnesses at trial presents evidence that could have been disclosed at the judicial examination in answer to a question the defendant declined to answer, then the court, the prosecution, and any co-defendant may make adverse comment.⁹⁸

Several cases exemplify application of this standard in practice. The cases show that a trial judge has relatively wide discretion to instruct a jury about a defendant's silence at the judicial examination stage.⁹⁹ For example, in the McEwan case, the defendant appealed a conviction for assault and robbery based on the jury instructions regarding the purpose of the judicial examination read by the judge before the transcript

⁹⁶ *See Id.*

⁹⁷ *Id.* citing G.D. McKinnon, *Accelerating Defence Disclosure: A Time for Change*, 1 CAN. CRIM. L. R. 59, 62.

⁹⁸ Kevin Dawkins, *Article: Defence Disclosure in Criminal Cases*, 2001 NZ Law Review 35, 58 (2001). [Reproduced in accompanying notebook at Tab 31].

⁹⁹ See *Hicks v. Her Majesty's Advocate*, 2002 S.C.C.R. 398 (2002). [Reproduced in accompanying notebook at Tab 32]; Note of Appeal against Conviction of *McEwan & Another v. Her Majesty's Advocate*, 1992 S.L.T. 317, 1990 S.C.C.R. 401 (1990). [Reproduced in accompanying notebook at Tab 33].

from the examination.¹⁰⁰ During the judicial examination, the defendant refused to comment including making any statement about an alibi. He continuously refused to answer the questions during the examination upon the advice of his solicitor.¹⁰¹ At the trial level, he raised the special defense of alibi and presented evidence to support the defense.¹⁰² The judge then instructed the jury that the purpose of the judicial examination was to “give an innocent man the opportunity of declaring his innocence, to prevent false alibis, and to give the accused an opportunity of denying or explaining any statements the police say he has made.” The appellate court held that a trial judge has discretion on instructing the jury about the purpose of the judicial examination and that a trial judge may also comment on a defendant’s silence during the judicial examination, but all comments must be advanced with restraint.¹⁰³ In this case the comments were within the limits of the law as the jury was entitled to consider the significance of the judicial examination in assessing the credibility of the defendant.¹⁰⁴

This next case demonstrates the consequences of an improper jury instruction on a defendant’s silence at judicial examination. In the McGhee case, the defendant appealed a conviction of murder on the grounds that the judge had not properly detailed the alibi evidence and had failed to provide the jury with defendant’s reason for remaining silent

¹⁰⁰*McEwan*, 1992 S.L.T. 317, 1990 S.C.C.R. 401 at 6.

¹⁰¹ *Id.* at 7.

¹⁰² *Id.* at 2.

¹⁰³ *Id.* at 8.

¹⁰⁴ *Id.* at 9.

at the judicial examination.¹⁰⁵ In his jury instructions, the judge stated if the defendant had told his lawyer about the alibi before the judicial examination, “would it not be extraordinary that the lawyer should tell Mr. McGhee not to say anything and not to give that account and just to say ‘No Comment’?”¹⁰⁶ The appellate court held that the judge’s instructions about the defendant’s answers at judicial examination were not made with restraint and had surpassed the permissible limits of the law.¹⁰⁷ The comments were inappropriate because the judge attempted to impress his perspective on matters of fact upon the jury, neither side presented evidence about the defendant’s conversation with his attorney before the judicial examination, and the judge had failed to offer the defendant’s explanation for the ‘no comment’ responses.¹⁰⁸ The jury verdict was thus set aside and a new prosecution ordered.¹⁰⁹

Scottish law therefore gives wide discretion to the trial judge to instruct on the silence of defendant’s at the judicial examination stage regarding the alibi defense. This method offers great flexibility to the judge on a case-by-case basis. Predictability under this remedy suffers, however, as neither the prosecution nor the defense can rely on protection by the rule. Giving complete discretion to the trial judge opens the door for numerous appeals as evidenced by the above cases. Moreover, the interests of the prosecution and the rights of the defense vary in degrees of protection with great

¹⁰⁵ McGhee v. Her Majesty’s Advocate, 1991 S.C.C.R. 510, 5 (1991). [Reproduced in accompanying notebook at Tab 34].

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2-3.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 11.

volatility. This rule seems to favor only the opinion of the trial judge, which can differ on any given day. The ICTR needs to promote laws with certain outcomes to ensure the proper balance between the rights of the defendant and the interests of the prosecution. This remedy is therefore inappropriate for the ICTR.

F. South Africa

South African law does not require the defense to provide the prosecution with notice-of-alibi before trial. The rationale justifying this digression from other jurisdictions can be inferred from the following case. *S v. Nassar* dealt with the disclosure requirement of the prosecution.¹¹⁰ The prosecution pointed out the intrinsic unfairness in requiring the state to disclose the statements of its witnesses without any reciprocal duty on the defendant.¹¹¹ The court discussed the defendant's right to a fair trial and explained the giant advantage enjoyed by the prosecution.

The State inevitably enjoys an enormous advantage in a criminal trial. It has the might of the police force at its disposal, it has a specialised prosecuting authority, it has access to expert witnesses and modern method of communication and, not least, it has the power to legislate procedures to be followed.¹¹²

South African courts thus find the interests of the state inherently protected through the structure of the criminal justice system. To redress the imbalance, defendants have the right to a fair trial under the civil rights Article 12.¹¹³ This right to a fair trial in South

¹¹⁰ *S v. Nassar*, 1994(5) B.C.L.R. 60, 1994 S.A.C.L.R. LEXIS 286 (High Court Namibia, September 21, 1994). [Reproduced in accompanying notebook at Tab 35].

¹¹¹ *Id.* at 87.

¹¹² *Id.* at 88.

¹¹³ *Id.*

Africa is so strong that it precludes the imposition of any pre-trial discovery rules on defendants.¹¹⁴ South Africa's distinct approach lends perspective to the discussion by illustrating the argument for interpreting rules principally in favor of the rights of the defendant. This approach, however, is inapplicable to the ICTR given the existence of a notice-of-alibi requirement.

G. ICTY

The International Criminal Tribunal for the Former Yugoslavia requires an accused to notify the Prosecutor of the intent to raise the alibi defense. The relevant provisions of Rule 67: Reciprocal Disclosure of Evidence of the Rules of Procedure and Evidence state that:

- (A) As early as reasonably practicable and in any event prior to the commencement of trial:
 - (ii) The defense shall notify the Prosecutor of its intent to enter:
 - (a) The defense 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;
- (B) Failure of the defense to provide such notice under this Rule shall not limit the right of the accused to rely on the above defenses.¹¹⁵

The Yugoslav Tribunal Appeals Chamber in *Prosecutor v. Aleksovski* dealt with the issue of timing and defenses.¹¹⁶ The Appeals Chamber decided that individuals before

¹¹⁴ *See id.*

¹¹⁵ JOHN E. ACKERMAN & EUGENE O'SULLIVAN, PRACTICE AND PROCEDURE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA WITH SELECTED MATERIALS FROM THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 332 (Kluwer Law International year). [Reproduced in accompanying notebook at Tab 36].

the Tribunal must raise all possible defenses, even in the alternative, during the trial stage as required by the Rules of Procedure and Evidence.¹¹⁷ Rule 67(A), addressing the pre-trial notice requirement of the alibi defense, especially requires prompt attention. The Appeals Chamber observed that an accused cannot generally raise a defense for the first time at the appellate level.¹¹⁸ Otherwise, the Defense limits the Prosecution's ability to cross-examine alibi witnesses and call any rebuttal witnesses. Moreover, an Appeals Chamber would encounter difficulties in assessing a trial judgment where the defendant failed to expressly rely on a defense for which it presented evidence.¹¹⁹

Regarding the information necessary to disclose under Rule 67, the Chamber in *Prosecutor v. Delalic* clarified the specific details constituting proper notice for compliance with the rule.¹²⁰ Identifying information for each witness presented by the Prosecution under Rule 67(A)(i) includes sex, date of birth, names of parents, place of origin and the location of the witnesses' residence at the time relevant to the charges.

¹¹⁶ *Prosecutor v. Aleksovski*, IT-95-14/1-A (24 March 2000) *Judgment*. [Reproduced in accompanying notebook at Tab 37].

¹¹⁷ *Id.* at paragraph 51.

¹¹⁸ *Id.* See also, *Prosecutor v. Tadic*, IT-94-1-A, paragraph 55 (15 July 1999) *Judgment*. [Reproduced in accompanying notebook at Tab 38]; *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, paragraphs 18-20 (16 February 2000) *Decision of Prosecutor's Appeal on Admissibility of Evidence*. [Reproduced in accompanying notebook at Tab 39]. The defenses in both *Delalic* and *Tadic* served the Prosecutor with notice-of-alibi before trial.

¹¹⁹ *Aleksovski*, IT-95-14/1-A at paragraph 51.

¹²⁰ *Prosecutor v. Delalic et al.*, IT-96-21-T, paragraph 20 (18 March 1997) *Decision on the Defense Motion to Compel the Discovery of Identity and Location of Witnesses*. [Reproduced in accompanying notebook at Tab 40].

The Prosecutor need not disclose the current address of a witness.¹²¹ This standard provides the defense with adequate notice and opportunity to investigate the Prosecution’s testimonial evidence and allegations. By clarifying the disclosure rules for the prosecution, the court strikes a balance between the right of the accused to examine witnesses and the right of the victims and witnesses to protection and privacy.¹²²

On the other hand, the *Delalic* Chamber ruled that the language of Rule 67(A)(ii) is clear and unambiguous.¹²³ Rule 67(A)(ii) requires the Defense to provide the Prosecutor, and only the Prosecutor, with the names and addresses of all witnesses to present testimony in support of the defense of alibi.¹²⁴ The Court pointed out the distinction between the disclosure obligations of the Prosecutor pursuant to Rule 67(A)(i) and of the Defense under Rule 67(A)(ii). The Rule requires the Prosecutor to disclose the identity of its witness before trial irregardless of the situation, but obligates the defense to offer pre-trial witness information only to the extent such witnesses further the defense of alibi or other special defense.¹²⁵

In *Prosecutor v. Delalic*, the Trial Chamber additionally ordered the Defense to provide the Prosecution with the names of the witnesses projected to testify at trial, “in

¹²¹ *Id.*

¹²² See *id.* at paragraphs 17-19.

¹²³ Prosecutor v. Delalic et al. IT-96-21-T, paragraph 11 (13 June 1997) *Decision on the Motion to Compel the Disclosure of the Addresses of the Witnesses*. [Reproduced in accompanying notebook at Tab 41].

¹²⁴ *Id.* at paragraph 10.

¹²⁵ *Id.*

writing at least seven working days prior to the testimony of each witness.”¹²⁶ In reaching its decision, the Chamber analyzed Rule 67(A)(ii) and assessed the rights of the parties involved. Rule 67(A)(ii) applies only to pre-trial discovery. The duties of the defendant in providing witness information are limited to alibi witnesses only during the pre-trial stage.¹²⁷ Once trial has begun, the defense has an obligation to inform the Prosecution about its witnesses.¹²⁸ The Trial Chamber expounded on the concepts of a fair trial and equality of arms. All defendants are entitled to a fair trial under Article 21.¹²⁹ The Chamber then pointed to Judge Vorah’s explanation of the concept of equality of arms:

¹²⁶ Prosecutor v. Delalic et al., IT-96-21-PT (4 February 1998) *Decision of the Prosecution’s Motion for an Order Requiring Advanced Disclosure, Disposition*. [Reproduced in accompanying notebook at Tab 42].

¹²⁷ *Id.* at paragraph 33.

¹²⁸ *Id.* at paragraph 41.

¹²⁹ *Id.* Article 21 specifies the Rights of the Accused as follows:

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
 - (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) to be tried without undue delay;
 - (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

The principle is intended in an ordinary trial to ensure that the Defence has means to prepare and present its case equal to those available to the Prosecution which has all the advantages of the State on its side... the European Commission of Human Rights equates the principle of equality of arms with the right of the accused to have procedural equality with the Prosecution.

It seems to me from the above authorities that the application of the equality of arms principle especially in criminal proceedings should be inclined in favour of the Defence acquiring parity with the Prosecution in the presentation of the Defence case before the Court to preclude any injustice against the accused.¹³⁰

The Chamber concluded their decision to compel defendants to disclosure during the course of the trial did not offend the notions of fairness or equality of arms.

The Trial Chamber decided that disregard of the notice-of-alibi rule could lead to the exclusion of any evidence in support of the alibi defense in the *Kupreskic*.¹³¹ Counsel for the accused suggested that he would raise the alibi defense, but failed to provide the requisite notice under Rule 67(A)(ii)(a). The Chamber noted that the accused could testify in furtherance of an alibi due to the existence of Rule 67(B).¹³² The court thus construed Rule 67(B) as affording the defendant the right to testify on his own behalf and avoid self-incrimination. The Chamber finally warned, however, that if counsel failed to

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

(g) not to be compelled to testify against himself or to confess guilt

¹³⁰ *Id.* at paragraph 48.

¹³¹ Prosecutor v. Kupreskic at al., IT-95-16 (11 January 1999) *Decision*. [Reproduced in accompanying notebook at Tab 43].

¹³² *Id.*

file the appropriate alibi notice under Rule 67(A)(ii)(a), the evidence of other witnesses as to alibi was liable to be excluded.¹³³

H. ICTR

The ICTR adheres to the same Rules of Procedure and Evidence as the ICTY. Rule 67 requires the Defense to notify the Prosecution of the intention to enter the defense of alibi and the particulars about the evidence to be presented at trial.¹³⁴ As evidenced by the above discussion, the notice-of alibi requirement reflects the well-established practice in common law jurisdictions throughout the world. It is a necessary requirement to allow the Prosecution the time and information necessary to prepare a case in full. Rule 67, however, largely ignores the issue of non-compliance. The rule stipulates no avenue for sanctioning a defendant given non-compliance or utter disregard. Conversely, failure to provide notice cannot limit the rights of the accused according to Rule 67(B). Section B seems to give the defense a way out of the notice-of-alibi requirement.¹³⁵ This may lead to abuse by defendants in using the rule to promote trial tactics similar to the wait-and-see approach discussed above.¹³⁶ However, the ICTR can follow the United States generally and the ICTY specifically by construing Rule 67(B) as a means to ensure the

¹³³ *Id.*

¹³⁴ *See generally* ANDRE KLIP; GORAN SLUITER, ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, VOLUME II: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994-1999, 255-290 (Antwerpen: Intersentia 2001). [Reproduced in accompanying notebook at Tab 44].

¹³⁵ *See id.* at 290.

¹³⁶ *See* UK case law discussing wait and see.

defendant's privilege to avoid self-incrimination.¹³⁷ Currently in the ICTR, the balancing of rights fall in favor of the defendant while the interests of the prosecution are subject to suffocation without specific direction for remedying failure to provide notice. A few cases lend insight into possible remedies for this oversight and may serve as a foundation from which to build a remedy into Rule 67 for non-compliance.

The defense in *Kayishema and Ruzindana* asked the Trial Chamber to define "alibi". The Trial Chamber found Rule 67 clear and unambiguous and denied the motion. Rule 67 defines "alibi" as the defense in which the accused claims to have been present at a place other than the scene of the alleged crime. After the defense failed to file notice in the *Kayishema and Ruzindana* case,¹³⁸ the prosecutor argued that such failure violated Rule 67(A)(ii)(a), constituted complete disregard of the written order issued by the Trial Chamber requiring immediate disclosure, and demonstrated indifference to the oral reminder by the Trial Chamber regarding alibi disclosure. Even though Rule 67(B) states that failure to provide notice shall not limit the rights of the accused, the prosecutor contended that the rule should not be used to violate the purpose and spirit of the law.¹³⁹ Options for consequences offered by the prosecutor for failure to disclose alibi evidence included prohibiting the use of the alibi defense completely, giving less deference to any

¹³⁷ See US Supreme court case on 5th amendment and ICTY case on self-incrimination.

¹³⁸ Prosecutor v. Kayishema and Ruzindana, ICTR-95- 1-T, 2 paragraph A (3 September 1998) *Decision on the Prosecution Motion for a Ruling on the Defence Continued Noncompliance with Rule 67(A)(ii) and with the Written and Oral Orders of the Trial Chamber*. [Reproduced in accompanying notebook at Tab 45].

¹³⁹ *Id.* at 2 paragraph C.

evidence presented in furtherance of the alibi defense, or at least furnishing the Prosecutor with additional time to investigate the alibi evidence after its presentation.¹⁴⁰

The Trial Chamber decided that invocation of Rule 67(B) requires a showing of “good cause” in order to give effect to Rule 67(A)(ii).¹⁴¹ The Trial Chamber recognized that limited circumstances activate Rule 67(B). When the defense offers absolutely no particulars as to alibi evidence, good cause does not comprise a short lapse of time between the close of the prosecution case and the start of the defense case or non-cooperation of governments by limiting access to information.¹⁴² Finally, the Trial Chamber reserved the right to consider the defense’s failure in weighing the credibility of the alibi defense.¹⁴³

Despite the above ruling, the Trial Chamber in judgment considered the defense of alibi advanced by both Kayishema and Ruzindana without prejudice to the accused.¹⁴⁴ Counsel for Kayishema indicated no intention to rely of the alibi defense prior to the commencement of trial, while counsel for Ruzindana submitted limited information about the witnesses he intended to call.¹⁴⁵ The Trial Chamber in judgment considered such failures, mentioned the above determination regarding the good cause requirement for

¹⁴⁰ *Id.* at 2 paragraphs D and E.

¹⁴¹ *Id.* at 3.

¹⁴² *Id.*

¹⁴³ *Id.* at 4.

¹⁴⁴ Prosecutor v. Kayishema and Ruzindana, ICTR-95- 1-T, paragraph 239 (21 May 1999) *Judgment*. [Reproduced in accompanying notebook at Tab 46].

¹⁴⁵ *Id.* at 235.

Rule 67(B), and decided to accord no extra weight to the alibi defense due to the Prosecution's omission to call rebuttal witnesses.¹⁴⁶ Nevertheless, the Chamber rejected the alibi defenses of both Kayishema and Ruzindana.¹⁴⁷

On appeal, Kayishema claimed the Trial Chamber erroneously placed an impossible burden of proof on the defense by requiring defense witnesses to testify to his location at the time of the massacres.¹⁴⁸ The Appeals Chamber acknowledged, in accordance with a presumption of innocence, the duty of the prosecution to prove guilt beyond a reasonable doubt.¹⁴⁹ Rule 67 places no responsibility on the defense to prove the existence of the facts, but simply provides for notice of alibi evidence.¹⁵⁰ To support an alibi defense successfully, evidence demonstrates the accused was in a different place at a different time than the scene and moment of the crime. Such evidence serves to prompt a reasonable doubt, rather than disprove any presumption of guilt.¹⁵¹ The Trial Chamber determines the credibility of the witnesses and reliability of the evidence.¹⁵² Evidence to substantiate the credibility of the alibi thus gives the defendant the opportunity to raise a

¹⁴⁶ *Id.* at 237, 239.

¹⁴⁷ *Id.* at 257, 272.

¹⁴⁸ Prosecutor v. Kayishema and Ruzindana, ICTR 95-1-A, paragraph 105 (1 June 2000) *Judgment and Reasons*. [Reproduced in accompanying notebook at Tab 47].

¹⁴⁹ *Id.* at paragraph 107.

¹⁵⁰ *Id.* at paragraph 110.

¹⁵¹ *Id.*

¹⁵² *Id.* at paragraph 115.

reasonable doubt.¹⁵³ Correspondingly, the Appeals Court appraised the credibility and reliability of Kayishema's alibi evidence, found it insufficient to provoke a reasonable doubt, and dismissed the appeal.¹⁵⁴

The Musema case also goes into detailed discussion regarding the alibi defense.¹⁵⁵ Given the wide time-span over which the massacres took place, alibi evidence presented by the defendant necessarily covered as much of that time as possible. Musema offered extensive alibi evidence to maintain his innocence.¹⁵⁶ First, the Chamber explained the law regarding alibi:

The onus is on the Prosecution to prove beyond a reasonable doubt the guilt of the Accused. In establishing its case, when an alibi defense is introduced, the Prosecution must prove, beyond any reasonable doubt, that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi defense. The alibi defense does not carry a separate burden of proof. If the defense is reasonably possibly true, it must be successful.¹⁵⁷

The Chamber next outlined the factual evidence and examined the credibility and reliability of the witnesses.¹⁵⁸ Finally, the Chamber found Musema guilty beyond a reasonable doubt for several of the offenses charged in the indictment.¹⁵⁹

¹⁵³ *Id.* at paragraph 110.

¹⁵⁴ *Id.* at paragraphs 116-18.

¹⁵⁵ Prosecutor v. Musema, ICTR-96-13 (27 January 2000), *Judgment and Sentence*. [Reproduced in accompanying notebook at Tab 48].

¹⁵⁶ *Id.* at paragraphs 317-335.

¹⁵⁷ *Id.* at paragraphs 106-108.

¹⁵⁸ *Id.* at section 5.

¹⁵⁹ *Id.* at section 6.

Rutaganda filed no notice of alibi, yet submitted the defense by stating that he was somewhere else doing something else at the times of the committed offenses.¹⁶⁰ Despite the failure to provide notice, the Trial Chamber found it “appropriate and necessary” to consider the alibi defense in accordance with Rule 67(B).¹⁶¹

Even though the Trial Chamber in Kayishema and Ruzindana expressed that Rule 67(B) requires a showing of “good cause,”¹⁶² subsequent ICTR decisions have not imposed any sanctions on defendants failing to serve notice-of-alibi. Instead, the ICTR has largely allowed the presentation of alibi evidence despite the absence of pre-trial notice. The ICTR must enunciate a standard to ensure the effectiveness of the notice rule and to uphold the adequate protection of both the rights of the defendant and the interests of the prosecution. The ICTR must consider the implications of the proscribed remedy on the interests of the state in a fair and fully prepared trial and the rights of the accused to a fair and complete defense. The most appropriate remedy for non-compliance in line with the Tribunal’s established proceedings would ideally entail a neutral scheme.

One method in line with the Tribunal’s previous determination lies with an advancement of the particulars of “good cause” to activate Rule 67(B). The ICTR can rely on U.S. case law, which has set forth several tests and methods of evaluating and establishing “good cause” in relation to notice-of-alibi rules. If the court finds good cause, then the defendant can introduce alibi evidence without notice. If the defendant

¹⁶⁰ Prosecutor v. Rutaganda, ICTR-96-3, paragraph 138 (6 December 1999) *Judgment and Sentence*. [Reproduced in accompanying notebook at Tab 49].

¹⁶¹ *Id.* at 139.

¹⁶² Kayishema and Ruzindana *supra* note 138.

fails to give notice or prove good cause, then the court will exclude alibi evidence. The Meyers test, for example, provides several factors the ICTR can consider in determining whether to allow alibi evidence despite a lack of notice. Most in line with the ICTR decisions, the *Bright* case outlined factors to examine good cause in deciding on the admissibility of alibi evidence without notice. The ICTR can adopt the *Bright* test to build upon and give meaning to the “good cause” language in Kayishema and Ruzindana. Application of this test, however, may result in the exclusion of defense evidence. Based on existing case law, the ICTR seems reluctant to exclude any evidence for failure to provide notice. The ICTR may instead fashion a remedy that allows the judge to give less credibility to alibi evidence presented without notice or good cause. This option, however, fails to give much effect to Rule 67 and could lead to numerous appeals and charges of unfairness and injustice on part of the ICTR.

A combination of granting a continuance and issuing criminal sanctions serves as the most neutral approach to remedy non-compliance with Rule 67. Granting a continuance clearly supports an unbiased scheme. The extra time afforded will provide the prosecution with time to investigate delayed alibi evidence and will ensure the notion of a fair trial for the defendant. However, this remedy alone may be too lenient, give rise to abuse, or fail to effectuate the notice requirement. To punish a defendant, the Tribunal could additionally issue criminal sanctions. Criminal sanctions, harsher than continuance, would allow the court to force the defendant to serve independent jail time for defiance of the notice requirement without interfering in the case at hand. These remedies used together would achieve the greatest balance available and aid the ICTR in conducting a fair, just, and efficient trial.

