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A Comparative Assessment of the Alibi Rule

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Issue 3: A Comparative Assessment of the Alibi Rule

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DISCUSSION

I. Introduction and Summary of Conclusions

Issue Three: An assessment of requirements for alibi evidence under the Rules of Procedure and Evidence of the ICTR and a comparative study of how alibi evidence is treated in the federal jurisdictions of Canada and the USA, England, Scotland, S. Africa, France and Belgium.[1]

The International Criminal Tribunal for Rwanda (ICTR) was established to prosecute individuals who are responsible for genocide along with other serious violations of the international humanitarian law. The ICTR has established Rules of Procedure and Evidence based on the International Criminal Tribunal for Yugoslavia (ICTY) and the national courts of the world, in order to set up the necessary framework for an operative functional judicial system.[2] The resolutions of the ICTR will establish significant precedents for the future of the International Criminal Court (ICC) system.[3]

Rule 67 of the ICTR Rules of Procedure and Evidence (A)(i) states that the prosecutor must notify the defendant of any names of witnesses intended to be called in order to establish guilt of the defendant or to rebut any defense of, which prior notice has already been given to the prosecutor.[4] Section (A)(ii)(a) establishes notification and the requirements of an alibi defense, stating that notice must specify the place or places where the accused claims to have been present

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[1] Issue taken from a memo sent from the Prosecutor's Office for the International Tribunal for Rwanda. [Reproduced in the accompanying notebook at Tab 67].

[2] ICTR mirrors the ICTY rules. Wladimiroff stated (in reference to the ICTY rules), "[o]n the whole the Rules are clearly marked by the America experience. Many of the Rules are counterparts to the American Rules." Michael P. Scharf, *Balkan Justice* 177 (1997). [Reproduced in the accompanying notebook at Tab 61].

[3] ICTR Webpage, <http://www.ictr.org/wwwroot/ENGLISH/genifo.htm.> [Reproduced in the accompanying notebook at Tab 6].

[4] Rule 67: Reciprocal Disclosure of Evidence, *see supra* note 3 [Reproduced in the accompanying notebook at Tab 7].

during the time-frame of the alleged crime. The notice must also specify any names and addresses of witnesses, along with any other evidence on which the defense intends to rely in order to ascertain the alibi.[5] Section (B) explains that the defense's failure to provide notice does not eliminate the right of the accused to rely on an alibi defense.[6] The rule does not offer any penalties for a defendant's failure to provide such notice; the rule only states that the defendant's failure to provide such notice will not limit the right to rely on the defense. In addition, section (D) states that either party who discovers any additional evidence, information, or material which could have been produced earlier must promptly notify the opposite party and the Trial Chamber of its existence.[7]

The ICTR Rule 67 does not establish a time-frame as to when defense council must notify the prosecutor of the intention to use the defense of alibi.[8] However, Rule 66 (A)(i) requires the prosecutor to disclose copies of material supporting the indictment as well as any statements obtained by the prosecutor from the accused, within thirty days of the initial appearance.[9] Section (A)(ii) requires the prosecutor to disclose copies of statements of all witnesses intended to testify no later than sixty days before the trial date.[10]

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Rule 66: Disclosure of materials by the Prosecutor, *see supra* note 3 [Reproduced in the accompanying notebook at Tab 6].

[10] *Id.*

A. Issues

Under the Rules of Procedure and Evidence the ICTR does not establish any guidelines pertaining to a time-frame as to when counsel is required to disclose an alibi defense. Rule 66 does require notice of evidence specifying where the defendant was at the time of the alleged criminal conduct, along with a list of names and addresses of any witnesses who will confirm the alibi.[11] However, the defense is not precluded from relying on an alibi defense for failure to provide such notice.[12]

Under the ICTR, Rule 67 is extremely vague in respect to the penalties for a defendant's failure to disclose pertinent information about the case. Furthermore, the rule does not give any reference on how to treat alibi witnesses. It is important that neither party is misguided or caught by surprise during the trial proceedings.

B. Conclusions

The ICTR must incorporate stricter guidelines in accordance to Rule 67 in order to ensure that neither party is prejudiced in relation to the reciprocal disclosure requirements.

The basic requirements for an alibi defense are similar throughout the current rules established by most countries. However, the ICTR does not elaborate on what standards constitute an effective, adequate, and timely disclosure. Moreover, the rule does not recognize the issue of witness protection or sensitive material that may arise in an alibi defense. Most countries have an elaborate inquiry into whether the charges against the accused are sufficient, along with an analysis of the parties' preparedness and ability to continue with the proceedings.

[11] *See supra* note 4 & 9.

[12] *See supra* note 4 & 9.

Countries have established guidelines to guarantee that a defendant's rights are protected from any excessive governmental intrusions. Canadian law requires that notice be given in a sufficient time to permit the proper authorities to investigate.[13] Under English law, notice must be given in court or at the end of the proceeding before the examining justice, or in written form to the prosecuting attorney.[14] Plus, English law provides protection for disclosure of evidence that may be deemed sensitive.[15] In accordance to English law, Scottish law insists that notice of any witnesses must be disclosed prior to the prosecutions first examining witness.[16] However, the United States has the strictest guidelines regarding a defendant's duty to disclose, the defendant has ten days to submit a written notice of the intention to present an alibi defense.[17] In addition, the government has ten days to disclose any evidence that may rebut the alibi defense.[18] In South Africa, the law places the burden only on the government to disclose witness information.[19] France and Belgium both require notification of desired witnesses to be disclosed twenty-four hours before trial.[20] However, Belgium law believes that each witness called should be heard, therefore, a witness is never barred from being heard.[21]

Since witness testimony plays an important role in the trial process, courts focus on the truthfulness of an alibi defense, as well as, assuring the safety of witnesses. All of the countries

[13] *See infra* section III.A.1. and note 35.

[14] *See infra* section III.A.2. and note 52.

[15] *See infra* section III.A.2. and note 60-61.

[16] *See infra* section III.A.3. and note 77.

[17] *See infra* section III.A.4. and note 88.

[18] *See infra* section III.A.4. and note 91.

[19] *See infra* section III.B.1.

[20] *See infra* section III.B.2. & B.3.

[21] *See infra* section III.B.3. and note 160-61.

that have not incorporated a defense of alibi rule have recognized detailed requirements in respect to witness testimony. South Africa, France, and Belgium all have specific witness disclosure requirements.[22] France and Belgium both require notice to include the name, profession, and address of each witness to be called.[23] Some countries have even standardized jury instructions to secure that a jury will not have any preconceived notions or be misled by an alibi defense. For example, under English and Scottish law, the judge instructs the jury that the prosecution has the duty to disprove the alibi defense and that the defendant does not have any obligation to prove his defense.[24] Therefore, a lay witness will be informed of all the criminal judicial proceedings that take place during a criminal trial and be aware of where the burden of proof rest amongst the parties.

Interpreted in light of an analysis of several countries' regulations concerning alibi witnesses, the ICTR should incorporate certain guidelines to eliminate any vagueness to its alibi rule. For instance, the ICTR should encompass penalties for nondisclosure by drawing an adverse inference when evidence is weighed at trial,[25] or by excluding testimony of an undisclosed witness failure to comply with procedural requirements.[26] A higher level of scrutiny would only protect each party from undue surprise, as well as guarantee enough time to perform proper investigation prior to the proceedings.

[22] *See infra* section III.B.

[23] *See infra* section III.B.2. & B.3.

[24] *See infra* section III.D. and note 182.

[25] *See infra* section III.A.1. and note 36.

[26] *See infra* section III.A.4. and note 92.

II. Factual Background

The ICTR indictments all refer to charges dealing with genocide, conspiracy to commit genocide, the direct and public incitement to commit genocide, and crimes against humanity. The charges concern ethnic violence and the extermination of the Tutsi throughout Rwanda during 1994.[27]

For an alibi defense to be upheld, the defendant shall base his defense "on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time."[28] The ICTR has established a broad rule concerning regulations to which the defendant must adhere to when claiming the defense of alibi.[29] Notice of a defendant's desire to use an alibi defense must be given to the prosecutor stating why the defendant is physically impossible of being guilty. Besides just stating the whereabouts of the defendant at the relevant time of the crime, the defense must disclose information about any witness offered to corroborate the alibi defense.

> '[E]vidence 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 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.[30]

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[27] Hate media inciting the population to eliminate the enemy resulted in the deaths of nearly 800,000 people. *See* Prosecutor v. Ntahobali, No. ICTR-97-21-1, Amended Indictment (for an example of charges in an indictment of the ICTR). [Reproduced in the accompanying notebook at Tab 21].

[28] *See* BLACK'S LAW DICTIONARY 72 (7th ed. 1999). [Reproduced in the accompanying notebook at Tab 56]. From the Latin meaning "elsewhere…"(2) The fact or state of having been elsewhere when an offense was committed." *See also* Fed. R. Crim. P. 12.1. [Reproduced in the accompanying notebook at Tab 4]. *See also* John B Saunders, *Words and Phrases: legally defined*, Vol. 1: A-C 66 (3rd ed. 1988). Defining Canada's interpretation of an alibi; "if evidence for an accused that he was not present at the time an offence was there committed is accepted by a jury, he is said to have established an alibi." [Reproduced in the accompanying notebook at Tab 3]. *Citing* R v. Foll (1957) 21 WWR 481 at 491, Man CA. per Montague JA. [Reproduced in the accompanying notebook at Tab 26].

[29] *See* ICTR Rule 67*supra* note 4. [Reproduced in the accompanying notebook at Tab 7].

[30] Canada's Criminal Justice Act 1967, §11(8) *cited in* John B Saunders, *Words and Phrases: Legally Defined*, Vol. 1: A-C 66 (3rd ed. 1988) *see supra* note 28.

III. Legal Analysis

A. An alibi defense differs between each country in determining what factors will establish the proper guidelines for notice of a defendant's intent and disclosure requirements.

Under the ICTR, Rules of Evidence and Procedure Rule 67, defense counsel is required to notify the prosecutor of the defendant's intent to enter a defense of alibi.[31] Although the rule states that the failure of a defendant's disclosure will not hinder his or her ability to apply such a defense.[32] The rule does not establish any repercussions for a defendant's inadequate disclosure.[33] A defendant's lack of disclosure will end up affecting the sufficiency of the prosecutions performance at trial. Moreover, an inadequate alibi defense holds the presumption that it has been manufactured under false pretenses as a last resort.

1. Canada

Under Canadian Law, an effective disclosure of an alibi defense entails the components of adequacy and timeliness.[34] The law has not determined precisely what constitutes adequacy and timeliness; however, the Canadian courts have stated that such notice shall be "given in sufficient time to permit the authorities to investigate and it should be given with sufficient particularity to enable authorities to investigate meaningfully."[35] To induce an adequate and

[31] ICTR Rule 67, *see supra* note 4 [Reproduced in the accompanying notebook at Tab 7].

[32] *See id.* Rule 67 (B) states that "Failure of the defen[s]e to provide such notice under this Rule shall not limit the right of the accused to rely on the above defens[s]es." *Id*.

[33] *Id*.

[34] Cleghorn v. R., 1995 CarswellOnt 126, at 2. [Reproduced in the accompanying notebook at Tab 11].

[35] *Id*.

timely disclosure, Canadian courts may punish nondisclosure by drawing an adverse inference when the trier of fact weighs the evidence heard at trial.[36]

Sufficient disclosures of an alibi defense consist of three parts: (1) "a statement that the accused was not present at the location of the crime when it was committed;"[37] (2) the whereabouts of the accused at the time of the alleged crime,[38] (3) "and the names of any witnesses to the alibi."[39] An accused whose defense solely rests on an alibi at trial is unable to assume the position that there ought to be a lesser charge if convicted on the present charge.[40]

The Canadian Charter of Rights and Freedoms §7 holds a broad protection against self-incrimination afforded to an accused individual.[41] The right to remain silent lacks a duty of disclosure in order to protect the accused and the presumption of innocence.[42] Therefore, in Canada, defense counsel is not required by law to "cooperate or assist the Crown" by revealing a

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[36] *Id*. However, the standard is flexible since "neither disclosure at the earliest possible moment, nor disclosure by the accused him- or herself is required in order for the criteria to be met. Third party disclosure is sufficient." *Id*.

[37] *Id*. at 3.

[38] See id.

[39] *Id*.

[40] Eberts v. The King, 22 W.L.R. 901, at 9 (1912). The jury was told that they were either to convict or acquit the defendant of murder; the jury was unable to return a verdict with a lesser charge of manslaughter. The case was on trial for the murder of a police officer where the defendant's alibi was that he had been home the whole time during the night in question. Yet there was proof that the defendant and his wife had left their home the night in question with the intention of committing a theft. The wife claimed that there was a secret police that had threatened them and her husband shot the man. Therefore, the court concluded since the defendant does not present a self-defense claim to the court, he cannot request a lesser charge for a guilty verdict. *Id*. [Reproduced in the accompanying notebook at Tab 13]. *See* Rex v. Eberts, 3 W.W.R. 37 #2, at 13 (1912). According to civil court cases the general rule is "in order to prevent litigation going on forever a party who deliberately elects at the trial to fight his case out upon one issue and gets beaten upon it cannot raise on appeal a new and totally different issue." *Id*. [Reproduced in the accompanying notebook at Tab 37].

[41] *See* R. v. M.B.P., 1994 CarswellOnt 65 at 17. A fundamental principle grounded in common law, "the presumption of innocence and the power imbalance between the state and the individual are at the root of this principle and procedural and evidentiary protections to which it gives rise." [Reproduced in the accompanying notebook at Tab 32]. *Citing* R. v. Dubois, (1985) 2 S.C.R 350. [Reproduced in the accompanying notebook at Tab 25].

[42] *See* R. v. M.B.P., 1994 CarswellOnt 65 at 17 [Reproduced in the accompanying notebook at Tab 32] *citing* R. v. Herbert, (1990) 2 S.C.R. 151. [Reproduced in the accompanying notebook at Tab 30].

defense theory, such as announcing an alibi defense or producing any physical or documentary evidence.[43] However, the protection afforded to disclosure is not absolute because the failure of disclosing an alibi defense in an adequate and timely manner will most likely affect the weight given to the defense.[44]

> The failure to disclose a defen[s]e of alibi in a timely manner may be considered in assessing the credibility of that defen[s]e but that is a unique situation. As a general rule there is no obligation resting upon an accused person to disclose either the defen[s]e which will be presented or the details of that defen[s]e before the Crown has completed its case.[45]

2. England

Under the Criminal Justice Act of 1967, Part 1 §11, a defendant is not allowed to adduce evidence supporting an alibi defense unless he has given particular notice of an alibi defense.[46] Disclosure must entail the name and addresses of each witness along with any material information that will assist in finding the witness.[47] If a name or address in unavailable, the court will acknowledge such information as long as there were reasonable steps (and continuance of such steps) to secure that relevant information is ascertained.[48] In the case of the prosecutor's inability to trace one of defendant's witnesses, defense must disclose all information that is in its current and future possession.[49]

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[43] R. v. M.B.P., 1994 CarswellOnt 65, at 17. [Reproduced in the accompanying notebook at Tab 32].

[44] *Id*. *See also* Ewaschuk, *Criminal Pleading & Practice in Canada* 16:8070 (2nd ed. 1987). [Reproduced in the accompanying notebook at Tab 52].

[45] Chambers v. R., (1990) 2 S.C.R. 1293, at 18. [Reproduced in the accompanying notebook at Tab 10].

[46] Halsbury's Statutes of England and Wales, Vol. 12, 348 (4th ed. 1997). [Reproduced in the accompanying notebook at Tab 5].

[47] *Id*.

[48] *Id*. Once evidence is subsequently discovered such evidence must be disclosed.

[49] See id.

The court will not deny an alibi defense if it is apparent that the defendant was unaware of such procedural requirements.[50] Both parties are obliged to disclose any evidence obtained that may disprove the alibi.[51] Notice can be given in three circumstances: (1) in court; (2) at the end of the proceedings before the examining justice; or (3) in written form to the prosecuting attorney.[52] The rule defines "evidence in support of an alibi" as proof of defendant's presence at a particular place or area at a specific time; leading to the deduction that, defendant was unlikely or not able to have been at the place where the alleged offense had been committed at the time of the alleged commission.[53]

The prosecutor has the duty to disclose any prosecutorial material that has not previously been disclosed and which might undermine the case of the accused.[54] After primary disclosure has been given by the prosecutor, the accused has fourteen days to give a statement concerning the defendant's defense to the court and the prosecutor.[55] Once the defense's statements have been admitted a burden is imposed obligating the prosecution to a secondary disclosure.[56]

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[50] *See id*. at 349.

[51] *Id*.

[52] Halsbury's Statutes of England and Wales, Vol. 12, 349 (4th ed. 1997). "Prescribed Period" is defined as "the period of seven days from the end of the proceedings before the examining justice." *Id*. [Reproduced in the accompanying notebook at Tab 5].

[53] *Id*.

[54] R. v. Director of Public Prosecutions, (1999) 2 Cr. App. R. 304, 313 (discussing the Criminal Procedure and Investigation Act of 1996). [Reproduced in the accompanying notebook at Tab 23].

[55] *See id*. The statement must follow specific guidelines: explaining the general nature and terms of the accused defense, indicating what matters the defense will be addressing to the prosecution, and explaining why the accused takes such issue with the prosecution. *Id*.

[56] *Id*.

> [T]he person responsible for examining material retained by the police during the investigation, revealing material retained by the police during the investigation, revealing material to the prosecutor during the investigation and any criminal proceedings resulting from it, and certifying that he has done this: and disclosing material to the accused at the request of the prosecutor. *See id*. at 314.

> The rules of disclosure which have been developed by the common law owe their origin to the elementary right of every defendant to a fair trial. If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. Fairness also requires that the rules of natural justice must be observed.[57]

Although there are pre-committal discovery regulations, they do not exceed the discovery obtainable once the proceedings have begun.[58]

The law notes on discoverable evidence that may need to be protected for security reasons. The rationale under the common law is that even though the criminal justice system has been established to regulate crime, a civilized society cannot disregard other fundamental values.[59] Therefore, certain regulations have been implemented when disclosure evidence has been deemed "sensitive material," to ensure it is protected for the interest of public immunity.[60] Such material is considered sensitive when it "contains details of private delicacy to the maker and/or might create risk of domestic strife."[61] For example, in *R. v. Brown*,[62] the court questioned whether there was a necessary legal obligation to disclose witness information that was unfavorable in regards to credibility.[63] The court struggled with the "legal objection to disclosure rooted in the preservation of the public interest as balanced against the interests of the defendant."[64] The court's analysis focused on the prosecutor's obligation to disclose knowledge

[57] *Id*. at 315.

[58] *Id*. at 317.

[59] R. v. Brown, (1995) 1 Cr. App. R. 191, 198. [Reproduced in the accompanying notebook at Tab 22].

[60] See id.

[61] *Id*.

[62] (1995) 1 Cr. App. R. 191. [Reproduced in the accompanying notebook at Tab 22].

[63] See id.

[64] *See id*. at 198.

of previous convictions of a witness.[65] However, it would be an unnecessary and an excessive burden to impose disclosure requirements pertaining to relevant information on the credibility of defense witnesses.[66] Therefore, the court concentrated on the question of "whether a reasonable jury or other tribunal of fact could regard it as tending to shake confidence in the reliability of the witness."[67] The court concluded that in "[t]he extent of discovery permitted in a particular case, in the light of the issues in that case, must be left to the good sense of the trial judge who must, of course, firmly discourage unnecessary and oppressive request for discovery."[68]

3. Scotland

In Scotland, two substantial issues arise once an indictment has been served. First, analyses of whether the parties' state of preparedness is efficient to circumvent an adjournment of the case at the trial date because preparation is incomplete.[69] For instance, in *McDermott v. HM*, [70] "the trial judge expressed concern that the Crown had failed to investigate the alibi and

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[65] *Id*. at 199.

[66] *Id*. at 201.

[67] *Id.*

[68] R. v. Brown, (1995) 1 Cr. App. R. 191, 202.

> [T]he ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as those about whose guilt there is any reasonable doubt should be acquitted.

[Reproduced in the accompanying notebook at Tab 22]. *See* R. v. Dobson, 2001 WL 825049, at 8. [Reproduced in the accompanying notebook at Tab 24].

[69] Alastair N. Brown, *Criminal Evidence and Procedure: An Introduction*, 72-73 (1996). [Reproduced in the accompanying notebook at Tab 57].

[70] (2000) S.L.T. 366. [Reproduced in the accompanying notebook at Tab 19].

adjourned to give both parties an opportunity to consider leading further evidence."[71] Once the parties have established their readiness, an inquiry into any preliminary legal challenges is made in case of a fundamental flaw in the indictment, which would preclude the charge from proceeding.[72]

An alibi defense falls under the category of a "special defense," which is basically a procedural term in Scots Law.[73] The term basically refers to certain defenses that an accused is unable to state until a written plea has been lodged. This plea must be lodged at the trial, before it, or within ten days, unless the accused can satisfy the court that there was just cause for failure to do so.[74] The defense of alibi simply means that the accused was elsewhere at the time that the alleged offense was committed.[75] To satisfy the guidelines of the defense, a foundation for the

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[71] *Id*. at 367.

> The absence of any statutory duty on the part of the prosecutor to communicate the results of his investigation, and the absence of any sanction in respect of any failure on his part to investigate the defen[s]e or his non-disclosure of the information obtained by means of such an investigation, points strongly to the conclusion that the subsection is administrative in character and that any pursuit of the question whether an investigation has been carried out, to what extent and with what results, belongs to the stage of proceedings before the case goes to trial. *Id.* at 371.

[72] *Id*. at 73. "[T]o ascertain whether the case is likely to proceed to trial on the date assigned or the trial diet and in particular—(a) the state of preparation of the prosecutor and of the accused with respect to their cases; and (b) the extent to which the prosecutor and accused have complied with the duty under section 257(1) of [the] Act." *See id*. at 90.

[73] Timothy H. Doner, LL.B., ET. AL., *Greens Concise Scots Law: Criminal Law*, §8.07 (1996). [Reproduced in the accompanying notebook at Tab 58].

[74] *Id*. *See also* Alastair N. Brown, *supra* note 69, at 92.

> The only purpose of the special defen[s]e is to give fair notice to the Crown and once such notice has been given the only issue for a jury is to decide, upon the whole evidence before them, whether the Crown has established the accused's guilt beyond a reasonable doubt. When a special defense is pleaded, whether it be of alibi, self-defen[s]e or incrimination, the jury should be so charged in the appropriate language, and all that requires to be said of the special defen[s]e, where any evidence in support of it has been given, wither in the course of the Crown evidence, whether from one or more witnesses, is believed, or creates in the minds of the jury reasonable doubt as to the guilt of the accused in the matters libeled, the Crown case must fail and they must acquit. *Id*.

[75] *See* Doner *supra* note 73 § 8-09 at 150.

alibi plea must be explicit, specifying the exact place where the accused alleges to be present, and at a definite time.[76]

Notice of intent to use the special defense of alibi must be given to the prosecutor, along with the alibi and any witness that may be called before the prosecution's first examining witness.[77] Once notice of an alibi defense has been disclosed, the prosecutor is entitled to an adjournment of the case.[78] Under §78(4) of the Criminal Procedure Act 1995,[79] it is not sufficient for defense counsel to examine any witness or submit any non-exculpatory evidence to the prosecutor at or before the first appearance in front of the sheriff court, or at least ten days before the High Court trial, unless otherwise instructed by the court.[80] The criminal procedure system of Scotland proceeds on the notion that the prosecutor has a duty to disclose exculpatory evidence in its possession to the accused.[81] Prosecutorial duties are not solely to protect a person accused of a crime; "[i]t is a duty conceived in the public interest to secure the proper investigation by the police of the case."[82]

For a proper conviction, an analysis of the Crown's evidence must determine a man's guilt.[83] The burden of proof rest upon the Crown throughout the whole case. Therefore, "there

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[76] *Id*. *See also* H.M. Advocate v. Laing (1817) 2 Coup. 23. [Reproduced in the accompanying notebook at Tab 16].

[77] Alastair L. Stewart, *The Scottish Criminal Courts in Action* 209 (2nd ed. 1997). [Reproduced in the accompanying notebook at Tab 62].

[78] *Id*. *See generally* 1995 Act, §149.

[79] Alastair N. Brown, *supra* note 69, at 92.

[80] *Id*

[81] McDermott v. HM, (2000) S.L.T. 366, 371. [Reproduced in the accompanying notebook at Tab 19].

[82] *Id*.

[83] Craddock v. HM, 1994 S.L.T. 454, 459. "[E]very criminal charge, must be established upon what is sufficient legal evidence." [Reproduced in the accompanying notebook at Tab 12]. Hayes, 1973 S.L.T. at 203. [Reproduced in the accompanying notebook at Tab 15].

is no burden on the accused to prove anything."[84] Every individual profits from the presumption of innocence because it leads to the practical effect of the prosecutor's burden being to satisfy beyond a reasonable doubt that the criminal charge has been established.[85] Thus, notice between both parties is imperative, for "[t]he benefit of any reasonable doubt therefore has to be given to the accused because in such an event the presumption of innocence cannot be held to be overcome."[86]

4. United States

Criminal procedure rules have been designed to ensure that accused rights are protected from excessive governmental intrusion. "Criminal procedure must balance the defendant's right and the state's interest in a speedy and efficient trial with the desire for justice."[87] Rule 12.1 under the Federal Rules of Criminal Procedures, establishes the requirements for notice of an alibi defense. As soon as notice by the government indicating the time, date, and place at which the alleged offense was committed is given, the defendant has ten days (unless otherwise directed by the court) to submit a written notice of defendant's intention to present an alibi defense.[88] Such notice must include the specific place or places where the accused claims to

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[84] Craddock, 1994 S.L.T. at 460. ("if you have any doubt in the case which is based upon reason and is in favo[]r of the accused, then the benefit of that doubt goes to the accused…any defen[s]e evidence did not require to be corroborated and that such obligation only lay on the Crown to lead corroborated evidence to prove their case"). [Reproduced in the accompanying notebook at Tab 12].

[85] HM v. Hayes, 1973 S.L.T. 202, 203. [Reproduced in the accompanying notebook at Tab 15].

[86] *See id.*

[87] Legal Information Institute, *Criminal Procedure: An Overview*, *at* <http://www.law.cornell.edu/topics/criminal_procedure.html> [Reproduced in the accompanying notebook at Tab 66].

[88] Fed.Rules Cr.Pro.Rule 12.1, *see* <http://www.law.ukans.edu/research/frcrimIV.htm> [Reproduced in the accompanying notebook at Tab 4].

have been during the time of the alleged offense.[89] Furthermore, the notice must comprise a list of names and addresses of witnesses on whom the defendant intends to rely in order to establish such alibi.[90] Subsequent to the defense's disclosure, the government has ten days (in any event, no less than ten days prior to trial) to produce details (name and addresses) concerning any witnesses that will rebut the defenses alibi or alibi witnesses.[91] The court may exclude testimony of an undisclosed witness for failure to comply with procedural requirements; however, the court may grant an exception for good cause.[92] Furthermore, a withdrawn alibi defense is inadmissible evidence against the accused.[93]

The Advisory Committee Report (which constitutes the legislative history of the Rules) notes that Rule 12.1 is a "defendant-triggered" procedure, concluding that the only benefit arising from disclosure is for the mere purpose of preventing unfair surprise on the prosecution.[94] The Committee's rationale is based on the theory that "[i]f the prosecution is worried about being surprised by an alibi defense, it can trigger the alibi defense discovery procedures."[95] Therefore, the government's failure to trigger the procedures would preclude it from asserting a claim of surprise in order to get a continuance when the defendant raises an alibi defense.[96] "The

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[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id. See generally* US v. Wills, 88 F.3d 704 (1996) (good cause exception when a witness' safety is threatened). [Reproduced in the accompanying notebook at Tab 51].

[93] Fed.Rules Cr.Pro.Rule 12.1. [Reproduced in the accompanying notebook at Tab 4]. *See generally* Bergmann v. McCaughtry, 65 F.3d 1372 (1995) (no adverse effects for a withdrawn alibi defense). [Reproduced in the accompanying notebook at Tab 9].

[94] *See* Notes of Advisory Committee on Rules – 1974 (Rule 12.1) pg.3 *at* <http://www.law.cornell.edu/topics/criminal_procedure.html> [Reproduced in the accompanying notebook at Tab 66].

[95] *Id.*

[96] *Id.*

Rule as revised and enacted by Congress clearly provides that a defendant need not disclose her intent to offer an alibi defense unless and until the Government submits a written request specifying the time, date and place of the alleged offense."[97] *Wardius v. Oregon*[98] established that due process requires the government to furnish reciprocal discovery rights prior to being able to enforce an alibi notice rule.[99]

The initial burden to raise an alibi defense is upon the defendant. However, the defendant is not obliged to release any information until the government specifies the time, place, and date of the alleged offense.[100] The Supreme Court focused on the constitutionality of an alibi notice in *Williams v. Florida*.[101] The Court held that an alibi notice requirement was valid even under conditions when a defendant did not benefit from "reciprocal discovery against the State."[102]

Williams established that alibi rules are constitutional;[103] therefore, preclusions of disclosure requirements can result in sanctions, which can be constitutionally applied when a

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[97] US v. Saa, 859 F.2d 1067, 1072 (1988) [Reproduced in the accompanying notebook at Tab 50]; *see also* US v. Dupuy, 760 F.2d 1492, 1499 (9th Cir. 1985) [Reproduced in the accompanying notebook at Tab 48]; US v. Bouye, 688 F.2d 471, 474-75 (7th Cir. 1982) [Reproduced in the accompanying notebook at Tab 46].

[98] 412 U.S. 470 (1973). Wardius v. Oregon, 412 U.S. 470, 472 n. (1973) [Reproduced in the accompanying notebook at Tab 54]; *see also* People v. Holiday, 265 N.E.2d 634 (1970) (where the Supreme Court of Illinois held that a statute requiring a defendant to disclose alibi witnesses although the government is not obliged to a reciprocal disclosure of alibi rebuttal witnesses to be valid). [Reproduced in the accompanying notebook at Tab 20].

[99] Wardius, 412 U.S. at 472 [Reproduced in the accompanying notebook at Tab 54]. *See also* US v. Jordan, 964 F.2d 944, 947 & n. 2 (1992). [Reproduced in the accompanying notebook at Tab 49].

[100] *See* Notes of Advisory Committee on Rules – 1974 (Rule 12.1) pg.1 *at* <http://www.law.cornell.edu/topics/criminal_procedure.html> ("Each party must, at the appropriate time, disclose the names and addresses of witnesses.") [Reproduced in the accompanying notebook at Tab 66].

[101] 399 U.S. 78 (1970). [Reproduced in the accompanying notebook at Tab 55].

[102] *Id*. at 82 n. 11.

[103] Williams v. Florida, 399 U.S. 78, 81-82 (1970) [Reproduced in the accompanying notebook at Tab 55]; *see* Grooms v. Solem, 923 F.2d 88, 90 (1991). [Reproduced in the accompanying notebook at Tab 14].

violation of the rules is willful and based on the motive of gaining a tactical advantage.[104] For instance, "[i]n *Taylor v. Illinois*,[105] the Supreme Court recognized that the trial judge may insist on an explanation for a party's failure to comply with an alibi notice statute, imposing the severest sanction of exclusion of the evidence if the delay was the product of willful misconduct."[106] Furthermore, to show prejudice there must be a demonstration that the uncalled alibi witnesses would have testified, which would have led to favorable testimony supporting the alibi.[107] Moreover, the court must consider the following factors such as "the reason for nondisclosure, mitigation of harm by subsequent events, and other evidence of the defendant's guilt."[108]

B. In the absence of specific alibi rules an assessment of countries disclosure requirements and witness regulations which are inherent to an alibi defense may aide in ascertaining proper guidelines for a defense of alibi.

1. South Africa

South Africa has yet to establish a specific criminal procedure rule pertaining to an alibi defense. Under §25(3)(b) of the Constitution, an accused individual has a right to a fair trial.[109] To ensure a fair trial, an accused individual must be informed with sufficient particularity of the

[104] Taylor v. Illinois, 484 U.S. 400 (1988) [Reproduced in the accompanying notebook at Tab 44]; *see* Grooms, 923 F.2d at 91. [Reproduced in the accompanying notebook at Tab 14].

[105] 484 U.S. 400 (1988). [Reproduced in the accompanying notebook at Tab 44].

[106] *See id. See also* Grooms, 923 F.2d at 91. [Reproduced in the accompanying notebook at Tab 14].

[107] Grooms, 923 F.2d at 91; *citing* to the *Strickland Test* stating that "the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." [Reproduced in the accompanying notebook at Tab 14]. Strickland v. Washington, 466 U.S. 688, 698 (1984). [Reproduced in the accompanying notebook at Tab 43].

[108] US v. Bissonette, 164 F.3d 1143, 1145 (1999) [Reproduced in the accompanying notebook at Tab 45]; *citing* US v. Woodward, 671 F.2d 1097 (8th Cir. 1982). [Reproduced in the accompanying notebook at Tab 52].

[109] Nico Steytler, *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996*, 225 (1998). [Reproduced in the accompanying notebook at Tab 63].

charge and details to answer it.[110] An accused is entitled to be informed promptly of the charge with such specificity that he comprehends the nature of the offence and the factual basis for the accusation of the charge against him.[111] *Kamasinski v. Austria*[112] recognized that an oral notice was satisfactory as long as the accused understands the indictment.[113]

Since South Africa does not recognize an alibi defense an analysis of the criminal procedure structure is imperative to determine an individual's rights when an alibi defense may be present. Under South African law "[t]he right to adequate notification of the charge…is an essential component of the right to a fair trial for it allows for the effective preparation of a defen[s]e."[114] Once efficient notice is given the accused must determine whether to contest the charge.[115] When a defendant enters a plea of not guilty an inquiry must be made in order to determine what evidence needs to be collected and a how to challenge any incriminating evidence in order to prepare a proper line of defense.[116]

> Once furnished, the prosecution cannot deviate from the charge during the trial for it sets the framework of the trial. This distinguishes the right to adequate notification from the right of access to information held by the prosecution. While such information may be useful for the preparation of a defen[s]e, a detailed charge binds the prosecution to a specified offence and particularized factual allegations. The information to be obtained is thus of a more limited nature and does not include the disclosure of evidence.[117]

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[110] *Id*.

[111] *Id* at 225-26.

[112] 19 Dec. 1989 Series A no. 168, *cited in* Nico Steytler, *supra* note 109 at 226.

[113] Nico Steytler, *supra* note 109 at 226. "[T]he accused should be informed of the charge in a language he or she understands; the indictment need not necessarily be translated into writing." *Id*.

[114] Nico Steytler, *supra* note 109 at 226; *see also* S v. Thobejane, 1995 1 SACR 329 (T) 334d-e. [Reproduced in the accompanying notebook at Tab 41].

[115] Nico Steytler, *supra* note 109 at 226.

[116] *Id*.

[117] Nico Steytler, *supra* note 109 at 226-27; *see also* S v. Thobejane, 1995 1 SACR 329 (T) 339i. [Reproduced in the accompanying notebook at Tab 41].

S v. Lavhengwa[118] established a right of receiving a definition of the offence charged.[119] "The prohibition against a vaguely formulated offence is certainly an integral part of the foundational value of the rule of law and can be brought home under a number of rights, including the right to freedom and the right against retrospective offences."[120]

An accurate charge must ascertain the elements of the offence and not merely state the name of an offence.[121] "It is preemptory that 'a charge shall set forth the relevant offence in such a manner and with such particulars…as may be reasonably sufficient to inform the accused of the nature of the charge.'"[122] Since the accused is presumed innocent, it is imperative that the factual allegations of the charge are revealed. Thereby, notifying the accused and leaving the opportunity of assessing the sufficiency of the information.[123]

Although the Constitution makes no reference as to promptness, it is implicit in the defendant's rights that the charge is disclosed in a timely manner, ensuring that an accused has adequate time to prepare a defense, plus the right to a speedy trial free from undue delay.[124] An error in the indictment generally may not be changed.[125] An error may be rectified only if it is

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[118] 1996 2 SACR 453 (W) 482-484. [Reproduced in the accompanying notebook at Tab 39].

[119] Nico Steytler, *supra* note 109 at 227; *see also* S v. Lavhengwa, 1996 2 SACR 453 (W) 482-484. [Reproduced in the accompanying notebook at Tab 39].

[120] Nico Steytler, *supra* note 109 at 227 (stating that such a right constitutionalizes the existing rules regarding charge sheets and indictments).

[121] Nico Steytler, *supra* note 109 at 227.

[122] Nico Steytler, *supra* note 109 at 227; *citing* S 84(1) CPA.

[123] Nico Steytler, *supra* note 109 at 227.

[124] Nico Steytler, *supra* note 109 at 228. §35(3)(b) of the Constitution states that "[e]very accused has the right to a fair trial, which includes the right…to have adequate time and facilities to prepare a defense" *Id*. at 230. "[T]he right against undue haste in prosecution and the right to adequate facilities for the preparation of a defense - is the principle of equality of arms; and accused should be placed on an equal footing with the prosecution." *Id*. at 231.

[125] *Id*.

done prior to judgment and most importantly, will not prejudice the defendant.[126] The test to determine prejudice is whether the accused will be placed in a worse position after the charge has been amended then when the accused pleaded to the charge.[127] Moreover, "[t]he prosecution is also bound by the particulars of the charge and may not substitute another offence for the original one where the evidence supports the former."[128]

A defendant's right to a fair trial includes facilities to prepare for a defense which incorporates access to any documents, records, and information that may be deemed necessary for the preparation of the defense.[129] "The right to adequate facilities has been defined…as guaranteeing for the accused the opportunity to organize his defen[s]e in an appropriate way and without restriction as to the possibility to put all relevant defen[s]e arguments before the trial court, and thus to influence the outcome of the proceedings."[130] The right is derived from the presumption that at the first appearance of the accused, the accused may be disheveled and unable to make a clear, uninfluenced, and intelligent decision.[131] Therefore, ensuring the defendant has ample time "to arrive at a mature and unhurried decision on how to plead (and) to conduct his case is vital."[132] A defendant's right to such facilities in order to prepare a defense is

[126] *Id*.

[127] *Id*.

[128] *Id. citing* S v. Sarjoo, 1978 4 SA 520 (N) [Reproduced in the accompanying notebook at Tab 40] & S v. Kuse, 1990 1 SACR 191 (E) [Reproduced in the accompanying notebook at Tab 38].

[129] Nico Steytler, *supra* note 109 at 231.

[130] *Id*. at 232.

[131] *Id*. at 233 ("A fair trial…cannot be trial by ambush").

[132] *Id*. *See also* S v. Yantolo, 1977 2 SA 146 (E) 150E [Reproduced in the accompanying notebook at Tab 42]; Van Niekerk v. Attorney General, Transvaal 1990 4 SA 805 (A) 808H-I. [Reproduced in the accompanying notebook at Tab 53].

fundamental to the preparation of an alibi defense, therefore, it is necessary that these rights are protected to ensure one's right to a fair trial.

In addition to receiving adequate facilities, an accused has the right to examine all witnesses' statements under the principle that the accused is entitled to exculpatory evidence.[133] "Without a general duty to disclose all witnesses' statements, the enforcement of this duty relies on the goodwill of the prosecutor."[134] The obligation to disclose witnesses' statements is triggered upon the defendant's request.[135] "[O]rdinarily, an accused person should be entitled to have access at least to the statements of prosecution witnesses."[136] However, the prosecution may refuse a defendant's request by persuading the court that such admission is not warranted in the pursuit of a fair trial.[137] When there is a dispute over information to be disclosed, the trial court will make the determination on whether the materials should be divulged.[138] Moreover, "[t]he prosecution must objectively establish that there are reasonable grounds for its belief that the contested documents fall within one of the exceptions."[139] Whether or not the materials fall within the exception, the judge still retains "discretion to order disclosure where the interests of a fair trial outweigh the risks disclosure may hold."[140] In the instance of an alibi defense, witness disclosure rules are pertinent in establishing an effective defense, therefore, it is important to

[133] Nico Steytler, *supra* note 109 at 240-41 (in minor cases disclosure is unnecessary).

[134] *Id*. at 241.

[135] *Id*.

[136] *Id*.

[137] *Id*.

[138] Nico Steytler, *supra* note 109 at 244.

[139] *Id*.

[140] *Id.* at 245.

analyze such requirements and ensure that the following regulations are not violated to ensure that a defendant's rights are not violated in the presence of an alibi defense.

2. France

France has not established an official or unofficial compilation of all the French laws that are currently in force;[141] therefore, for an accurate understanding of the law an in depth research is required. France runs under civil law jurisdiction, which means that a judge adjudicates from the analysis of the present case with less regard to prior case law.[142] The French penal code consists of only eight defenses: insanity; compulsion; error of law; order of legitimate authority; defense of self, of third person, or of property; necessity; and youth.[143] The code does not recognize a specific defense of alibi; therefore, analysis of the penal structure will help determine procedural requirements in order to perform a proper alibi defense.

To fully understand French criminal procedure one must begin with the investigation of an accused individual. As soon as, the investigation is completed the dossier is given to the prosecuting attorney.[144] An examining magistrate determines whether there is an existing charge that violates the penal law against the accused.[145] An order from the magistrate will "indicate the legal qualifications of the acts imputed" to the accused and the reasons for whether there are or

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[141] Thomas H. Reynolds & Arturo A. Flores, *FOREIGN LAW: Current sources of Codes and Legislation in Jurisdictions of the World* II France 9 (2001). [Reproduced in the accompanying notebook at Tab 68].

[142] French Legal Courts *at* <http://www.law.harvard.edu/library/research_guides/french_legal/courts.htm> "Le juge doit se prononcer sur tout ce qui est demandé." *Id*. [Reproduced in the accompanying notebook at Tab 65].

[143] Edward A. Tomlinson, *The French Penal Code of 1994 (as amended as of January 1, 1999)*, 6 (1999). [Reproduced in the accompanying notebook at Tab 64].

[144] Gerald L. Kock & Richard S. Frase, *The French Code of Criminal Procedure* art. 175 (rev. ed. 1988). [Reproduced in the accompanying notebook at Tab 60].

[145] *Id*. at art. 176.

are not any sufficient charges.[146] Under the following procedures a defendant is pretty much already presumed guilty before any formal charges have been made. It seems that the government does not want to file formal complaints against the innocent, therefore, an alibi defense may be difficult to establish considering the in depth investigations that have been complied with prior to the charge. Once all the investigatory processes and determinations of the charges, including interrogations by the president of the assize court, are completed, the accused is invited to choose counsel.[147] The defense has access to examine the contents of the dossier, as long as inspection of the dossier does not cause any undue delay.[148] The defense is unable to remove any materials from the dossier; however, the Attorney General may remove information for a period of twenty-four hours.[149]

In regards to, witness testimony, both parties must disclose a list of individuals that are desired to be called as witnesses, twenty-four hours before the opening of trial.[150] The disclosure must state the name, profession, and addresses of each witness.[151] Any further investigation must be added to the dossier and shall be at the disposal of both parties.[152]

An accused has the right to remain silent since the duty to prove guilt is upon the prosecutor.[153] The presumption of innocence is the penal process way to transform suspicion

[146] *Id*. at art. 184.

[147] *Id*. at art. 274.

[148] *Id*. at art. 278.

[149] *See* Gerald L. Kock, *supra* note 144 at art. 278 & 284.

[150] *Id*. at art. 281.

[151] *Id*. at art. 281.

[152] *Id*. at art. 284.

[153] *Id*. at 191.

and formal charges into a conviction of certitude.[154] An accused does not need to establish innocence with absolute evidence; it is enough that through arguments and answers the defendant maintains reasonable doubt strong enough to entertain reservation in the certainty of a guilty conviction.[155] The legislature incorporated the presumption of innocence to guarantee that justice is equal between the parties.[156] Therefore, a defendant is assured of the right to be informed of the nature of the charges, the right to counsel, and the right to a speedy trial.[157] In correlation with an alibi defense, a defendant has the right to remain silent and does not necessarily need to present proof to verify his or her alibi.

3. Belgium

Belgium has not recognized a rule or any procedural requirements pertaining to an alibi defense. The law works under the theory of a verbal jurisdiction emphasizing the importance of an oral argument in search of the truth.[158] Each party has a right to choose how many witnesses will be called to testify and who will be heard.[159] The witnesses' testimony plays a significant role in convincing the jury of whether or not the accused is guilty.[160] Therefore, it is an essential

[154] ROGER MERLE & ANDRÉ VITU, TRAITÉ DE DROIT CIMINEL: PROCÉDURE PÉNALE 182 (5th ed. 2001). [Reproduced in the accompanying notebook at Tab 1].

[155] *Id*. at 182-83.

[156] *Id*. at 187 (recently added to legislative body of law—2000).

[157] *Id*.

[158] GASTON SCHUIND, TRAITÉ PRATIQUE DE DROIT CRIMINEL 658 (4th ed. 1981). [Reproduced in the accompanying notebook at Tab 2].

[159] *Id*. at 659.

[160] *See id*.

requirement that each witness called is heard, the court cannot refuse to hear a witness.[161] In the end, the jury makes the final decision on the culpability of the accused.[162]

Under Belgium law, notification includes a list of names, professions, and addresses of witnesses who will be heard.[163] Nevertheless, a party's failure to disclose the following information will not nullify a witness's testimony.[164] The rule is to ensure that neither party is caught by surprise; however, there is no penalty for a party's failure to abide by the rule.[165] If there is a disagreement on whether a certain witness shall be heard a formal debate by both parties will be presented.[166] Any question about the presence of a witness or for failure of proper disclosure will be made by the president of the Cour d'assises.[167]

Each party has up to twenty-four hours before the commencement of trial for proper disclosure of witness notification requirements.[168] Under the guidelines a delay in disclosure is allowed as long as notification is given twenty-four hours before the witness' testimony.[169] During the trial, witnesses are separated and are invited to stay in the president chambers to

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[161] *Id*.

[162] *Id*.

[163] GASTON SCHUIND, *supra* note 158 at 660.

[164] *Id*.

[165] *Id*.

[166] *Id*.

[167] *Id*. at 661.

> L' irrégularité de la notification d'un témoin à l'accusé donne seulement à celui-ci le droit de s'opposer à son audition…Attendu, toutefois, que cette notification (celle de l'atricle 315 du Code d'instruction criminelle) n'est pas prescrite à peine de nullité; que son omission n'a d'autre sanction que la faculté reconnue par l'article 315 du Code d'instruction criminelle à la partie intéressée de s'opposer à l'audition des témoins non notifies. *Id*. at n. 255-56.

[168] *Id*. at 662.

[169] GASTON SCHUIND, *supra* note 158 at 662.

ensure that the witnesses do not converse among themselves and/or the accused.[170] The court's concern is to ensure that nothing interrupts the search for truth and justice.[171]

C. Guidelines for witnesses testimony have been incorporated into Canadian law through case law, to guarantee that the trustworthiness of the fact-finding process is uninterrupted.

An alibi defense is automatically questionable because it can easily be fabricated and the only proof rests on evidence that may not always be obtainable or suspicious since it is made by the defendant. For instance, *R. v. Nygaard*[172] represents a situation where the defendant has concocted and orchestrated the compliance of friends in his alibi defense.[173] The conspiracy was discovered through investigations that intercepted conversations between the defendant and a witness therefore the prosecution was able to damage the credibility of the witness and the alibi defense.[174]

> It led the trial judge in his charge to the jury to put forward the theory that the defen[s]e witnesses had lied under oath because they had been concocting the alibi story and to make the suggestion that the jury might considered the fabrication of evidence by an accused as a circumstance from which they could infer consciousness of guilt, although he emphasized it would not be conclusive evidence of guilt.[175]

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[170] *Id*. at 669.

[171] *Id*. at 663.

> Le caractère «sacramentel» de la formule du serment interdit, dés lors, l'omission ou le changement d'une partie quelconque de cette formule, à peine de nullité; doit donc être cassé, meme d'office, un arrêt de la Cour d'assises lorsqu'il résulte du process-verbal d'audience que les témoins ont prêté serment de dire la vérité, rien que la vérité, au lieu de prêter serment de dire toute la vérité, rien que la vérité. *Id*.

[172] 1989 CarswellAlta 152. [Reproduced in the accompanying notebook at Tab 33].

[173] *See id*.

[174] *Id*.

[175] *Id*. at 21.

A witness has the opportunity to retract any testimony that may be suspicious during a cross-examination of a previous inconsistent statement. The witness may either claim that the statement was truthfully made, or admit it was deceitfully made, or deny that the statement was ever made.[176]

In respect to a defendant's testimony, "[i]t is open to the jury to draw an inference from the failure of the accused to testify, particularly in a case in which it is sought to establish an alibi."[177] A judge cannot make comment on a defendant's failure to testify or a defendant's witness failure to testify.[178] "The failure of an accused person, who relies upon an alibi, to testify and thus submit himself to cross-examination is a matter of importance in considering the validity of that defen[s]e."[179] A defendant is not obliged to testify since it is the duty of the prosecution to prove its case.[180]

D. England and Scotland's case law focus on jury instructions regarding a defense of alibi.

Under English and Scottish law, the Notes to the Alibi Direction,[181] advises the judge to give an instruction stating that the prosecution has the duty to disprove the alibi defense and that the defendant does not have any obligation to prove his defense.[182]

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[176] *Id*. at 23. "It is only in the first situation that the statement comes within the testimonial response and becomes evidence against the accused as to the truth of the facts therein." *See id*.

[177] R. v. Vezeau, 1975 CarswellQue 19, 2. [Reproduced in the accompanying notebook at Tab 36].

[178] *Id*. at 5.

[179] *Id*. at 7.

[180] *Id*. at 9.

[181] The Judicial Studies Board Specimen Direction offers direction for the courts to follow but they do not have the force of law. "The specific directions found in this work become authority only when and to the extent that they have been expressly approved or adopted." R v. Hickey, 2000 WL 491481, 4. [Reproduced in the accompanying notebook at Tab 31].

[182] *Id*. at 4.

> It is a rule of law that when an alibi is raised a particular direction should be given to the jury in regard to the burden of proof, and that in every case when an alibi is raised the judge should tell the jury, quite apart from the general direction of the burden and standard of proof, that it is for the Prosecution to negative the alibi.[183]

There is danger that when an alibi is presented as a defense it raises some burden to inform the jury that the defendant is not obliged to establish the defense.[184] "[C]learly it is the duty of the judge to give a specific direction to the jury in regard to how they should approach the alibi."[185] For example, in *R. v. Hickey*[186] the judge misdirected the jury by failing to direct the jury that a false alibi did not necessarily indicate guilt of the accused and it did not constitute as evidence towards identification of the accused.[187] Furthermore, the judge failed to explain to the jury that the burden of proof rests on the prosecution to disprove the defendant's alibi.[188] "The jury must have fully appreciated that proof of this special defen[s]e turned on whether they believed the alibi evidence and if they did believe the alibi evidence it was ample for them on any standard of proof."[189]

A judge is given discretionary power to ensure that the judicial proceedings remain fair between the two parties.[190] Justice "requires that those who are undoubtedly guilty should be convicted as well as those about whose guilt there is any reasonable doubt should be

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[183] *Id*. at 5.

[184] *Id*.

[185] *Id*.

[186] 2000 WL 491481. [Reproduced in the accompanying notebook at Tab 31].

[187] *Id*.

[188] *Id*.

[189] McCann v. H.M., 1960 S.L.T. (Notes) 46, 2. [Reproduced in the accompanying notebook at Tab 18].

[190] R. v. Dobson, 2001 WL 825049, 8. [Reproduced in the accompanying notebook at Tab 24].

acquitted."[191] A jury instruction is given so that a jury does not take the view that some burden is placed on the defendant to prove his innocence, therefore, if a defendant does not call any witnesses in support of his alibi, the assumption that he must be guilty is not predetermined.[192] "The mere fact that a defendant has not called witnesses that you thought he would have done, cannot possibly prove that a defendant is guilty of whatever charge he is facing…remembering that a defendant does not have to prove his innocence."[193] It is important to keep in mind that even though "[t]he absence of some fairly obvious potential alibi witness does not help a defendant's case."[194] However, a judge should tell the jury that they must not "treat the absence of defen[s]e witnesses as positive evidence against the defendant."[195]

The courts follow the hypothesis that even though the prosecution proves that the alibi was not established does not necessarily prove that the defendant is guilty.[196] The court recognizes that "an alibi can be invented to bolster a true defen[s]e."[197] The court rationalizes that even though the alibi may be found itself to be false does not mean that the defendant is guilty.[198] "The general proposition is that even if there is a false alibi it might well be in some cases concocted foolishly what otherwise might be a perfectly genuine defen[s]e."[199] Sometimes

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[191] *Id*.

[192] R. v. Headon, 2000 WL 976066, 2. [Reproduced in the accompanying notebook at Tab 29].

[193] *Id*.

[194] *Id*.

[195] *Id*.

[196] R. v. Rodrigues, 2001 WL 239698, 4-5. [Reproduced in the accompanying notebook at Tab 35].

[197] *Id*.

[198] R. v. Rist, 2001 WL 172123, 5. [Reproduced in the accompanying notebook at Tab 34].

[199] *Id*.

a defendant who is perfectly innocent may invent an alibi for foolish or misguided reasons.[200] Under the Judicial Studies Board, a standard guideline is given for an alibi defense stating "[e]ven if you conclude that the alibi is false that does not itself entitle you to convict the defendant. The prosecution must still prove the defendant's guilt. An alibi is sometimes invented to bolster a genuine defense."[201]

The judge holds discretion as to whether or not a jury instruction or an explanation of a judicial examination is necessary. However, it is important that the judge make sure that he does not influence a jury's decision. "It is not a function of the trial judge to speculate about possible lines of defen[s]e which have not been advanced in any way by the accused."[202] Although, the defendant may not dispute certain matters it is the job of the prosecutor to prove those matters.[203] "The purpose of charging a jury is to give the jury necessary directions in law to provide a proper framework for their consideration of the facts and, in particular, to give them proper directions on matters which are in issue in the trial."[204] In the instance of a critical witness statement, to be read to a jury, especially in the circumstance of an alibi case when the issue of identification is at stake, it is imperative that the judge explains the drawbacks to the defense if such statements are read.[205] The judge must explain the significance of the fact that the defense was unable to cross

[200] *Id*.

[201] R. v. Harron, 2 Cr. App. R. 457, 461. "[Y]ou do not have to be sure his witnesses are right, you have to be sure they are wrong and that the other evidence called by the prosecution is right." [Reproduced in the accompanying notebook at Tab 28].

[202] Hobbins v. HM,1997 S.L.T. 428, 432. [Reproduced in the accompanying notebook at Tab 17].

[203] *Id*.

[204] *Id*.

[205] R. v. Hardwick, 2001 WL 98166, 4. [Reproduced in the accompanying notebook at Tab 27].

examine the witness, a mere statement that defense lacked such opportunity may not be appreciated by a lay jury.[206]

E. The United States has established the strictest laws regarding reciprocal disclosure for the defense of alibi.

Disclosure for an alibi defense has basic similarities between the countries that have established an alibi defense.[207] However, the United States has the strictest regulation in regards to the time frame that a defendant has to disclose such information.[208] Furthermore, the initial burden is placed on the defendant to disclose the defense of an alibi. *US v Jordan*[209] recognized that the notice of an alibi rule typically involves a defendant to inform the government of intent to raise an alibi defense and all information pertaining to the defense within a specified period prior to trial.[210] On the other hand, in *US v. Clark*,[211] the court stated that the government held no obligation to the defendant to disclose a list of alibi rebuttal witnesses.[212] In that case, the government never submitted a written demand for production of the defendant's notice of an alibi.[213] Instead, the defendant revealed information gratuitously and therefore sought to obtain the government's list of potential witnesses that would refute the defendant's defense.[214]

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[206] *Id*.

[207] *Supra* sections III. A-D.

[208] Fed.Rules Cr.Pro.Rule 12.1, *supra* note 28.

[209] 964 F.2d 944 (1992). [Reproduced in the accompanying notebook at Tab 49].

[210] *Id*.

[211] 988 F.2d 1459 (1993). [Reproduced in the accompanying notebook at Tab 47].

[212] *Id*.

[213] *Id*.

[214] *Id*.

In addition, *US v. Bissonette*[215] confirmed that the alibi notice rule requires the government to supply notice of its alibi rebuttal witnesses within a certain time-frame.[216] The court noted that the determination of whether a violation mandated an exclusion of testimony is left to the discretion of the trial court.[217] Similarly, *US v. Wills* [218] represented the theory that in circumstances where concern for a witness' safety is present constituted good cause to grant an exception to the production requirements of the alibi rule.[219] The United States scrutiny of regulations under the notice of an alibi rule is to ensure that both parties have equal treatment.

[215] 164 F.3d 1143 (1999). [Reproduced in the accompanying notebook at Tab 45].

[216] *Id*.

[217] *Id*.

[218] 88 F.3d 704 (1996). [Reproduced in the accompanying notebook at Tab 51].

[219] *Id*.