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## Basic Rights and Anti-Terrorism Legislation

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# **Basic Rights and Anti-Terrorism Legislation: Can Britain's Criminal Justice (Terrorism and Conspiracy) Act 1998 Be Reconciled with Its Human Rights Act?**

## **Abstract**

*This Note addresses whether Britain's Criminal Justice (Terrorism and Conspiracy) Act (CJTCA), which permits police officer opinion testimony as to whether a terrorist suspect is a member of an illegal terrorist organization and allows adverse inferences to be drawn from that suspect's silence, can be reconciled with the fair trial provisions of the Human Rights Act (HRA). Part II of this Note describes the background of the CJTCA, concentrating on the reasons for its rushed passage and on the evidentiary changes it makes to trials of defendants charged with terrorist offenses. Part III describes the background and mechanics of the HRA, which incorporates the European Convention on Human Rights into Britain's domestic law. As the HRA directs British judges to refer to case law of the European Court of Human Rights for guidance, Part IV evaluates that tribunal's interpretation of Article 6 of the Convention, which guarantees the right to a fair trial. Specifically, this section examines decisions of the European Court of Human Rights and the British courts with regard to issues likely to arise in trials under the CJTCA, including the following: the right to remain silent, the right to cross-examine adverse witnesses, the prosecution's duty to disclose information, and the doctrine of "equality of arms." Part V applies the principles explicated by those authorities to the evidentiary provisions of the CJTCA, and assesses the soundness of the policy goals behind it. In this section, the author concludes that many trials under the CJTCA will run afoul of the HRA. Accordingly, the CJTCA should be repealed or given a very narrow interpretation by the British Courts. The author also concludes that the CJTCA will not advance the goals for which it was passed—reducing terrorist activity in the United Kingdom and bolstering the peace process in Northern Ireland.*

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### I. INTRODUCTION

Consider the following scenario. You are arrested and charged with membership in a terrorist organization. At the police station, you refuse to answer questions posed by the interrogating police officer. Maybe you are nervous. Maybe you are awaiting legal representation. Maybe you are somewhat uneducated, inarticulate, and incapable of effectively expressing yourself under the circumstances. Your exchange with the police officer goes something like this:

Policeman: "I have reliable information that you are a member of a terrorist organization. What do you say?"

Suspect: "What information?"

Policeman: "I am not at liberty to say."

Suspect: "Then—nothing."<sup>1</sup>

At trial, the judge or jury hears a high-ranking police officer testify to your refusal to answer questions during interrogation and that in his professional opinion you are a member of a terrorist organization. On cross-examination, defense counsel asks the officer on what information he bases his opinion, but the officer declines to answer on the basis that disclosing such information would jeopardize national security or would be contrary to the public interest. You decide to maintain your right to silence at trial. Based on the above evidence, the verdict comes back—"Guilty!"<sup>2</sup>

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1. Donald Findlay, *Cut Crime, Not Corners: Donald Findlay, QC, Sounds A Note Of Caution In The Wake Of New Anti-Terrorist Legislation*, SCOTLAND ON SUNDAY, Sept. 6, 1998, at 15.

2. *Id.*

Critics of recent anti-terrorism legislation in Britain, especially civil rights groups, indicate that the scenario above is possible under the government's new laws. The Criminal Justice (Terrorism and Conspiracy) Act 1998 (CJTCA), which passed through the House of Commons within twenty-four hours of being drafted,<sup>3</sup> makes significant changes in the types of evidence that can be admitted at trials of defendants suspected of involvement with terrorist organizations. The Act permits judges and juries to draw inferences from a suspect's silence in the face of police interrogation.<sup>4</sup> Additionally, the opinion evidence of a senior police officer that a defendant is a member of a terrorist group is also admissible at trial.<sup>5</sup> The Act was passed in the emotional aftermath of one of the Northern Ireland's worst bombings and the bombings of the U.S. embassies in Tanzania and Kenya in August 1998.

At the same time Britain passed these tough anti-terrorism measures, it adopted the European Convention on Human Rights (HRA)<sup>6</sup> into its domestic law. The HRA, which incorporates the terms of the Convention almost verbatim, will allow claimants to enforce Convention rights in British courts.<sup>7</sup> It will become effective in October 2000, but the Scottish courts have already entertained claims based on the Convention since May 20, 1999.<sup>8</sup> Although British Courts will not be permitted to strike down legislation under the HRA,<sup>9</sup> courts will be directed to favor an interpretation of a statute which is in accord with the Convention over an

3. *See In the space of a couple of hours on Wednesday night, the Government swept in legislation that shot holes through the rights of terrorist suspects—and, in doing so, undermined the rights of us all. These measures, which could only have come in on the back of public revulsion over the Omagh bombing, will have repercussions far beyond their narrow target*, W. MORNING NEWS (Plymouth), Sept. 5, 1998, at 11 [hereinafter *In the space of a couple of hours*]; *see also Emergency Bills in Britain and Ireland Drawn Up to Crack Down on Terrorism in the Wake of the Omagh Atrocity Became Law Today*, EXPRESS & ECHO (Exeter), Sept. 4, 1998, at 8 [hereinafter *Emergency Bills in Britain and Ireland*]; Catherine Macleod, *Tolerance is Watch Word for Terrorist Legislation Dissenters*, THE HERALD (Glasgow), Sept. 4, 1998, at 10.

4. Criminal Justice (Terrorism and Conspiracy) Act, 1998, ch. 40, (Eng.) [hereinafter CJTCA].

5. *See id.*

6. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 1 [hereinafter *European Convention on Human Rights*].

7. Human Rights Act, 1998, ch. 42, § 7 (Eng.).

8. *See Robert Verkaik, Law: A Case of Guilty Until Proven Innocent; A High Court Case is Challenging the Prevention of Terrorism Act*, THE INDEPENDENT (London), July 27, 1999, at 14 (noting that Scotland introduced the Human Rights Act 16 months ahead of England and Wales and that lawyers expect the Scottish experience to be similar to that of the entire United Kingdom next year).

9. *See Human Rights Act, supra note 7, at § 4.* The court may make a "declaration of incompatibility" where a statutory provision cannot be reconciled with the Convention. However, the statute continues to be valid. The powers of the British courts to enforce the Convention are discussed in more detail later in this Note.

interpretation which is not.<sup>10</sup> The HRA will effectively act as a “Bill of Rights” for the United Kingdom.

This Note deals specifically with whether the provisions of the Criminal Justice (Terrorism and Conspiracy) Act 1998, permitting opinion testimony of senior police officers and inferences of guilt from a suspect’s silence, will, in practice, contravene the European Convention on Human Rights. If British courts do not construe the provisions of the CJTCA narrowly, convictions may result in cases where the substantial evidence presented by the state is the suspect’s silence combined with police opinion evidence that is basically immune from cross-examination. Such convictions would violate Article 6 of the European Convention on Human Rights and accordingly, would violate the HRA. Without a very narrow construction of the CJTCA, courts will essentially have to choose between applying the CJTCA or the HRA to the trials of terrorist suspects. An expansive interpretation of the CJTCA would violate rights considered fundamental in most democratic societies, such as the right to silence, the right to be presumed innocent, and the right to confront witnesses and accusers.

The evidentiary provisions of the CJTCA will be analyzed primarily under case law from the European Court of Human Rights (ECHR) and also under British common law, as these are the sources which the HRA directs judges to consider when hearing claims under the Convention.<sup>11</sup> The HRA may provide persons charged with offenses to which the CJTCA applies a viable means of challenging the manner in which their trial is conducted.<sup>12</sup>

While the CJTCA is part of a joint effort between the British and Irish governments to combat terrorism through similar legislation, only the British legislation will be considered for the purposes of this Note. Because Britain is considered by many to be among the leaders of liberal democracies, its experience with the CJTCA will most likely have more influence over legislation in other countries, especially within Europe and in the United States and Canada. Consideration of Britain’s attempts to deal with terrorism and at the same time provide for protection of civil rights is relevant given the current scope of terrorism’s threat. Britain’s experience with the CJTCA may influence the manner in which other large democracies,

10. *Id.* § 3.

11. *Id.* § 3.

12. The Scottish courts are already hearing challenges to the Prevention of Terrorism Act, the legislation to which the evidentiary provisions of the CJTCA apply, based upon the Convention. *See supra* note 8 and accompanying text. Most of these cases have dealt with suspects’ lack of access to a lawyer during interrogation or delays in cases being tried. *See Verkaik, supra* note 8.

such as the United States, decide to deal with the increasing prevalence of both domestic and international terrorism.<sup>13</sup>

## II. THE CRIMINAL JUSTICE (TERRORISM AND CONSPIRACY) ACT 1998

Passed in what seemed like record time for a piece of legislation, the Criminal Justice (Terrorism and Conspiracy) Act 1998 was attacked by civil rights groups as an ill-thought-out, short-sighted solution to the problem of organized terrorism. It was criticized not only for its substantive changes to the laws of criminal procedure in the United Kingdom but also for the political haste in which it passed. Despite the criticisms against it, there was less than substantial opposition to the bill in the form of parliamentary votes. However, some MPs, especially in the Liberal Democratic Party, felt a heavy backlash from party backbenchers and constituents in the weeks following the CJTCA's passage.

### A. *The Political Climate*

The CJTCA passed the House of Commons in a sixteen-hour sitting on September 4, 1998 after a marathon session that began the previous day and lasted into the early hours of the morning.<sup>14</sup> It became law later the same day when it cleared the House of Lords with little opposition.<sup>15</sup> Parliament was recalled from its summer holiday for an emergency session to debate the bill.<sup>16</sup>

Tony Blair's Labour government introduced the bill for the immediate purpose of increasing the pressure on splinter paramilitary groups in Northern Ireland that were attempting to halt the peace process in Ulster.<sup>17</sup> On August 15, less than three weeks before the bill's introduction, a bomb had exploded in Omagh, Northern Ireland, causing the deaths of twenty-nine people.<sup>18</sup> The

13. See generally Roberta Smith, *America Tries to Come to Terms with Terrorism: The United States Anti-Terrorism and Effective Death Penalty Act of 1996 v. British Anti-Terrorism Law and International Response*, 5 CARDOZO J. INT'L & COMP. L. 249 (1997) (discussing and comparing the responses of the American and British governments to international and domestic terrorism).

14. See *The Weeks Top Ten British Stories*, THE GUARDIAN, Sept. 5, 1998, at 4.

15. But see *Dangerous Anti-Terrorism Bill Blasted by Top British Judge*, TORONTO STAR, Sept. 4, 1998, at A10 (quoting Lord Lloyd Berwick, one of 12 Lords of Appeal who constitute the highest court in Britain, stating that the anti-terrorism legislation was "a mere mouse of a bill and in some respects it is a dangerous mouse.").

16. See *Emergency Bills in Britain and Ireland*, supra note 3, at 8.

17. See *Anti-Terror Law on Course to Become Law*, BELFAST NEWS LETTER, Sept. 4, 1998, at 8.

18. See Patrick Wintour et. al., *Focus Ireland: A FRANTIC RACE FROM HORROR TO HOPE*, THE OBSERVER, Sept. 6, 1998, at 16.

bomb was allegedly an attempt to frustrate the ongoing peace process<sup>19</sup> by the Real IRA, a militant republican group that split off from the Provisional IRA because of the endorsement of the peace process by the Provisionals through the republican political party Sinn Fein. The British government appeared to be playing catch-up to the Irish Government, which had also passed new laws<sup>20</sup> aimed at rounding up the Omagh bombers.<sup>21</sup> The bombings of the U.S. embassies in Tanzania and Kenya, as well as pressure on the British government by other countries who claimed Britain had become a haven for planning international terrorist plots,<sup>22</sup> also contributed to the urgency with which the Act was pushed through Parliament.<sup>23</sup>

Aside from the substantive changes effected by the CJTCA, there was much criticism both from within Parliament and in the British media of the haste and manner in which it was passed. For example, not only were members of Parliament recalled from their summer holiday, but the emergency sitting also lasted only two days.<sup>24</sup> Many MPs claimed that there was not enough time given to properly debate the Act before its passage.

The bill passed through the House of Commons despite a cross-party coalition of backbench MPs' attempts to force more time for consideration of the bill.<sup>25</sup> The most outspoken leader of the

19. See generally *The Belfast Agreement*, April 10, 1998, Ir.-U.K. (visited Sept. 4, 1998) <<http://www.ireland.com/special/peace/agreement/agreement.htm>> (webpage no longer available, copy on file with author) The agreement was approved by large majorities of the peoples of the Republic of Ireland and in the six counties comprising what is currently British controlled Northern Ireland.

20. See *Offenses Against the State Act, 1998* (Ir.).

21. See *Emergency Bills in Britain and Ireland*, *supra* note 16.

22. See *Newspaper Comments on Britain's New Anti-Terrorism Legislation*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 7, 1998 (reprinting the text of EL KHABAR (Algiers), in arabic Sept. 5, 1998).

With the passing of the new anti-terrorism bill . . . last Thursday . . . by the British House of Commons, the first country . . . suspected of harboring the most dangerous international terrorist networks has made the first serious step towards taking tight measures against terrorist which made the United Kingdom's territory a refuge from which they plan their criminal acts in a number of places in the world. . . . A number of states, led by Egypt and Algeria, had on many occasions called on Britain to stop its policy which encouraged the networks that supported and planned acts of terrorism.

*Id.*; see also Jason Bennetto, *Police Seize Arab Terror Suspects*, THE INDEPENDENT (London), Sept. 24, 1998, at 1; Adrian Levy and Cathy Scott-Clark, *Pakistan Links 50 Killings to London*, SUNDAY TIMES (London), Nov. 8, 1998, at 21.

23. See Phillip Webster and Martin Fletcher, *British-Based Terror Plotters Face Life Jail*, THE TIMES (London), Aug. 26, 1998, at 1-2.

24. See Rachel Donnelly, *Tories and Lib Dems Support Terrorist Bill*, IRISH TIMES, Sept. 2, 1998, at 6.

25. See Dave Frazzle, *Anti-Terror Bill Becomes Law*, GLOUCESTER CITIZEN, Sept. 4, 1998, at 8.



opposition to the bill was MP Kevin McNamara, Labour's former Northern Ireland spokesperson, who protested that the United Kingdom was already "under the cosh" from the European Court because of inferences which were permitted to be drawn from a suspect's decision to remain silent in a criminal case.<sup>26</sup> McNamara contended that the Act would further breach European law.<sup>27</sup>

The government was criticized for allegedly manipulating the Queen into giving royal assent to the bill before the House of Lords had finished debating it. This led to criticism from some MPs, most notable among them former Cabinet Minister Tony Benn, who claimed that this was a breach of constitutional practice.<sup>28</sup> Normally, the Queen's assent is given only after debate has finished in both the House of Lords and the House of Commons.

The CJTCA has not yet fulfilled its immediate objectives of speedily "rounding up" the people responsible for the Omagh bombing in August 1998. The first significant arrests related to the bombings were made in late February 1999, more than six months after the bombing and more than five months after the CJTCA's rushed passage through parliament.<sup>29</sup> The Royal Ulster Constabulary—the police force in the North of Ireland—and the Gardai—the Irish Republic's police force—have combined to make over 100 arrests related to the bombing.<sup>30</sup> As of late September 1999, the British government has yet to prosecute anyone for alleged terrorist offenses under the highly controversial CJTCA.<sup>31</sup> Irish police have charged only one person under the Republic's similar legislation.<sup>32</sup>

26. *Labour MPs Challenge Terror Law*, BELFAST TELEGRAPH, Aug. 31, 1998.

27. *See id.*

28. *See Benn in a Row Over Role of Queen in Terror Bill*, THE HERALD (Glasgow), Sept. 5, 1998, at 7; *Queen Used to Win Vote on Terror Bill: Claim; Benn Hits Out at BBC Report of Royal Approval During Debate*, BELFAST NEWS LETTER, Sept. 5, 1998, at 8; *Queen Was Manipulated, Claims Benn*, BIRMINGHAM POST, Sept. 5, 1998, at 2.

29. *See Jim Dee, Police Arrest Dozen in Northern Ireland's Omagh Car Bombing*, BOSTON HERALD, Sept. 22, 1998, at 31 (reporting that arrests were made immediately following the bombing and in September 1998, but the suspects were released); *see also Jason Johnson, Smiling Bomber Makes a Mockery of Police Shadows*, THE PEOPLE, Aug. 15, 1999 (reporting that 4000 people have been interviewed in connection with the bombing in which police believe at least 60 people were involved).

30. *See Woman Arrested in Omagh Blast*, BOSTON GLOBE, Mar. 1, 1999, at A6.

31. *See Chris McLaughlin and Ted Oliver, Why Are the Omagh Bombers Still Free One Year On? Arrests Might Upset the IRA*, MAIL ON SUNDAY, Aug. 8, 1999, at 12; *Woman Arrested in Omagh Blast*, *supra* note 30.

32. *See Woman Arrested in Omagh Blast*, *supra* note 30.

### B. *The Mechanics of the CJTCA*

The CJTCA is intended to work in conjunction with the Prevention of Terrorism Act<sup>33</sup> and related anti-terrorism acts,<sup>34</sup> which make it an offense to be a member of an organization specified by the Home Secretary. Among the organizations currently specified are the Continuity Irish Republican Army, the Red Hand Defenders, the Orange Volunteers, and the Real Irish Republican Army (Real IRA).<sup>35</sup> Organizations like the Provisional IRA (IRA), the Ulster Defense Association (UDA), the Irish National Liberation Army (INLA), and the Loyalist Volunteer Force (LVF) as well as other paramilitary groups could be proscribed if they fail to continue their current cease-fires.<sup>36</sup>

One of the fundamental evidentiary changes made by the CJTCA is that it permits police officers of or above the rank of superintendent to give oral evidence that "in his opinion, the accused . . . belongs to an organisation which is specified, or . . . belonged at a particular time to an organisation which was then specified."<sup>37</sup> The officer's statement is "admissible as evidence of the matter stated," but the accused cannot be committed to trial or convicted solely on the basis of the officer's statement alone.<sup>38</sup> Thus, the police officer becomes somewhat of an expert witness, permitted not only to testify to facts of which he has knowledge, but also as to inferences and opinions.

Furthermore, the CJTCA continues a trend in British law of curtailing suspects' rights to remain silent.<sup>39</sup> In considering

33. See CJTCA, *supra* note 4, ch. 40, § 1(1).

34. Cf. Northern Ireland (Sentences) Act, 1998, ch. 35 (Eng.); Northern Ireland (Emergency Provisions) Act, 1998, ch. 9 (Eng.).

35. See Northern Ireland (Sentences) Act, 1998, § 3(8).

36. The IRA, UDA, and INLA were among other organizations proscribed in the past. See *id.* § 30(2), sched. 2.

37. CJTCA, *supra* note 4, ch. 40, § 1(2).

38. *Id.* § 1(3).

39. See, e.g., Gregory W. O'Reilly, *England Limits the Right to Silence and Moves toward an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402, 402 (1994) (discussing the provisions of the Criminal Justice and Public Order Act 1994, permitting the drawing of adverse inferences from the silence of a suspect during interrogation and at trial); Diane Beckman, Note, *You Have the Right to Be Silent . . . Anything You Do Not Say May Be Used Against You. Is the Right to Silence in Great Britain Really a Protection?*, 14 DICK. J. INT'L L. 95, 96-97 (1995) (suggesting that changes to the right to silence in the Criminal Justice and Public Order Act 1994 undermine the right to a fair trial and the right to assistance of counsel); Thomas P. Quinn, Jr., Note, *Judicial Interpretation of Silence: The Criminal Evidence Order of 1988*, 26 CASE W. RES. J. INT'L L. 365, 373-77 (1994) (explicating the Criminal Evidence Order, 20 N. Ir. Stat., No. 1987 (1988), which permits adverse inferences from silence in four situations: (1) where the accused is silent while interrogated but puts forth an explanation or alibi at trial, (2) where the prosecution establishes a case

whether a suspect belongs or belonged to a specified organization, the CJTCA permits the jury to draw inferences from a suspect's failure to respond to interrogation.<sup>40</sup> This applies in the following two situations: where the suspect was questioned before being charged and was permitted to see a lawyer before questioning; and where the suspect has been charged or informed by the police that he might be charged for an offense and is questioned after being permitted to see a lawyer.<sup>41</sup> Thus, under ch. 40, § 1(4) the jury may draw adverse inferences where:

- (a) at any time before being charged with the offence the accused, on being questioned under caution by a constable, failed to mention a fact which is material to the offence and which he could reasonably be expected to mention, and
- (b) before being questioned he was permitted to consult a solicitor.

Under ch. 40, § 1(5) an inference may be drawn where:

- (a) on being charged with an offence or informed by a constable that he might be prosecuted for it the accused failed to mention a fact which is material to the offence and which he could reasonably be expected to mention, and
- (b) before being charged or informed he was permitted to consult a solicitor.

Evidence of the accused's silence or failure to respond can be given either prior to or subsequent to evidence "tending to establish the fact which the accused is alleged to have failed to mention."<sup>42</sup> Again, the suspect cannot be tried or convicted solely on the basis of inferences drawn from the suspect's silence.<sup>43</sup>

### III. THE HUMAN RIGHTS ACT INCORPORATING THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Set to come into effect in October 2000, the Human Rights Act is intended to be somewhat of a "Bill of Rights" for the United Kingdom. It incorporates most of the European Convention on Human Rights and will allow aggrieved persons to enforce Convention rights in the British court system. Previously, British citizens could only enforce these rights by applying to the European Commission of Human Rights in Strasbourg, France.

to which the accused must answer and the accused refuses to testify, (3) where the accused refuses to explain certain facts such as marks on clothing, and (4) where the accused fails to account for his presence at a given location).

40. See CJTCA, *supra* note 4, ch. 40, § 1(6)(a).

41. See *id.* § 1(4)-(5).

42. *Id.* § 1(7).

43. See *id.* § 1(6)(b).

### A. *The Background of the Human Rights Act*

The Human Rights Bill was part of the platform on which the Labour party ran successfully in the last parliamentary election. The Bill began as a consultation paper written by Labour MPs Jack Straw and Paul Boateng in late 1996 and was first published as part of the government's white paper, *Rights Brought Home*, in October 1997.<sup>44</sup> It is part of Tony Blair's goal of creating a "human rights culture" in which "awareness of human rights will be enhanced in our [British] society."<sup>45</sup> The Bill received royal assent in November 1998 and was originally expected to become active law on January 1, 2000.<sup>46</sup> Because more time was needed to train the British judiciary about the mechanics of the Human Rights Act, however, that date has been pushed back to October 2000.<sup>47</sup> It is predicted to affect lawyers practicing in many fields and to have a substantial impact on the British criminal justice system once it becomes effective.<sup>48</sup>

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44. See Geoffrey Bindman et al., *Recognising Rights—A Look at the Progress of the Human Rights Bill and Analysis of the Impact of the Government's Rushed Anti-Terror Legislation*, 95 L. SOC'Y GAZ. 22 (1998).

Critics of the CJTCA might note the possible irony in the fact that Jack Straw, the current Home Secretary and author of the consultation paper that eventually became the Human Rights Bill, was also a major proponent of the CJTCA and has power as Home Secretary to determine which organizations will be listed as "proscribed" under it.

45. See Bindman, *supra* note 44 ("The intention is that ordinary members of the public will develop a new perception of themselves as the confident possessors of inviolable fundamental rights, protected by the courts against any encroachment under whatever authority.").

46. See Susan Nash & Mark Furse, *Human Rights Law Update: The Human Rights Act 1998*, 149 NEW L.J. 877, 891 (1999); Susan Nash & Mark Furse, *Human Rights Law Update: The Human Rights Act 1998*, 148 NEW L.J. 1737, 1782 (1998).

47. See Verkaik, *supra* note 8.

48. See Dan Bindman et al., *The Right to Redress—The Impact of the Human Rights Act 1998 Will Be Pervasive; A Look at How It Will Affect Lawyers in a Wide Range of Practice Areas*, 95 L. SOC'Y GAZ. 20 (1998); David McIntosh, *Rights The Way Through—Whatever Your Place or Area of Practice, If You Are a Solicitor, The Human Rights Act 1998 Has Direct Relevance*, 96 L. SOC'Y GAZ. 14 (1999); see also Francis Gibb, *More Judges Needed for Rights Challenges*, THE TIMES (London), Sept. 7, 1999 (noting that the Lord Chancellor, expecting a substantial increase in human rights challenges in British courts, intended to seek parliamentary approval for what would be the largest increase in the number of judges sitting on the High Court in over a decade).

B. *The European Convention on Human Rights  
and Fundamental Freedoms*

The European Convention of Human Rights was signed in Rome in 1950,<sup>49</sup> with Great Britain as one of the signatories. The Convention provides that the signatories "shall secure to everyone in their jurisdiction the rights and freedoms defined in . . . this Convention."<sup>50</sup> Among these rights is the right to a fair and public hearing by an independent and impartial tribunal.<sup>51</sup>

The Convention created two institutions to enforce these rights—the European Commission on Human Rights and the European Court of Human Rights (ECHR).<sup>52</sup> Persons alleging violations of a Convention right may apply to the Commission, which analyzes the relevant facts and law before deciding whether to refer the case to the ECHR.<sup>53</sup> Domestic remedies must be exhausted before applying to the Commission.<sup>54</sup> The ECHR's interpretation of Convention rights is final.<sup>55</sup> The ECHR consists of twenty-one judges, at least seven of whom decide an individual case unless that chamber of seven requests that the case should be decided by the full court because it raises a serious question of interpretation of the Convention.<sup>56</sup>

C. *Enforcing Convention Rights Under the Human Rights Act*

As the United Kingdom is a signatory of the European Convention on Human Rights, its citizens already may seek redress from the ECHR in Strasbourg. In fact, the British Government has been the subject of numerous adverse rulings from the ECHR.<sup>57</sup> When the HRA becomes effective, persons alleging violations of the Convention will be able to enforce their Convention rights not only

49. See Christian Kohler, *The Court of Justice of the European Communities and the European Court of Human Rights*, in SUPRANATIONAL AND CONSTITUTIONAL COURTS IN EUROPE: FUNCTIONS AND SOURCES 15, 25 (Igor I. Kavass ed., 1992).

50. See European Convention on Human Rights, *supra* note 6, at art. 1.

51. See *id.* art. 6.

52. See *id.* art. 19; see generally, John P. Flaherty and Maureen P. Lally-Green, *Fundamental Rights in the European Union*, 36 DUQ. L. REV. 249 (1998).

53. See Kohler, *supra* note 49, at 29.

54. See European Convention on Human Rights, *supra* note 6, art. 26.

55. *Id.* art. 27(3).

56. *Id.* art. 29(1).

57. See generally Sue Farran, THE UK BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY (1996); A.W.B. Simpson, *Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights*, 41 LOY. L. REV. 629 (1996).

in Strasbourg, but in the courts of the United Kingdom as well.<sup>58</sup> To that end, the HRA prohibits “public authorities”<sup>59</sup> from acting “in a way which is incompatible with one or more of the Convention rights.”<sup>60</sup> The public authority’s act is not prohibited, however, if the public authority could not have acted differently pursuant to a provision of primary legislation.<sup>61</sup> Neither houses of Parliament are considered to be public authorities.<sup>62</sup> An “act” is defined to include omissions as well as overt acts, except failures to introduce or enact legislation.<sup>63</sup> Any person who is or would be the victim of an unlawful act may bring action under the HRA or rely on the Convention rights in any legal proceeding.<sup>64</sup>

Specifically with regard to legislation, the HRA requires that so far as possible, it must be read and applied “in a way which is compatible with Convention rights.”<sup>65</sup> When interpreting the legislation, the U.K. courts are directed to consider judgments, declarations, decisions, and advisory opinions of the ECHR, as well as opinions and decisions of the Commission.<sup>66</sup> However, the ECHR is without power to affect the continuing validity or enforcement of the legislation.<sup>67</sup> The ECHR may make a “declaration of incompatibility” where the legislation cannot be reconciled with Convention rights and where the legislation in question precludes removal of the incompatibility.<sup>68</sup> Additionally, in such cases the HRA provides an expedited procedure by which the relevant government minister may amend the legislation to make it compatible with the Convention rights, subject to Parliament’s right to object within a limited time.<sup>69</sup>

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58. See generally Judge Christopher Tromans, *Benchmarks: Human Rights, A Beginner’s Guide: A Sketch of the European Convention on Human Rights and the Human Rights Act 1998 Which Will be Implemented on 2 October 2000*, 96 LAW Soc’y GAZ. 34 (Sept. 2, 1999). Arguably, the Human Rights Act could have the effect of stifling the number of applications from British citizens brought before the European Commission on Human Rights because of the Convention’s requirement that domestic remedies be exhausted. This is likely to please some critics of the European Court of Human Rights. See, e.g., Fenton Bresler, *Can a Foreign Court Pronounce on British Justice?*, 20 NAT’L L. J. A26 (June 2, 1998).

59. See Geoffrey Bindman, *supra* note 44, noting that this term will be interpreted broadly to include the courts themselves.

60. Human Rights Act, *supra* note 7, § 6(1).

61. See *id.* § 6(2)(a)-(b).

62. See *id.* § 6(3).

63. See *id.* § 6(6).

64. See *id.* § 7(1).

65. *Id.* § 3(1).

66. *Id.* § 2(1).

67. See *id.* § 3(2).

68. See *id.* § 4(4).

69. See Bindman, *supra* note 44.

The rights incorporated into the HRA are embodied in Articles 2 through 18 of the Convention. The right to a fair trial is explicated in Article 6.<sup>70</sup>

#### IV. ARTICLE 6 OF THE CONVENTION AND THE RIGHT TO A FAIR TRIAL UNDER ECHR DECISIONS AND BRITISH CASE LAW

Article 6 has generated more case law in the ECHR than any other article in the Convention.<sup>71</sup> The ECHR has recognized the right to a fair trial as fundamental in a democratic society and, accordingly, has held that a narrow or restrictive interpretation of Article 6 would be at odds with the objectives of the Convention.<sup>72</sup> Article 6 reads as follows:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
  - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - b. to have adequate time and facilities for the preparation of his defence;
  - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal

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70. See European Convention on Human Rights, *supra* note 6, art. 6. The rights are as follows: the right to life; the right not to be subjected to torture or to inhuman or degrading treatment or punishment; the right not to be held in slavery or forced servitude and not to be required to perform forced or compulsory labour; the right to liberty and security of person; the right to a fair hearing of any criminal charge; the right not to be convicted for what was not unlawful at the time of its commission; the right to respect for private and family life, home and correspondence; the right to freedom of thought, conscience and religion; the right to freedom of expression; the right to freedom of peaceful assembly and freedom of association with others; the right to marry and found a family for those of marriageable age. See Bindman, *supra* note 44.

71. See ANDREW GROTIAN, COUNCIL OF EUROPE, HUMAN RIGHTS FILES NO. 13, ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: THE RIGHT TO A FAIR TRIAL 6 (1994).

72. See *Delcourt v. Belgium*, 1 Eur. H.R. Rep. (ser. A) 355 (1970).

assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.<sup>73</sup>

Under Article 6, the ECHR looks at the proceedings as a whole to determine fairness.<sup>74</sup> Particular incidents may, however, have a decisive effect, and defects may be remedied in later proceedings.<sup>75</sup> The ECHR does not pass on whether the court made errors of fact or law.<sup>76</sup>

The provisions of Article 6 relating to the presumption of innocence and the right to examine adverse witnesses are of particular importance to analyzing a potential prosecution under the CJTCA. Also important to this analysis are the right to silence, which the ECHR and the Commission have recognized to be implicit in Article 6,<sup>77</sup> and the doctrine of “equality of arms” related to procedural fairness which is embodied in Article 6.<sup>78</sup>

#### A. *The Right to Silence and Legal Advice After Murray v. United Kingdom*

While a defendant’s right to silence in criminal trials is not explicitly mentioned in Article 6 of the Convention, the ECHR has recognized that “the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of fair procedure under Article 6.”<sup>79</sup> The use of the accused’s silence against him will only constitute a violation of Article 6 where the trial will be declared unfair under all of the facts and circumstances.<sup>80</sup> Thus, the Court has not adopted a rule that the use of an accused’s silence to draw inferences renders the trial unfair per se for the purposes of Article 6.<sup>81</sup>

One of the most important and most recent cases from the ECHR is *Murray v. United Kingdom*, in which the ECHR addressed

73. European Convention on Human Rights, *supra* note 6, art. 6, at 228.

74. See GROTIAN, *supra* note 71, at 41.

75. See *id.*

76. See *id.*

77. See *Murray v. United Kingdom*, App. No. 18731/91, 22 Eur. H.R. Rep. 29, 48 (1996) (Commission report).

78. See GROTIAN, *supra* note 71, at 41.

79. *Murray*, 22 Eur. H.R. Rep. at 60, ¶ 45 (1996) (citing *Funke v. France*, 16 Eur. H.R. Rep. 297).

80. See *id.* at 44, ¶ 58.

81. See *id.*



the issue of whether the drawing of inferences from an accused's decision to remain silent, in addition to being denied legal advice for over forty-eight hours, violated Article 6.<sup>82</sup> In *Murray*, the Crown charged the applicant and seven other people with conspiracy to murder, unlawful imprisonment, and membership in the Provisional IRA, a proscribed organization.<sup>83</sup> All of these charges were pursuant to the Prevention of Terrorism Act (PTA)—charges to which the evidentiary provisions of the CJTCA will apply at trial.<sup>84</sup>

Murray was arrested in the hall of a house after police, while conducting a raid, had seen him coming down a flight of stairs.<sup>85</sup> The police discovered a Mr. L, a police informer who had been abducted two days earlier in the upstairs bedroom.<sup>86</sup> Mr. L later testified that he was forced by his abductors to confess on audiotape that he was an informer.<sup>87</sup> Mr. L also testified that on the night of the raid, he heard commotion in the house, was told to take off his blindfold, and then saw Murray standing at the stairs and pulling the tape out of a cassette.<sup>88</sup> Mr. L claims he was told to go downstairs to the living room to watch television while the police were there.<sup>89</sup> Murray did not make any statements upon arrest that explained his presence in the house.<sup>90</sup>

At trial, the judge warned Murray that if he refused to take the witness stand or to answer any question without good reason, the court "in deciding whether you are guilty . . . may take into account against you to the extent that it considers proper your refusal to give evidence or to answer any questions."<sup>91</sup> Pursuant to his lawyers' advice, Murray neither gave evidence nor called any witnesses on his behalf.<sup>92</sup> Along with supporting evidence from co-defendant DM, Murray's lawyers claimed that his presence in the house upon the arrival of the police was "recent and innocent."<sup>93</sup>

82. *Id.* at 29. See also *Saunders v. United Kingdom*, 23 Eur. H.R. Rep. 313, 331 (1997) (holding that there had been a violation of Article 6(1) where statements given by applicant to DTI inspectors, using their statutory powers of compulsion, were admitted as evidence in a subsequent criminal trial.).

83. *Murray*, 22 Eur. H.R. Rep. at 33, ¶ 17.

84. CJTCA, *supra* note 4, § 1(1).

85. See *Murray*, 22 Eur. H.R. Rep. at 33, ¶ 19.

86. See *id.*

87. See *id.*

88. See *id.*

89. See *id.*

90. See *id.*

91. *Id.* at 33-34, ¶ 20. The Criminal Evidence (Northern Ireland) Order 1988 permitted the judge—or jury in a jury trial—to make common sense inferences from a suspect's silence. The Order's provisions regarding inferences from silence bear a close similarity to the provisions in the CJTCA applicable to such inferences. See Criminal Evidence (Northern Ireland) Order 1988, arts. 3 & 4.

92. See *Murray*, 22 Eur. H.R. Rep. at 34, ¶¶ 20, 21.

93. *Id.* ¶ 21.

The trial judge (in a “diplock” court without a jury) rejected the co-defendant’s claim that Murray was there innocently.<sup>94</sup> The judge further rejected Murray’s claim that the trier of fact should not be permitted to draw adverse inferences where there was a “reasonably plausible explanation for the accused’s conduct consistent with his innocence.”<sup>95</sup> Accordingly, the judge drew adverse inferences from Murray’s failure to give a reason for his presence in the house when police questioned him upon arrest.<sup>96</sup> He further drew adverse inferences from Murray’s failure to testify and give an explanation for his presence when called by the court to do so.<sup>97</sup> Based on these inferences in combination with Mr. L’s testimony and the surrounding circumstances, Murray was found guilty of aiding and abetting false imprisonment.<sup>98</sup> The trial judge accepted Mr. L’s testimony despite agreeing with defense counsel’s submission that he was a “man fully prepared to lie on oath to advance his own interests and is a man of no moral worth whatever.”<sup>99</sup>

The Court of Appeal of Northern Ireland affirmed Murray’s conviction and eight-year sentence.<sup>100</sup> It reasoned that it was inevitable that the trial judge would draw strong inferences against him given that Mr. L had identified Murray and testified as to his being involved in keeping Mr. L held captive, and that Murray had refused to give answers to the police or the court at trial.<sup>101</sup>

The European Court of Human Rights began its analysis in *Murray* with a review of decisions of the British courts interpreting the changes to the right to silence made by the Criminal Evidence (Northern Ireland) Order 1988.<sup>102</sup> It noted that the House of Lords interpreted the statute as first requiring that the prosecution demonstrate a prima facie case against the defendant, and only then can the judge or jury make such inferences that appear proper.<sup>103</sup> The prima facie case amounts to a case for which the defendant should answer, making the drawing of inferences from silence proper.<sup>104</sup> The Court cited the following British case law in defining a “prima facie case”:

[A] case which is strong enough to go to a jury—i.e., a case consisting of direct evidence which, if believed and combined with legitimate inferences based upon it, could lead a properly directed jury to be

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94. See *id.* ¶ 23.

95. *Id.* ¶ 24.

96. See *id.* at 35, ¶ 25.

97. See *id.*

98. See *id.*

99. *Id.*

100. See *id.* at 35-36, ¶ 26.

101. See *id.* at 36, ¶ 26.

102. See *id.* at 36-39.

103. See *id.* at 38, ¶ 29.

104. See *id.*

satisfied beyond a reasonable doubt . . . that each of the essential elements of the offence is proved.<sup>105</sup>

The drawing of such inferences is in the discretion of the trial judge given the particular facts and circumstances of the case.<sup>106</sup> The suspect still retains, however, a specific immunity from having the prosecution comment adversely on the suspect's failure to answer questions before or at trial.<sup>107</sup>

Addressing Murray's claim that permitting use of his silence against him rendered the right worthless and effectuated a means of compelled self-incrimination, the Commission noted that the right to silence in Article 6 was not unqualified.<sup>108</sup> Under the standard of analyzing the fairness of the case as a whole, the Commission found no violation of Article 6(1) and (2) regarding Murray's silence.<sup>109</sup> It first remarked that there was no penalty imposed on Murray for exercising his right to silence.<sup>110</sup> While the Commission recognized that the trial judge drew strong inferences against Murray for remaining silent, this did not render the trial unfair for a number of reasons. First, the prosecution had to put forth sufficient evidence to constitute a *prima facie* case.<sup>111</sup> Only then was it permissible for the trial judge to draw inferences from the accused's failure to rebut such evidence.<sup>112</sup> Second, the burden of proof remained on the prosecution to prove guilt beyond a reasonable doubt.<sup>113</sup> Third, the suspect was warned that if a *prima facie* case was made out against him and that if he failed to respond, inferences could be drawn against him.<sup>114</sup> Fourth, there was no suggestion that he did not understand those warnings.<sup>115</sup> The Commission went on to find, however, that the suspect's rights were violated by being denied access to a lawyer for over forty-eight hours.<sup>116</sup>

The ECHR also ruled that there had been no violation of Article 6 with regard to the right to silence.<sup>117</sup> It noted that to base a conviction solely or substantially on the inferences drawn from the

105. *Id.* at 39, ¶ 30 (citing *R. v. Kevin Sean Murray, sub nom. Murray v. Director of Public Prosecutions*, 97 Cr. App. R. 151 (1993)).

106. *See id.* ¶ 31.

107. *See id.* ¶ 32 (citing *R. v. Director of Serious Fraud Office, Ex Parte Smith*, 3 W.L.R. 66 (1992)).

108. *See id.* at 44, ¶ 56 (Commission Report).

109. *See id.* at 46-47, ¶¶ 64, 65.

110. *See id.* at 44, ¶ 57.

111. *See id.* at 44-45, ¶ 58.

112. *See id.*

113. *See id.*

114. *See id.* at 45, ¶ 60.

115. *See id.* at 46, ¶ 62.

116. *See id.* at 48, ¶ 73.

117. *See id.* at 58, ¶ 58.

accused's refusal to answer questions would clearly breach the immunities inherent in Article 6.<sup>118</sup> However, the ECHR deemed it "equally obvious that these immunities cannot . . . prevent the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the pervasiveness of the evidence adduced by the prosecution."<sup>119</sup> Like the Commission, the ECHR found it notable that the accused was permitted to remain silent throughout the trial.<sup>120</sup> It stated that, though there may be a certain level of indirect compulsion to speak if inferences might be drawn from silence, that factor alone cannot be decisive.<sup>121</sup> The focus of the analysis must be on the role of such inferences in influencing the proceeding and the conviction.<sup>122</sup>

For the most part, the ECHR reiterated the Commission's opinion regarding procedural safeguards and weight of the evidence against the accused, which prevented a violation of Article 6.<sup>123</sup> It went on to state that in many countries where evidence is freely assessed by judges, they are able to take into account all of the relevant circumstances when assessing the case, including the accused's behavior and the manner in which he conducted his defense.<sup>124</sup> Furthermore, in this particular case, the trial was conducted by an experienced judge who was required to put the basis of his decision in writing, including why he chose to draw inferences from the accused's silence.<sup>125</sup>

The provisions of the statute challenged in *Murray*, delineating the use of the accused's silence, bear a close similarity to the silence provisions in the CJTCA. Additionally, the CJTCA provides for use of the accused's silence only after he has been extended the opportunity to consult with a lawyer.<sup>126</sup> Thus, in some ways it mitigates against the likelihood of a finding that a CJTCA trial would be deemed "unfair" under Article 6. However, it appears that under the CJTCA a terrorist suspect does not have a right to have his lawyer present during interrogations, but rather, only to have been given the chance to consult with the lawyer beforehand.<sup>127</sup> Thus, the lawyer may have to advise his client about the implications of the suspect's silence before an interrogation, the subject of which is yet unknown to the lawyer.<sup>128</sup> Furthermore, if the lawyer is not

118. See *id.* at 60, ¶ 47.

119. *Id.*

120. See *id.* at 61, ¶ 48.

121. See *id.* ¶ 50.

122. See *id.*

123. See *id.* at 61-64, ¶¶ 48-56.

124. See *id.* ¶ 54.

125. See *id.* ¶ 51.

126. See CJTCA, *supra* note 4, ch. 40, § 1(4)-(5).

127. See *id.*

128. See Bindman, *supra* note 44.

permitted to be present during the actual interrogation, the suspect will be on his own in applying whatever legal principles were imparted to him by his lawyer.<sup>129</sup>

The ECHR reviewing *Murray* also seemed to place substantial importance on the fact that in Northern Ireland, where judges sit without juries in criminal trials, the experienced judge was required to put in writing the basis of a decision to draw inferences from an accused's silence.<sup>130</sup> It is not clear whether the ECHR still would have found the proceedings to be fair if a jury were charged with the decision of whether to draw inferences from silence, especially elsewhere in the United Kingdom where criminal suspects are afforded jury trials.<sup>131</sup>

B. "Equality of Arms" and the Prosecution's Duty to  
Disclose Evidence: The Tension Between the Right  
to Cross-Examine Witnesses and Britain's Public  
Interest Immunity

The ECHR has consistently held that the principle of "equality of arms" inheres in the requirement that the accused be given a fair trial under Article 6. Basically, this principle embodies the notion that the accused should be afforded procedural equality with the prosecution. Article 6 also explicitly provides that every person charged with a criminal offense has the rights "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."<sup>132</sup>

Seemingly at odds with the idea of equality of arms and the right to cross-examine prosecution witnesses is the prosecution's right under British law to withhold information from the defense in some circumstances. These circumstances usually occur when disclosing certain information to the defense might jeopardize the security of police or military operations or when an informer's or witness's well-being might be at risk if his identity is disclosed to the defense. This can pose a serious risk of unfairness, especially where a police officer's opinion might be based on hearsay originating from such informants and witnesses.

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129. See *id.*

130. See *Murray*, 22 Eur. H.R. Rep. at 61-62, ¶ 51.

131. See Anthony F. Jennings, *More Resounding Silence—Part 2*, 149 NEW L.J. 1232, 1233 (Aug. 6, 1999).

132. European Convention on Human Rights, *supra* note 6, art. 6(3)(d).

## 1. Public Interest Immunity

Under British law, the prosecution must normally disclose “all unused material . . . if it has some bearing on the offence(s) charged and the surrounding circumstances of the case.”<sup>133</sup> However, the prosecution may decide not to disclose relevant information to the defense on the grounds that disclosure would be contrary to the public interest. This public interest immunity may be used to protect the identity of informers for their own safety as well as to ensure that authorities have a continuous supply of information from these sources.<sup>134</sup> Particularly important to cases that might involve the CJTCA are the Attorney General’s Guidelines for the prosecution. The Guidelines provide that statements containing “sensitive material” may be withheld if it is not in the public interest to disclose them.<sup>135</sup> A list of examples explicates that a statement contains sensitive material if:

- (a) It deals with matters of national security; or it is by, or discloses the identity of, a member of the Security Services who would be of no further use to those Services once his identity became known.
- (b) It is by, or discloses the identity of, an informant and there are reasons for fearing that disclosure of his identity would put him or his family in danger.
- (c) It is by, or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity became known.
- (d) It contains details which, if they became known, might facilitate the commission of other offences . . . or it discloses some unusual form of surveillance or method of detecting crime.<sup>136</sup>

The Guidelines afford the police and the prosecution much discretion in deciding whether disclosure is warranted. Thus, “[I]f . . . the material supports the case for the prosecution or is neutral . . . there is a discretion to withhold not merely the statement containing the sensitive material, but also the name and address of the maker.”<sup>137</sup> The guidelines provide that in deciding a disclosure issue, a balance should be struck between the “degree of sensitivity” and the extent to which the information would be helpful to the defense.<sup>138</sup> Any doubt as to whether the balance favors disclosure or non-disclosure should be resolved in favor of disclosure.<sup>139</sup>

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133. Attorney General’s Guidelines: Disclosure of Information to the Defence in Cases to be Tried on Indictment, 74 Crim. App. 302 (1981), ¶ 2 [hereinafter A.G. Guidelines].

134. See *R. v. Hennessey*, 68 Crim. App. 419, 425 (1978).

135. A.G. Guidelines, *supra* note 133, ¶ 6(v).

136. *Id.* ¶ 6(v)(a)-(d).

137. *Id.* ¶ 8.

138. See *id.*

139. See *id.* ¶ 9.

The British courts have followed suit in applying the balancing test to relevant evidence. According to case law, there is a general rule in favor of protecting the identity of informers, but the court will order disclosure if the information at issue may prove the defendant's innocence or avoid a miscarriage of justice.<sup>140</sup> The accused has the burden of proving that there is a "good reason" why his request for information should prevail over the need to protect informers.<sup>141</sup>

If a defendant requests that the prosecution disclose certain information in its possession and the prosecution wishes to keep this information confidential, the prosecution may make an *ex parte* application to the trial judge to determine whether the information must be disclosed.<sup>142</sup> In doing so, the prosecution is obliged to put forth to the judge only such information that it deems "material." Information is material if upon a "sensible appraisal" the prosecution finds it:

- (1) to be relevant or possibly relevant to an issue in the case;
- (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
- (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).<sup>143</sup>

It is up to the defense to make known to the prosecution any defense or issues that the defense might potentially raise in order for the prosecution to determine materiality.<sup>144</sup> The prosecution should determine materiality based on the enumerated criteria and not simply hand over all of its unused material to the court to determine materiality.<sup>145</sup>

Additionally, Article 6 guarantees the right to the necessary facilities for conducting a defense, including, *inter alia*, "the opportunity to acquaint himself . . . with the results of investigations carried out throughout the proceedings" regardless of whom carried

140. See *R. v. Keane*, 2 All E.R. 478, 99 Crim. App. 1 (1994).

141. See *Hennessey*, 68 Crim. App. at 425.

142. See *R. v. Davis, Rowe and Johnson*, 2 All E.R. 643, 97 Crim. App. 110 (1993) (upholding the trial court's ruling that the defense could put positive assertions to the chief inspector and inquire into sources of information on cross examination, but it was for the witness to decide whether or not to answer without divulging information, which the crown wished not to disclose); see also *R. v. Johnson, Davis and Roe*, Mar. 29, 1999 (Crim. App.), available in LEXIS, U.K. Cases Library, Combined Courts File (terminating the order of public interest immunity because the information at issue had recently become public).

143. *R. v. Keane*, 2 All E.R. at 484 (quoting *R. v. Melvin and Dingle* (20 Dec. 1993, unreported)).

144. See *id.*

145. See *id.*

out the investigations.<sup>146</sup> This includes a right of access “to all relevant elements that have been or could be collected by the competent authorities.”<sup>147</sup> However, an applicant alleging a violation of this right must demonstrate that the facility to which he was denied access was necessary to allow preparation of an adequate defense.<sup>148</sup>

The public interest immunity afforded police and military personnel poses a significant problem for the defense in the context of “opinion” testimony permitted by the CJTCA. For example, it is likely that during direct examination at trial a senior police officer will testify that in his opinion the accused is a member of a proscribed organization. Assume the officer bases this opinion on information received from informants or military intelligence personnel and that which would amount to hearsay if the officer were to disclose the information at trial. Permitting the use of such opinion testimony allows what would otherwise be inadmissible hearsay to become direct evidence that can be considered by the judge or jury in determining the accused’s guilt or innocence. Furthermore, if some of these sources of information are informants who would lack credibility were they to appear before the jury, allowing the senior police officer to give testimony based on this information lends credibility to an unreliable source.

Also assume that upon cross-examination, defense counsel wisely attempts to inquire into the sources of the police officer’s testimony. At most, the officer may have revealed that such information came from unidentified informants or intelligence sources. Assume that on further inquiry about these sources by the defense, the officer invokes public interest immunity and declines to answer the questions. Whether the judge applies the balancing test prior to trial or during trial in determining whether disclosure should be ordered, in many of these situations it is likely that the balance may favor non-disclosure. This is due to the nature of prosecutions for terrorist offenses. They often involve information

146. *Jespers v. Belgium*, App. No. 8403/78, 22 Eur. Comm’n H.R. Dec. & Rep. 110, 121-22 (1980) (Commission report) (commenting on Article 6(3)(b)); *see also* John Wadham, *Prosecution Disclosure, Crime and Human Rights*, 147 *NEW L.J.* 697 (1997) (discussing potential conflicts between ECHR caselaw and restricted prosecution disclosure under the Criminal Procedures and Investigations Act 1996).

147. *Jespers*, 22 Eur. Comm’n H.R. Dec. & Rep. at 12-22.

148. *See* GROTIAN, *supra* note 71, at 50, ¶ 114, which found no violation of Article 6(1) where the applicant was denied access to the entirety of his customs file in a prosecution for tax and customs offenses. *Bendenoun v. France*, 18 Eur. H.R. Rep. 54 (1994). During the proceedings, the prosecution relied only on documentary evidence which had been disclosed to the accused, and the accused knew the content of most of the undisclosed documents. *Id.* at 76-77, ¶¶ 51, 52. The applicant failed to give reasons why he was entitled to or required to access the documents at issue.). *Id.* at ¶ 52.



flowing from highly confidential intelligence sources such as MI5. Also, there will be a great need to keep the identities of informers confidential due to the reputation of certain paramilitary and terrorist organizations of exacting revenge on informers. Additionally, the permanent nature of many of these organizations weigh in favor of keeping confidential all methods used by the police and military in infiltrating an organization's operations. This situation makes it even more difficult to put forth a viable request for disclosure. In defending against the charge, the defense may need to know the nature of the information relied upon by the police before determining a defense strategy. At this point, the defense will not be able to raise issues that allow the prosecution to analyze materiality.

## 2. The Right to Cross-Examine Witnesses Under Article 6

Despite the high degree of deference afforded national courts by ECHR in matters concerning the admissibility of evidence, the ECHR has found violations of Article 6 in numerous cases where either hearsay evidence has been used at trial or the defense has not been afforded an adequate opportunity to cross-examine key prosecution witnesses. In most of these instances, the application to the Commission was based on alleged violations of paragraph 1 taken in conjunction with paragraph 3(d) of Article 6 of the Convention. Paragraph 1 guarantees the right to a fair trial by an independent and impartial tribunal, while paragraph 3(d) guarantees the accused the right to cross-examine witnesses against him.

The ECHR has repeatedly stated that "the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them."<sup>149</sup> As such, the ECHR will not undertake to assess whether certain statements are legally admissible as evidence but rather will determine whether the criminal proceedings taken as a whole, including the way in which evidence is taken, were fair.<sup>150</sup> There is also a general rule that evidence must be produced at a public trial, with the accused present, with a view toward adversarial argument.<sup>151</sup> While there are exceptions to this rule, the exceptions must not infringe upon the right of the defendant to be given an "adequate opportunity to challenge and question a witness against him."<sup>152</sup> While the use of statements by an anonymous witness as evidence supporting a conviction is not a per se violation of the

149. Van Mechelen & Others v. Netherlands, 25 Eur. H.R. Rep. 647, 673, ¶ 50 (1998).

150. *Id.* (citing Doorson v. Netherlands, 22 Eur. H.R. Rep. 330, ¶ 70 (1996)).

151. *Id.* ¶ 51.

152. See Ludi v. Switzerland, 15 Eur. H.R. Rep. 173, ¶ 47 (1993).

Convention, restrictions upon the accused's rights should be strictly necessary and should not be permitted if there are less restrictive means of furthering society's interest in witness anonymity.<sup>153</sup>

Typical of the cases in which the accused challenges witness anonymity and claims a denial of the right to cross-examine an adverse witness is the 1998 judgment of the ECHR in *Van Mechelen & Others v. Netherlands*. In a six to three decision, the ECHR held that there had been a breach of Article 6(1) as well as Article 6(3)(d) of the Convention. The two applicants' convictions for attempted manslaughter and robbery were based largely on anonymous testimony by police officers given outside the presence of the accused.<sup>154</sup> While *Van Mechelen* is not a case involving terrorism, it is relevant in that the prosecution sought to keep the identity of the police witnesses anonymous to protect the safety of officers and their families and to protect the integrity and usefulness of the officers in future undercover operations.<sup>155</sup>

In *Van Mechelen*, the authorities had received a tip that the defendants had been involved in numerous robberies.<sup>156</sup> A police observation team staked out the caravan site from where the defendants allegedly ran their operation.<sup>157</sup> One night in January 1989, the police recorded the tag numbers of three cars—a BMW, a Lancia, and a Mercedes—that left the site together around five-fifteen p.m.<sup>158</sup> Forty-five minutes later a post office was robbed in a nearby town.<sup>159</sup> A Mercedes equipped with a steel girder was used to break through the post office window, and a man wearing a black balaclava helmet robbed the store at gunpoint.<sup>160</sup> The Mercedes was then set on fire and the robbers took off in a BMW.<sup>161</sup> The police were alerted and followed the BMW to a sand track leading into a nearby forest, where the pursuit ceased.<sup>162</sup> They saw a pillar of smoke come from the forest and later found the BMW in the forest, burnt out.<sup>163</sup> Four police officers observed a red Lancia leave the forest from the same path that the BMW used to enter it, and they followed.<sup>164</sup> While chasing the Lancia, its trunk opened to reveal two men who began shooting at the police with a pistol and

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153. See *Van Mechelen*, 25 Eur. H.R. Rep at 674, ¶ 58.

154. *Id.* at 671, ¶ 47.

155. See *id.* ¶ 48.

156. *Id.* at 650.

157. See *id.*

158. See *id.* ¶ 10.

159. See *id.* ¶ 11.

160. See *id.*

161. See *id.*

162. See *id.*

163. See *id.*

164. See *id.*

a sub-machine gun.<sup>165</sup> The police finally caught up with the Lancia when it came to a stop on a side road, where a man in the middle of the road began firing at the police with a submachine gun.<sup>166</sup> One of the policemen was hit, and the men in the Lancia were able to escape.<sup>167</sup> The three cars involved in the robbery were subsequently identified as the cars that had their tag numbers recorded at the caravan site by the observation team.<sup>168</sup>

Prior to the applicants' trial, the statements made by the four police witnesses, who were identified only by a number, were testified to by an identified police officer.<sup>169</sup> Upon a challenge by the defense, the investigating judge determined that the unidentified officers had "investigative competence" and as such the admissibility of their statements was not affected by their anonymity.<sup>170</sup> The only evidence given at trial identifying the applicants as the robbers were the statements given by the anonymous officers, who did not appear.<sup>171</sup> The applicants were convicted.<sup>172</sup> During proceedings in the Court of Appeal, an identified civilian witness gave evidence in open court, but the four police officers were permitted to give evidence in a private room with the judge and the prosecutor.<sup>173</sup> The room was connected by sound link to the defense. The court permitted the defense to put questions to the anonymous witnesses through the judge.<sup>174</sup> The police witnesses who were cross-examined in open court could not give positive evidence identifying the applicants as the perpetrators of the crime.<sup>175</sup> The Court of Appeal convicted the applicants.<sup>176</sup>

The ECHR found the proceedings to be unfair under Article 6, despite the Commission's finding to the contrary.<sup>177</sup> The ECHR stated that while Article 6 does not explicitly account for the interests of witnesses, it can be implied from other articles in the convention that proceedings should be organized so as not to "unjustifiably imperil" such persons.<sup>178</sup> It went on to say that when

165. *See id.* at 650-51, ¶ 11.

166. *See id.* at 651, ¶ 11.

167. *See id.*

168. *See id.* ¶ 12.

169. *See id.* ¶ 13.

170. *Id.* ¶ 14.

171. *See id.*

172. *See id.*

173. *See id.* at 652, ¶ 16.

174. *See id.*

175. *See id.* ¶ 23.

176. *See id.* ¶ 26.

177. *See id.* ¶¶ 65-66.

178. *Id.* ¶ 53. For example, Article 8 of the Convention provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

anonymity is maintained, Article 6 requires that, because the defense is disadvantaged by procedures that should not normally be involved in criminal prosecutions, the disadvantage should be counterbalanced by appropriate judicial procedures.<sup>179</sup> In any case, a conviction should not be based entirely “or to a decisive extent” upon statements by anonymous witnesses.<sup>180</sup>

The ECHR, upon reviewing *Van Mechelen*, noted that special problems arise when balancing defense interests with the interest in witness anonymity when the witnesses at issue are agents of the state.<sup>181</sup> While police witnesses and their families also deserve protection, their position as agents of the state and their usual ties to the prosecution dictate that anonymity should only be maintained in exceptional circumstances.<sup>182</sup> Also, the ECHR noted that giving evidence in open court, especially by arresting officers, is usually a natural part of an officer's duty.<sup>183</sup> While the ECHR recognized that it might be legitimate for an undercover officer to remain anonymous so long as the defendant's rights were respected,<sup>184</sup> this should only be permitted where strictly necessary and where alternative methods less restrictive to the defendant's rights are unavailable.<sup>185</sup>

According to the ECHR, the fact that the anonymous officers in *Van Mechelen* were in a separate room connected only by sound link to the defense with the investigating judge posing questions deprived the defense of its ability to observe the officers' demeanor under

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety . . . , for the prevention of disorder or crime, . . . or for the protection of the rights and freedoms of others.

European Convention on Human Rights, *supra* note 6, art. 8. From these provisions, the Court appears to imply a general duty to protect the well being of witnesses in criminal trials.

179. See *Van Mechelen*, 25 Eur. H.R. Rep. At 673, ¶ 53 (citing *Doorson*, 22 Eur. H. R. Rep. 330, ¶ 70). The court does not explicitly state of what those counterbalancing procedures should consist. In *Doorson*, however, the court found that although the two anonymous witnesses identifying the applicant as the perpetrator of the crime were heard outside of the applicant's presence, the handicap to the defense was counterbalanced by the fact that 1) the witnesses were questioned by an investigating judge at the appeals stage, in the presence of the defense counsel, 2) the judge knew the identities of the witnesses, and 3) the witnesses identified the applicant from a photograph which the applicant acknowledged to be of himself. See *Doorson*, 22 Eur. H.R. Rep. At 349, ¶¶ 73-76. See *infra* notes 189-95 and accompanying text.

180. *Van Mechelen*, 25 Eur. H. R. Rep. at 674, ¶ 55.

181. See *id.* ¶ 56.

182. See *id.*

183. See *id.*

184. See *id.* ¶ 57 (citing *Lüdi v. Switzerland*, 15 Eur. H.R. Rep. 173, ¶ 49).

185. See *id.* ¶ 58.

direct questioning.<sup>186</sup> The government argued that because the witnesses were interrogated by an investigating judge, who tested the witnesses' reliability and gave a written report of his finding of reliability and reasons for maintaining anonymity, the disadvantage to the defense was counterbalanced by appropriate procedures.<sup>187</sup> The ECHR rejected this argument, stating that the disadvantage was not counterbalanced because of the defense's inability to cross-examine the witness in its presence and make its own judgment regarding demeanor and reliability.<sup>188</sup> Because the only positive identification evidence linking the applicants to the crime was by these anonymous officers, the ECHR held that the conviction rested to a "decisive extent" on these anonymous statements and thus, rendered the trial unfair under Article 6.<sup>189</sup>

The *Van Mechelen* opinion distinguished itself from *Doorson v. Netherlands*, decided two years earlier, in which the use of statements by anonymous witnesses was held not to be unfair.<sup>190</sup> The applicant in *Doorson* was convicted for drug trafficking and was denied the opportunity at trial to question anonymous witnesses whose statements identifying the applicant as the perpetrator were admitted.<sup>191</sup> However, on appeal the applicant's counsel was given the opportunity to cross-examine two of these witnesses, even though the applicant himself was not permitted in the room.<sup>192</sup> Furthermore, the only witness who was not cross-examined during the course of the entire proceedings could not be found and brought in to testify, justifying the use of his statement as corroborative evidence only.<sup>193</sup> Additionally, there was a finding by the ECHR of a substantial threat of reprisal against the anonymous witnesses.<sup>194</sup> Various other witnesses who were heard in open court had identified the applicant as the perpetrator in the *Doorson* case.<sup>195</sup> The ECHR found by a vote of seven votes to two that there had been no violation of Article 6(1) taken together with Article 6(3)(d).<sup>196</sup> The ECHR found that the handicaps to the defense were appropriately counterbalanced because (1) the witnesses were questioned by an

186. See *id.* ¶ 59.

187. See *id.* ¶ 62.

188. See *id.*

189. *Id.* ¶¶ 63, 66. The Court also noted that the prosecution failed to establish that less restrictive alternatives, such as disguising the witnesses while in court, could achieve the same protection. The prosecution also did not establish a real threat of reprisals against the officers. See *id.* ¶¶ 60-61.

190. See *id.* ¶ 64; *Doorson*, 22 Eur. H.R. Rep. at 350, ¶ 83.

191. See *id.* at 335-36, ¶¶ 19-20.

192. See *id.* ¶ 25.

193. See *id.* ¶¶ 79-80.

194. *Id.* ¶ 71.

195. *Id.*

196. See *id.* ¶ 83.

investigating judge in the presence of defense counsel, (2) the judge knew the witnesses identities, and (3) the witnesses identified the applicant from a photograph that the applicant acknowledged to be himself.<sup>197</sup>

*Van Mechelen* and *Doorson* together set out the rules and principles developed in much of the ECHR's case law under Article 6(3)(d) related to examination of witnesses and disclosure of evidence in the hands of the prosecution.<sup>198</sup> The right to cross-examine witnesses is closely related to the duty of the prosecution to disclose information, as they both are crucial to the principle of "equality of arms" espoused by the ECHR.

What appears from the case law is a general rule that convictions based to a significant extent on testimony by anonymous witnesses, whom the defense is not able to cross-examine, breach Article 6. The ECHR will likely tolerate convictions based on anonymous witness testimony that cannot be cross-examined where there is a heavy interest in favor of preventing the witnesses from appearing at trial, coupled with a significant amount of corroborative evidence which the defense can adequately challenge during trial.<sup>199</sup>

197. See *id.* ¶¶ 73-76. See *supra* note 179 and accompanying text.

198. Among the cases in which the ECHR has found no violation of Articles 6(1) and 6(3)(d) taken together is *Asch v. Austria*, 15 Eur. H.R. Rep. 597 (1993) (holding that where statement of defendant's co-habitee given soon after the defendant's arrest was admitted into evidence after co-habitee refused to testify, no violation because defendant failed to cross-examine the police officer who took the report and failed to call other witnesses in his behalf). The Court has, however, found violations in numerous other cases. See *Delta v. France*, 16 Eur. H.R. Rep. 574 (1993) (robbery conviction based solely on written statements of the victim and a friend, and court denied defendant's request to call these witnesses); *Saidi v. France*, 17 Eur. H.R. Rep. 251 (1993) (conviction based on the identification evidence of three persons, and applicant's requests to examine these witnesses repeatedly denied.); *Windisch v. Austria*, 13 Eur. H.R. Rep. 281 (1991) (conviction based largely on statements by two anonymous witnesses heard only by the police, in the absence of the defense, and not appearing at trial); *Kotovski v. Netherlands*, 12 Eur. H.R. Rep. 434 (1990) (robbery conviction based to a decisive extent on statements by two anonymous witnesses who were heard by the police in the absence of defense counsel and did not appear at trial, although one of the witnesses was examined by an examining magistrate in the absence of defense counsel). See generally John Wadham & Janet Arkinstall, *Hearsay Evidence and the Use of Anonymous Witnesses*, 149 NEW L.J. 703 (1999) (discussing the ECHR's treatment of the use of anonymous witnesses and the requirement of disclosure).

199. For an approach similar to that taken by the European Court of Human Rights, see Mercedeh Momeni, *Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia*, 41 How. L.J. 155, 157 (1997) (citing International Criminal Tribunal for the Former Yugoslavia, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, (Aug. 10, 1995) <<http://www.un.org/icty/100895pm.htm>>). The article discusses the test employed by the Tribunal:

The balancing process weighs heavily in favor of the defendant's rights. While the ECHR has not directly addressed the issue of Britain's public interest immunity, the Commission has already indicated, albeit in an unreported decision, that non-disclosure to the defense on some public interest immunity grounds violates the right to a fair trial in Article 6.<sup>200</sup>

### 3. "Equality of Arms" and the Prosecution's Duty of Disclosure under Article 6(1)

The concept of equality of arms essentially requires that the accused be given procedural rights equal to those of the prosecution in the course of criminal proceedings. The ECHR has held that this is inherent in the concept of a fair trial.<sup>201</sup> More specifically, it has noted that Article 6(3)(d) of the Convention exemplifies the principle of equality of arms with regard to the right to call witnesses as between the prosecution and the defense. The Commission has noted that the prosecution also has a duty to disclose relevant material to the defense,<sup>202</sup> but this is limited by the principle that the admissibility of evidence is generally a matter for the national courts to assess themselves.<sup>203</sup> Thus, the overall "fairness" test still applies.

On the basis of generally recognized principles of international law . . . a five-prong balancing test must be met in order for a request of anonymity of witnesses to be granted. The five prongs to be met are: (1) the existence of a real fear for the safety of a witness; (2) the testimony of the witness must be sufficiently relevant and important to the case; (3) there must be no *prima facie* evidence of the witness's unworthiness in any way; (4) the non-existence of a witness protection program; (5) the unavailability of less restrictive protective measures.

*Id.*

200. See Wadham & Arkinstall, *supra* note 198 (discussing the Commission's finding in *Rowe & Davis v. United Kingdom*, an unreported March 1999 decision, that in some circumstances PII and the holding of private *ex parte* hearings is a breach of the right to a fair trial).

201. See *Foucher v. France*, 25 Eur. H.R. Rep. 234, ¶ 34 (1997) (holding that there was a violation of Articles 6(1) and 6(3)(d) taken together where applicant was denied access to his case file to procure relevant documents under a policy that copies could not be issued to individuals who had declined counsel, an noting that "equality of arms" is a feature of the wider concept of a fair trial); *Bulut v. Austria*, 24 Eur. H.R. Rep. 84, 103-04 (1996) (holding that "[e]ach party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-a-vis his opponent.").

202. See *Jespers v. Belgium*, App. No. 8403/78, 22 Eur. Comm'n H.R. Dec. & Rep. 100 (1981) (holding that prosecution must disclose potentially exculpatory material, including information that might undermine the credibility of prosecution witnesses, in order to make up for the inequality of resources between the prosecution and the defense.).

203. See *Edwards v. United Kingdom*, 15 Eur. H.R. Rep. 417 (1992).

An example of a violation of the principle of equality of arms occurred in the case of *Bönisch v. Austria*.<sup>204</sup> In *Bönisch*, the applicant ran a firm that specialized in meat smoking.<sup>205</sup> The applicant was criminally prosecuted under Austrian food regulations for allegedly using a process of smoking meats that created a dangerously high level of the carcinogenic substance benzopyrene, having an unacceptably high water content, and subsequently distributing the product.<sup>206</sup> Prior to filing charges, the Vienna food inspectors had taken samples of the applicants' meat because they had received a number of complaints.<sup>207</sup> The inspectors gave the samples to the Federal Food Control Institute.<sup>208</sup> The Institute found the high benzopyrene concentrations after testing and turned its opinion over to the city, which subsequently turned the results over to the prosecutor so that charges could be filed.<sup>209</sup>

At Bönisch's trial in Regional Court, the trial judge appointed as an expert witness the director of the Institute, the body whose findings led to the filing of charges.<sup>210</sup> Bönisch challenged both the expert and the judge on the grounds that the two had disregarded the rights of the defense.<sup>211</sup> Bönisch sought to introduce another witness as an expert to counter the director's testimony, but the court would only hear Bönisch's witness as an ordinary witness.<sup>212</sup> He claimed that his right to the attendance and examination of witnesses and experts for the defense on the same grounds as those for the prosecution was violated in contravention of Article 6 and requested that several defense experts be heard.<sup>213</sup>

The judge heard the testimony of the defense witness, the director of another meat-analyzing institute.<sup>214</sup> This witness disputed the findings of the court's expert, claiming that the benzopyrene level in the meat was much lower than what the court's expert found.<sup>215</sup> After hearing the rebuttal testimony of the court's expert, the trial judge convicted Bönisch of the charges.<sup>216</sup> On appeal, Bönisch challenged the appointment of the court expert on the grounds that the trial court appointed the same person as an

204. See 9 Eur. H.R. Rep. 191 (1987).

205. See *id.* ¶ 7.

206. See *id.* ¶¶ 8-9.

207. See *id.* ¶ 8.

208. See *id.* ¶ 9.

209. See *id.* ¶ 10.

210. See *id.* ¶ 11.

211. See *id.*

212. See *id.* ¶¶ 11, 14.

213. See *id.*

214. See *id.* ¶ 12.

215. See *id.*

216. See *id.* ¶ 13.



expert who had reported Bönisch's case to the prosecutor.<sup>217</sup> He further claimed that his rights were not respected because his witness was only heard as a defense witness, whereas the director of the Institute was heard as an expert witness.<sup>218</sup> Based on detailed explanations of the expert, the Vienna Court of Appeal rejected Bönisch's appeal.<sup>219</sup> Additional similar charges were later brought against Bönisch for another food contamination incident; he was convicted, and his appeal on the same grounds was rejected.<sup>220</sup>

The ECHR found a violation of Article 6.<sup>221</sup> In doing so, it noted that while Article 6(3)(d) does not explicitly refer to experts but only to witnesses against the accused, the provisions of Article 6(3)(d) were "constituent elements, amongst others, of the concept of a fair trial set forth in paragraph 1" of Article 6.<sup>222</sup> Thus, the ECHR took note of the accused's right under Article 6(3)(d), but analyzed the criminal proceedings under the more general provisions of Article 6(1).<sup>223</sup>

The ECHR rejected the government's contention that because the court appointed expert was a "neutral and impartial auxiliary of the court" under Austrian law and was appointed by the court itself, the expert was not a witness against the accused for purposes of Article 6.<sup>224</sup> The ECHR agreed with the Commission and the applicant that the director of the Institute was not "an 'expert' in the classic sense of the term," but rather a witness against the accused within the meaning of Article 6.<sup>225</sup> The director—later appointed as the expert—drafted the Institute reports that led to the filing of charges against the applicant. Later, as an appointed expert, he was charged by the court with "explaining and supplementing the findings or opinion' of the Institute."<sup>226</sup> Thus, the director by all appearances was a witness against the accused and, as such, the principle of equality of arms dictated that the Austrian courts afford equal treatment between hearing the court-appointed expert and

217. *See id.* ¶ 14.

218. *See id.*

219. *See id.*

220. *See id.* ¶¶ 15-18.

221. *See id.* ¶ 35.

222. *Id.* ¶ 29 (citing *Artico v. Italy*, 3 Eur. H.R. Rep. 1, ¶ 32 (1980); *Goddi v. Italy*, App. No. 8966/80, 6 Eur. H.R. Rep. 457 ¶ 28 (1984); *Collozza v. Italy*, App. No. 9024/80, 7 Eur. H.R. Rep. 516, 26 (1985)).

223. *Bönisch*, 9 Eur. H.R. Rep. 191, ¶ 29.

224. *Id.* ¶ 30. The Court also stated that it was not going to re-define "expert" under Austrian law. Rather, the Court could not rely exclusively on the Austrian terminology in analyzing the role of the court appointed expert, "but must have regard to the procedural position he occupied and . . . the manner in which he performed his function." *Id.* ¶ 31.

225. *Id.* ¶ 30.

226. *Id.* ¶ 31.

hearing “persons who were or could be called, in whatever capacity, by the defence.”<sup>227</sup>

For a number of reasons, the ECHR found that the accused was not afforded equal treatment in the proceedings against him. First, because the director was appointed as an expert under Austrian law and “formally invested with the function of neutral and impartial auxiliary,” his statements carried greater weight than any witnesses called by the accused.<sup>228</sup> However, in this case the director’s neutrality and impartiality were open to doubt.<sup>229</sup> Second, the expert was able to attend all of the proceedings, question witnesses and the accused, and comment on the evidence of these witnesses.<sup>230</sup> Third, the witness called by the accused was subject to examination by the judge as well as by the director. The witnesses called by the defense, on the other hand, had no opportunity to examine the director.<sup>231</sup> Fourth, the applicant was not able to have a counter-expert appointed.<sup>232</sup> Finally, if the court needed clarification regarding the Institute’s opinion, it had to get it from another member of the Institute’s staff and could not consult another expert, except in limited circumstances inapplicable to the case at hand.<sup>233</sup>

While the principle of equality of arms appears general in concept and application, it may influence how both the British Courts and the ECHR analyze challenges to prosecutions under the CJTCA, especially with regard to any “opinion” testimony given by high-ranking police officers against the accused. The equality of arms principle, though, seems to underlie some of the decisions of the ECHR in cases discussed earlier in this Note, even though it may not have been mentioned explicitly. At the very least, it represents an argument that some criminal defendants can fall back on where there is the appearance of unfairness in the proceedings and the more specific provisions of Article 6 or decisions of the ECHR are not directly applicable.

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227. *Id.* ¶ 32.

228. *Id.* ¶ 33.

229. *See id.* Expert witnesses in Austrian proceedings can attend all of the hearings, question witnesses, including the accused, and in some circumstances may comment on the testimony given by other witnesses. Ordinary witnesses may not engage in this activity. *See id.*

230. *See id.*

231. *See id.*

232. *See id.* ¶ 34.

233. *See id.*

C. *The European Convention on Human Rights and the Human Rights Act: Interpretations by the British Courts*

Although the Human Rights Act (HRA) does not yet have the force of law throughout the United Kingdom, British courts have begun hearing challenges to criminal convictions under Article 6. The recent cases of *Ex Parte Kebilene*, *R. v. Radak*, and *R. v. Thomas & Others* may provide the basis of the British judiciary's interpretations of the HRA.

1. The Presumption of Innocence under Article 6

The Court of Appeal (the High Court) recently examined certain provisions of the Prevention of Terrorism Act (PTA) and their compatibility with the HRA. In *R. v. Dir. Of Public Prosecutions, Ex Parte Kebilene & Others*; *R. v. Same, Ex Parte Rechachi*, the court held that §§ 16A and 16B of the PTA conflicted with Article 6 because they undermined the presumption of innocence.<sup>234</sup> Section 16A essentially makes it a crime for a person to possess any materials that give rise to a "reasonable suspicion" that the article is being possessed for "a purpose connected with the commission, preparation or instigation of acts of terrorism" outside of the United Kingdom or connected with Northern Ireland.<sup>235</sup> The PTA creates a presumption that materials are in the person's possession if the person and the materials are present in any premises or where the materials are in the premises occupied by that person.<sup>236</sup> In this case, the applicants had been charged with possessing chemical containers, radio equipment, manuals, documents, credit cards, and money under circumstances raising the suspicion that they were in the applicants' possession for a purpose connected with terrorism.<sup>237</sup> Section 16B makes it a crime to collect, record, or possess any information or documents containing information, "of a nature as is likely to be useful to terrorists in planning or carrying

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234. *R. v. Dir. Of Public Prosecutions, Ex Parte Kebilene & Others*; *R. v. Same, Ex Parte Rechachi* (hearing date: Mar. 30, 1999) (C.A.), available in THE TIMES (London), Mar. 31, 1999. The House of Lords later overruled *Ex Parte Kebilene* on purely procedural grounds. See *R. v. Dir. of Public Prosecutions, Ex Parte Kebilene & Others* (hearing dates: July 19-22, Oct. 28, 1999) (H.L.), available in THE TIMES (London), Oct. 28, 1999; *infra* note 240 and accompanying text.

235. Prevention of Terrorism (Temporary Provisions) Act, 1989, Ch. 4, §§ 16A(1), 16A(2) (Eng.).

236. See *id.* § 16A(4).

237. See *R. v. Dir. Of Public Prosecutions, Ex Parte Kebilene & Others*; *R. v. Same, Ex Parte Rechachi* (hearing date: Mar. 30, 1999) (C.A.), available in THE TIMES (London), Mar. 31, 1999.

out any act of terrorism."<sup>238</sup> One of the applicants was charged under this provision for possessing books containing information of such a nature that they were likely to be useful in planning or carrying out a terrorist attack.<sup>239</sup> In reviewing the decision of the Director of Public Prosecutions to prosecute the applicants, the High Court decided that it could also review the substantive challenges to the PTA provisions, since they were relevant to the decision to prosecute in the interim between the passage of the HRA and its effective date of application.<sup>240</sup>

In judicial review proceedings, the High Court noted that these provisions of the PTA criminalized the possession of otherwise innocent materials and placed the burden on the defendant of disproving a substantial element of the charge—*mens rea*.<sup>241</sup> The government did not need to prove the purpose for which the information was possessed.<sup>242</sup> The High Court noted that the presumption of innocence is breached when the accused could be convicted even though a reasonable doubt exists as to a material fact.<sup>243</sup> The High Court pointed out that a defendant who chose not to present evidence could be convicted without the government having to prove the *mens rea* of the offense.<sup>244</sup> Thus, the accused could be convicted despite the existence of a reasonable doubt as to whether the accused had criminal intent.<sup>245</sup> According to the High Court, this undermined the presumption of innocence guaranteed in Article 6.<sup>246</sup> It stopped short of addressing the issue of whether there was any way that §§ 16A and 16B could be read so as to be compatible with Article 6.<sup>247</sup>

238. Prevention of Terrorism (Temporary Provisions) Act, 1989, Ch.4, § 16B(1) (Eng.).

239. R. v. Dir. Of Public Prosecutions, Ex Parte Kebilene & Others; R. v. Same, Ex Parte Rechachi (hearing date: Mar. 30, 1999) (C.A.), available in THE TIMES (London), Mar. 31, 1999.

240. See *id.* The House of Lords overruled this judicial review of the decision to prosecute, holding that the criminal trial should be permitted to proceed. See R. v. Dir. of Public Prosecutions, Ex Parte Kebilene & Others (hearing dates: July 19-22, Oct. 28, 1999) (H.L.), available in THE TIMES (London), Oct. 28, 1999. The Lords noted that whether the Prevention of Terrorism Act conflicted with the Convention was an issue that should be argued by the prosecution and defense in open court. See *id.* They also asserted, however, that the courts should start taking account of convention principles. See *id.*

241. R. v. Dir. Of Public Prosecutions, Ex Parte Kebilene & Others; R. v. Same, Ex Parte Rechachi (hearing date: Mar. 30, 1999) (C.A.), available in THE TIMES (London), Mar. 31, 1999.

242. See *id.*

243. See *id.*

244. See *id.*

245. See *id.*

246. See *id.*

247. See *id.*

*Ex Parte Kebilene* demonstrates the impact that the HRA will have on anti-terrorism laws when it comes into effect. The provisions of the CJTCA that permit inferences from a suspect's silence might be challenged on the basis that they create a presumption of both criminal intent and culpability for the *actus reas* when an accused fails to mention a material fact, albeit in a less blatant manner than §§ 16A and 16B of the PTA. As in *Ex Parte Kebilene*, the accused could arguably be convicted simply on the basis of his inaction, despite the existence of a reasonable doubt as to criminal intent or the *actus reas*.

## 2. The Right to Cross-Examine Witnesses under Article 6 in British Trials

In *R. v. Thomas; R. v. Flannagan*, the prosecution was allowed to read to the jury from a witness's statement and deposition because the witness feared giving evidence in open court.<sup>248</sup> The appellants argued that this breached Article 6, which, although it was not yet domestic law, should be considered by the court.<sup>249</sup> The two appellants had been convicted of drug and assault charges.<sup>250</sup>

Besides the statements read to the jury, there was substantial testimonial evidence from other witnesses and medical evidence substantiating the prosecution's charges.<sup>251</sup> Additionally, the witness had testified before the judge in pre-trial proceedings and convinced the judge of the danger posed to the witness in the event that he testified in open court.<sup>252</sup> The judge invited defense counsel to cross-examine the witness during this proceeding, but defense counsel did not take advantage of the opportunity.<sup>253</sup> The witness was cross-examined in the magistrate's court, and at trial the judge warned the jury of the dangers of reliance upon statements from a witness who did not appear at trial.<sup>254</sup>

The Court of Appeal held that given the narrow grounds under which the statement was admitted, it did not render the trial unfair under Article 6.<sup>255</sup> In doing so, it relied on the ECHR's decision in *Kotovski v. Netherlands*<sup>256</sup> and the Commission's opinion in *Trivedi*

248. *R. v. Thomas* (C); *R. v. Flannagan*; *R. v. Thomas* (F); *R. v. Smith*, 1998 Crim. L. Rep. 887 (hearing dates: June 19, 1998) (C.A.), available in THE TIMES (London), July 7, 1998; see also Susan Nash & Mark Furse, *Human Rights Law Update: The Human Rights Act 1998*, 148 NEW L. J. 1782, 1782 (1998).

249. See *R. v. Thomas*, 1998 Crim. L. Rep. 887.

250. See *id.*

251. See *id.*

252. See *id.*

253. See *id.*

254. See *id.*

255. See *id.*

256. App. No. 11454/85, 12 Eur. H.R. Rep. 434 (1990).

*v. UK*,<sup>257</sup> which in the court's view permitted the use at trial of pre-trial statements of non-testifying witnesses in limited circumstances.<sup>258</sup> The *Kotovski* Court found a violation of Article 6 where (1) the conviction was based to a decisive extent on statements by witnesses who did not appear at trial but made statements to police in the absence of defense counsel, and (2) there was no opportunity to cross-examine the witnesses.<sup>259</sup> In *Trivedi*, the Commission found no violation of Article 6 where statements of a witness who had become too ill to testify were presented at trial.<sup>260</sup> At trial, the defense was permitted to attack the credibility and reliability of the witness's statements by commenting upon them in front of the jury, and the judge directed the jury to accord less weight to such witness's statements than to the testimony of witness who appeared at trial.<sup>261</sup> Relying on these authorities, the Court of Appeal concluded that the admission of the statements did not breach the Convention because the defense had the opportunity to cross-examine the witness in pre-trial proceedings and because other evidence substantially supported the conviction.<sup>262</sup>

In *R. v. Radak*, a prosecution witness refused to travel from the United States to the United Kingdom to testify, and the trial court admitted the witness's written statement.<sup>263</sup> Without the witness's statement, the prosecution would have had to dismiss the indictment for money laundering because the statement was essential to establish the *actus reus*.<sup>264</sup> After considering whether the defendant's lack of opportunity to cross-examine the witness at trial could result in a serious lack of unfairness, the Court of Appeal held that the risk of unfairness to the defendant required exclusion under the applicable evidentiary statute and under Article 6(3)(d) of the Convention.<sup>265</sup>

These two cases demonstrate the amenability of the British courts to challenges based on the Convention, even in the interim period before the HRA becomes effective. Convictions under the CJTCA may be challenged in the same manner between now and October 2000. Substantively, the cases create common law precedent incorporating Convention guarantees into British law in advance of the statutory mandate of the HRA.

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257. No. 31700/96, 89 Eur. Comm'n H.R. Doc. 3 Rep. 136 (1977).

258. See *R. v. Thomas*, 1998 Crim. L. Rep. 887.

259. App. No. 11454/86, 12 Eur. H.R. Rep. 434, ¶¶ 44,45.

260. No. 31700/96, 89 Eur. Comm'n H.R. Doc. 3 Rep. 136 (1977).

261. *Id.*

262. See *R. v. Thomas*, 1998 Crim. L. Rep. 887.

263. 1 Crim. App. 187, 1999 Crim. L. Rep. 223 (1999).

264. See *id.*

265. See *id.*

V. THE CJTCA IN THEORY AND PRACTICE: THE NEED FOR REPEAL, OR  
ALTERNATIVELY, A NARROW INTERPRETATION

The Criminal Justice (Terrorism and Conspiracy) Act (CJTCA), when applied in practice, may undermine the rights guaranteed by the HRA. The HRA provisions include the guarantee to the presumption of innocence, the implied right to silence, the right to facilities necessary to the preparation of an adequate defense, the right to equality of arms, and the overall analysis of whether the accused has been afforded a fair trial. These provisions cast doubt upon the validity of criminal proceedings utilizing the evidentiary provisions of the CJTCA. While some trials under the CJTCA may be "fair" despite restrictions on these rights, many trials will not be, and the legislation is likely to give rise to much litigation when the HRA becomes effective throughout the United Kingdom. Accordingly, British judges will, at a minimum, have to construe provisions of the CJTCA very narrowly in order to reconcile criminal proceedings against terrorism suspects with the rights already guaranteed by the Convention and soon to be guaranteed by the HRA.

*A. The CJTCA Should Be Repealed Because Its Combination  
of Changes to Criminal Proceedings Against Terrorist  
Suspects Will Contravene the Convention and,  
Accordingly, the Human Rights Act*

Several provisions of the CJTCA run afoul of Article 6 of the Human Rights Convention because they violate specific rights inherent in a fair trial as enumerated in Article 6. First, the provisions allowing inferences to be drawn from a suspect's silence and allowing opinion evidence from a senior police officer shift the burden of proof, compelling the defendant to prove his innocence. Also, by permitting police officers to assert the public interest immunity privilege, the CJTCA violates the equity of arms principle and the defendant's right to cross-examine witnesses, and allows for convictions based on evidence lacking any credibility.

To begin with, the CJTCA allows a judge or jury to draw inferences from the silence of the accused concerning a fact that is "materially related" to an offense for which he is being investigated. This applies to the accused's silence both during interrogation and at trial. A compounding threat to the fairness of the proceeding is the fact that under the Prevention of Terrorism Act (PTA), which the CJTCA's procedural provisions supplement, suspects can be detained for up to seven days before being charged with a crime.<sup>266</sup>

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266. Prevention of Terrorism (Temporary Provisions) Act 1989, Ch. 4, § 14(4), 14(5) (Eng.).

During the first forty-eight hours of detention, there is no right to a lawyer or to a phone call.<sup>267</sup> The PTA is already infamous because of the instances of beatings and even torture suffered by suspects at the hands of police. But even without physical abuse, detention for such a long period obviously leaves the door open for intense psychological pressures.<sup>268</sup> Permitting these inferences does not alone render a trial “unfair” according to the ECHR. However, it places an additional burden on the defendant in that it does effectively “compel” the defendant, if only indirectly, to answer questions posed by the police or the prosecution.

The CJTCA does require that there be additional evidence besides the suspect’s silence in order to convict, but it is not clear what additional evidence will suffice. The statute does not elaborate on this point. Can the opinion evidence of a senior police officer, along with the accused’s silence, constitute sufficient evidence to support a conviction? Under both British case law and ECHR case law, this seems unlikely, but certainly not impossible. The prosecution must demonstrate a prima facie case against the defendant under the ECHR’s case law, and probably under British case law, as a prerequisite for permitting the defendant’s silence to be used against him. A crucial question becomes what a prima facie case might consist of under the CJTCA.

The CJTCA, read on its face, certainly does not prohibit a conviction based upon a combination of the senior police officer’s opinion testimony and adverse inferences drawn from the accused’s silence. In separate sections, it does prohibit the accused from being committed to trial on the basis of only one of these two evidentiary pieces.<sup>269</sup> For the accused to be committed to trial based upon the senior police officer’s testimony, there must also be other corroborative evidence. The rule is the same for committing the accused to trial based partly on the accused’s failure to mention facts material to the charge. Thus, theoretically, the accused’s silence could corroborate the opinion testimony of the senior police officer, and vice versa.

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267. See John Wadham & Janet Arkinstall, *Right to a Fair Trial*, 149 NEW L.J. 436 (Mar. 26, 1999) (asserting that any restrictions upon an accused’s right of access to a lawyer probably violate Article 6 under the Court’s holding in *Murray* that there is a right to counsel where there can be adverse consequences from a suspect’s demeanor during interrogation); see also Northern Ireland (Emergency Provisions) Act, 1991, ch. 24, § 45(1), (5)-(6) (Eng.).

268. See Martin S. Flaherty, *Interrogation, Legal Advice, and Human Rights in Northern Ireland*, 27 COLUM. HUM. RTS. L. REV. 1, 2-5 (describing pressures such as prolonged detention without access to a lawyer and other harsh conditions, as well as a system of emergency laws designed to obtain convictions primarily through statements and confessions obtained during interrogation).

269. See CJTCA, *supra* note 4, ch. 40, §§ 1, 2A(3)(b), 2A(6)(b).



Such a reading would seem clearly at odds with Article 6 of the Convention and the case law emanating from it. It would effectively shift the burden of proof. The opinion testimony is essentially an allegation against the defendant,<sup>270</sup> even though the CJTCA permits its consideration as substantive evidence. Mere inaction when faced with the allegation forces the accused to prove his innocence. The only evidence at trial is an allegation by the government and an inference drawn from the inaction of the accused. Thus, the British courts should at least require other hard, direct evidence that first establishes a *prima facie* case before admitting the police opinion testimony and inferences from the accused's silence.

Even if British courts do read the CJTCA in such a way as to make it compatible with the Convention by requiring more than the police officer's opinion testimony and the accused's silence, this does not necessarily render a trial "fair" for the purposes of Article 6. In most cases, there will be some other corroborative evidence consisting of either eyewitness testimony or physical evidence. To bring the trial within the realm of fairness as required by the Convention, the conviction cannot be based to a substantial extent on the accused's silence.<sup>271</sup> However, *Murray* does allow the accused's failure to respond where the evidence against him clearly calls for an explanation to be taken into account in assessing the pervasive evidence against him.<sup>272</sup> It is in this area that the British judges will have to fill the looming gaps in the CJTCA with judicial requirements of substantial direct evidence, enough to constitute a *prima facie* case, besides the police opinion testimony and the accused's silence. This would go a long way toward compliance with the basic requirements of Article 6 and the judgments of the ECHR in cases like *Murray*. This assumes, however, that judges will be willing to impose requirements that are not explicitly in the statute and seem to go against the general policy of the CJTCA. Also, it assumes that British judges hearing CJTCA cases will attempt to comply with the guarantees of the Convention, even though they will not be bound by the HRA until October 2000—except for Scotland, where the HRA is already in effect.<sup>273</sup>

270. As Donald Findlay, *supra* note 1, points out:

An allegation is not evidence—though try telling that to the baying crowds who hurl abuse at those who have been no more than accused of a crime which is deemed to be particularly offensive or antisocial. Evidence consists of facts, hard facts which lead to proof of an allegation to that most fundamental standard—beyond a reasonable doubt.

271. See *Murray v. United Kingdom*, 22 Eur. H.R. Rep. 29, 42, ¶ 47 (1996).

272. See *id.* at 45, ¶ 60.

273. One of the problems posed by these two pieces of legislation is the potential for disparate treatment of similar defendants, in that those tried under the CJTCA before the Human Rights Act becomes effective will be tried before courts that

Additionally, the single factor of permitting police officers to assert a public interest immunity privilege while giving opinion testimony will render trials unfair under Article 6 for a number of reasons. First, it violates the general principle of equality of arms, which the ECHR recognizes as inherent in Article 6. To prohibit the defense from inquiring into the underlying basis of such testimony puts the defendant at a major disadvantage vis-à-vis the prosecution. The defendant will be prevented from challenging any factual basis for that opinion whenever the police officer asserts the privilege.<sup>274</sup> In some instances, it will prevent the defendant from accessing witnesses who may have potentially exculpatory information about the offenses charged, in contravention of the principles of disclosure espoused by the Commission.<sup>275</sup> Also, it may prevent the defendant from ever finding out whether the information upon which the officer based his testimony was obtained through illegal means.<sup>276</sup>

Second, when the police officer's opinion is based upon what he has been told by other persons, whether they be eyewitnesses or police or military personnel conducting the investigation, the specific right of the defendant to cross-examine witnesses against him is violated. The ability of the senior police officer to testify that in his opinion the accused is a member of a terrorist organization, based on this confidential information, becomes a vehicle for admitting evidence that would otherwise be non-admissible hearsay.<sup>277</sup> It

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do not yet have the power to enforce Convention Rights in the face of the Parliamentary mandate of the CJTCA. See CJTCA, *supra* note 4, ch. 40; Human Rights Act, *supra* note 7, ch. 42. However, the British courts are already taking into account the provisions of the Convention in some cases. See *R. v. Thomas (C)*; *R. v. Flannagan*; *R. v. Thomas (F)*; *R. v. Smith*, 1998 Crim. L. Rep. 887 (hearing dates: June 19, 1998) (C.A.), available in THE TIMES (London), July 7, 1998; *R. v. Radak*, 1 Crim. App. 187, Crim. L. Rep. 223 (Crim. App.) (1999); see also Susan Nash & Mark Furse, *Human Rights Law Update: The Human Rights Act 1998*, 148 NEW L. J. 1782 (1998).

274. See *More Haste Less Speed*, 148 NEW L.J. 1293, (1998):

[W]orse still is the further introduction of hearsay evidence. A senior police officer may now give evidence of a suspect's membership in a proscribed organisation. Effectively he will not be able to be cross-examined on his beliefs. He may hide his sources on the grounds that national security will be prejudiced and he can also hide behind the Public Interest immunity certificate.

275. See *Jespers v. Belgium*, App. No. 8403/78, 22 Eur. Comm'n H.R. Dec. & Rep. 100 (1980).

276. See John Harrison & Stephen Cragg, *Police Complaints and Public Interest Immunity*, 144 NEW L.J. 1064 (July 29, 1994) (stating that "[u]sed too freely [public interest immunity] is a gift to secretive bureaucrats, louche politicians, and other agents of the state who seek to shield their questionable conduct from public scrutiny and accountability before the law.>").

277. See *More Haste Less Speed*, *supra* note 274.

prevents the accused from cross-examining those with first-hand knowledge of the "facts."<sup>278</sup> Thus, both the factfinder and the defendant lose the opportunity of having the credibility of the defendant's true accusers tested and evaluated in open court.<sup>279</sup>

Third, the opinion testimony of the police officer becomes credible evidence where the information upon which he bases his testimony may not be credible at all. This problem is especially acute when the officer's information comes from informants, whether confidential or otherwise. Thus, what may not be very credible evidence if presented in court is elevated to a very high degree of credibility by virtue of its inclusion in the basis of a high-ranking police officer's opinion. Because of public interest immunity, the credibility of such information becomes unassailable by the defendant.<sup>280</sup>

Thus, as one lawyer commenting on the CJTCA points out,

The courts must be prepared to look behind the bland assertion and test the evidence on which it is based. Frankly, if the police are not able or prepared to produce that evidence, it seems to me that the mere statement is worth nothing and the innocent may be wrongly convicted.<sup>281</sup>

The courts should carefully scrutinize whatever information the prosecution or police claim is privileged, but this will not compensate for the inability of the defense to attack this evidence if the judge decides to uphold the privilege. The prosecution is privy to the information claimed to be privileged. The defense is obviously not. Thus, the prosecution knows the exact details and nature of the information when arguing to the judge that the privilege should be upheld. The defense, on the other hand, will have no knowledge about the information claimed to be privileged. The defense must overcome the problem of arguing that the interests in disclosure outweigh the interests in confidentiality, but without knowing the underlying facts which would inform the defense of the full extent of the prosecution's and defense's respective interests. Accordingly,

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278. Cf. *R. v. Radak*, 1 Crim. App. Rep. 187, Crim. L. Rep. 223 (Crim. App.) (1999). See, for example, Anthony Heaton-Armstrong & David Wolchover, *On the Record—Should Prosecution Witnesses Have Their Statements Recorded in the Same Way as Those Made by Suspects*, 90 L. SOC'Y GAZ. 25 (June 16, 1993):

Police officers who claim to have witnessed the same event or conversation 'collaborate' prior to recording their notes or statements. A joint account is produced which may exclude details of the individual officer's true recollection and inconsistent statements made during the collaborative process.

It would seem that denying cross-examination of those with first-hand knowledge of such information would only exacerbate this problem in the determination of facts.

279. Cf. *R. v. Radak*, 1 Crim. App. Rep. 187.

280. See *More Haste Less Speed*, *supra* note 274.

281. Findlay, *supra* note 1, at 15.

the defense has an inherent disadvantage vis-à-vis the prosecution when arguing the public interest immunity issue. In most cases, the good judgment of the trial court cannot make up for this inequality in information.

It is unlikely that a trial utilizing inferences from the accused's silence and police opinion testimony, in which claims of public interest immunity are upheld, would meet the requirements of Article 6 as explicated by the ECHR.<sup>282</sup> For example, the ECHR only tolerates the admission of statements by anonymous witnesses in extreme situations where there is no alternative less restrictive to the defense. It also requires that there be a substantial amount of corroborative evidence and that this restriction upon the right of the defense to cross-examine witnesses is counterbalanced by adequate procedural safeguards.

Because permitting public interest immunity in the context of police opinion testimony effectively allows the senior police officer to reiterate information from other witnesses who will remain undisclosed under the privilege, an analysis similar to the *Van Mechelen* case should apply. After all, in *Van Mechelen*, the ECHR found a violation of Article 6 where the only affirmative identification evidence linking the accused to the crime were the statements of anonymous police officers who did not testify in open court, but instead had other police officers basically testify as to what the "eyewitness" police officers saw.<sup>283</sup> Under *Van Mechelen*, any conviction based to a "decisive extent" upon such evidence violates Article 6.<sup>284</sup> *Van Mechelen* also took into account the special problems for the defense where the anonymous witnesses were agents of the state with special ties to the prosecution, which dictated the use of such evidence only in the most exceptional circumstances.<sup>285</sup> Accordingly, any conviction under the CJTCA should not be permitted if it is based to a decisive extent upon the opinion evidence of a senior police officer who refuses to disclose the sources of his information based upon public interest immunity.

While *Van Mechelen's* "decisive extent" test can be overcome by substantial amounts of corroborative evidence, the ECHR also requires adequate procedures to counterbalance the disadvantage to the defense.<sup>286</sup> The CJTCA provides no such adequate counterbalance. For example, the accused will not be able to call

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282. See John Wadham, *Prosecution Disclosure, Crime and Human Rights*, 147 NEW L.J. 697 (May 9, 1997) (discussing the law regarding prosecution disclosure in Great Britain and Article 6 of the Convention).

283. See *Van Mechelen et al. v. Netherlands*, 25 Eur. H.R. Rep. 647, 675-76, ¶¶ 63, 66 (1997).

284. See *id.*

285. *Id.* ¶ 56.

286. *Id.* ¶ 54.

any credible witness as a defense "expert" in whose opinion the defendant is *not* a member of a proscribed organization.<sup>287</sup> Any counterbalance would have to be force-read into the statute and basically require that the public interest immunity be disallowed when police officers give opinion testimony under the CJTCA. While the restrictions upon the suspect's right to remain silent will not alone contravene Article 6, when coupled in the same trial with police opinion testimony bolstered by public immunity, it will create such a disadvantage to the defense as to shift the presumption of innocence and render the trial unfair.<sup>288</sup> Only in cases with very substantial hard evidence in addition to the evidence authorized by the CJTCA might the conviction be considered fair. This additional evidence would probably have to rise to a level sufficient to convict beyond a reasonable doubt anyway, rendering the CJTCA evidence surplusage for the government's case but nevertheless, an additional burden for the defendant.

While this analysis is, of course, somewhat speculative given that the quantity and quality of evidence among individual trials may differ significantly, it highlights the numerous problems inherent in the CJTCA, especially in light of the soon to be effective HRA. Because of these problems and because of the heavy burdens it places upon the defense, the CJTCA should be repealed.

#### B. Policy Concerns Dictate in Favor of Repealing the CJTCA

Besides the CJTCA's potential to create serious unfairness in criminal trials, the wisdom of the statute's provisions and the timing of its passage is questionable. For one, the CJTCA makes it very difficult for defense attorneys to adequately represent and advise their clients. Additionally, whereas the CJTCA was intended to eradicate terrorist organizations and more specifically to contribute to the peace process in Northern Ireland, it may have exactly the opposite effect.<sup>289</sup> Lastly, it may increase the number of convictions

287. See *Bönisch v. Austria*, 9 Eur. H.R. Rep. 191, 200, ¶ 32 (1985).

288. Some civil liberties lawyers claim that the burden of proof is that of a civil court. See Bindman, *supra* note 44.

289. See Andrew Rawnsley & Patrick Wintour, *Politics: Nice Guys Can Finish First; Charles Kennedy Enjoys a Wee Dram and a Good Joke. But He's Serious About Winning the Party Leadership*, THE OBSERVER, Mar. 7, 1999, at 19 (quoting Charles Kennedy, likely to be the next leader of the Liberal Democratic Party, who cites the CJTCA as a classic example of coming up with the worst legislative answer, for the best political motives.) *But see Will We Regret Laws Made So Hastily?*, LEICESTER MERCURY, Sept. 14, 1998, at 4:

I generally think that bad laws are made in haste and we will regret the speed in which [the CJTCA] was brought forward at some time in the future. But what I also know is that I would have regretted doing nothing and letting a very small, isolated group of hardened terrorists derail the peace process. I

for terrorist offenses, but it probably will not deter terrorists or actually assist in their apprehension.<sup>290</sup>

### 1. The Awkward Position of the Defense Attorney

One of the few procedural safeguards afforded to a terrorist suspect in the CJTCA is that as a prerequisite to the drawing of inferences from silence, the suspect must have been permitted to consult with a solicitor before the questioning took place.<sup>291</sup> In fact, Home Secretary Jack Straw, who has the power to proscribe organizations, stated that the measures of the CJTCA are "tightly focused and proportionate measures which contain safeguards for suspects."<sup>292</sup> Critics point out, however, that this safeguard is inadequate.

For example, a suspect will not necessarily have the right to consult with counsel *while* being interviewed.<sup>293</sup> Furthermore, neither the client nor the attorney will know why the client is being interviewed.<sup>294</sup> The lawyer will be charged with the task of first

voted for the Bill in the hope that the risks we have taken over the last year, accompanied by this Act will lay the foundations for a lasting peace in Northern Ireland.

290. There is also a danger that it will be used to extend beyond terrorism trials to other criminal prosecutions, especially in prosecutions related to organized crime and drug trafficking. *See More Haste Less Speed*, *supra* note 274. The government has not officially indicated whether its anti-terrorist legislation will apply to right-wing groups such as neo-Nazis. *See Jimmy Burns & Rosemary Bennet, Engineer Charged Over Nail Bombings*, *FIN. TIMES* (London), May 3, 1999, at 1 (noting that government officials said ministers were not likely to extend anti-terrorist legislation to cover right-wing groups).

291. *See* CJTCA, *supra* note 4, ch. 40, § 2A(4)(b)

292. Bindman, *supra* note 44.

293. *See* R. v. Chief Constable of the Royal Ulster Constabulary, [1997] N.I. 278 (H.L.) (recognizing a British common law right of access to counsel while in custody, but holding that this right does not extend to interrogations of suspects in Northern Ireland arrested under the PTA); *In the Matter of Michael Russel & Others for Judicial Review*, HUTE 2184 (Q.B., Oct. 25, 1996) (holding that suspects have no right to have a lawyer present during an interrogation); *Report on the Mission of the Special Rapporteur to the United Kingdom of Britain and Northern Ireland*, U.N. ESCOR, Hum. Rts. Comm., 54th Sess., Agenda Item 8, addendum pt. 3, U.N. Doc. E/CN.4/1998/39/Add.4, ¶ 43 (Mar. 5, 1998) (noting the RUC's practice of denying access to a lawyer at all stages of interrogations in Northern Ireland of suspects arrested under § 14 of the PTA); *see also* Bindman, *supra* note 44. These practices may have to change when the Human Rights Act becomes effective, and they may change if recent proposals for the overhaul of the policing system in Northern Ireland are implemented. *See generally* *Report of the Independent Commission for Policing in Northern Ireland* (Patten Commission), ¶¶ 4.8, 4.11, Sept. 9, 1999 (proposing that codes of practice on all aspects of policing, including covert operations, accord strictly with the Convention and recommending that a lawyer specializing in human rights be appointed to the staff of police legal services).

294. *See* Bindman, *supra* note 44.

explaining to the client that he technically has the right to remain silent and that whatever the client says might be used against him in court.<sup>295</sup> Next, the lawyer will have to explain to the client that despite this “right,” if the client chooses to remain silent during interrogation, inferences may nevertheless be drawn from the suspect’s failure to answer questions regarding a material fact.<sup>296</sup> Explaining the law regarding the suspect’s silence is complicated enough on its own.<sup>297</sup>

The lawyer will then have to define for the client what might be a “material fact,” even though both lawyer and client may be ignorant as to why the client is even being questioned.<sup>298</sup> Finally, the client will have to remember and apply all of the advice of the lawyer during the interrogation, as his lawyer may not be permitted to be present.<sup>299</sup> As prominent British civil liberties lawyer John Wadham points out, “This will mean not only that it will be impossible for solicitors to advise their clients adequately, but that once they have been consulted the clients themselves will be expected to understand and apply complex legal principles. Their failure to do so will have dire consequences.”<sup>300</sup> These problems faced by defense counsel adversely affect the representation of the client, which creates the potential for serious unfairness at trial.<sup>301</sup>

295. *See id.*

296. *See id.*

297. Consider the following warnings contained in arrest cards issued by Irish welfare organizations in Britain, before the passage of the CJTCA, in the event that someone is detained under the Prevention of Terrorism Act (PTA):

**IF YOU ARE DETAINED:**

No one can entirely predict how they will cope with being detained for the first time. It is important to bear in mind that your detention will probably have little to do with being a “suspected terrorist” and more to do with general information gathering and intimidation of the Irish Community.

1. We strongly recommend that beyond giving your name, address and date of birth you decline to answer any further questions and demand to see your solicitor. Be prepared to make this request repeatedly.
2. If you feel you wish to answer questions or make a statement we strongly advise that you do so only in the presence of your solicitor. On no account sign any statement without first seeing your solicitor. (Do not use a Duty Solicitor)

The Pat Finucane Center, *The Prevention of Terrorism Act—Advice to the Irish Community* (visited Jan. 12, 2000) <<http://www.serve.com/pfc/pta.html>>. How should such a card read now, given the provisions of CJTCA?

298. Paul McGee, legal officer at the Campaign for the Administration of Justice, has said, “These safeguards go no way to assist the suspect as neither he nor his solicitor will be aware of what they will be interviewed about.” Bindman, *supra* note 44.

299. *See id.*

300. *Id.*

301. *See Beckman, supra* note 39 at 109-16 (describing the difficulties of explaining the scope of the right to silence under the Criminal Justice and Public

If only because of these problems, the CJTCA should be repealed.<sup>302</sup> At a minimum, it should be amended to give suspects the right to have their lawyers present during interrogation. But repealing the CJTCA entirely would save British courts the time and expense resulting from HRA litigation challenging practices authorized by the CJTCA.

## 2. The CJTCA Will Undermine the Specific Goals for Which It Was Passed—Reducing Terrorist Activity in Britain and Bolstering the Irish Peace Process

Although the CJTCA was passed in the aftermath of one of the worst bombings in Northern Ireland's history, it also came at a time when there was broad-based support for peace in the region. The Northern Ireland Executive, elected by the population of the six counties, was on the verge of having power devolved to it from Westminster, giving the region its first local government since 1972. Most of the more militant extremes in Northern Irish politics have been marginalized. Most importantly, the political parties that formerly endorsed political violence and have widespread support in some communities, such as Sinn Fein, have endorsed the peace process and have become active participants. Implicit in this process is a reconciliation of two communities that have been at war with each other for centuries and a growing trust by each of these communities of both the British and Irish governments.<sup>303</sup> While this fragile peace process has hit some stumbling blocks as of

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Order Act 1994, which permitted inferences to be drawn from silence similar to that provided for in the CJTCA, ch. 40, § 1(4)-(5)).

302. These client advisory issues will be even more troublesome for defense counselors in Northern Ireland, who already face a range of obstacles to effectively representing their clients. These obstacles include, inter alia, death threats, inhibited access to clients, hostility from security forces and government officials, and governmental emergency powers more extensive than in the rest of the United Kingdom. See generally Flaherty, *supra* note 268, at 1, 2-5; Martin Flaherty, *Human Rights Violations Against Defense Lawyers: The Case of Northern Ireland*, 7 HARV. HUM. RTS. J. 87 (1994). Compare Report of the Special Rapporteur on the Independence of Judges and Lawyers, U.N. ESCOR, Hum. Rts. Comm., 55th Sess., Agenda Item 11(d) ¶ 186, U.N. Doc. E/CN.4/1999/60 (Jan. 13, 1999) (stating that the Special Rapporteur was satisfied that there had been harassment and intimidation of defense counsel by the Royal Ulster Constabulary (RUC)), with Rachel Donnelly, *Harassment of Lawyers is Denied*, IRISH TIMES, Apr. 24, 1999, at 7 (reporting that the Independent Commissioner for Holding Centers in Northern Ireland rejects the Special Rapporteur's conclusion that members of the RUC harassed defense lawyers).

303. "Finally it should be remembered that today's terrorists are tomorrow's freedom fighters, next months political opponents and, next year, 'our oldest allies.' We have seen this change in attitude and language in Israel, Kenya, and Cyprus and we may be seeing it in Northern Ireland." *More Haste Less Speed*, *supra* note 274.



late,<sup>304</sup> an opportunity still remains for the British government to aid in the creation of a lasting peace in the region.

The CJTCA also comes at a time of widespread fear of Arab terrorism in Europe and North America. Events such as the bombing of a Pan Am flight over Lockerbie, Scotland, the bombing of the World Trade Center in New York, and the bombings of two U.S. embassies in Africa have heightened what might be an unwarranted fear of Arab communities in both the United States and Europe.

Given these circumstances, the CJTCA may become an abusive tool and is likely to be aimed at suspects who come from both the Irish and Arab communities in Britain.<sup>305</sup> This is troubling for primarily two reasons. First, relationships and associations that a person may naturally have because of their ties to one of these communities might serve as a substantial factor: in the "opinion" of a police officer, that person is a member of a terrorist organization. The basis of such an opinion may be unassailable in court. Second, the CJTCA will only create more resentment of the British government and ironically contribute to the support of those who espouse violence as a legitimate and viable political tool. This will ultimately undermine the peace process in Northern Ireland, not strengthen it, and is at odds with the spirit of reconciliation fostered over the past few years.<sup>306</sup> As one lawyer commenting on the law

304. For news specifically related to the Irish peace process updated daily, see generally IRISH TIMES, *The Path to Peace* (visited Jan. 12, 2000) <<http://www.ireland.com/special/peace/assembly/news/index.htm>>.

305. Cf. Bennetto, *supra* note 22.

306. As of late September 1999, the peace process is at a very fragile point. In the process of attempting to form an executive, to which Sinn Fein is entitled two seats, negotiations have stalled over the issue of the decommissioning of IRA arms. The UUP, the largest party in Northern Ireland, which represents the majority of Unionists, is demanding that the IRA decommission its arms before it will form an executive with Sinn Fein, the political party affiliated with the IRA, which has substantial support in many Catholic communities, especially Catholic ghettos. See, e.g., *Guns At the Door Please, Trimble Tells Sinn Fein*, IRISH TIMES, Mar. 10, 1999, at 14; Rosie Cowan, *Mitchell Still Hopeful on Peace Breakthrough*, PRESS ASSOC. NEWSFILE, Sept. 23, 1999; Mervyn Pauley, *Accusations Mark Crucial Party Talks; Sinn Fein and UUP Clash Over Agreement*, BELFAST NEWS LETTER, Sept. 22, 1999, at 6; Peter Taylor, *Wild Men Waiting on the Thin Orange Line*, SUNDAY TIMES (London), Feb. 28, 1999, § 6, at 5 (discussing the readiness of the Ulster Freedom Fighters (UFF), a loyalist paramilitary unit, for a violent civil war should the peace process fail). The CJTCA may give the IRA even more reason not to decommission. In some areas, they are seen as the defenders of the community against brutality and oppression from the police, military, and unionist paramilitaries. Many people in these communities who support the IRA feel that to give up weapons would mean surrendering to the government. See, e.g., Jimmy Burns, *McGuinness Pessimistic on IRA Climbdown*, FIN. TIMES (London), Mar. 1, 1999, at 8 (quoting Sinn Fein's chief negotiator Martin McGuinness as saying, "[I]n my view there isn't the remotest possibility of the IRA responding to this unilateral demand from the leader of the Ulster Unionist Party, which amounts to a demand for the surrender of the IRA."). They might see the

pointed out, as the communities in Northern Ireland try to rebuild a society and government based on the rule of law, "the government passes significant legislation departing from it."<sup>307</sup>

For example, the CJTCA applies in Northern Ireland. It is especially dangerous to people living in communities who have supported paramilitary organizations over the last thirty years, such as particular urban neighborhoods in Derry and Belfast and rural areas in counties Tyrone and Armagh. In these communities, some people may naturally associate with known members of paramilitary organizations in social or business environments. It does not take much for a police officer to infer from such relationships that a person may be involved with a proscribed organization. This is especially troubling in a region like Northern Ireland where the police, who are overwhelmingly Protestant and pro-British, are often the primary targets of political violence emanating from predominantly Catholic nationalist communities. Even more troubling are the possible links between the police and Loyalist paramilitary groups in some areas.<sup>308</sup> Even personal vendettas may underlie a police officer's "opinion."<sup>309</sup>

CJTCA as another tool of oppression and discrimination depending on how it is applied by the police, a body whose human rights record over the last thirty years is replete with abuse. If the peace process falls apart, the CJTCA becomes even more dangerous as it may again become another weapon in a war between two communities, instead of a tool simply utilized to isolate a few extremists. The peace process may very well fall apart because of accusations that the IRA has not remained committed to its ceasefire. See John Murray Brown, *Ceasefire Ruling Faces Court Challenge*, FIN. TIMES (London), Sept. 21, 1999, at 11 (discussing a challenge to the Northern Ireland Secretary's ruling that the IRA has not broken its ceasefire despite allegations of involvement in a Florida gun-running scheme and two recent assassinations). If the ruling is reversed, the British government may have to exclude Sinn Fein from the peace talks.

307. Bindman, *supra* note 44.

308. For example, a recent report of the British Irish Rights' Watch (BIRW) alleges collusion between the Royal Ulster Constabulary (the police force in Northern Ireland), MI5 (the U.K.'s equivalent of the CIA), and Loyalist paramilitaries in the 1989 assassination of renowned criminal defense lawyer Patrick Finucane. Finucane had made a name for himself as a successful defender of Republican defendants in Northern Ireland's courts. See Jack Flynn, *Report Links RUC to Finucane Murder*, IRISH VOICE, Feb. 17, 1999, at 8; see also *British Army Can Conceal Amount Paid to Nelson*, IRISH TIMES, Mar. 11, 1999, at 7 (discussing civil claims by Finucane's widow against the Ministry of Defense and Brian Nelson, an army intelligence agent also serving as intelligence officer to a loyalist paramilitary organization called the UDA, alleging that Nelson targeted Finucane for assassination and that the army intentionally failed to warn Finucane or provide him with protection); Mervyn Pauley, *Ex-UFF Man to Face Collusion Claims Quiz*, BELFAST NEWS LETTER, Mar. 6, 1999, at 6 (discussing police plans to interview a former member of the UFF, a loyalist paramilitary organization, about allegations that police and army intelligence documents on IRA suspects were handed over to his terror group).

Collusion between the RUC and loyalist paramilitaries has also been alleged in the recent murder of defense lawyer Rosemary Nelson in March. See Martin Fletcher & Ian Brodie, *FBI to Oversee Ulster Bomb Investigation*, THE TIMES (London), Mar. 17,

Added to this danger of irrational application of the CJTCA is the perception, whether based on the truth or not, that might develop within these communities that this law and others like it are purposeful attempts to target and harass them. Convictions of Arab or Irish terrorist suspects are bound to create more martyrs and undermine any peace that might exist presently or in the future.<sup>310</sup>

It will undermine any trust or respect which was being built between these communities and the British government and between those communities and the police force.<sup>311</sup> Thus, the

1999, § 1, at 12; see also United Nations High Commissioner for Human Rights Press Release, *Special Rapporteur on Independence of Judiciary Calls for Independent Investigation into Murder of Northern Ireland Human Rights Attorney*, HR/99/21 (Mar. 16, 1999) (reporting the Special Rapporteur's call for an independent investigation into Nelson's assassination). This prompted the U.S. Congress, at the behest of Congressmen Chris Smith and Peter King, to cut-off funding for U.S. sponsored training and exchange programs to the RUC until an independent investigation into the Nelson and Finucane murders was initiated. See Julie O'Connor, *US Congress Halts RUC Training Fund; New Call for Independent Murder Probe*, BELFAST NEWS LETTER, Apr. 16, 1999, at 4. The move was proposed by Congressman Chris Smith, chairman of the subcommittee on International Operations and Human Rights, and is intended to interrupt the training of RUC officers at the FBI academy in Quantico, Virginia. See Audrey Magee, *US Stops 'Biased' RUC's Funding*, THE TIMES (London), July 23, 1999, § 1, at 10.

Collusion between the Security Forces and Protestant paramilitaries had been alleged in the late 1980s by John Stalker, the former Manchester police chief brought in by the British government to make an independent inquiry into such allegations. Stalker's report was suppressed by the British government when Stalker found substantial evidence supporting allegations of collusion and a shoot to kill policy by the security forces. See generally JOHN STALKER, *THE STALKER AFFAIR* (1988); see also Report of the Special Rapporteur on the Independence of Judges and Lawyers, *supra* note 302, ¶ 191 (concluding that there is a prima facie case of collusion in Finucane's murder and calling for an independent investigation); SEAN MCPHILEMY, *THE COMMITTEE: POLITICAL ASSASSINATION IN NORTHERN IRELAND* (1998) (alleging that the RUC had active death squads and aided loyalist paramilitaries in the assassination of republicans as well as innocent nationalists, McPhilemy was aided in his research by assassinated defense lawyer Rosemary Nelson); Affidavit of John Weir, Feb. 3, 1999, *State Sponsored Terror British Collusion in Murder and Terrorism* (visited Jan. 12, 2000) <<http://www.geocities.com/CapitolHill/Senate/1922>> (alleging RUC involvement in bombings in the Republic of Ireland and in supplying loyalist paramilitaries with weapons). Weir is an ex-RUC officer who was convicted of terrorist offenses. See *id.*

309. See *In the space of a couple of hours*, *supra* note 3, at 11 (Stating that "[h]earsay, finger-pointing and the settling of grudges could very easily decide just who these suspects might be. The net is cast so widely it could potentially take in everyone from activists, sympathisers, relatives, associates, or those who have spoken publicly, for political reasons, against the peace process.").

310. See *id.* ("[the CJTCA] also, most unusually, plays directly into the hands of [sic] those extremists it is aimed at defeating. It sows the seeds of grievances among a wider constituency who suffer the fallout from authoritarian powers, and so allows fanatics to exploit their discontent.").

311. "Like earlier anti-terrorist measures it is likely to target communities with intimidation and harassment, resulting in increased support for paramilitary organisations, and . . . 'the weakening of respect for the rule of law.'" Bindman,

CJTCA might ironically create support for violence in some communities where the peace process is perceived to have failed and to have brought little in the way of respect for their rights.<sup>312</sup> The history of British legislation dealing with Northern Ireland justifiably makes some people suspicious of any measures aimed at terrorists.<sup>313</sup>

### 3. The CJTCA Is Unlikely to Deter Potential Terrorists or Aid in Their Apprehension

The CJTCA is also unlikely to aid in the apprehension of terrorists or to deter potential terrorists from committing offenses. The targets of the CJTCA are political extremists, many of whom have already been punished greatly for causes in which they believe. The presence of what amounts to an army of occupation in their midst has done little to deter them in the past, and a new law of evidence is unlikely to do so in the future. In the long run, all that the CJTCA may accomplish is an increase the number of terrorist convictions and, given the evidentiary burdens that face these suspects, a corresponding increase in the number of innocent people falsely convicted.<sup>314</sup> In the short term, the CJTCA may actually hinder efforts at apprehending the actual wrongdoers. Some commentators have noted that the police are presently apprehensive about using the new legislation because of its

*supra* note 44. Public confidence in the police in Britain is reportedly at a low due to civil rights abuses. See Liz Parratt, *Holding the Thin Blue Line in Place*, THE TIMES (London), Feb. 9, 1999, § 5, at 37. Additionally, the police force in Northern Ireland has failed to gain the confidence of many nationalists despite the peace process proposed reforms, and many question whether it ever will. See, e.g., Linda Moore, *Policing and Change in Northern Ireland: The Centrality of Human Rights*, 22 FORDHAM INT'L L.J. 1577 (1999); Jimmy Burns, *Distrust Continues, 30 Years After the Barricades*, FIN. TIMES (London), Sept. 9, 1999, at 10; Michael Settle, *All Change for the RUC; Ulster is Preparing for Sweeping Reforms to Policing Which Must Satisfy Grave Doubts on Both Sides*, THE HERALD (Glasgow), Sept. 9, 1999, at 7.

312. See Moore, *supra* note 311, at 1589 (arguing that emergency legislation is counter-productive in that it fuels conflict as well as creates alienation from and hostility toward the state in communities experiencing harassment).

313. For example, emergency powers such as internment without trial have been a hallmark of British policy toward Northern Ireland throughout the course of this century and have done little to bring peace to the region. See Peter Kellner, *Why We May Live to Regret This Rash New Terror Law*, EVENING STANDARD (London), Sept. 3, 1998, at 4; See generally, Fionnuala Ni Aolain, *The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353 (1996). The CJTCA, while it may not explicitly confer emergency powers, is certainly similar in that it does restrict the trial rights of terrorist suspects and is intended as a measure to create peace in Northern Ireland.

314. See generally Siobhan Keegan, Note, *The Criminal Cases Review Commission's Effectiveness in Handling Cases from Northern Ireland*, 22 FORDHAM INT'L L.J. 1776 (1999) (noting that emergency legislation such as the PTA increases the potential for miscarriages of justice and inhibits efforts to correct those wrongs).

questionable legality, and because they fear upsetting the Irish peace process by using such controversial legislation.<sup>315</sup>

## VI. CONCLUSION

The Criminal Justice (Terrorism and Conspiracy) Act 1998 contravenes both the letter and spirit of the European Convention on Human Rights. The CJTCA's provisions restricting the right to silence and provisions for "opinion" testimony by senior police officers, in conjunction with the public interest immunity privilege, will combine to shift the presumption of innocence and render most trials of terrorist suspects "unfair" under European Court of Human Rights case law. Additionally, the implementation of the CJTCA threatens to undermine the peace process in Northern Ireland. It will be used to discriminately target certain communities in Britain, particularly the Arab and Irish communities. The CJTCA will, thus, contravene the purpose and the explicit provisions of the Human Rights Act incorporating the European Convention on Human Rights. Accordingly, the CJTCA should be repealed.

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315. See, e.g., Jimmy Burns & Robin Allen, *Police Arrest Radical Moslem Cleric Wanted by Yemen*, FIN. TIMES (London), Mar. 16, 1999, at 9 (while reporting on the arrest of a radical Moslem cleric wanted by Yemen for involvement in international terrorism, the article notes that British police have been reluctant to arrest terrorist suspects under the new anti-terrorism laws because of the controversy surrounding them); Chris McLaughlin & Ted Oliver, *Why Are the Omagh Bombers Still Free One Year On? Arrests Might Upset the IRA*, MAIL ON SUNDAY, Aug. 8, 1999, at 12 (arguing that the security forces in Northern Ireland fear that the political expediency with which the law was passed, the complexity of the law, its questionable legality, as well as the potential that the peace process would be destroyed if Provisional IRA members are arrested under the law, are combining to hamper attempts to charge bombing suspects. The authors claim that senior police officers are wary of charging suspects when the law's legality is questionable, only to see them freed on a technicality in the near future.).

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