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UNITED KINGDOM

Fair Trial Concerns in Northern Ireland: the Right of Silence

1. INTRODUCTION

The right of an accused person to remain silent in the face of police questioning and not to have to testify against oneself at trial has been an essential and fundamental element of the British criminal justice system. Through the enactment of the Criminal Evidence (Northern Ireland) Order 1988,¹ the Government of the United Kingdom curtailed the right of silence of all people involved in criminal proceedings in Northern Ireland. Judicial interpretation of the Order has further curtailed this right. Amnesty International is concerned, under its mandate on fair and prompt trials for political prisoners, that the Criminal Evidence (N.I.) Order 1988 and the jurisprudence interpreting that law have significantly diminished an essential component of fundamental rights guaranteed by international standards, to the detriment of the individual rights of the accused. These standards include two treaties to which the United Kingdom is a party, the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).

This document examines provisions of relevant international standards which incorporate the right of silence and the current state of the law on the right of silence in Northern Ireland, as set forth in the Order and recent case law. The analysis of the right of silence in Northern Ireland includes a description of the history and the debate surrounding the change of law and makes recommendations for changes of current law and practice.

2. THE RIGHT OF SILENCE AND INTERNATIONAL LAW

Amnesty International believes that an essential component of the presumption of innocence and the right not to be compelled to testify against oneself or confess guilt - and an essential safeguard of those rights - is the right of silence. The organization believes that an effective way to ensure that the legal system guarantees that all persons are presumed innocent until proven guilty beyond a reasonable doubt is to recognize that the accused has the right to remain silent throughout the pre-trial and trial stages. Doing so will ensure that the prosecution satisfies its burden to present evidence which proves the accused guilty beyond a reasonable doubt.

Requiring the accused to testify shifts that burden from the prosecution to the accused. Similarly, permitting the prosecution or the court to comment or draw adverse inferences on the silence of the accused also shifts the burden of proof from the prosecution to the accused. Moreover, a system which permits such compulsion - and permitting adverse inferences to be drawn is an effective means of compulsion - is also inconsistent with the right not to be compelled to testify against oneself or to confess

¹The Criminal Evidence (Northern Ireland) Order 1988 will hereafter be referred to as "the Order".
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guilt because the accused is left with no reasonable choice between silence - which will be taken as testimony against oneself - and testifying.

Amnesty International notes that any abridgement of the right of silence is inconsistent with the right not to be compelled to confess guilt or to testify against oneself, and the right to be presumed innocent until proven guilty beyond reasonable doubt after a fair trial in which the prosecution bears the burden of proof, as guaranteed by international standards. This is the case in the application of the law in Northern Ireland, where the Order, *inter alia*, permits silence to be corroborative of other evidence against the accused. The law changes the caution accordingly. This law is implemented in the context of people being detained under emergency legislation and being interrogated in the absence of legal advice and in the absence of their lawyer.

The Burden of Proof Rests with the Prosecution

The presumption of innocence is incorporated in all major human rights instruments; it includes the obligation for the prosecution to bear the burden of proof.

The ICCPR, to which the United Kingdom is a party, provides that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law" (Article 14(2)). The Human Rights Committee, which monitors the implementation of the ICCPR, in its General Comment on Article 14,² has made clear that this is a heavy burden:

"By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is therefore a duty for all public authorities to refrain from prejudging the outcome of a trial."

The European Convention, to which the United Kingdom is a party, likewise provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law". (Article 6(2)). The European Court for Human Rights, in its judgment in the Barberá, Messegué and Jabardo vs. Spain case,³ held that the presumption of innocence required:

"inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused".

As will be elaborated below, as currently applied in Northern Ireland, the attachment of adverse inferences to the exercise of the right of silence results in lowering the standard of proof to be adduced by the prosecution in order to establish guilt. When adverse inferences from an accused's silence are drawn, the prosecution is no longer required to prove guilt beyond reasonable doubt; it is only required to call sufficient evidence to allow the court, when adding to this evidence the impact of the inference drawn against the accused as a consequence of his/her silence, to conclude guilt. In other words, the adverse

²Human Rights Committee, General Comment 13/21, para 7 (12 April 1984).

³European Court of Human Rights, Barberá, Messegué and Jabardo vs. Spain, Judgment of 6 December 1988, para 7. Amnesty International November 1992AI Index: AI EUR 45/02/92

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inferences allow the court to establish guilt on the basis of evidence which otherwise may be insufficient.

A national law, such as the 1988 Order, which permits a court to draw adverse inferences from an accused person's exercise of his or her right of silence is inconsistent with the presumption of innocence and the benefit of the doubt for the accused which is entrenched in international law. The internationally recognized obligation of the prosecuting authority to prove guilt beyond reasonable doubt should not be diluted by national law provisions which have the effect of upgrading evidence otherwise inadequate to prove guilt by allowing the drawing of adverse inferences from an accused person's silence. The burden of proof lies on the State and the discharge of that burden is not to be eroded by requiring the suspect to explain his or her actions.

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The Protection Against Self-Incrimination

The ICCPR provides that in the determination of any criminal charge against him or her, everyone is entitled "not to be compelled to testify against himself or to confess guilt" (Article 14(3)(g)). The Human Rights Committee, in its General Comment, clarified that:

"Subparagraph 3(g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard, the provisions of article 7⁴ and article 10(1)⁵ should be borne in mind. In order to compel the accused to confess or to testify against himself frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable."⁶

In its views in the case of Kelly vs. Jamaica⁷ the Committee added that the safeguard against self-incrimination implied an obligation for the investigating authorities to abstain from any direct or indirect physical or psychological pressure with a view to obtaining a confession of guilt.

Other international standards take an equally wide view of the prohibition against compulsion under the safeguard against self-incrimination. Such prohibited forms of compulsion extend beyond the use of torture and cruel, inhuman or degrading treatment.

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by consensus by the UN General Assembly as an authoritative guide for shaping national legislation, provides that "it shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person" (Principle 21).

The Concluding Document of the 1991 Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe, which was signed by the United Kingdom, equally provides that "effective measures will be adopted, if this has not already been done, to provide that law enforcement bodies do not take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to incriminate himself, or to force him to testify against any other person..." (Paragraph 23).

The right not to be compelled to testify against oneself is not explicitly recognized in Article 6(3) of the European Convention. It is, however, generally accepted that the rights set out in Article 6(3) are not exhaustive of the requirements of fair trial, as is confirmed by the wording of the first sentence of Article 6(3) which speaks of "minimum rights". In the case of Bönisch vs. Austria,⁸ the European Court of Human Rights explicitly held that the guarantees contained in paragraph 3 were "constituent elements, amongst others, of the concept of fair trial set forth in paragraph 1".⁹ Given the state of general

⁴The prohibition of torture.

⁵The rights of detainees to humane treatment.

⁶UN Human Rights Committee, General Comment 13/21, para 14 (12 April 1984).

⁷UN Human Rights Committee, Kelly v. Jamaica, views of 8 April 1991, para 5.5.

⁸Bönisch vs. Austria, European Court of Human Rights, Judgment 6 May 1985, para 29.

⁹Article 6(1) of the European Convention contains the basic fair trial guarantee: "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
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international human rights law, a strong case can be made that the protection against self-incrimination should be considered implicit in Article 6, as a whole.

The United Kingdom is bound by the obligation to respect the right not to be compelled to testify against oneself under the ICCPR and the other international instruments referred to above.

Under the Northern Ireland (Emergency Provisions) Act, statements, even if involuntary, are legally admissible evidence, unless it is proved that they were induced by torture or inhuman or degrading treatment or by violence or threat of violence. The combination of this provision with the curtailment of the right of silence is inconsistent with the international prohibition of the use of compulsion to obtain evidence from the accused. Permitting adverse inferences to be drawn in the event of silence is a means of compulsion: it constitutes "a form of direct pressure" exercised by law enforcement officials to obtain evidence. During interrogation, "undue advantage of the situation of the detained" is taken in order to obtain his/her co-operation. The suspect is left with no reasonable choice between silence and testifying. As will be shown below, in Northern Ireland this decision must often be made by suspects before they have had an opportunity to consult with a lawyer (to discuss, *inter alia*, the possible ramifications of silence on their defence) and frequently even before they know of the charges and evidence against them.

The Need to Combat Terrorism as a Justification for the Curtailment of the Right of Silence

In proposing the curtailment of the right of silence in Northern Ireland, the United Kingdom Government referred to the need to combat terrorism. The curtailment of the right of silence in Northern Ireland was not, however, introduced by way of emergency legislation. Citing the same need, the United Kingdom has derogated from the European Convention and the ICCPR, with respect to the requirement that detained or arrested persons be brought promptly before a judicial authority. The government remains, however, bound by provisions of international standards which require the government to guarantee to all the presumption of innocence and the right not to be compelled to testify against oneself or to confess guilt.

It should be noted that international humanitarian law standards, which apply to situations of armed conflict, guarantee to all people involved in criminal proceedings the presumption of innocence and the right not to be compelled to testify against oneself, both during preliminary investigations and at trial.¹⁰ These rights, in which the right of silence is inherent, are considered elementary rights of the human person, even during armed conflict. It has been held that these minimal guarantees should always be ensured when recourse is had to judicial proceedings, whatever the circumstances.¹¹ There is no valid justification to evade international human rights obligations and international fair trial standards by which the State is bound.

3. THE CURTAILMENT OF THE RIGHT OF SILENCE IN NORTHERN IRELAND: The Criminal Evidence (N.I.) Order 1988

independent and impartial tribunal established by law. (...)"

¹⁰See Third Geneva Convention relative to the Treatment of Prisoners of War at, Article 99, para 2; Optional Protocol I Article 75 para.s 4 (d) and (f); Additional Protocol II Article 6 para.s 2(d) and (f).

¹¹See: Oraá, J., Human Rights in States of Emergency in International Law, Oxford, Clarendon Press, p. 126 (1992); Sandoz, Y., Swinarski, C., Zimmermann, B., Commentary on Additional Protocols, Geneva, ICRC/M. Nijhoff, p. 1396 (1987); Stavros, S., "The Right to Fair Trial in Emergency Situations", International and Comparative Law Quarterly, p. 364 (1992).

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History of the Enactment of the Order

The curtailment of the right of silence has been the subject of intense debate in the United Kingdom for more than twenty years. In 1972 the Criminal Law Revision Committee (CLRC) recommended that the law be amended to allow a court or jury to draw adverse inferences against accused persons if, in the course of pre-trial interrogation by the police, they failed to mention any fact on which they later relied on in their defence in court. In conjunction, it was recommended that suspects were to be specifically cautioned that their failure to mention to the police during interrogation facts later relied on in defence at trial would render this defence less likely to be believed in court and thus might have a negative effect on their cases.

This and other recommendations to abolish or amend the right of silence were rejected by the Royal Commission on Criminal Procedure in 1981.¹² Notwithstanding this rejection, and consistent with the Home Secretary's continuing desire to curtail the right, the Home Office set up the Working Group on the Right to Silence (in May 1988) to once again explore its abolition or modification.

Before the Working Group published its report,¹³ the government presented to Parliament a draft Order to modify the right of silence in Northern Ireland. The draft Order was not amendable. Justifying this draft Order as necessary in light of the emergency situation in Northern Ireland and the particular need to deal with terrorist suspects and persons suspected of holding money for paramilitary organizations, the draft Order was rushed through Parliament by means of an expedited procedure called Order in Council. Following a short debate in the House of Commons and approval by the House of Lords, the Order was passed on 14 November 1988 and came fully into effect on 15 December 1988.

The Order limits the right of silence of all criminal suspects in Northern Ireland. Thus the government was able to change in Northern Ireland, in short order and without public debate or parliamentary scrutiny, a well-established principle of jurisprudence which is still the subject of heated debate in England and Wales. Adverse comment over the expedited procedure utilized to make this change in Northern Ireland and the debate over similar proposed modifications in England and Wales still continues.

Substance of the Criminal Evidence (N.I.) Order 1988

The Criminal Evidence (N.I.) Order 1988 curtails the right of silence in the investigatory stage and trial phases of criminal proceedings.

Prior to the enactment of the Order, a tribunal of fact was not able to draw inferences from a person's silence in the face of police questioning except in circumstances where it could be said that the parties had spoken on equal terms.¹⁴

Article 3 of the Order now permits the Court to draw appropriate inferences from the defendant's failure to mention to a constable (during questioning aimed at discovering whether and by whom an offence was

¹²Report of the Royal Commission on Criminal Procedure, Cm 8092 (1981).

¹³The Working Group recommended reforms similar to those which had been proposed (and were rejected) by the CLRC in 1972. See Working Group on the Right to Silence, C Division, Home Office, 13 July 1989.

¹⁴Gilbert (1977) 66 Cr App R 237; Raviraj (1987) 85 Cr App R 93, Leonard (1987) 5 NIJB. Amnesty International November 1992AI Index: AI EUR 45/02/92

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committed) a fact later relied on in his/her defence at trial, if the defendant could reasonably have been expected to mention such a fact in the circumstances existing at the time of the questioning. The reasonableness of the failure to mention such a fact is determined *ex post facto* by the court at the trial stage.

Article 3 applies to questioning taking place before the person is charged with an offence, when the questioning constable need not believe that the person questioned committed an offence, and when the person questioned may not have been informed of the allegations against him. It also applies to questioning taking place once the accused has been charged or officially informed that he might be prosecuted.

The accessibility to legal advice is deemed irrelevant; the Order in no way limits the circumstances in which it would be reasonable to mention certain facts to those in which a person is assisted by a lawyer. Further, absent from the mandate of Article 3 is a corresponding obligation for the law enforcement official to keep an official record of what was said during such preliminary questioning.

In contrast to the reforms recommended by the CLRC in 1972, Article 3 of the Order does not require that a person being questioned be informed of the possible consequences of his silence. Upon the entry into force of the Order, the Secretary of State, however, issued guidance requiring a constable questioning a person in the circumstances referred to in Article 3 of the Order to caution that person in the following terms:

"You do not have to say anything, unless you wish to do so, but I must warn you that if you fail to mention any fact which you rely on in your defence in Court your failure to take this opportunity to mention it may be treated in court as supporting any relevant evidence against you. If you wish to say anything, what you say may be given in evidence."

This caution may be administered before the person being questioned knows what evidence has been assembled against him/her, and before he/she has had the opportunity to consult (and discuss a possible defence and the possible ramifications of maintaining silence) with a lawyer.

Article 5 of the Order permits appropriate inferences to be drawn by a court in circumstances where an arrested person failed or refused to account for the presence of objects, substances or marks on his/her person or clothing, or in his/her possession or in the place in which he/she is arrested.

Article 6 permits the court to draw inferences from the defendant's failure or refusal, at the time of arrest, to account for his/her presence at a place at or about the time the offence for which he/she was arrested is alleged to have been committed.

Pursuant to the Order, the court may not draw inferences pursuant to either Articles 5 or 6, unless the following three conditions have been satisfied:

- the constable must have reasonably believed that the presence of an object or of the accused at that place or at that time may have been attributable to his/her participation in the commission of a specified offence;
- the constable must have informed the person arrested that he so believed and must have asked the defendant to account for that presence;

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- the constable must have also informed the defendant, in ordinary language, of the possible consequences of his silence under the 1988 Order.

Article 4 of the Order curtails the right of silence of the accused at trial. If the accused refuses to be sworn or to give evidence at trial, such inferences as appear proper may be drawn by the court. Nevertheless, Article 4 does not require the accused to give evidence on his/her own behalf under compulsion; consequently, he/she cannot be found guilty of contempt of court by reason of refusal to be sworn and to testify in the proceedings against him/her. Before any evidence is called for the court must tell the accused, in ordinary language, what effect his/her silence may have.

The court may draw the inferences permitted pursuant to the Order during both pre-trial and trial phases of the proceedings. In pre-trial proceedings, pursuant to Articles 3, 5, and 6, adverse inferences about a defendant's silence during police questioning may be drawn by a Court in the course of determining whether an accused should be committed for trial and in determining whether there is a case to answer. During the trial, adverse inferences from a defendant's silence in the face of the circumstances outlined in Articles 3, 5, and 6 of the Order, as well as failure to testify (pursuant to Article 4) may be drawn when determining the question of guilt or innocence of the accused.

The text of the Order offers little detail as to the scope of the inferences which may be drawn under Articles 3-6. The Order provides that the Court and jury may draw such inferences "as appear proper". The Order specifies that, on the basis of such inferences, silence may be treated as, or as capable of amounting to, corroboration of any evidence against the accused which is material. The inferences drawn may thus be used to bolster the prosecution's case. They may not, however, be the sole basis of a determination of whether a person should be committed for trial, of whether there is a case to answer, or of whether the accused is guilty (Article 2, para 4). The appropriateness of the drawing of inferences is to a large extent left to the discretion of the courts.

Since the enactment of the Order, the courts in Northern Ireland have, through their decisions interpreting the Order, gradually widened the scope of permissible adverse inferences drawn from a defendant's silence. A review of the case law follows.

Survey of Case Law Interpreting the Order

This review of the case law focuses on the cases decided primarily in the "Diplock Courts" of Northern Ireland, particularly with respect to Article 4 of the Order.

Initially, the "Diplock Court"¹⁵ judges took a cautious approach to the drawing of adverse inferences from an accused's silence at trial. When inferences were drawn in order to support the prosecution's case, high requirements were set with regard to the strength of the case put forward by the prosecution.

In R. vs. McDonnell,¹⁶ Judge Nicholson ruled, with respect to Article 4 of the Order, that

"the refusal to give evidence may be used by the court as supportive of other evidence from which at least

¹⁵The "Diplock Courts" were established in 1973; they consist of a single judge, without a jury and only try cases of "scheduled offences" (defined as "those crimes which are commonly committed by members of terrorist organizations").

¹⁶R. vs. McDonnell, unreported judgment, Belfast Crown Court (Nicholson, J.) 13 March 1989. Amnesty International November 1992AI Index: AI EUR 45/02/92

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the accused's probable guilt can be inferred or as corroborative of such other evidence and thus enable the court to conclude beyond reasonable doubt that the accused is guilty. But there must be other evidence which at least establishes the probable guilt of the accused."

This ruling suggested that the drawing of adverse inferences from a defendant's silence during the trial would only be permitted in cases where the probable guilt of the accused was already established on the basis of other evidence. A similar position was taken by Justice Kelly in the R. vs. Smyth case:¹⁷

"It seems to me in some cases the failure of an accused to give evidence may justify a finding of guilt where the weight of the Prosecution evidence just rests on the brink of the necessary standard of proof. In other cases the failure to give evidence may merely heighten suspicion for it is nothing novel to say that courts have long recognised that there may be reasons innocent as well as sinister for the refusal of an accused to give evidence."

Again, the requirement of other evidence "on the brink of the necessary standard of proof" required for guilt suggested that the effect of the Order would be limited.

In addition to the use of the drawing of further inferences from silence at trial to support very strong prosecution evidence, the Courts interpreted the Order to permit the drawing of inferences which have the effect of weakening the defence case.

In R. vs. Gamble & others,¹⁸ the defendants, members of the Ulster Volunteer Force, a proscribed loyalist organization, were charged with a punishment shooting, resulting in the death of the victim. The Crown case was based on admissions of the defendants made at Castlereagh Police Station. One of the defendants, Douglas, admitted to waiting to collect three men whom he thought would give the victim a beating. He also admitted overhearing one of the men saying that the victim would be knee-capped, but stated during the interviews that he did not believe the threat to be serious. Douglas remained silent at trial. Judge Carswell ruled:

"For present purposes, I think it is sufficient to say that where the extent of the knowledge of an accused may be ambiguous or uncertain on the wording of the admissions made by him, the court may be entitled to draw an adverse inference about the true extent of that knowledge in consequence of his refusal to give evidence I consider that when Douglas refused to give evidence ... the court is entitled to discount the exculpatory part of these remarks."

Judge Carswell was not satisfied beyond reasonable doubt that the defendant had contemplated the deliberate killing of the victim. He did, however, find the defendant guilty of wounding with intent to cause grievous bodily harm. As has been pointed out, in this case silence was used to discount the exculpatory part of an admission, but not to prove matters which were never admitted as within contemplation, namely that the victim would be murdered.

The key case announcing a shift in "Diplock Court" case law away from a restrictive approach on the

¹⁷R. vs. Smyth, ex tempore judgment, Belfast Crown Court (Kelly, J.), 20 October 1989.

¹⁸R. vs. Gamble & Others, unreported judgment, Belfast Crown Court (Carswell, J.) 27 October 1989.

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scope of inferences to be drawn from silence was also decided, at the trial level, by Judge Carswell.¹⁹

The case of R. vs. Kane & others²⁰ concerned the Casement Park killings. On 19 March 1988 two British soldiers were attacked and shot in West Belfast after driving their car into the funeral procession of an IRA supporter. The deceased had been killed by a loyalist gunman three days earlier during an attack on a joint funeral of three IRA members shot in Gibraltar. Dressed in civilian clothes, the soldiers drove their unmarked car into the head of the funeral procession. A crowd of mourners, frightened that another attack was about to begin, surrounded and set upon the car. One of the soldiers produced a gun and fired a warning shot. Apparently believing another loyalist assault was underway, some of the mourners pulled the two men from the car. The men were disarmed and beaten up. Surrounded by a group of some fifteen people each, they were pushed into Casement Park. Inside the park, they were severely beaten and stripped of most of their clothing. They were then thrown over a wall, put in a taxi and driven to a nearby waste ground where they were shot dead by two IRA gunmen.

The defendants in this case were accused of having assisted in keeping the soldiers in the Park, but not with being involved in the final phase of the incident.

Video evidence played an important role in the proceedings. During the proceedings footage, shot by television crews of the events on the public road, was introduced into evidence. In addition, the prosecution introduced into evidence a film shot by a British army helicopter (the "heli-tele" film) which was flying overhead at the time of the incident. The "heli-tele" film showed, among other things, scenes in the park, the taxi ride and the execution-style killings.

One of the defendants, Kelly, was interviewed seven times on the day of his arrest and the following day. At first he refused to speak, but after being cautioned, he made a short statement which he declined to sign. In his statement, Kelly acknowledged being at the funeral. He stated that while in the vicinity of the gate of the park, he saw the incident with the car and a man being brought into Casement Park. Kelly claimed that after having witnessed these events, he rejoined the funeral procession.

In his judgment Judge Carswell found, on the basis of the video evidence, that Kelly could be clearly identified as having participated both in the attack on the car and in the operation of taking one of the soldiers to the gate of Casement Park. He also found that Kelly could be seen again, outside the park, when the taxi carrying the soldiers was departing. These identifications contradicted Kelly's statement, which Judge Carswell deemed to be untrue. On the "heli-tele" film, a man wearing clothes similar to those of Kelly and participating in the events could be seen inside Casement Park. However, Judge Carswell admitted to having "some reservations about accepting the identification of Kelly from the heli-tele film on its own, because of the quality of the film". He nevertheless concluded, by "examining together all the facts", that Kelly was one of the members of the Casement Park group. Pursuant to Article 4 of the Order, Judge Carswell felt entitled "to draw such inferences as appear proper" from Kelly's refusal to testify at trial. Judge Carswell concluded:

"In my opinion, the Court is entitled to place together and consider in sum the evidence of the film taken outside Casement Park up to the point when the soldiers were taken inside, the film taken when the taxi

¹⁹See Jackson, J., o.c., 411. See also Ruddell, G., "A Summary of Recent Judicial Decisions in Northern Ireland" in Greer, S., Morgan, R. (eds.), o.c., 54.

²⁰R. vs. Kane & Others, unreported judgment, Belfast Crown Court (Carswell, J.), 30 March 1990.
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was leaving, the heli-tele film of events inside Casement Park, the falsity of Kelly's statement and his refusal to give evidence. When that is done, I am satisfied that Kelly not only took part in bringing Corporal Wood to Casement Park, but took part as an active participant in the events that occurred inside."

Judge Carswell consequently found Kelly guilty of murder, even though the accused had not been involved in the final phase.

Given the weakness of the identification evidence of Kelly inside the park, which was crucial to Kelly's conviction for murder, the prosecution's case, as a whole, was arguably not "on the brink of" the necessary standard of proof. The silence of the accused at trial in this case appears to have been an important factor in strengthening the prosecution's case. The requirements set for the other evidence called by the prosecution thus appeared to be lowered.

In its review of the case, the Court of Appeal, somewhat perplexingly, held that Sean Kelly could be clearly identified from the "heli-tele" film, as having been present in Casement Park, beyond a reasonable doubt. The appeal court judges consequently did not need to use the adverse inferences from Kelly's failure to testify at trial in upholding the conviction.

The relaxation of the requirements of the strength of the prosecution's evidence is exemplified even more in Judge Kelly's decision in the case of R. vs. McLernon & Others.²¹ As will be recalled, in the case of R. vs. Smyth, Judge Kelly introduced the "on the brink of the necessary standard of proof" criterion.

In R. vs. McLernon & others, Judge Kelly stated that he had not intended to limit the use of Article 4 of the Order to such cases. Rather, he argued for a much weaker standard, without any guidelines for its application:

"(...) in the widest terms. It imposes no limitation as to when it may be invoked or what result may follow if it is invoked. Once the Court has complied with the preliminaries in Article 4, para 2, and called upon the accused to give evidence and a refusal is made, the Court has then a **complete discretion** as to whether inferences should be drawn or not (...). In Raymond Smith²² I gave such instances in broad and general terms as what may be the consequence of the application of Article 4, but I add to these another instance only to show the width of the parameters of Article 4 that is that **in certain cases a refusal to give evidence under the Article may well in itself with nothing more increase the weight of a prima facie case to the weight of proof beyond a reasonable doubt**". (emphasis added)

Judge Kelly followed up his decision in R. vs. McLernon & others with an equally significant judgment in the case of R. vs. K.S. Murray.²³

Kevin Sean Murray was charged with the attempted murder of a part-time member of the Ulster Defence Regiment. He made a brief statement to a constable, at his home, while the premises were being searched in connection with the shooting. After his arrest, he remained silent. He made no reply during

²¹R. vs. McLernon & Others, unreported judgment, Belfast Crown Court (Kelly, J.), 20 December 1990.

²²This refers in fact to R. vs. Smyth.

²³R. vs. K.S. Murray, unreported judgment, Belfast Crown Court (Kelly, J.), 18 January 1991.

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interrogation, and did not testify during his trial.

In deciding the case, Judge Kelly found that the different elements of evidence (including forensic findings) introduced by the Crown were

"not inconsistent with the guilty participation of the accused in the crime. Some are more consistent with guilt than others. Not one of them, however, in itself, proves guilt to the standard of proof required ... It would however, be unrealistic, for a trier of fact, to ignore their cumulative effect."

Judge Kelly then went on to draw adverse inferences from the accused's failure to give foundation to the innocent alternatives which, according to the defence, countered the prosecution case. The Court discussed in detail Articles 3, 4 and 5 of the Order, and in finding the defendant guilty, concluded:

"In the instant case, it seems that what the prosecution has proved in evidence calls for evidence from the accused in the witness-box ... It is only commonsense ... to infer as proper inference that he is not prepared to assert his innocence on oath because that is not the case."

On appeal of the conviction, the defence case focussed almost exclusively on the interpretation of Articles 3 and 4 of the Order. With respect to Article 4, the defence argued that Article 4 was only declaratory of the common law, and did not extend the nature and scope of the inferences which can be drawn at common law. Therefore, the defence argued, Article 4 permitted an inference to be drawn from the accused's silence only when the evidence adduced by the Crown was so strong as to constitute a 'confession and avoidance' situation at common law.

The Court of Appeal, however, rejected these submissions.²⁴ The court declared itself satisfied that Article 4 did change the common law. The court confirmed that adverse inferences could be drawn from a defendant's silence once a *prima facie* case against the accused was established; it was not necessary that the evidence called by the prosecution was "on the brink of" proving guilt or should create a situation which at common law would be regarded as a "confession and avoidance" situation. The court held that:

"Under Article 4 it would be improper for the court to draw the bare inference that because the accused refused to give evidence in his own defence he was therefore guilty. But where commonsense permits it, it is proper in an appropriate case for the court to draw the inference from the refusal of the accused to give evidence that there is no reasonable possibility of an innocent explanation to rebut the *prima facie* case established by the evidence adduced by the Crown, and for the drawing of this inference to lead on to the conclusion, after all the evidence in the case has been considered, that the accused is guilty."

In November 1991 the Court of Appeal granted leave for the case to be taken to the House of Lords, on the grounds that Murray's conviction (to an 18-year sentence) raised a point of law of general public importance. Following the decision of the Court of Appeal in Murray, the prosecution's burden of proof, which in the early decisions had hardly been affected by the operation of the Order, was lowered to the demonstration that merely a *prima facie* case against the defendant exists. The defendant's remaining silent (not taking the witness stand) at trial may then "in appropriate cases" suffice to establish his guilt.

²⁴See R. vs. K.S. Murray, unreported judgment, Court of Appeal in Northern Ireland (Hutton, LCJ., McCollum, J.), 28 October 1991.

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In May 1992 the House of Lords heard the appeal; the judgment giving the reasons for the decision to uphold the conviction was published at the end of October. The judgment confirmed that the Order changed the common law and practice regarding the comments which could be made and the inferences which could be drawn from an accused's silence and failure to testify at trial. The House of Lords held that, under Article 4 of the Order, where the prosecution has made out a *prima facie* case and the defendant refuses to testify, a judge or jury may draw "such inferences from the refusal as appear proper". The inferences which may be drawn are not limited to specific inferences from specific facts, but also, "in a proper case, the drawing of the inference that the accused is guilty of the offence charged". While reiterating that a court cannot simply conclude that because the accused does not give evidence that she/he is guilty, the House of Lords stated:

"The accused cannot be compelled to give evidence, but must risk the consequences if he does not do so."

In R. vs. Martin & others²⁵ Lord Chief Justice Hutton indicated that, in his opinion, the intent of Articles 3, 4 and 6 was to enable the tribunal of fact to exercise ordinary common sense in drawing inferences against an accused. The case of R. vs. Martin & others is of particular relevance for the interpretation of Article 3, as invoked against Daniel Morrison, the National Director of Publicity for Sinn Fein.

The case involved the detention by the IRA of a man who was suspected of being a police informant, in a house in the Lenadoon district of Belfast. The man was detained in a private house and brutally interrogated from Friday evening to Sunday afternoon, when the police and the army arrived. Morrison, who was found in a neighbouring house, was arrested, and later charged with false imprisonment and conspiracy to kill the alleged informer.

On the advice of his solicitor, Morrison remained silent during interrogation. He did, however, give evidence in court. Morrison testified that he had been asked by IRA contacts to organize a press conference involving an IRA volunteer who wished to publicize that he had been the object of threats by the RUC intended to force him to work for them and had been put under pressure to set up two other IRA members on a "shoot to kill" operation. According to this testimony, Morrison, who alleged that it did not occur to him at that time that the man in question was held under restraint, asked to see the volunteer. The police arrived only a few moments after Morrison himself arrived at the house where the man was being held, and before he had spoken to any of the people there.

Morrison explained that his refusal to answer questions during interrogation was, in part, a political decision, as, in the press in November/December 1988, he had advised people in Castlereagh to exercise their right to remain silent.

On the basis of the evidence, Lord Chief Justice Hutton stated that he believed Morrison to have been present in the house for a longer time than he had admitted.

Lord Chief Justice Hutton also declared himself to be satisfied that, at all material times, Morrison knew that the informer was being held against his will, and that he thus knowingly became involved in false imprisonment. In arriving at this conclusion, Lord Chief Justice Hutton relied on Article 3 of the Order. He held that Morrison's failure to speak during interrogation, and his later explanations in the witness box

²⁵R. vs. Martin & Others, unreported judgment, Belfast Crown Court (Hutton, LCJ.), May 1991.
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at the trial

"gives rise to very strong inferences against him that his account of what he did (in the house) and the state of his knowledge as to what was happening in that house was false, and strongly supports the conclusion that he was guilty of criminal involvement in ... false imprisonment".

The Lord Chief Justice also declared himself to be satisfied that Morrison's failure to give an explanation to the police was dictated

"not by any political attitude or matter of principle on his part, but by his desire to see the evidence which could be adduced against him in court before he gave an explanation of his conduct and from a tactical desire not to reveal his line of defence at that stage".

Lord Chief Justice Hutton found Morrison guilty of aiding and abetting false imprisonment, but not of conspiring to commit murder. Morrison was sentenced to eight years' imprisonment.

It is apparent that the inferences drawn under the Order were crucial to the Court's making a determination about the state of knowledge of the accused, and thus in finding him guilty of criminal involvement in false imprisonment. Arguably, the case was not one involving an "ambush defence" (wherein the police would have been unable to investigate new evidence brought forward by the defendant at the trial). Rather, the decision turned on Morrison's knowledge of what was happening in the house, and the credibility of his defence that, as a Sinn Fein spokesman, he would not co-operate with the police at Castlereagh or knowingly become involved in an ongoing IRA operation. Apparently, the Lord Chief Justice believed that this line of defence did not withstand the "commonsense" test, and used the adverse inferences as a primary factor in determining the extent of Morrison's knowledge of the false imprisonment.

As can be seen from the above review of cases, over time the courts have interpreted the Order more broadly, and are more frequently drawing adverse inferences from an accused's silence (during interrogation or trial) in determining guilt or innocence at trial. The recent decisions dilute the required burden of proof. According to the courts, the prosecution need only present a *prima facie* case against the accused before adverse inferences from the accused's silence (either during questioning or trial) will be drawn against him. Amnesty International believes that the standard of proof permitted by the Order is contrary to the mandated guarantee of the presumption of innocence prescribed by international treaty obligations binding on the United Kingdom.

The Debate on the Need to Curtail the Right of Silence in Northern Ireland

In putting forward the proposed curtailment of the right of silence in the pre-trial phase, the Government argued that the right frustrated police investigations by providing suspects with a haven from questioning; in addition, reference was made to unpublished RUC figures showing that almost half of those detained for serious crimes, including terrorist offences, refused to answer substantive questions. The government stated that the change in the law was particularly directed at those suspected of terrorist and racketeering offences. Terrorists were said to be trained in interrogation resistance, and to use the right of silence as a strategy to avoid conviction.

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The Order is, however, not an emergency measure: it is part of the general criminal law in Northern Ireland, and relates to all offences, regardless of seriousness and to all people, not just "terrorists and racketeers". Consequently, the law also affects "persons who can in no sense be described as professionals - the feckless, the inarticulate, and those overborne by the whole experience of questioning".²⁶

Not all persons suspected of scheduled offences are necessarily "professional terrorists", as the Casement Park cases demonstrate. These cases involved the prosecution of forty-one people for their involvement in the murder of two soldiers in Andersonstown, following the intrusion of the soldiers' unmarked car in the funeral cortège of a man killed in a loyalist attack on a funeral three days earlier. Many of those involved in the incident, which commenced as a crowd reaction of fear and anger to the sudden appearance of the soldiers' car, were never charged or seriously suspected of membership in a terrorist organization.²⁷

Commentators report that the effect of the change in the law on suspected "professional criminals and terrorists" is uncertain. It has been held that the changes are likely to be ineffective in respect to such persons "because a variety of other evasive tactics (e.g. false alibis) are already at their disposal and these may simply come to be used more widely with the right of silence gone".²⁸ It is further argued that the changes do not necessarily make such suspects more inclined to speak.

It has been argued that the curtailment of the right of silence may increase the chances that innocent people will be convicted as a result of either inferences drawn from their silence, or as a result of inadvertent remarks made in order to comply with the added pressure to speak, without obvious corresponding gains for law enforcement.

The right of silence may be justified as a means by which acceptable limits can be set on police interrogation powers. During the interrogation process, the State has far greater resources at its disposal than the individual suspect or accused. Experience indicates that the powers of the state may be abused unless sufficient safeguards are provided for. The value of the right of silence is thus substantial in the context of a criminal justice system, including the criminal justice system of Northern Ireland.

Fundamentally, the Order shifts the balance during interrogation procedures between the powers of the State (and its law enforcement personnel) and individual rights, by further curtailing individual rights during interrogation. Amnesty International has, on previous occasions, expressed its concern about the general absence of safeguards in Northern Ireland for the protection of individual rights during pre-trial and trial phases.²⁹ The organization has urged the adoption of fundamental pre-trial safeguards aimed at

²⁶Asworth, A., Creighton, P., "The Right of Silence in Northern Ireland" in Hayes, J., O'Higgins, P., (ed.), Lessons from Northern Ireland, pp. 131-132, SLS Legal Publications (N.I.), (1992).

²⁷The case of Patrick Kane, who was sentenced to life imprisonment for his involvement in the Casement Park murders, comes to mind. Kane, who had never before been in a police station prior to his interrogation in this case, has an "abnormally low intellectual ability" and suffers from a hearing loss. Kane did not exercise his right to silence during police questioning. At trial, he retracted the confessions made during police interrogation, on the grounds that his statements were made as a result of fear of the police. See, Committee on the Administration of Justice, The Casement Trials, p. 46, CAJ, Belfast, April 1992. Other aspects of the case of R. v. Kane and Others are reviewed above on p.12.

²⁸Greer, S., "The Right to Silence: A Review of the Current Debate", Modern Law Review, p. 724 (1990).

²⁹See Amnesty International's publication, "Allegations of Ill-treatment in Northern Ireland", November 1991.

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ensuring that a detained person is given prompt access to legal assistance and protecting a detained person from ill-treatment. The organization has been concerned about many cases in which detainees were denied legal advice and uncorroborated contested confessions were the basis for convictions. Amnesty International has also expressed concern about the deliberate withholding of crucial evidence from defence lawyers by the prosecution or police.³⁰ In such a context, the right of silence is a particularly important safeguard against abuse of State interrogation powers.

Many of those who argue that the retention of the right is not crucial make its withdrawal conditional on the existence of other safeguards to control the interrogation system, including tape-recording police interviews and granting the detained person access to legal advice before and during interrogation. None of these safeguards, however, are secured under the current Northern Ireland emergency legislation.

Even with such safeguards installed, however, the right of silence still serves important functions. Valid, innocent reasons exist for remaining silent during interrogation and at trial.³¹ Exercises of the right of silence may be an indication of lack of public confidence in the police. Silence may also be considered a legitimate tactic in negotiation with investigating officers in order to obtain access to information about the nature of the available evidence and the level of charges contemplated.

In defence of the change in the law, the government argued that the right of silence during interrogation hinders proof of guilt at trial as it allowed the suspect to "ambush" the prosecution during the course of the trial by raising an unexpected defence, the truth of which the police were then unable to verify. The common law, however, already allowed the finder of fact (judge or jury) to give greater weight to a case against a silent accused in instances in which the presentation of a "late" defence prevented the police from investigating it.

The right of silence has received increasing recognition in other criminal justice systems in Europe. The Dutch Criminal Procedure Code provides that "in all cases in which a suspect is interrogated, the questioning judge or official should refrain from any act aimed at provoking a statement, of which it cannot be said that it was freely given. The suspect is not required to answer. Before the interrogation, the suspect is informed that he/she is not required to answer." (Article 29) The German Criminal Procedure Code likewise provides that the courts should inform the accused that he/she has the freedom to decide to speak to the charge or to remain silent. No inferences unfavourable to the accused may be drawn, if he/she opts for silence (Article 243, para 4). In a recent case, the Bundesgerichtshof³² held that the failure of police officers to inform a suspect of the right to remain silent rendered statements made by the suspect inadmissible in criminal proceedings³³. In Belgium, where the right of silence is not explicitly provided

³⁰United Kingdom: Human Rights Concerns, June 1991, AI Index: EUR 45/04/91

³¹As the United States Supreme Court noted in 1893 in the case of *Wilson v. United States*, 149 U.S. 60 (1893) "It is not everyone who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not everyone, however honest, who would therefore willingly be placed on the witness stand."

³²Federal Court

³³While pursuant to Section 136 (1) sent 2 of the Strafprozessordnung (Code of Criminal Procedure), the police had a duty to inform all people suspected of having committed a criminal offence of their right to remain silent, prior case law permitted the introduction of statements of the accused into evidence in the absence of the caution, if it was established that the accused already knew of his/her right to remain silent. In changing the law as described above in the text, the Bundesgerichtshof relied on French, Italian, English and American law. See *Bundesgerichtshof*, 27.2.92, *Neue Juristische Wochenschrift* 1992, p. 1463. Amnesty International November 1992 AI Index: AI EUR 45/02/92

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for in legislation, the right is nevertheless upheld by the courts.

As has been illustrated, the recognition and protection of the right of silence as an essential component of the presumption of innocence and the right not to testify against oneself is evolving as a fundamental principle of European criminal procedural systems. The curtailment of the right in Northern Ireland is therefore contrary to the trend in Europe.

4. CONCLUSION

The right of silence is an essential component of the presumption of innocence and the right not to be compelled to testify against oneself or confess guilt, which are guaranteed by international human rights standards, including treaties to which the United Kingdom is a party. An effective way to ensure that the legal system guarantees that all people are presumed innocent until proven guilty beyond a reasonable doubt is to recognize that the accused has the right to remain silent throughout the criminal investigation and proceedings. Doing so will ensure that the prosecution satisfies its burden to present evidence which proves the accused guilty beyond a reasonable doubt.

The attachment of adverse inferences to the exercise of the right of silence results in lowering the requirements of proof to be adduced by the prosecution in order to establish guilt. The prosecution is no longer required to prove guilt beyond reasonable doubt; it is only required to call sufficient evidence to allow the court, when adding to this evidence the impact of the inference drawn against the accused as a consequence of his silence, to conclude guilt. In other words, the adverse inferences allow the court to establish guilt on the basis of evidence which otherwise may be insufficient. A national law incorporating such a rule, such as the 1988 Order, is inconsistent with the presumption of innocence and the benefit of the doubt for the accused as entrenched in international law. The international obligation of the prosecuting authority to prove guilt beyond reasonable doubt cannot be rendered devoid of meaning by determining at the national level that evidence otherwise inadequate to prove guilt may be upgraded by permitting the drawing of adverse inferences from an accused person's silence.

The curtailment of the right of silence is also inconsistent with the internationally recognized right not to be compelled to testify against oneself or to confess guilt. Permitting adverse inferences to be drawn is a means of compulsion; it constitutes a form of direct pressure exercised by law enforcement bodies to obtain evidence. During interrogation, undue advantage of the situation of the detainee can be taken in order to obtain his co-operation with the threat of adverse inferences being drawn against him for remaining silent.

Amnesty International has concluded that the Order, which permits the drawing of adverse inferences from a person's silence in the face of police questioning and at trial, is inconsistent with guarantees of the presumption of innocence and against compulsion to confess guilt or testify against oneself, as safeguarded by international standards.

The effects of the 1988 Order are particularly worrisome in the pre-trial phase, given the general inadequacy of safeguards under the emergency legislation in Northern Ireland for the upholding of individual rights during interrogation. The curtailment of the right of silence may well increase the risk that innocent people are convicted as a result of either inferences drawn from their silence, or as a result

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of inadvertent remarks made in order to comply with the added pressure to speak.

In addition, the "Diplock Courts" in Northern Ireland appear to have departed from their original reticence to drawing inferences from an accused's silence at trial. Requirements concerning the strength of the prosecution's other evidence before adverse inferences may be drawn have gradually been relaxed. The prosecution's obligation to call adequate evidence to prove the accused guilty beyond reasonable doubt has at the same time been eroded, and the risk of unsafe convictions has increased.

Amnesty International urges that the right not to be compelled to testify against oneself and the right to be presumed innocent be strictly respected in Northern Ireland. Amnesty International consequently calls for the Criminal Evidence (N.I.) Order 1988 to be repealed, and urges that legislation which safeguards the right to remain silent in conformity with international fair trial standards be enacted. Such legislation should include, *inter alia*, provisions which guarantee to all persons the right to consult with a lawyer immediately upon detention or arrest and during police questioning.