

**THE GIBRALTAR SHOOTING CASE\***  
**An analysis of the European Court of Human Rights judgment**  
**in the case of *McCann & Others -v.- the United Kingdom***  
**(judgment of 27 September 1995 in case No. 17/1994/464/545)**

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Pregledni znanstveni članak

*SLUČAJ "GIBRALTAR"*

*Analiza presude Europskog suda za ljudska prava u slučaju*  
*McCann i dr. protiv Ujedinjenog Kraljevstva*

*U Gibraltaru su 6. ožujka 1988. vojnici specijalnih britanskih postrojbi, tzv. SAS-a, smrtno ustrijelili tri osobe (Daniela McCanna, Seana Savagea i Maireada Farrella) za koje se sumnjalo da su teroristi, pripadnici IRA-e. Istražna porota je zaključila da se radi o "zakonitom usmrćivanju"; vojnici nisu bili kazneno gonjeni. Vlada je uspješno prekinula građansku parnicu, koju su u Sjevernoj Irskoj pokrenuli rođaci poginulih, upotrebom uvjerenja kojim se onemogućava sudsko utvrđivanje državne odgovornosti za ubijanje. Europski sud za ljudska*

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\* This paper was originally prepared as a hand-out for teaching purposes at the University of Essex and the London Metropolitan University. Although largely unchanged, its present version includes re-numbering of the various parts and sections, expansions on a few footnotes (pointing out, in particular, the abolition of the European Commission of Human Rights), and some minor changes to the text.

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*prava u Strasbourgu je 27. rujna 1995. jedva dostatnom većinom glasova (deset naprema devet) u slučaju McCann i dr. protiv Ujedinjenog Kraljevstva presudio da je došlo do povrede čl. 2. Europske konvencije. Sud je ovom odlukom prvi put osudio jednu europsku državu radi nezakonite uporabe smrtonosne sile od strane vojno-redarstvenih službi. Iako sadrži određene slabosti, odluka "Gibraltar" naglašava da se demokratske vlade ne smiju suprotstavljati nasilju i terorizmu s jednakim stupnjem nemara prema ljudskom životu kao što to čine oružane skupine koje napadaju državu. Svrha je ovog članka (kritička) analiza te odluke te, posebice, identifikacija pitanja koja povlače šire implikacije za države članice Vijeća Europe.*

**Ključne riječi:** *Europski sud za ljudska prava, Europska konvencija za ljudska prava, članak 2., terorizam, državna uporaba sile.*

### **1. Introduction**

On Sunday, 6 March 1988, in Gibraltar, soldiers from the British "Special Air Services" Regiment, the SAS, shot dead three suspected IRA terrorists, Daniel McCann, Sean Savage and Mairead Farrell. The three IRA members had planned to detonate a car bomb in the British colony on the next Tuesday, 8 March, when another British Regiment, the Royal Anglian Regiment, would perform a changing of the guard ceremony at Ince's Hall in the centre of Gibraltar. They had entered Gibraltar from Spain that day, and had parked a car in the area next to Ince's Hall where the Royal Anglians would assemble. However, after they had been killed it was established that the car they had parked did not contain a bomb, and that the three suspects had been unarmed. Eye witnesses reported that they had been shot by the soldiers without being given a chance to surrender.

An inquest was held in Gibraltar in September 1988. The proceedings lasted nineteen days; seventy-nine witnesses were called. At the end, the inquest jury returned verdicts of "lawful killing" by a majority of nine to two. The soldiers were not prosecuted. Civilian proceedings, brought by relatives of the deceased in Northern Ireland, were effectively stopped by the Government, through the use of a certificate which prevented the court from assessing the Government's liability for the killings. On 14 August 1991, the relatives lodged an application against the United Kingdom under Art. 25 of the European Convention on Human Rights, claiming that the United Kingdom had violated Art. 2 of the European Convention on Human Rights, which guarantees the "right to life", when its soldiers shot and killed their relatives.

In its Report of 4 March 1994, the European Commission of Human Rights held, by a majority of 11 votes to six that there had been no violation of

Art. 2.<sup>1</sup> However, exceptionally, the Commission nonetheless referred the case to the European Court of Human Rights, because of the fundamental issues raised by the case. The Court, again because of the importance of the case, decided to deal with the matter in a Grand Chamber.

On 27 September 1995, the European Court of Human Rights in Strasbourg delivered judgment in the case of *McCann and Others v. the United Kingdom*.<sup>2</sup> The Court found, by a narrow margin of 10 to nine, that Art. 2 had been violated. The Government was ordered to pay the relatives £St. 38.700 in legal fees. It was the first time any European Government had been found guilty by the Court of the unlawful use of lethal force by law enforcement officials.

The “Gibraltar” judgment, while weak in some respects, underlines that democratic governments are not free to meet political violence and terrorism with the same lack of regard for human life as is shown by armed groups opposing the state. On the contrary, they are bound under the Convention to meet even the most serious threat to life, limb and property within the law, within standards set for civilised states. The case crucially clarifies those standards for States Party to the European Convention on Human Rights - that is, for all democratic European states.<sup>3</sup> It is the purpose of this article to analyse the judgment (critically), and in particular to identify the issues of wider implication to all Member States of the Council of Europe.

The 68-page judgment in *McCann* is complex and turns around a (sometimes confusing) mixture of law and fact. Specifically, the Court (that is to say, the majority of the Court), having adopted a particular legal approach to Art. 2, went on to rely on three main facts to hold that that article had been violated. The dissenting minority of the judges, while not disagreeing (expressly) with this legal approach, and while also not disputing these facts, nonetheless reached the opposite conclusion because of the different way in which they assessed the facts. The Commission was similarly divided.

In view of this somewhat confusing situation, we believe it is useful first to set out in part 2 of this paper the, what one might call “abstract” issues of law,

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<sup>1</sup> Report of the Commission in Application No. 18984/91, adopted on 4 March 1994. The Commission was abolished by the 11<sup>th</sup> Protocol to the Convention, which came into force in November 1998. It used to examine cases on admissibility and merits. Normally, cases which had been rejected by the Commission as “inadmissible” for various reasons, or as disclosing “no violation” of the Convention were not referred to the Court. The *McCann* case is an exception.

<sup>2</sup> European Court of Human Rights Judgment of 27 September 1995 in Case nr. 17/1994/464/545, Publ. ECHR, Series A, Vol. 324; 1996) 21 EHRR 97. Hereafter “the judgment” or simply “judgment”.

<sup>3</sup> Note that acceptance of the European Convention on Human Rights has become a formal condition for membership of the Council of Europe. Russia, for instance, had to indicate its willingness to become a Party to the Convention before its application for membership of the Council was accepted. This means that States that are Party to the Convention cannot denounce the Convention without also excluding themselves from the Council and the “family” of European democratic nations.

i.e. the issues of interpretation of Art. 2 of the Convention, on which there was no express dissent within the Court - and which therefore must be assumed to set a very strong precedent on the law.

Only then will we address, in part 3, the facts of the case. We will commence that part with an examination of what the Commission and Court of Human Rights said about the *legal* question of what they felt was the proper judicial approach to the facts. Next, we will provide the facts as contained in the “outline case” on which the Commission and the Court based their assessments, while noting that the facts as set out in that case by no means answer all the questions surrounding the killings. We will then go on to see how the various groups within these organs (minority and majority of the Commission, majority and minority of the Court) actually dealt with those facts.

In the final part, part 4, we will set out our conclusions.

## **2. Legal issues**

### **2.1. The text of Article 2**

Article 2 of the European Convention on Human Rights reads as follows:

#### **Article 2** *Right to Life*

1. *Everyone’s right to life shall be protected by law. No-one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.<sup>4</sup>*
2. *Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
  - (a) *in defence of any person from unlawful violence;*
  - (b) *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
  - (c) *in action lawfully taken for the purpose of quelling a riot or insurrection.*

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<sup>4</sup> Note that under the Sixth Protocol to the Convention, the States Party to that protocol undertake to abolish the death penalty in peacetime. For those States, the Sixth Protocol therefore amends this part of Art. 2. This is, however, not relevant for the present case.

Article 2 is construed somewhat differently from other substantive articles in the Convention,<sup>5</sup> in that it does not just state that “*everyone has the right to life*”, but rather, that “*everyone’s right to life shall be protected by law*”; and by allowing for state action which might limit or endanger this right only when this is “*absolutely necessary*”. Most of the other articles (and in particular Arts. 8 – 11) allow for restrictions on substantive rights to the extent that these are “*prescribed by law*” and “*necessary in a democratic society*” for a legitimate aim, as listed in the articles concerned.

The Court analysed the text of Art. 2, in the light of the submissions of the parties and of *amicus curiae* submissions by Amnesty International and by other human rights groups. The Court reiterated, first of all, that it seeks to interpret and apply the provisions of the Convention generally in such a way as to make its safeguards “*practical and effective*”.<sup>6</sup> It stressed that Art. 2:

“ranks as one of the most fundamental provisions in the Convention - indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention,<sup>7</sup> it also enshrines one of the basic values of the democratic societies making up the Council of Europe. As such, its provisions must be strictly construed.”<sup>8</sup>

The reference to Art. 15 may be important. Art. 15 § 1 allows for derogations from most Convention rights “*in time of war or other public emergency*”. However, Art. 15 § 2 stipulates that no derogation may be made from (*inter alia*) Art. 2, “*except in respect of deaths resulting from lawful acts of war*”. It should be noted that it was not argued by the Government that the qualification in Art. 15 in respect of Art. 2 had any application in the case. More important, it would appear from the above quote that the Court, in any case, would have rejected such a contention. ***One may therefore (tentatively) conclude that the exception in Art. 15 § 2 to the non-derogability of Art. 2 in times of war - the reference to “deaths resulting from lawful acts of war” - does not apply to anti-terrorist operations “in peacetime”: “War” means an international armed conflict; it does not include operations such as the SAS operation against the IRA in Gibraltar.***

The Court examined, first, the question of whether Art. 2 § 1 imposed any “positive obligations” on States, (i) as far as the phrasing and application of national law is concerned, and (ii) in terms of a requirement on the State to

<sup>5</sup> In particular, the “typical” Convention articles, Art. 8 (concerning the right to private and family life), Art. 9 (right to freedom of thought, conscience and religion), Art. 10 (right to freedom of expression), and Art. 11 (right to freedom of peaceful assembly). But note also the similarities between Art. 2 and these articles, discussed in the text.

<sup>6</sup> Judgment, para. 146, with reference to earlier case-law.

<sup>7</sup> Article 3 contains an absolute prohibition of torture, inhuman or degrading treatment or punishment.

<sup>8</sup> Judgment, para. 147.

hold *ex post facto* inquiries into killings by state agents. The Court also made certain pronouncements on the application of Art. 2 § 2, according to which some killings “shall not be regarded” as violating the right to life, and clarified its approach to the assessment of the facts.

In the following sub-sections, we will briefly set out the Court’s considerations on these matters, with references, as appropriate, to the views put forward by the applicants, the Government, the *amici curiae*, and the Commission.

## **2.2. Positive obligations under Art 2 § 1 of the Convention**

### ***i. the obligation to “protect” the right to life “by law”***

As already noted, Art. 2 § I of the Convention differs from the first paragraphs of the “typical” substantive provisions by providing that States must “protect” the right to life “by law”.

The Applicants had pointed out that a similar requirement is contained in Art. 6 of the (UN) International Covenant on Civil and Political Rights; and that the Human Rights Committee, in interpreting that provision, had held that:

“The requirement that the right to life shall be protected by law and that no one shall be arbitrarily deprived of his life means that **the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State**”.<sup>9</sup>

The applicants had submitted that the Convention, too, imposes a “positive duty” on States, under which they must ensure that their national law will “strictly control and limit” the circumstances in which a person may be deprived of his life by agents of the State.<sup>10</sup> They also submitted that it was an inherent part of this positive duty, that the State must give appropriate training, instructions and briefings to its soldiers and other agents who may use force, and that the State must furthermore exercise strict control over any operations which may involve the use of lethal force.<sup>11</sup>

The applicants invited the Commission and Court to examine (a) the national legal standard on the use of lethal force and judicial practice under this national

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<sup>9</sup> See the “views” of the Committee in the *Camargo/Guerrero*-case, repeated verbatim in its General Comment on Art. 6 of the Covenant. It is notable, if regrettable, that neither the Commission nor the Court expressly referred to the pronouncements of the Human Rights Committee.

<sup>10</sup> The applicants’ submissions are noted in the judgment, in para. 151; and in the Commission Report, in para. 185; but without the source of the standard invoked (the UN Human Rights Committee’s views on Art. 6 ICCPR) being acknowledged.

<sup>11</sup> *Idem*.

standard; and (b) the training and instructions given to SAS soldiers, on their compatibility with Art. 2 § 1.<sup>12</sup>

The Convention organs did not fully comply with the applicants' requests in these respects. It is useful to see how they approached these issues.

***(a) domestic law on the use of lethal force:***

The English legal test concerning the lawfulness of use of force is that such force must be "reasonably necessary" in the circumstances. The applicants contended that this standard was vague and general, and applied by the courts in a lax manner. They said that "*English law on the use of force (as also applicable in Gibraltar) consists of little more than a few vague and generally worded principles, entirely subjectively applied*"; and added that "*this contrasts with the law in other Council of Europe Member States.*"<sup>13</sup> They furthermore submitted an academic examination of judicial practice under this rule, which, they said, indicated that the Northern Irish courts, at least, accepted the "reasonable necessity" of any use of lethal force by soldiers, if such use of force was in accordance with the soldiers' general training and instructions.<sup>14</sup> Finally, they submitted that the agents of the State (in particular, soldiers, and more in particular, soldiers belonging to the SAS Regiment) were not trained in accordance with the strict standards of Art. 2 § 1.

The Government claimed, by contrast, that "*the test of reasonable necessity is strictly applied in practice*".<sup>15</sup>

In addressing this point, both the Commission and the Court stressed (with reference to different cases) that the United Kingdom was not required to either incorporate the Convention into domestic law, or to adopt corresponding provisions with identical formulations.<sup>16</sup> It suffices if the substance of the Convention right in question is protected.<sup>17</sup>

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<sup>12</sup> See, in particular, the Comments by the Applicants on the Observations by the United Kingdom Government on the first and second questions put to the Government by the Commission (November 1992), in particular under point 3.1, at p. 26 ff; and the Memorials of the Applicants, submitted to the Court, in particular in Part II (Legal Issues), point 3 (domestic law and practice), at p. 12. The same points were also, strongly, emphasised in the oral hearing before the Commission and in the hearing before the Court.

<sup>13</sup> Memorials of the Applicants, Part II (Legal Issues), section 3, p. 12, with reference to the applicants' earlier submissions to the Commission.

<sup>14</sup> In particular, R J Spjut, *The 'official' use of deadly force by the security forces against suspected terrorists: some lessons from Northern Ireland*, Public Law Journal, 1986, pp. 38 ff.

<sup>15</sup> Commission Report, para. 188.

<sup>16</sup> Commission Report, para. 189; judgment, para. 153. Neither the Commission nor the Court reflect however, in this context, on the implications of the requirement, unique to Art. 2, that the right to life must be protected "by law": none of the cases they refer to concern Art. 2.

<sup>17</sup> Commission Report, para. 189, quoted in the judgment, para. 152.

There was nonetheless a difference in approach between the Commission and the Court. Having looked only at the bare wording of the “reasonable necessity” test, without examining judicial practice, the Commission found,

“on examination of the applicable law in this case **no indication that it fails to offer the requisite general prohibition against the arbitrary use of lethal force by state authorities.**”<sup>18</sup>

Before the Court, the applicants strongly criticized this approach by the Commission, pointing out that it seemed to indicate that the right to life was sufficiently “*protected by law*”, as long as the law prohibits, “in general terms”, “*arbitrary*” killings. They noted that this very lax interpretation of Art. 2 of the Convention contrasted with the strict interpretation given to the (on paper, seemingly weaker) text of Art. 6 of the International Covenant on Civil and Political Rights.<sup>19</sup>

The Court examined national law in greater detail, with specific references, not just to Art. 2 of the Gibraltar Constitution, but also to leading English cases, a report of a Royal Commission, and a summary by Lord Justice McGonigal in the leading Northern Irish case - but without reference to the analysis by Spjut, submitted by the applicants, or to the cases referred to in that analysis. The Court also noted the guide to police officers in the use of firearms, issued to the Gibraltar police officers involved in the case, which stressed the individual responsibility of such officers under the law.<sup>20</sup>

In the end, the Court still felt that “*the Convention standard on its face appears to be stricter than the relevant national standard*”, while noting however that “*it has been submitted by the Government that, having regard to the manner in which the [national] standard is interpreted and applied by the national courts..., there is no significant difference in substance between the two concepts.*”<sup>21</sup> Without endorsing the Government’s submission, the Court nonetheless concluded that,

“whatever the validity of [the Government’s] submission, the difference between the two standards is not sufficiently great that a violation of Art. 2 § 1 could be found on this ground alone.”<sup>22</sup>

One may regret that the Court did not look more closely at the cases noted by Spjut, which seem to indicate a more lax application of the English legal standard than was suggested by the Government; indeed, one may disagree with the Court’s conclusion that “*there is no significant difference in substance*” between the English and the Convention standards.

<sup>18</sup> Commission Report, para. 190, emphasis added.

<sup>19</sup> Memorials of the Applicant, Part II, p. 10 ff.

<sup>20</sup> Judgment, paras. 133 – 136.

<sup>21</sup> Judgment, para. 154.

<sup>22</sup> Judgment, para. 155.

As a matter of precedent, however, it is more important that the Court felt called upon to examine domestic law and judicial practice in some detail; and that, in the end, it seemed to have concluded that there was no violation of Art. 2 § 1 because it believed (rightly or wrongly) that the English/Northern Irish/Gibraltar legal standard on the use of lethal force substantively met the Convention one. One may infer that, if a case were to arise (in England, Northern Ireland or elsewhere) in which it could be shown that the domestic legal standards manifestly fell below the Convention standard, that in itself *could* give rise to a violation of Art. 2.

***(b) domestic practice: the training and instructions given to SAS soldiers:***

Counsel for the applicants had argued at the hearing before the Court:

“In the present case, it is undisputed that the SAS soldiers acted fully in accordance with their general training and instructions. The inquest jury furthermore held that they acted ‘lawfully’. That training, and those instructions, are therefore part and parcel of the way in which ‘the law’ protects the right to life (or rather, fails to do so) in the United Kingdom and in Gibraltar. That training, and those instructions, should therefore be examined, not just in the context of the second paragraph of Article 2 but also under the first paragraph.

We would recall the words of [Dissenting Member of the Commission] Mr Trechsel (who the Court mows is an eminent criminal legal expert). He said that:

*‘The decisive element is, in my view, the fact that the use of firearms by the soldiers automatically involved shooting to kill. Thus, from the outset, they were not trained or instructed to reflect whether it would not have been sufficient merely to wound their targets.’*

The point is that the law did not require such strict training, it did not require such strict instructions. We submit that that in itself shows a violation of Article 2 § 1 of the Convention.<sup>23</sup>

However, the Court (like the Commission) expressly refused to examine the general training and instructions, given to the SAS, under Art. 2 § 1; it said that those matters, and the question of operational control over the specific operation in Gibraltar, should, “*in the context of the present case*”, be examined under Art. 2 § 2 instead.

In our view, this is regrettable and significantly reduces the value of the judgment. As we shall show below, in Part II, on the facts, the case ultimately hinged crucially on the “automatic recourse to lethal force” by the SAS soldiers; i.e. on the fact that:

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<sup>23</sup> Verbatim Record of the Court hearing of 20 February 1995, Cour/Misc (95)44, p. 10.

“Their reflex action in this vital respect [shooting to kill without apparently considering whether they could have shot to wound] lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects.”<sup>24</sup>

However, as we shall also note in that part, neither the Commission nor the Court examined the training and instructions, given to the SAS soldiers.

We find it difficult to see how the State can be said to have sufficiently protected the right to life, “by law”, if it is “*not clear whether [the SAS soldiers] had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest.*”<sup>25</sup> Be that as it may, it is nonetheless clear that the failure of the authorities to ensure that its soldiers did not react in the manner they did was one of the main grounds on which the Court relied in reaching its finding that the Convention had been violated, in this case.<sup>26</sup>

*ii. the obligation to hold ex post facto proceedings to establish the facts*

The applicants had submitted that (apart from adopting legal standards compatible with the Convention, in order to protect the right to life, “by law”), Art. 2 also implied a positive duty on the State to provide “*an effective ex post facto procedure for establishing the facts surrounding the killing by agents of the State through an independent judicial process to which relatives must have full access*”.<sup>27</sup> In this, they had referred to the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted on 7 September 1990 by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and to the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 24 May 1989 in UN Economic and Social Council Resolution 1989/65. The *amicus curiae* briefs, submitted by Amnesty International and other human rights organisations also drew the attention of the Court to these UN standards.<sup>28</sup> and, in a crucial passage of the judgment, accepted the Applicants’ general proposition:

<sup>24</sup> Judgment, para. 212.

<sup>25</sup> *Idem*.

<sup>26</sup> Judgment, para. 213.

<sup>27</sup> Judgment, para. 157, emphasis added. Note that this suggested procedural requirement flows from Art. 2 itself, and is distinct from the separate rights to an “effective remedy” against violations of the Convention (Art. 13) and from the right of access to court to bring civil proceedings (Art. 6), neither of which were invoked by the Applicants (cf Judgment, para. 160).

<sup>28</sup> Judgment, paras. 138 – 140.

“[The Court] confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. **The obligation to protect the right to life under this provision, read in conjunction with the State’s general duty under Article. 1 of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention’, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by *inter alios*, agents of the State.**”<sup>29</sup>

The Court felt that it was “not necessary” in the case at hand to decide “*what form such an investigation should take and under what conditions it should be conducted*” - because whatever the specific requirements, they had been met in the inquest procedures.<sup>30</sup> The Court noted a number of aspects of the Inquest procedures which clearly contributed to its overall finding that there had been a sufficiently effective official investigation to meet the requirements of Art. 2:

- the proceedings had been public;
- the applicants (i.e. the relatives of the deceased) had been legally represented;
- a large number of witnesses (seventy-nine) had been heard;
- the lawyers for the relatives had been able to examine and cross-examine key witnesses, including the military and police personnel involved in the planning and conduct of the operation, and to make submissions in the course of the proceedings.<sup>31</sup>

The applicants, and the *amici curiae*, by contrast, had pointed out a large number of shortcomings in the inquest proceedings; summed up by the Court as follows:

“In particular, they complained that no independent police investigation took place of any aspect of the operation leading to the shootings; that normal scenes-of-crime procedures were not followed; that not all eye witnesses were traced or interviewed by the police; that the Coroner sat with a jury which was drawn from a ‘garrison’ town with close ties to the military; that the Coroner refused to allow the jury to be screened to exclude members who were Crown servants; that the public interest certificates issued by the relevant government authorities effectively curtailed an examination of the overall operation.

<sup>29</sup> Judgment, para. 161, emphasis added.

<sup>30</sup> Judgment, para. 162.

<sup>31</sup> *Idem*.

They further contended that they did not enjoy equality of representation with the Crown in the course of the inquest proceedings and were thus severely handicapped in their efforts to find the truth since, *inter alia*, they had no legal aid and were only represented by two lawyers; witness statements had been made available in advance to the Crown and to the lawyers representing the police and the soldiers but, with the exception of ballistic and pathology reports, not to their lawyers; they did not have the necessary resources to pay for copies of the daily transcript of the proceedings which amounted to £500 - £700.”<sup>32</sup>

We will return to the exclusion of certain matters from the fact-finding by the inquest, in part 3. Here, it may suffice to note that the Court found that:

“the alleged various shortcomings in the Inquest proceedings... [did not]... substantially hamper the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killings.”<sup>33</sup>

One may not agree with the Court on that finding of fact in respect of the specific proceedings in the particular case. However, it is again more important to note the legal precedent set by the Court: Basically, the Court has held that **it is a legal requirement under Art. 2 § 1 of the Convention, that if a person has been killed by agents of the State, there must be an effective, thorough, impartial and careful *ex post facto* examination of the circumstances surrounding such killings.** The Court refused to spell out the exact requirements of such proceedings but clearly, access to the proceedings by relatives and their lawyers, and the holding of such proceedings in public, are important factors to be taken into account.

### **2.3. Stricter tests than under the “typical” Convention articles**

The Court agreed with the Commission, that the exceptions delineated in the second paragraph of Art. 2 “*primarily*” describe “*the situations where it is permitted to ‘use force’ which may result, as an unintended outcome, in the deprivation of life*”. However, in the Court’s view, Art. 2 also extended to intentional killing.<sup>34</sup>

In either case, the use of force must be “*absolutely necessary*”.<sup>35</sup> The use of that term (and in particular of the adjective “absolutely”) furthermore indicates:

<sup>32</sup> Judgment, para. 157.

<sup>33</sup> Judgment, para. 163.

<sup>34</sup> Judgment, para. 148.

<sup>35</sup> *Idem*.

“that a **stricter and more compelling test of necessity** must be employed from that normally applicable when determining whether State action is ‘necessary in a democratic society’ under paragraphs 2 of Articles 8 to 11 of the Convention. In particular, the force used must be **strictly proportionate** to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2.”<sup>36</sup>

The Court derived from this a certain approach to the assessment of the facts, which we will discuss in part 3. Suffice it to note here that the Court approached the case at hand with a view to ascertaining whether the killing of the three terrorists “constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 § 2 (a) of the Convention.”<sup>37</sup>

#### 2.4. *The judicial approach to the facts*

##### i. *general approach*

The Court recalled that, “under the scheme of the Convention the establishment and verification of facts is primarily a matter for the Commission.”<sup>38</sup> The Court would, accordingly, only use its own powers in this area in exceptional circumstances. However, the Court was not bound by the Commission’s findings of fact and, moreover, “remains free to make its own appreciation [of the facts] in the light of all the material before it.”<sup>39</sup>

Both the Commission and the Court furthermore to a very large extent based themselves on the facts as they had been presented at the inquest. However, both the Commission and the Court expressly rejected repeated Government assertions (made, in particular, in the Commission stage of the proceedings), that the inquest jury had made certain (express or implicit) “findings of fact”, which (the Government argued) the Court should accept as proven.<sup>40</sup> To the contrary, both Convention organs stressed that they were not in any way bound by the facts as presented at the inquest.<sup>41</sup>

In the case at hand, the Court felt, first of all, that “the Commission’s establishment of the facts and findings [on the points at issue, summarised in

<sup>36</sup> Judgment, para. 149, emphasis added.

<sup>37</sup> Cf. Judgment, para. 213.

<sup>38</sup> Judgment, para. 168, with reference to Articles 28 § 1 and 31 of the Convention. Of course, with the abolition of the Commission (see footnote 1, above), this issue has become moot: the Court now fulfils this function itself.

<sup>39</sup> *Idem.*, with reference to the *Cruz Varas* and *Klass* judgments.

<sup>40</sup> Cf. Commission Report, para. 175. In the proceedings before the Court, the Government softened its stance, and argued merely that the Court should give “substantial weight” to the verdicts of the jury: see Judgment, para. 165.

<sup>41</sup> Commission report, para. 176; Judgment, para. 167.

*the judgment] to be an **accurate and reliable** account of the facts underlying the present case.”<sup>42</sup> The Court also clearly felt that the Commission had established the facts **sufficiently**: it made its own assessment of whether there had been a violation of Art. 2, on the basis of “*the facts as established by the Commission*”.<sup>43</sup> The Court said that “*in the present case, neither the Government nor the applicants have, in the proceedings before the Court, sought to contest the facts as they have been found by the Commission...*” even though, as the Court also notes, “*they differ fundamentally as to the conclusions to be drawn from them under Article 2 of the Convention.*”<sup>44</sup> What is more, neither the dissenting members of the Commission, nor the dissenting members of the Court, disagreed with the respective majorities on the facts.*

All this, however, is not to say that all the facts of the case were *fully* established - or that the applicants, in particular, accepted that the Commission had fully absolved itself of its fact-finding duties. Specifically, the applicants had strongly urged the Commission to look closer into certain matters of fact, not or not **fully** clarified by the inquest - but the Commission had felt it unnecessary to do so, and as just noted, the Court, too, felt it could make its assessment on whether there had been a violation of the Convention on the basis of the facts as established by the Commission, without a need for further fact-finding.

In the end, the majorities and the minorities of the Commission and the Court, as well as the applicants and the respondent Government, therefore argued the case on the basis of a more or less agreed (or at least accepted) **abstract** of the facts surrounding the case, largely (but not entirely) derived from the inquest. While this, what one might call “outline case” was held by the Commission and Court to have been sufficient for their determination of the legal issues, it should be noted that some matters were not fully established. Surprisingly, as we shall see below, at 3.2, this includes certain matters which (in spite of being only partially clarified) determined the outcome of the case.

## *ii. onus and standard of proof*

The applicants made a number of submissions on the question of onus and standard of proof. Specifically, they argued that:

“in examining the actions of the State in a case in which the use of deliberate lethal force was expressly contemplated in writing, the Court should place on the Government the onus of proving, beyond reasonable doubt, that the planning and execution of the operation was in accordance with Article 2 of the Convention. In addition, it should not

<sup>42</sup> Judgment, para. 169, emphasis added.

<sup>43</sup> Cf. Judgment, para. 171.

<sup>44</sup> Judgment, para. 169.

grant the State authorities the benefit of the doubt as if its criminal liability were at stake.”<sup>45</sup>

The Commission did not pronounce itself on these matters, but the Court made some important observations in this respect. Thus, the Court concluded from its own affirmation of the importance of Art. 2 (above, sub-section 2.1), that:

“the Court must, in making its assessment [as to whether there was a violation of Art. 2], subject deprivations of life to **the most careful scrutiny**, particular where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also **all the surrounding circumstances including such matters as the planning and control of the actions under examination.**”<sup>46</sup>

The Court also notes expressly that “*in determining whether there has been a breach of Article 2 in the present case, [the Court] is not assessing the criminal responsibility of those directly concerned*”<sup>47</sup> - but it does not go on, in that context, to set out the evidentiary standards more clearly. Its approach to these matters can, however, be gleaned from certain other passages.

Specifically, the Court, in dealing with the applicants’ assertion that the killings had been premeditated, said that “*it would need to have convincing evidence before it could conclude that there was a premeditated plan, in the sense developed by the applicants*”<sup>48</sup> - which the applicants had not produced.<sup>49</sup> In other words, in respect of an allegation that a killing was deliberately in contravention of Art. 2, the onus is on the applicant to prove that claim; and he must produce “*convincing evidence*” before such a claim can be accepted.<sup>50</sup>

However, on a more general assertion that a killing (whether deliberate or otherwise) is in contravention of Art. 2 by virtue of a lack of due diligence on the part of the authorities, it would seem that the Court reverses these evidentiary rules. Thus, in the end, the Court, having found that the facts suggested that there was a “*lack of appropriate care in the control and organisation of the arrest operation*”,<sup>51</sup> was “*not persuaded*” that the killings were “*absolutely necessary*” in the sense of Art. 2 § 2.<sup>52</sup> In other words, when a person has been (deliberately) killed by agents of a State, that State bears the

<sup>45</sup> Judgment, para. 172.

<sup>46</sup> Judgment, para. 150, emphasis added.

<sup>47</sup> Judgment, para. 173.

<sup>48</sup> Judgment, para. 179.

<sup>49</sup> Judgment, para. 178.

<sup>50</sup> Note that this is not the same as a deliberate killing in violation of Art. 2: In the case at hand (as we shall see) it was not disputed that the killings were deliberate (cf. Commission Report, para. 202; Judgment, para. 199).

<sup>51</sup> Cf., e.g., Judgment, para. 212, last sentence.

<sup>52</sup> Judgment, para. 213.

onus to prove - it would seem, at least on the balance of probabilities - that its actions were “*absolutely necessary*” in the sense of Art. 2. Moreover, it must show this “*absolute necessity*”, not only in respect of the actions of the agents who actually carried out the killing, but in respect of “*all the surrounding circumstances*”, including the planning, control and organisation of the operation.<sup>53</sup>

In section 3.2, we will take a closer look at the actual examination, by the Commission and the Court, of the crucial factual issues in the case. After comparing (and at times, contrasting) the different approaches of the minorities and the majorities in these different organs of the Convention to these matters of fact in that section, we will, in part 4, try to assess the extent to which those different approaches accord with the more abstract approach to the law, set out above. First, however, we should set out the “*outline case*”: the somewhat limited facts on which the Commission and Court based their assessments. This is done in section 3.1. The remaining unanswered questions of fact are briefly noted in section 3.3.

### 3. The facts

#### 3.1. The “*outline case*”

*The Commission and Court based their assessments, effectively, on the following facts (even though these leave several matters open, as noted in section 3.3):*<sup>54</sup>

From (at least) the beginning of 1988, the British and Spanish authorities were aware of the planned attack on Gibraltar by the Northern Irish separatist terrorist organisation, the “*Irish Republican Army*” or IRA (or, to be more precise, its so-called “*Provisional*” wing, sometimes referred to as PIRA).<sup>55</sup> They knew from “*intelligence*” reports that the aim of the IRA was the detonation of a car bomb at the weekly “*changing of the guard*” ceremony, carried out on Tuesdays outside a building called Ince’s Hall, in the centre of Gibraltar.<sup>56</sup>

There was close cooperation between the British and Spanish authorities from an early moment on. Specifically, the British and Spanish authorities must have been aware of the imminence of the attack by early March at the latest: a considerable number of security service (secret service) personnel and soldiers

<sup>53</sup> Cf., again, Judgment, para. 150.

<sup>54</sup> See. Commission Report, paras. 19 - 171 and Judgment, paras. 13 - 132, for a more detailed description of the “*outline case*” presented here. Note that most of the details in the Commission Report and the Judgment were drawn from the transcript of the inquest proceedings: while many of these additional details were not expressly contested, they do often rest entirely on the word of the witness in question and cannot be independently verified.

<sup>55</sup> Judgment, para. 13.

<sup>56</sup> Judgment, para. 23.

of the “Special Air Services” (SAS) Regiment had arrived in Gibraltar “prior to 4 March 1988”.<sup>57</sup> The SAS is a specialised army regiment, used in particular in counter-insurgency and anti-terrorist operations.<sup>58</sup>

An advisory group was formed before 4 March to advise and assist the Gibraltar Commissioner of Police on how to prepare for and deal with the attack. The group consisted of the senior SAS officer and military adviser (“Soldier F”), the SAS “attack commander” (“Soldier E”), a “bomb disposal adviser” (“Soldier G”), police and secret service officers.<sup>59</sup>

The United Kingdom police had “at the beginning of March” provided the Spanish police with the names and photographs of the three IRA members who were expected to form the so-called “Active Service Unit” or ASU, i.e. the terrorist cell to be responsible for the attack: they were Daniel McCann, Mairead Farrell and Sean Savage.<sup>60</sup> The Spanish authorities did in fact observe the three suspects upon arrival at Malaga airport on 4 March.<sup>61</sup> This information was conveyed to the British authorities, and surveillance was mounted in Gibraltar from that date.<sup>62</sup>

What happened next on the Spanish side was never fully clarified, either at the inquest or in the Strasbourg proceedings. Shortly after the killings, Spanish and British journalists were told by Spanish officials, on the record, that the three suspects had been under continuous close surveillance right until the moment they entered the colony, and that the British and Gibraltar authorities had been kept constantly and fully informed. The Malaga police even assisted a British television crew in reconstructing the final surveillance of the car which was being driven to Gibraltar. However, the British authorities later produced a statement by a Spanish police officer, stating that the three suspects had been lost immediately after being spotted at Malaga airport on 4 March.<sup>63</sup>

On 5 March, an “Operational Order” was drawn up under the authority of the Gibraltar Commissioner of Police. The Operational Order stated that it was suspected that a terrorist attack was planned in Gibraltar and that the target was highly probably the band and guard of the First Battalion of the Royal Anglian Regiment during the ceremonial changing of the guard at Ince’s Hall on Tuesday 8 March 1988. The Order stated that there were “*indications that the method to be used is by means of explosives, probably using a car bomb*”.<sup>64</sup> The Order listed the methods to be used to counter the terrorist threat, including police surveillance and the availability of other (i.e. secret service and army/SAS)

<sup>57</sup> Judgment, para. 15.

<sup>58</sup> Cf. Judgment, para. 183.

<sup>59</sup> Judgment, para. 14.

<sup>60</sup> Judgment, para. 127.

<sup>61</sup> *Idem*.

<sup>62</sup> Judgment, para. 21.

<sup>63</sup> On the question of surveillance in Spain, see below, at 3.3.ii and 3.4.

<sup>64</sup> Judgment, para. 17.

personnel, suitably equipped to deal with any contingency. The Order also stated that the suspects were to be arrested by using minimum force; that they were to be disarmed; and that evidence was to be gathered for a court trial. Annexed to the Order were, *inter alia*, lists of attribution of police personnel, firearms rules of engagement and a guide to firearms use by police.<sup>65</sup>

At the same time, a plan for the evacuation of the expected area of attack was also drawn up.<sup>66</sup>

The counter-terrorist operation was run from a joint operations room in the centre of Gibraltar. In this room, there were three distinct groups - the army or military group (comprising the SAS and bomb disposal personnel), a police group, and the surveillance or security service group. Each group had its own means of communication with personnel on the ground operated from a separate control station. The two principal means of communication in use were the two radio-communication networks known as the surveillance net and the tactical or military net.<sup>67</sup>

At midnight between 5 and 6 March, the Police Commissioner held a briefing which was attended by officers from the security services (including, in particular, members of the secret service surveillance teams), military personnel (including, in particular, the SAS soldiers in charge of the tactical side of the operation, and more in particular the soldiers who actually carried out the killings the next day and their superiors), and member of the Gibraltar police. The SAS soldiers were also, separately, briefed by their own officers.<sup>68</sup>

On Sunday 6 March (the day of the killings), a considerable number of secret service surveillance teams, teams of SAS soldiers and members of the Gibraltar police were deployed in a range of places in Gibraltar,<sup>69</sup> including the car parking area behind Ince's Hall, in which the British Regiment carrying out the "changing of the guard" ceremony (on Tuesdays) assembled, and which was the place where it was expected the car containing a bomb would be placed.<sup>70</sup>

Measures were also taken at the border. A British Detective Constable sat in the computer room at the Spanish immigration post; through a visual display unit linked to the computer room, the Spanish border officers showed him passports of persons leaving Spain. The Detective knew the names of the three suspects and had been shown their photographs; under cross-examination at the inquest he also (reluctantly) acknowledged that at the time he must have also known the aliases of all three suspects.<sup>71</sup> As the Court put it in its

<sup>65</sup> Judgment, para. 18.

<sup>66</sup> Judgment, para. 19.

<sup>67</sup> Judgment, para. 20.

<sup>68</sup> Judgment, para. 22.

<sup>69</sup> Judgment, para. 32.

<sup>70</sup> Judgment, para. 38.

<sup>71</sup> Judgment, para. 33.

assessment of the operation: “*the [British] security services and the Spanish authorities had photographs of the three suspects, knew their names as well as their aliases and would have known what passports to look for.*”<sup>72</sup> On the Gibraltar side of the border, there was a separate surveillance team in place and, in the area of the airfield nearby, an arrest group.<sup>73</sup>

However, in spite of these precautions, a decision was taken not to prevent the suspects from entering Gibraltar.<sup>74</sup> There is however some ambiguity (to put it mildly) as to whether or not the suspects (and in particular Savage driving a white Renault car into the colony from Spain) were in fact spotted at the border and whether they were therefore actually deliberately allowed in.

Leaving that question aside for now, the next established fact is that at about 12.30 hours a man was spotted parking this white Renault car in the assembly area behind Ince’s Hall. The man was closely watched and his movements reported.<sup>75</sup> Two secret service agents followed him and reported that he was using anti-surveillance techniques.<sup>76</sup> The man returned to the car at approximately 14.00 hours. He was identified at some stage - and in any case, “without difficulty”, upon his return to the car at 14.00 hours - as Savage.<sup>77</sup> During the period between 12.30 and 14.00 hours, the car was (by the Governments own admission) not examined to ascertain whether it contained a bomb, nor was the area around it evacuated.

In the meantime, the two other suspects had been at least tentatively identified as they crossed into Gibraltar separately from Savage, on foot, at about 14.30.<sup>78</sup>

At 14.50, all three suspects were (again) identified, together, in the assembly area, looking at the Renault car. The three suspects walked around, returned to the car at 15.25 hours,<sup>79</sup> and walked off again, in the direction of the border. They were followed by secret service watchers; and their movements were also monitored by SAS soldiers on the ground.<sup>80</sup>

Only at about this time was the car (cursorily) examined by “Soldier G”, who (after about two minutes) reported to the operations room that he regarded the car as a “*suspect car bomb*”, in particular because, although the car was new, the aerial was rusty. At the subsequent inquest, he “*explained that [the*

<sup>72</sup> Judgment, para. 203.

<sup>73</sup> Judgment, para. 34.

<sup>74</sup> Judgment, para. 132, referring to the finding of fact by the Commission on this issue in the Commission Report, at para. 213 of that Report. This crucial decision is further discussed in the judgment, at paras. 203 - 205. It is one of the three points which combined to lead the Court to find a violation of Art. 2: see para. 213 of the judgment, further discussed at 3.3, below.

<sup>75</sup> Judgment, para. 38.

<sup>76</sup> Judgment, para. 42.

<sup>77</sup> Judgment, para. 39.

<sup>78</sup> Judgment, paras. 43 and 44.

<sup>79</sup> Judgment, para. 47.

<sup>80</sup> Judgment, para. 54.

term ‘a suspect car bomb’] was a term of art for a car parked in suspicious circumstances where there is every reason to believe that it is a car bomb and that **it could not be said that it was not a car bomb**’.<sup>81</sup> In other words, Soldier G reported that he could not conclude from his examination that there was not a bomb. Curiously, although at the inquest G was described as “*the bomb disposal adviser*”, he admitted there, under cross-examination, that he was neither a radio communications expert nor an explosives expert.<sup>82</sup>

Crucially, however, the SAS soldiers following the three suspects were told (over their radio) that there was **definitely** a car bomb in place in the assembly area; that the bomb was **definitely** a remote-controlled device; that the suspects **definitely** had a (and perhaps even more than one) remote-control device on them; and that each of them could be carrying the device.<sup>83</sup>

Earlier, the soldiers had been briefed to the effect that the suspects would almost certainly be armed and that, if confronted, they would be likely to use their weapons or any “button jobs” they carried.<sup>84</sup> The SAS soldiers were also told that such a radio-control device would be small - small enough to conceal on the person - and that it could be detonated by the pressing of just one button.<sup>85</sup>

The SAS soldiers had been given certain “Rules of Engagement” by the British Ministry of Defence, before departing for Gibraltar. These said that they could use force if necessary in order to protect life, but no more force than necessary to protect life; that they could open fire against a person if they had reasonable grounds for believing that that person is committing, or is about to commit, an action endangering their lives or the lives of others, and if there was no other way to prevent this; and that they could fire without warning if the giving of a warning or any delay in firing could lead to death or injury (but that in all other circumstances they should give a clear warning).<sup>86</sup>

However, the SAS soldiers were also trained to continue shooting once they open fire, until their target is dead.<sup>87</sup>

About a kilometer and a half from the assembly area, at a road junction, the suspects split up, with McCann and Farrell continuing north towards the border, and Savage turning south.<sup>88</sup>

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<sup>81</sup> Judgment, para. 48 (emphasis added). While not using that word there, the Court describes G’s examination of the car as “cursory” in para. 209.

<sup>82</sup> Judgment, para. 53.

<sup>83</sup> Cf Judgment, para. 52. See further at 3.3.ii, below. Note that the “unjustifiable transformation” of what were (at best) dubious assessments into definite certainties was the second main ground for the ultimate finding of a violation of Art. 2 (Judgment, para. 213; see further below, at 3.3.v).

<sup>84</sup> Judgment, para. 23 at (c) and para. 28.

<sup>85</sup> Judgment, para. 30.

<sup>86</sup> Judgment, paras. 15 and 16.

<sup>87</sup> Judgment, para. 211, with reference to paras. 61, 63, 80 and 120. Note that the soldiers’ “automatic recourse to lethal force” was the third main ground for the finding of a violation of Art. 2 (Judgment, para 213; see again further below, at 3.3.iv).

<sup>88</sup> Cf. Judgment, paras. 56 – 58.

Almost immediately thereafter, at about 16.00 hours, first McCann and Farrell, and then Savage, were shot dead by the SAS soldiers following them.<sup>89</sup> Farrell was shot eight times, including three shots in the back.<sup>90</sup> McCann was shot twice in the back and three times in the head.<sup>91</sup> Savage was shot sixteen times and was (as the pathologist later put it) “riddled with bullets”.<sup>92</sup> All were shot at close range.

The soldiers claimed that the suspects had changed their facial expressions, which they felt indicated that they realised that they were being followed, and had made “sudden” and “aggressive” movements, which they thought meant that the suspects went for a “button”. Civilian witnesses said that McCann and Farrell were shot without a warning; one claimed that they had tried to surrender. Another civilian witness said that Savage was shot while already down on the ground, but later retracted this statement. The soldiers all confirmed that (in accordance with their training), once they had opened fire, they continued shooting until the three suspects were dead.<sup>93</sup> All members of the Commission and the Court agreed as a matter of fact that the soldiers had used deliberate lethal force; they had “shot to kill”.<sup>94</sup>

After the shooting, it transpired that none of the three suspects was armed; that there had been no bomb in the car; and that the suspects had not carried any remote-control detonating devices. However, a car, hired by Farrell in the name of Smith, and which contained 64 kgs of Semtex explosives, was subsequently discovered in Marbella. Four detonators and 200 rounds of ammunition were packed around the explosives. There were also two timers marked 10 hrs 45 mins and 11 hrs 15 mins respectively. The device was not primed or connected when found.<sup>95</sup> The find confirmed that the three suspects had indeed intended to explode a car bomb in Gibraltar as suspected - albeit by means of a bomb detonated by a timer, rather than by remote-control. If they had succeeded in their plans, the bomb would have caused carnage, with many soldiers as well as civilians likely to have been killed.

### **3.2. *The three crucial issues***

As already indicated in the footnotes to the above summary, there were three issues of fact which led the Court to its finding that Art. 2 had been violated:

<sup>89</sup> Judgment, paras. 68 - 76 (McCann and Farrell), 77 - 90 (Savage).

<sup>90</sup> Judgment, para. 108.

<sup>91</sup> Judgment, para. 109.

<sup>92</sup> Judgment, para. 110.

<sup>93</sup> For details, see Commission Report, paras. 86 – 108 (re the McCann and Farrell shootings) and paras. 109 – 122 (re the Savage shooting).

<sup>94</sup> Cf. Commission Report, para. 202, where it is said that “it is not disputed that the killings in this case constituted an intentional deprivation of life...”; Judgment, para. 199: “All four soldiers admitted that they shot to kill.”

<sup>95</sup> Judgment, para. 99.

- the decision not to prevent the suspects from traveling into Gibraltar;
- the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous; and
- the automatic recourse to lethal force when the soldiers opened fire.<sup>96</sup>

We will briefly examine each of these issues in turn, with reference to the observations on these points, made by the applicants and the Government; and to the findings of fact, as well as to the conclusions in law, reached by the majorities and minorities of both the Commission and the Court.

*i. the decision to allow the suspects to enter Gibraltar*

The British authorities did not, from the, beginning, acknowledge that they had taken a clear decision to allow the three suspects to enter Gibraltar; and they never acknowledged that they actually deliberately allowed the three suspects (including the car driven by Savage) to enter Gibraltar. Quite the contrary: they said at the inquest that they had been taken by surprise and had only spotted Savage in particular, when he had already driven into the colony and had parked the car. Indeed, as may have been noted in our description of the “outline case”, at the inquest the Government witnesses did not even acknowledge that they had identified Savage immediately after he had parked the car (at about 12.30 or 12.45 hrs), even though the “man” who had parked the car had been closely observed and followed for some time, and even though later on (at about 14.00 hrs), the “man” was identified as Savage “without difficulty”.<sup>97</sup>

The fact that there had been a conscious decision to allow the suspects into Gibraltar was only prised out of a reluctant Government witness at the inquest, Police Inspector Ullger, under persistent cross-examination from the relatives’ solicitor, Mr McGrory Sr.<sup>98</sup>

The Commission dealt with the issue (only) in the context of the applicants’ allegation that there had been a deliberate plan to kill the terrorists - an allegation which the Commission then dismissed. The applicants had submitted that the authorities had been fully aware of the movements of the suspects, because the latter had been under constant surveillance in Spain. The Government, for its part,

“deny the allegation that the authorities were aware of Savage’s arrival in Gibraltar or that he had been subject of surveillance by the Spanish police...”<sup>99</sup>

<sup>96</sup> Judgment, para. 213.

<sup>97</sup> Cf the Judgment, at paras. 38 - 39.

<sup>98</sup> Cf. the remarks made in this respect by Mr McGrory Jr (the applicants’ solicitor) at the Court hearing: Verbatim Record (footnote 23, above), at p. 17, with detailed references to the relevant passages in the transcript of the inquest.

<sup>99</sup> Commission Report, para. 210.

We will examine the question of the Spanish surveillance (which both the Commission and the Court refused to examine and which had also not been examined at the inquest) later on. Here, it suffices to note that the Commission expressly:

“finds..., that the suspects were effectively to be allowed to enter Gibraltar to be picked up by the surveillance operatives in place in strategic locations for that purpose...”<sup>100</sup> -

but that that finding did not extend to a finding that the suspects, and in particular Savage and the car, actually had been deliberately allowed to enter the colony. Indeed, the member of the Commission representing the Commission at the hearing before the Court (curiously, the British member), actually said at that hearing:

“Savage came into Gibraltar by car. He was not identified at the frontier.”<sup>101</sup>

That statement in fact goes beyond what the Commission established in its Report, in which the matter was conspicuously left open.

The Court, in its list of findings made by the Commission, which served as the factual basis for the Court’s judgment, first recalled the above passage from the Commission Report.<sup>102</sup> However, later on, the Court adds to this finding, in the following passage:

“It may be questioned why the three suspects were not arrested at the border immediately on their arrival in Gibraltar and why, as emerged from the evidence given by Inspector Ullger, the decision was taken not to prevent them from entering Gibraltar if they were believed to be on a bombing mission. Having had advance warning of the terrorists’ intentions **it would certainly have been possible for the authorities to have mounted an arrest operation.** Although surprised by the early arrival of the three suspects, they had a surveillance team at the border and an arrest group nearby... In addition, the security services and the Spanish authorities had photographs of the three suspects, knew their names as well as their aliases and would have known what passports to look for...”<sup>103</sup>

In other words, the Court found that, not only had the decision been taken to allow the suspects into Gibraltar, it would also, “certainly”, have been possible to arrest them at the border.

<sup>100</sup> Commission Report, para. 213, emphasis added.

<sup>101</sup> Verbatim Record of the hearing (footnote 23, above), at p. 3.

<sup>102</sup> Judgment, para. 132, first indent.

<sup>103</sup> Judgment, para. 203, emphasis added.

The answer to the Court's question, why, if this was so clearly an option, this was not done, points to a crucial weakness in the Government's case. The Government had argued (once it had had to concede that the suspects were "to be allowed" in) that this was because there might not have been enough evidence to warrant their detention and trial - i.e. if the suspects were only on a reconnaissance mission - and to have to release them might have posed further risks.<sup>104</sup> The dissenting minority of the Court accepted this (in our view, rather spurious) argument,<sup>105</sup> but the majority was not impressed:

"The Court confines itself to observing in this respect that the danger to the population of Gibraltar - which is at the heart of the Government's submissions in this case - in not preventing their entry must be considered to outweigh the possible consequences of having insufficient evidence to warrant their detention and trial."<sup>106</sup>

The Court then goes on to make a most serious deduction:

"In its [the Court's] view, **either the authorities knew that there was no bomb in the car... or there was a serious miscalculation by those responsible for controlling the operation.** As a result, the scene was set in which the fatal shooting, given the intelligence assessments which had been made, was a foreseeable possibility if not a likelihood."<sup>107</sup>

As far as the first possibility is concerned, the Court, in the above passage, recalls that it had already discounted this in its dismissal of the so-called "conspiracy theory" (i.e. the claim made by, the applicants that the whole operation had been planned with a view to having the suspects killed, discussed earlier). The Court was therefore (in the view of the majority) left with the second - and for the Government, **least damning** - option: that the authorities had merely "*seriously miscalculated*".

Not surprisingly, the Court held that: "*The decision not to stop the three terrorists from entering Gibraltar is thus a relevant factor to take into account under this head.*"<sup>108</sup>

## *ii. the failure to allow for errors in the intelligence assessments*

The second main point which led the Court to find a violation of Art. 2, was the fact that:

<sup>104</sup> Judgment, para. 204.

<sup>105</sup> Dissenting opinion, para. 11.

<sup>106</sup> Judgment, para. 205.

<sup>107</sup> *Idem*, emphasis added.

<sup>108</sup> *Idem*.

“a series of working hypotheses were conveyed to [the SAS soldiers who fired the shots] as certainties, thereby making the use of lethal force almost unavoidable.”<sup>109</sup>

The first part of this observation<sup>110</sup> relates to a range of matters, passed on to the SAS soldiers as established facts but which were in reality, at best, “possible hypotheses”.<sup>111</sup> Specifically, at the midnight briefing, the soldiers were given the following assessments as to the modus of the terrorist attack:<sup>112</sup>

- that the terrorists would not use a blocking car;
- that the bomb would be detonated by a radio-control device;
- that the detonation could be effected by the pressing of one single button on a miniscule device (“a button job”) which would be easily concealable on the person;<sup>113</sup>
- that it was likely that the suspects would detonate the bomb if challenged;
- that the suspects would be armed and would be likely to use their arms if confronted.

The Court notes that:

“In the event, all of these crucial assumptions, apart from the terrorists’ intentions to carry out an attack, turned out to be erroneous.”<sup>114</sup>

During the operation, the soldiers were furthermore told, over their radios:

- that it had been **definitely** confirmed that the car parked in the assembly area was a car bomb; and
- that it had also been **definitely** confirmed that the bomb was a remote-controlled one which could be detonated by any one of the three suspects (most probably, Savage).<sup>115</sup>

<sup>109</sup> Judgment, para. 210.

<sup>110</sup> The second part of this observation links this issue with the “*automatic recourse to lethal force*” by the SAS, i.e. with the third main point in the Court’s reasoning, which is dealt with separately, below, at iv.

<sup>111</sup> Cf. Judgment, para. 207.

<sup>112</sup> Judgment, para. 206, with reference to paras. 23 - 31.

<sup>113</sup> On the issue of the size of a remote-control device, see Judgment, para. 130 and the Dissenting Opinion of Mrs Liddy *et al.*, paras. 9 - 10. See also footnote 120, below.

<sup>114</sup> Judgment, para. 207.

<sup>115</sup> Cf. Judgment, para. 52. The judgment here in fact understates the emphatic nature of the information passed on to the soldiers, as is manifest from the transcript of the inquest. Thus (as the applicants pointed out), one of the soldiers (“Soldier C”) had said in his evidence that he:

“was briefed by [his superior, ‘Soldier E’] on that day and **emphatically** told that there was a **definite** bomb in place at Ince’s Hall...” (Transcript of the Inquest, Book 8, page 7, emphasis added).

In other words, as the applicants pointed out, the working hypotheses of the authorities, which constituted no more than probabilities, were “*unjustifiably transformed into certainties when passed on to the soldiers on the ground.*”<sup>116</sup>

The questions that arise are: first, why, and on what basis, these “*erroneous assumptions*” were made; second, why they were so emphatically reinforced in the minds of the soldiers; and third, to what extent these “*erroneous assumptions*” and “*unjustifiable transformations*” entailed the liability of the Government.

It is impossible, within the scope of this article, to examine each and every one of these assumptions in full detail. Nor is that necessary. Indeed, the various groups within the Convention organs themselves focused on different points. What matters is the different *approaches* to these issues taken by, on the one hand, the majority of the Commission and the dissenting minority of the Court and, on the other hand, the minority members of the Commission and the majority of the Court, in particular with regard to the most important (and, as it happened, lethal) assumptions and confirmations: that the car driven into Gibraltar on the Sunday already contained a bomb; that that bomb was to be detonated by remote control; and that the remote-control device was a miniscule “button job” which could be activated by the flick of one single switch.

In all these respects, the Government gave (at best) highly dubious, and often contradictory reasons. For instance, one of the reasons given by the Government for the assumption that the car driven by Savage on 4 March was not a “blocking car”, was that parking spaces would be available on the Tuesday - but a local police officer testified that it would be busy and difficult to find a parking space.<sup>117</sup> The reason given for the assumption that the terrorists would use a remote-control device was that, after a disastrous bomb attack in Northern Ireland in which 12 civilians were killed, the IRA wished to avoid civilian casualties.<sup>118</sup> However, the authorities briefed the soldiers to the effect that the suspects would detonate a bomb if apprehended regardless of civilian casualties.<sup>119</sup> Most important, the information passed on to the soldiers with regard to the nature and size of detonating devices (as the Court put it) “oversimplifie[d]” the true nature of these devices.”<sup>120</sup>

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Similarly, that soldier, and his colleagues, were told:

“*specifically that it would only be a radio-controlled device*” (Idem, Book 8, p. 4, emphasis added).

<sup>116</sup> Commission Report, para. 248.

<sup>117</sup> Judgment, para. 23, at (e).

<sup>118</sup> Commission Report, para. 238.

<sup>119</sup> Idem.

<sup>120</sup> Judgment, para. 208. The applicants and the Government had in fact been asked to comment on the probable size of a remote-control device, and the applicants had sent in a mock-up of such a device; the Government had submitted an actual one. The Government’s was slightly bulkier than the applicant’s mock-up. Neither could easily be hidden on the body.

Clearly, there were serious doubts about these assumptions; they were certainly not probable. However, it is the assessment of the Government's actions in these respects on which the majority of the Commission, and the minority of the Court, differ from the view of the other members of these bodies, and on which, crucially, their different ultimate findings rest. Basically, the majority of the Commission, and the minority of the Court, in each of the assessments under consideration, gave the Government a repeated, extensive "benefit of the doubt" - whereas the dissenting members of the Commission, and the majority of the Court, clearly felt that there is a limit to the amount of times the Government can be given this benefit.

In the end, this largely determined the minds of the members of the Commission and the Court: those who found that there was no violation of Art. 2 were willing to largely absolve the Government from responsibility for making these (erroneous) assumptions, arguing that "*once the risk was found to exist, the soldiers would necessarily have had to act on that basis.*"<sup>121</sup> For the majority of the Commission, the degree of probability of an assessment being correct does not come into the question:

"The nature of the risk was such as to render **irrelevant** consideration as to the degree of probability of that risk..."<sup>122</sup>

The dissenting members of the Court in fact went further. In their view, the authorities were not only absolved from blame for acting on the basis of (perhaps highly improbable) assumptions, they had a duty to do so:

"In these circumstances, for the authorities to have proceeded otherwise than on the basis of a worst-case scenario that the car contained a bomb which was capable of being detonated by the suspects during their presence in the territory would have been to show **a reckless failure of concern for public safety.**"<sup>123</sup>

The dissenting minority of the Commission, and the majority of the Court, disagreed. Both clearly allowed for a very wide margin of error on the part of the authorities:

"...the authorities had had prior warning of the impending terrorist action and thus had ample opportunity to plan their reaction and, in co-ordination with the local Gibraltar authorities, to take measures to foil the attack and arrest the suspects. **Inevitably, however, the security authorities could not have been in possession of the full facts and**

<sup>121</sup> Commission Report, para. 248, emphasis added.

<sup>122</sup> *Idem*, emphasis added.

<sup>123</sup> Dissenting Opinion, para. 13, last sentence, emphasis added.

**were obliged to formulate their policies. on the basis of incomplete hypotheses.”<sup>124</sup>**

Nonetheless:

“... in determining whether the force used was compatible with Article 2, the Court must **carefully scrutinise**, ..., not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.”<sup>125</sup>

The approach to the crucial question of the responsibility of the State for the (factual) “working hypotheses” on which it acted, is therefore, for the majority, ultimately determined by their ruling on the *law*, that:

“In keeping with the importance of [Art. 2 of the Convention] in a democratic society, the Court must, in making its assessment, subject deprivations of life to **the most careful scrutiny**, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also the surrounding circumstances including such matters as the planning and control of the actions under examination.”<sup>126</sup>

*iii. the automatic recourse to lethal force when the soldiers opened fire*

The third, and final, matter of fact which led the Court to find that there had been a violation of Art. 2, was that the SAS soldiers’ use of firearms “automatically involved shooting to kill”.<sup>127</sup> Even the majority of the Commission found this disquieting:

**“A disturbing aspect of this case however is the fact that the response of the four soldiers was to shoot to kill.** This emerges from their testimony and was the conclusion of the Coroner in his summing-up to the jury. The soldiers made no attempt to overpower physically or disable the suspects since this was regarded as posing too much of a risk.”<sup>128</sup>

However, the majority of the Commission,

<sup>124</sup> Judgment, para. 193, emphasis added.

<sup>125</sup> Judgment, para. 194, emphasis added.

<sup>126</sup> Judgment, para. 150, emphasis added.

<sup>127</sup> Judgment., para. 211.

<sup>128</sup> Commission Report, para. 232, emphasis added.

“finds nonetheless that given the soldiers’ perception of the risk to the lives of the people of Gibraltar... the shooting of the three suspects can be considered as absolutely necessary for the legitimate aim of the defence of others from unlawful violence.”<sup>129</sup>

As is clear from these observations, the majority of the Commission only assessed the automatic recourse to lethal force by the soldiers in the context of **the soldier’ perception of the risk**. They did not examine the soldiers’ general training and instructions in this context; and they also, as we saw in section 2.2.i.(b), above, declined to assess that training in the context of their examination of domestic law and practice.

All the other groups within the organs of the Convention, by contrast, did address the question of the training and instructions given to the soldiers - albeit that they, again, reached different conclusions.

The dissenting minority of the Court, criticising the majority verdict discussed below, addressed the issue in the following terms:

“More generally as regards the training given, there was in fact ample evidence at the inquest to the effect that soldiers (and not only these soldiers) would be trained to respond to a threat such as that which was thought to be posed by the suspects in this case - all of them dangerous terrorists who were believed to be putting many lives at immediate risk - by opening fire once it was clear that the suspects were not desisting; that the intent of the firing would be to immobilise; and that the way to achieve that was to shoot to kill. There was also evidence at the inquest that soldiers would not be accepted for the SAS unless they displayed discretion and thoughtfulness; that they would not go ahead and shoot without thought, nor did they; but that they did have to react very fast. In addition, evidence was given that SAS members had in fact been successful in the past in arresting terrorists in the great majority of cases.

We are far from persuaded that the Court has any sufficient basis for concluding, in the face of the evidence at the inquest and the extent of experience in dealing with terrorist activities which the relevant training reflects, that some different and preferable form of training should have been given...”<sup>130</sup>

The dissenting members of the Commission assess the matter fundamentally differently. Mr Trechsel (also speaking on behalf of Mr Ermacora), after (briefly) criticising the various assumptions made, states:

“Finally, the decisive element is, in my view, the fact that the use of firearms by the soldiers automatically involved shooting to kill. Thus, from

<sup>129</sup> Commission Report, para. 233.

<sup>130</sup> Dissenting Opinion, paras. 23 - 24.

the outset, they were not trained or instructed to reflect whether it would have been sufficient merely to wound their targets.”<sup>131</sup>

The majority of the Court, giving the final verdict on this matter, was less conclusive about the training, but equally forceful in its criticism:

“Although detailed investigation at the inquest into the training received by the soldiers was prevented by the public interest certificates which had been issued..., it is not clear whether they had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest.

**Their reflex action in this vital respect lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society**, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police...

This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation.”<sup>132</sup>

#### *iv. overall assessments by the Convention organs*

The above analysis clearly shows the way in which the different groups within the Commission and Court reached their final assessments. In fact, three different approaches can be discerned.

First of all, there is the approach which is most accommodating to the Government, as adopted by the dissenting members of the Court. These judges accept the Government’s argument that Savage and the car (in particular) had to be allowed into Gibraltar because there might not have been enough evidence to detain him if he had been arrested at the border (whereby they do not reflect on the fact that this can only be maintained if one allows for the possibility that, at the time, the suspects were not yet transporting the bomb, an assumption which the authorities otherwise discounted). They feel that, with regard to the various assumptions that were made, the Government would have failed in its duty if it had not acted on the basis of the “worst-case scenario”, i.e. if it had not acted on the basis that, no matter how improbable those assumptions might have been, they were all established fact. And finally, they feel that the actions of the soldiers on the ground were perfectly justified. Indeed, if (as they feel was clearly established) the soldiers acted in accordance with their training and instructions, then there was also nothing wrong with those. Overall, in the view of these judges, the Government was not just not

<sup>131</sup> Dissenting Opinion of Messrs Trechsel and Ermacora, final paragraph.

<sup>132</sup> Judgment, para. 212, emphasis added.

guilty of a violation of Art. 2 of the Convention, but indeed was to be fully absolved from all blame.

A second, more cautious approach is reflected in the report by the majority of the Commission. The members of this majority only deal with the question of allowing Savage into Gibraltar in the context of their examination of the applicants' claim that there had been a deliberate plot to kill the suspects (which they find was not proven). On the various assumptions made by the authorities, they hold the view that, while some of these assumptions may not have been likely, they were also not unreasonable or irresponsible. They find the automatic use of lethal force by the soldiers "disturbing", but feel that from the point of view of the soldiers, that force can be considered absolutely necessary. On each point, they therefore, in the end, find in favour of the Government; and they conclude that the State did therefore not violate the right to life.

The view which in the end prevailed approaches the question of the liability of the State differently. Both the dissenting members of the Commission and the majority of the Court examined the above issues, not in isolation but jointly and in relation to each other. They note the contradiction between, on the one hand, the Government's claim that the suspects could not be arrested at the border because there might not be sufficient evidence to detain them (i.e. because they were merely bringing in a blocking car or were on a reconnaissance mission) and the briefing and confirmation given to the soldiers to the effect that there would be no blocking car and that there was definitely a bomb in place. In a damning indictment of the Government, they conclude that, if the decision to allow Savage to drive the car into Gibraltar was not part of a conspiracy to kill the terrorists, it at least indicated that the authorities had made "serious miscalculations". While accepting that the various assessments made by the authorities were all possible and could be adopted as "working hypotheses", they clearly felt that they should not have been transformed into acting certainties when passed on to soldiers whose "reflex actions" in the use of fire-arms involved automatic recourse to lethal force.

Their final verdict rests, not on any one of these considerations and conclusions in isolation, but on the overall assessment of the actions of the Government. Most notably, they emphasised the crucial links between these factors: deliberately allowing Savage and the car into Gibraltar "*set the scene in which the fatal shooting... was a foreseeable possibility if not a likelihood*"; and the conveying of "*a series of working hypotheses to [the SAS soldiers] as certainties [made] the use of lethal force almost unavoidable.*" While the soldiers themselves are absolved from blame, in view of the fact that they were told these matters as certain fact, the Government was responsible for what Mrs Liddy called "*the chain of lack of care, omissions, errors and misleading information*", in which the soldiers' decision to open fire and to shoot to kill is only "*the final, decisive link*".

It is this judgment, this approach, which was adopted by the Court as law.

### **3.3. Remaining questions**

Most aspects of the issues discussed above were examined extensively and in detail by the organs of the Convention. However, surprisingly, some aspects of these issues, and indeed some further (and we would suggest, relevant) issues, were not, or not fully, clarified. While these matters can also not be resolved here, they should at least be noted. They concern the question of the reported Spanish surveillance of the suspects, and the failure of the authorities to evacuate the area around the “car bomb”.

#### ***i. the question of the reported Spanish surveillance of the suspects***

Many Spanish and British journalists were briefed, on the record, by senior Spanish officials immediately after the killings, to the effect that the suspects had been under constant surveillance in Spain; that Savage had been followed to the border; and that the British and Gibraltar authorities had been kept fully and continuously informed. The British Government, however, later denied that there had been such surveillance and said that Savage’s arrival went unnoticed. They produced an unsworn statement by a Malaga police officer to that effect and claimed that that officer had not given his testimony before a (Spanish) judge because no magistrate had been on duty at the time. The issue was excluded from the inquest on technical legal grounds. The applicants had written to the Spanish Government and to the officials involved, asking for clarification, but had not received any reply (indeed, not even an acknowledgment of their letters). The Commission felt that it was not necessary to examine the point and refused to ask the Spanish Government for clarification.<sup>133</sup> Given the ultimate importance of the British authorities’ decision to allow Savage to enter Gibraltar, this matter could - and we submit, should - have been examined further.

#### ***ii. the failure of the authorities to evacuate the area around the “car bomb”***

It never became clear why the authorities did not examine the car parked by Savage during the one and a half hours it was left unattended (12.30 to 14.00 hours), or why they did not evacuate the area if they really believed that the car contained a bomb. Even if they had not recognised Savage immediately, they clearly treated “the man” who parked the car with suspicion. Of course, if Savage had been followed by the Spanish police, then the British authorities knew who he was all along. The Commission did not examine this point in detail but felt that the delay “may be explained by the manpower difficulties

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<sup>133</sup> Commission Report, para. 178.

facing the Gibraltar police” at the time<sup>134</sup> - which is unconvincing, to put it mildly, given the vast numbers of security personnel flown in especially for the operation.

#### 4. Conclusions

The main importance of the *McCann* judgment is, perhaps, psychological: it sends a message to all European Governments, putting them on notice that even in the fight against terrorism, the State must act within the law, including international human rights law.

In purely legal terms, the judgment moreover establishes a number of important principles about the application of Art. 2 of the Convention. These include the principle that the exemption in Art. 15 of the Convention, allowing for “deaths resulting from lawful acts of war” can (probably) not be invoked in the fight against terrorism. The judgment also implies that, if a case were to arise in which it could be shown that the domestic legal standards on the use of lethal force manifestly fell below the Convention standard, that **in itself** could give rise to a violation of the requirement of Art. 2 § 1 of the Convention, that the right to life be protected “by law”.

The Court furthermore expressly confirmed that it is a legal requirement under Art. 2 § 1 of the Convention, that if a person has been killed by agents of the State, there must be an **effective, thorough, impartial and careful *ex post facto* examination of the circumstances** surrounding the killing; factors to be taken into account are, in particular, whether the proceedings are held **in public**, and the extent to which the relatives of the deceased and their lawyers have access to, and can participate in, the proceedings.

The Court clarified that the exceptions delineated in the second paragraph of Art. 2 primarily describe situations in which it is permitted to use force which *may* result, as an unintended outcome, in the deprivation of life; but that Art. 2 also extends to intentional killing. However, in either case, the use of force must be “*absolutely necessary*” - which means that a **stricter and more compelling test of necessity** must be employed from that normally applicable when determining whether State action is “*necessary in a democratic society*” under paragraphs 2 of Arts. 8 to 11 of the Convention. In particular, the force used must be **strictly proportionate** to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Art. 2.

This latter point of law led the Court to also hold that, consequently, when agents of the State use deliberate lethal force, the organs of the Convention must subject the actions of the State to **the most careful scrutiny**; and the

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<sup>134</sup> Commission Report, para. 215.

liability of the State is entailed if the State fails to show that it had exercised “*appropriate care*” in the **planning and control** of the specific operation, including (it would seem) in the **training and instructions** it gave to its law enforcement officials.

In other words, the Court deduced from its general interpretation of Art. 2, certain important **evidentiary rules**: that the onus is clearly on the State to show that it has exercised all due care in the use of (deliberate) lethal force by its agents; that this care is not limited to the actions of those agents themselves but applies to the operation as a whole; and that the Court has a duty to subject these matters - i.e. the facts as established - to “*the most careful scrutiny*”. In this respect, the Court expressed itself much more clearly than the Commission.

However, while there was no express dissent on this point from the dissenting minority in the Court, in practice the dissenters seemed to have abandoned this approach. Rather than subjecting the actions of the British and Gibraltar authorities to such scrutiny, they (like the majority of the Commission) gave the authorities repeated, extensive “*benefits of the doubt*” - to the extent that (we submit) their scrutiny became far from “careful” and effectively marginal at most.

That, however, is not the law. We believe that the judgment of the majority rather than the opinion of the dissenters of the Court agrees with the legal approach established by the Court in the case at hand - with which those dissenters did not formally disagree. The Court had the courage of its convictions; the dissenters nominally subscribed to those convictions but failed to abide by them in practice.

In cases such as these it will always remain difficult to persuade the Commission and Court<sup>135</sup> to criticise Governments. However, whatever the innate reluctance of the members of these bodies to find against the Government in such cases (as shown by the majority of the Commission and the dissenting members of the Court), *McCann* provides a strong precedent in law against such hesitations. In future, the Court will be aware of its approach in *McCann*, of its pronouncement that, in law, States are expected to exercise due diligence and care, even in anti-terrorist operations; and that it (the Court) has a duty to examine “most carefully” whether the authorities of the State that killed have fulfilled this duty. And last but not least, Governments will be aware that they will be subject to this scrutiny. In that sense, *McCann* is a victory for the rule of law over *raison d'état*.

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<sup>135</sup> Following the abolition of the Commission (footnote 1, above) only the Court, albeit different subsidiary bodies of the Court: Judge-Rapporteur, Committee, Chamber.

Summary

**THE GIBRALTAR SHOOTING CASE**  
**An analysis of the European Court of Human Rights judgment**  
**in the case of *McCann & Others -v.- the United Kingdom***

On Sunday, 6 March 1988, in Gibraltar, soldiers from the British “Special Air Services” Regiment, the SAS, shot dead three suspected IRA terrorists, Daniel McCann, Sean Savage and Mairead Farrell. The inquest jury returned verdicts of “lawful killing”; the soldiers were not prosecuted. Civilian proceedings, brought by relatives of the deceased in Northern Ireland, were effectively stopped by the Government, through the use of a certificate which prevented the court from assessing the Government’s liability for the killings. On 27 September 1995, the European Court of Human Rights in Strasbourg delivered judgment in the case of *McCann and Others v. the United Kingdom* holding, by a narrow margin of 10 to nine, that Art. 2 had been violated. It was the first time any European Government had been found guilty by the Court of the unlawful use of lethal force by law enforcement officials. The “Gibraltar” judgment, while weak in some respects, underlines that democratic governments are not free to meet political violence and terrorism with the same lack of regard for human life as is shown by armed groups opposing the State. It is the purpose of this article to analyse the judgment (critically), and in particular to identify the issues of wider implication to all Member States of the Council of Europe.

**Key words:** *European Court for Human Rights, European Convention on Human Rights, Article 2, terrorism, use of state force.*

Zusammenfassung

**DER FALL “GIBRALTAR”**  
**Analyse des Urteils des Europäischen Gerichtshofs für Menschen-**  
**rechte im Falle *McCann u.a. gegen das Vereinigte Königreich***

In Gibraltar haben am 6. März 1988 Soldaten britischer militärischer Spezialeinheiten der sg. SAS drei Personen erschossen (Daniel McCann, Sean Savage und Mairead Farrell) die verdächtigt wurden Terroristen, Angehörige der IRA zu sein. Der Untersuchungsausschuss beschloss, dass es sich um eine “rechtmäßige Tötung” handelte; die Soldaten wurden nicht strafverfolgt. Die Regierung hat erfolgreich den Zivilprozess unterbrochen, den die Verwandten der Getöteten in Nordirland angestrengt hatten, indem sie ein Dokument benutzen, dem nach eine gerichtliche Bestätigung der staatlichen Verantwortung für das Töten unmöglich gemacht wird. Der Europäische Gerichtshof für Menschenrechte hat am 27. September 1995 in Straßburg mit knapper Mehrheit

(10 gegen 9 Stimmen) im Fall McCann u.a, gegen das Vereinigte Königreich das Urteil gefällt, dass der Art. 2 der Europäischen Konvention verletzt wurde. Das Gericht hat mit dieser Entscheidung zum ersten Mal einen europäischen Staat wegen ungesetzmäßiger Anwendung totbringender Gewalt seitens eines militärischen Ordnungsdienstes verurteilt. Obwohl sie gewisse Schwächen enthält, betont die Entscheidung "Gibraltar", dass demokratische Regierungen Gewalt und Terrorismus nicht mit dem gleichen Maß von Nichtachtung des menschlichen Lebens begegnen dürfen wie dies bewaffnete Gruppen tun, die einen Staat angreifen. Ziel dieses Aufsatzes ist die (kritische) Analyse dieser Entscheidung sowie vor allem die Identifikation von Fragen, die breitere Implikationen für die Mitgliedsstaaten des Europarats nach sich ziehen.

**Schlüsselwörter:** *Europäischer Gerichtshof für Menschenrecht, Europäische Menschenrechtskonvention, Artikel 2, Terrorismus, staatliche Gewaltanwendung.*

Sommario

### **CASO "GIBILTERRA"**

#### **Un'analisi della sentenza della Corte europea dei diritti umani nel caso *McCann e altri contro Regno Unito***

Domenica 6 marzo 1988, in Gibilterra, soldati del Reggimento britannico "Servizi Aerei Speciali", il SAS, colpirono a morte tre sospetti terroristi dell'IRA, Daniel McCann, Sean Savage e Mairead Farrell. La commissione di indagine dichiarò verdetto di "uccisione legittima" e i soldati non furono perseguiti. I procedimenti civili, presentati in Irlanda del Nord dai parenti dei deceduti, furono efficacemente bloccati dal Governo, attraverso l'uso di un documento che impediva alla Corte di accertare la responsabilità del Governo per le uccisioni. Il 27 settembre 1995 la Corte europea dei diritti umani in Strasburgo emise sentenza nel caso McCann e altri contro Regno Unito, giudicando con uno stretto margine di 10 a 9 che l'Art. 2 era stato violato. Fu la prima volta che qualunque Governo europeo veniva trovato colpevole dalla Corte dell'uso illegittimo di forza letale da parte di funzionari di polizia. Il caso "Gibilterra", mentre è debole in alcuni aspetti, sottolinea che i governi democratici non sono liberi di affrontare la violenza politica e il terrorismo con la stessa indifferenza per vita umana che è mostrata dai gruppi armati che si oppongono allo stato. È lo scopo di questo articolo analizzare (criticamente) la sentenza, e in particolare identificare le questioni di maggiore implicazione per tutti gli Stati membri del Consiglio di Europa.

**Parole chiave:** *Corte europea dei diritti umani, Convenzione europea dei diritti umani, Articolo 2, terrorismo, uso della forza pubblica.*