

THE EUROPEAN COURT OF HUMAN RIGHTS

McCann, Farrell and Savage v United Kingdom

**Case 17/1994/464/545
Application No. 18984/91**

Third Party Intervention made jointly by

BRITISH IRISH RIGHTS WATCH

THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE

INQUEST

LIBERTY (THE NATIONAL COUNCIL FOR CIVIL LIBERTIES)

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CONTENTS

EXECUTIVE SUMMARY

	PAGE
SECTION I: Introduction	1
SECTION II: The Facts	3
- Introduction	3
- Events prior to 4 March 1988	3
- The documentation and the briefings of 5 March	4
- The events of 6 March leading up to the killings	4
- The three killings	5
- Events after the killings	6
- The inquest procedure	6
SECTION III: The Standard Set by Article 2	8
- Introduction - the scope and significance of the first sentence of Article 2(1)	8
- The scope of Article 2(2)	10
- The legal test in a case of intentional deprivation of life under Article 2(2)	11
- The judicial approach in a case of intentional deprivation of life	17
SECTION IV: Procedural Protections	18
- Introduction	18
- The application of the UN Prevention Principles	19
- Investigation	19
- Autopsy procedures	22
- Legal proceedings	22
ANNEX 1: Judicial protection for the victims of alleged abuse of lethal force arising out of the conflict in Northern Ireland	
ANNEX 2: The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials	
ANNEX 3: The United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions	

EXECUTIVE SUMMARY

This 22-page document can be summarized as follows:

In Section II the relevant facts are briefly set out:

On 6 March 1988, members of the military Special Air Services (SAS) shot dead Mairead Farrell, Daniel McCann and Sean Savage in the streets of Gibraltar. Each of the four soldiers involved in the shootings have said that, once having decided to open fire, he shot to kill. *For the purposes of Article 2, this case therefore concerns three instances of intentional killing.*

There was an absence of proper procedure in the assembly of forensic and witness evidence and therefore a lack of clear and certain evidence from the scenes of the killings or the post mortems. Further, eye witnesses were not all traced or interviewed. There are considerable concerns about the adequacy of the inquest which followed in September 1988, particularly the effect of the Public Interest Immunity certificates (PIICs), the lack of "equality of representation", and the coroner's summing up and directions to the jury.

Section III contains a detailed analysis of the standard demanded of the state by Article 2:

Any alleged violation of Article 2 requires the closest possible examination by the Convention organs. It is "one of the most important rights in the Convention, from which no derogation is possible." (para 181 of the Commission's Report).

Further, **the right to life has acquired the special status of a peremptory norm of general international law (*jus cogens*)**, so that the obligation to protect the right to life is "towards the international community as a whole".

Under Article 2 the state must take appropriate steps to safeguard life, including positive measures to protect the right to life. It follows that a violation of Article 2 will be found if a respondent government cannot demonstrate that it has fully discharged its positive duties in this respect.

Further, given the fundamental nature of the right to life, the state is not entitled to any margin of appreciation as regards Article 2, including the discharge of its positive obligations to protect life. Thus, **in an Article 2 case the Convention organs must depart from their general approach in cases arising from the conflict in Northern Ireland**, whereby "due account" has been taken of "the special nature of terrorist crime, the threat it poses to democratic society and the exigencies of dealing with it." The fact that the Gibraltar killings relate directly to the political disorder then existing in Northern Ireland should not affect the Court's approach to this case.

In *Stewart -v- United Kingdom*, the Commission concluded that Article 2(2) was framed mainly with unintended killings in mind. In *Stewart*, the Commission was concerned with unintended loss of life.

Therefore, the specific legal test the Commission laid down in *Stewart* is not entirely appropriate to a case of intentional killing. **The Court will wish to enunciate a legal test in cases of intentional killings which will enable the Convention organs to assess whether any particular intentional killing was absolutely unavoidable in the sense required by Article 2. In short, the highest possible standard must apply in the exceptional case where a public authority intentionally deprives someone of their life.** The requirement for a higher standard in cases of intentional killing is implicit in relevant international minimum standards adopted by the United Nations.

In the present case, the test of absolute necessity, when combined with the requirement to protect everyone's right to life "by law", must be sufficiently stringent to allow for:

- (a) an assessment of whether the state adequately regulates in its domestic law "in a manner consistent with the rule of law, the permissible use of lethal force by its agents." (see para 187 of the Commission's Report in the present case); **and**
- (b) a determination as to whether the state was sufficiently careful in the planning and execution of the operation up to the point that the force was used (see para 234 et seq of the Commission's Report); **and**
- (c) a close examination of the genuineness and reasonableness of *each* killer's belief that the decision to kill the person was absolutely unavoidable.

As to point (b) above, the Convention organs will wish to examine in detail the planning and execution of the operation leading up to the killing. To be able to conduct this examination adequately, the Convention organs will need to be provided with the maximum possible operational and intelligence information. This is part of a *general burden of proof* as to providing evidence as to the lawfulness of a killing under Article 2, which a state must discharge where its agents were involved. **If vital information has been improperly withheld or has never been collected, it is open to the Convention organs to find a violation of Article 2 purely on the basis that the burden of proof has not been discharged.**

The state must show that it has exercised sufficient care in the planning and execution of an operation. The Court is referred to the objective judicial approach adopted by the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case. **We respectfully suggest that the Court adopt an objective judicial approach in this case.**

Thus, a state will only have complied with Article 2 in the case of an intentional killing if a killer's (correct or mistaken) belief that lethal force was absolutely unavoidable was both genuinely and reasonably held **and** that belief (if mistaken) arose despite the care taken in planning the operation right up until the use of lethal force, including the care taken to supply the killer with relevant and accurate facts. Also, when examining the strict proportionality of the lethal force used, the Court will wish to allow for legitimate error only where a mistaken belief was objectively justified (ie a "very reasonable" test).

Finally, the Convention organs can not allow a respondent government any discretion in conforming with Article 2, particularly in the case of an intentional killing. Indeed, the *jus cogens* status of the right to life re-inforces the need to apply the strictest possible standards to any permissible deprivation of that right.

Section IV contains a detailed application of international minimum standards regarding *ex post facto* procedural protections in cases involving the use of lethal force:

The Court will wish to reach its own assessment of the events which followed the shootings, particularly the inquest. When examining the standards and procedures necessary for an adequate inquiry, the Court will want to take into account all the relevant international material, including the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions ("the UN Prevention Principles").

The Court will find a violation of Article 2 where it finds serious differences between the UN standards and the inquest and other investigations.

The duty of the state to properly investigate the circumstances of alleged violations of the right to life by its agents was widely recognised in international human rights jurisprudence prior to the adoption of the UN Prevention Principles. As the Inter-American Court of Human Rights has found: investigations must be "undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the state as its own legal duty."

The Court will wish to assess the significance of the breakdown in proper autopsy procedures in the present case, particularly as regards the inadequate scene-of-crime procedures described by the Commission in its Report (paras 126-127 and 195-196).

In the light of the above, the Court will wish to determine whether the basic duty to properly investigate was discharged by the respondent government in the present case.

As to the inquest itself, the Court will note that the issuing of three PIICs prevented witnesses from testifying as to certain crucial aspects of the planning of the operation which led to the killings (paras 137-138 of the Commission's Report). Further, the rules on the conduct of inquests will need to be considered, as they prevented the families' legal representative from having access to all the witness statements available. Indeed, the Court will wish to consider whether the families' had adequate access to the hearing, given the lack of equality between the families' legal representative and those of the respondent government. The restriction on jury screening within the inquest system appears to fly in the face of the UN Prevention Principles. The Court will wish to take into account the outcome in the present case.

Further, the Court will note that because an inquest jury can only deliver one of a limited number of verdicts, with the capacity to add riders only where relevant to preventing future fatalities, and because there was no other public inquiry into the killings, **various aspects of the UN Prevention Principles were breached by the respondent government in the present case.**

Finally, Court will wish to consider whether a special investigation should have taken place under the terms of the UN Prevention Principles and whether the failure to hold one constitutes a violation of Article 2.

Section I - Introduction

British Irish Rights Watch, the Committee on the Administration of Justice, Inquest and Liberty, were given consent by the Court pursuant to Rule 37 paragraph 2 of the Rules of the Court, to jointly to submit written comments in this case.

British Irish Rights Watch is an independent non-governmental organisation that monitors the human rights dimension of the conflict in Northern Ireland. Its services are available to everyone, whatever their community or affiliations, who alleges that their human rights have been violated as a result of the conflict. It seeks to promote the proper observance of international human rights standards by government organisations by means of monitoring, training and research. Much of its work has been concerned with the use of lethal force by the UK's security forces and the means of investigation available, such as inquests.

The Committee on the Administration of Justice (CAJ) is an independent civil liberties group with a membership drawn from all sections of the community in Northern Ireland. It is an affiliate of the International Federation of Human Rights and is working to secure the highest standards in the administration of justice in Northern Ireland. The Committee has produced a number of publications on the use of issue of lethal force and has several submissions to the United Nations Special Rapporteur on Summary and Arbitrary Executions. Lastly CAJ submitted written comments to the Court in the case of *Brannigan and McBride -v- the United Kingdom*.

INQUEST offers specialist legal advice to families after a death in circumstances requiring an inquest. The organisation uses its expertise to lobby for reform of the inquest system, with all its inequalities and anomalies. Since 1981 INQUEST has specialised in deaths where the institutions of the state have allegedly been involved, whether the police, the prison service or the psychiatric services. It has been instrumental in reforms such as the random selection of juries at inquests, and the mandatory involvement of a jury after a death in police custody. In 1988 INQUEST sent an independent legal observer to the Gibraltar inquest, and produced the first report to analyze the legal and procedural problems of the inquest ("The Gibraltar Report").

Liberty (the National Council for Civil Liberties) is a leading human rights and civil liberties organisation and has monitored the state's response to terrorism since it was first set up in 1934. Liberty has published a number of books and pamphlets on emergency legislation and the conflict in Northern Ireland and with its sister organisation, the Civil Liberties Trust, has commissioned a number of research projects in this area, including a forthcoming publication on the use of lethal force in Northern Ireland. Liberty also sent a lawyer to observe the inquest in the present case and therefore have a detailed knowledge of at least that part of the case itself. Lastly, Liberty has developed considerable experience in making applications on behalf of clients to the European Commission and Court of Human Rights and submitted written comments to the Court in the case of *Brannigan and McBride -v- the United Kingdom*.

The Court will realise from the above descriptions that the four organisations are each naturally and deeply concerned in the general issues of principle and in the specific questions of interpretation of article 2 of the Convention raised by this case. INQUEST and Liberty sent observers to the inquest held in Gibraltar in September - October 1988 and two of these people have helped to draft this submission.¹

The Court will have read the **summary** which is set out at the front of these written comments. The detailed comments are divided up in the following way.

Section I: This introduction.

Section II: This summarizes the relevant facts in the case.

Section III: This is a detailed analysis of the standard demanded of the state by Article 2 by reference to other international standards on the right to life, the jurisprudence of the Commission and the Court, in order to set out our view of how the Court should approach this case.

Section IV: This is a detailed application of international minimum standards regarding *ex post facto* procedural protections in cases involving the use of lethal force. In particular, we consider the rules in relation to the gathering of evidence and the purpose and scope of investigation procedures, including an assessment of the adequacy of the inquest process and the need for commissions of enquiry in cases such as this one.

We hope and believe that our comments will be of assistance to the Court in reaching its own judgment on the crucially important questions raised by this case. We would want also to stress the wider implications of this judgment, well beyond the area of the Council of Europe, as many other countries look to your Court for guidance in the interpretation of fundamental standards of human rights. This, the right to life, is, moreover, the most fundamental of those rights. Your judgment in this case could have profound implications in international law on the use of lethal force. A ruling by the Court regarding the scope of the right to life in this case cannot be divorced from a panoply of interlinked issues. The right to life is a relational right, its breadth subject to constant negotiation by the state and international courts.

¹ The authors of this submission are: (1) For British Irish Rights Watch, Jane Winter; (2) For CAJ, Prof. Fionnuala Ni Aolain of Columbia University School of Law; (3) For INQUEST, June Tweedie, a barrister who was an independent legal observer at the inquest in the present case; (4) For Liberty, John Wadham, solicitor and Director of Law and Policy, Hilary Kitchen, a barrister who was an independent legal observer at the inquest in the present case on behalf of Liberty and the International League of Human Rights, New York; and Daniel Machover, Senior Solicitor and Co-ordinator of the Human Rights Project at North Kensington Law Centre.

Section II - The facts giving rise to an alleged violation of Article 2

1 Introduction

- 1.1 On 6 March 1988, members of the military Special Air Services (SAS) shot dead Mairead Farrell, Daniel McCann and Sean Savage in the streets of Gibraltar. Members of a Provisional IRA active service unit (ASU), they were perceived by the respondent government and the Gibraltar authorities as presenting a threat of the highest order: the respondent government had discovered an IRA plan to detonate a car bomb near Ince's Hall in Gibraltar during a military display on 8 March 1988.
- 1.2 Three mistakes were made which lead to the use of lethal force:
- * that a bomb had been placed in Gibraltar in advance of 8 March, rather than a marker car to reserve a parking place
 - * that the three would be able and ready to detonate the bomb at any point during their time in Gibraltar
 - * that the three were armed
- 1.3 Below, we set out a chronological summary of events, as far as they are known, including the conduct of the inquest. The Court is respectfully reminded that two of the authors of these written comments attended the inquest as independent legal observers.¹ Where possible, we have cross-referred the Court to the facts found by the Commission, principally in Section II A-C (paras 19-168) of its Report - references in parentheses are to the relevant paragraphs in the Commission's Report. The following facts set the context for Sections III-IV of these written comments.

2. Events prior to 4 March 1988

- 2.1 Little is known about when the respondent government learned of the planned bombing in Gibraltar or of the early plans of the respondent government to meet this threat, including the choice of the SAS to carry out the operation with the Gibraltar police and the content of the early briefings or the initial communications with the Spanish authorities. This lack of evidence is due to the decision of the respondent government to issue Public Interest Immunity Certificates (PIIC's) at the inquest, which prevented detailed examination of evidence prior to 4 March 1988 (paras 137-138). This places the Convention organs in an almost impossible position as regards a full assessment of the facts, particularly regarding the care taken in planning the operation, as preparation of the detailed operational plans commenced prior to 4 March 1988 (cf. para 199).
- 2.2 It is known that prior to 4 March 1988 the respondent government and the Gibraltar authorities had cooperated with the Spanish authorities, which enabled the Spanish authorities to plan a surveillance operation. The Coroner did not have the power to subpoena Spanish witnesses who would have been able to give evidence on their surveillance operation. Therefore, this is an aspect of events leading to the shootings on which there was conflict but which was not considered at the inquest (para 21 and paras 160-162).

¹ See footnote 1 in Section I above.

2.3 It is also known that an advisory group was set up in Gibraltar prior to 4 March 1988, consisting of senior military and security staff of the respondent government and members of the Gibraltar police and security services. Soldiers of the SAS arrived in Gibraltar before 4 March. The respondent government has said that the role of the advisory group and the SAS was to advise the Gibraltar Commissioner, and to assist the Gibraltar police in arresting the three members of the active service unit (paras 22-23). However, the court will note that the SAS officers had expertise and eventually responsibilities which meant that they played the leading role in all aspects of the operation. This separation of responsibility is illustrated at the various stages of the events of 4 - 6 March. Ultimately, the final shootings occurred after a complete transfer of control to the military.

3. The documentation and the briefings of 5 March

3.1 The documentation for the operation included Rules of Engagement issued by the Ministry of Defence in London, the Operational Order of the Gibraltar Commissioner, and the (statement) transferring control to the military at the point of arrest. These documents move in precision from a broad statement of the procedures to be followed in the use of force, to the final unequivocal written request by the Commissioner that the SAS soldiers "proceed with the military option which may include the use of lethal force for the preservation of life" (paras 24-27 and para 79).

3.2 The activities of the advisory group included a midnight briefing on 5 March 1988, which involved both security and police officers and soldiers. The soldiers likely to be involved in the potential arrest of the three members of the ASU were present. Issues for the briefing were the likely use of a blocking car and likely time for placing the bomb, the method of detonation of the bomb, and the likely conduct of the ASU. It was a common recollection that the use of a blocking car was thought less likely by those at the briefing, but recollection of briefing on the method of detonation differed. The senior military witnesses responsible for briefing the soldiers were convinced that a remote control device would be used to detonate a bomb (paras 30-49, particularly paras 37-43).

3.3 The SAS soldiers being prepared for the operation were briefed on more than one occasion, and were also subject to a separate briefing on the night of 5 March (para 31). On their evidence, as a result of the two briefings late on 5 March, the soldiers were convinced that a remote control device would be used, and that any one of the three, even all three, would be carrying such a device capable of detonating the bomb, and be ready to use it (paras 41-49). As a result of the briefing, they also believed that the three would each be armed (para 47). The practical implications which would have informed the soldiers of the degree of this risk were not discussed.

4. The events of 6 March leading up to the killings

4.1 On the day of the shootings surveillance was arranged at the border with Spain, and extensively in the streets of Gibraltar. The evidence at the inquest was that surveillance of the three was

successful, being close and consistent, without the three realising that they were under observation (paras 52-72). The possibility existed for an assessment of the probability of each of the three carrying a weapon or a remote control device. From the evidence given, it would have been able to distinguish between the three, to evaluate the risk they presented and consequently to consider an approach short of use of lethal force. There was no evidence that this was done.

4.2 Sean Savage crossed the border with Spain by car and parked in the area already identified (paras 58-64). A cursory evaluation of the risk presented by the car followed. There was no suggestion by the respondent government that the assessment was done by an expert in radio communications or explosives. Soldier G was described as being a bomb disposal advisor and the examination of the car was superficial. The vehicle was treated as a possible bomb for the purpose of the operation after a brief two minute examination (paras 73-78). This speedy assumption was probably affected by the advice given at the briefing the night before, that it was not expected that a blocking car would be used. In short, no considered assessment was made or conveyed to the soldiers of the degree of certainty that the car was armed with a bomb (para 77).

4.3 Despite this assumption, the evacuation plan was not put in motion. The failure to adopt the plan was accounted for, variously, by the danger of alerting the three; by the lack of available resources; and by the need to resolve the set of criteria established by the advisory group before a formal conclusion could be reached that there was a strong likelihood that the parked car contained a bomb (paras 209 and 215). The danger of alert would no doubt have ceased to count once a certain distance was covered. The question of available resources in terms of cars and off duty officers was not explored.

5. The three killings

5.1 Sean Savage separated from his two companions near the entrance of the Landport tunnel. They continued towards the border with Spain followed by soldiers A and B. Soldiers B and C followed Sean Savage. After a short distance the shootings of Mairead Farrell and Daniel McCann took place. They were almost immediately followed by the shooting of Sean Savage.

5.2 The evidence of each the four soldiers was that, once having decided to open fire, he shot to kill. On D's account, this was his training. Each soldier fired to stop the person becoming a threat, and fired until they were no longer a threat, and were dead. On the evidence each soldier gave of what he believed to be the case, concerning the presence of the bomb, and the risk that each individual was carrying a device which could be used with the slightest movement to detonate that bomb, and that each was prepared to detonate, the outcome was inevitable (paras 89-91 and paras 110-112).

5.3 There was a conflict of evidence over whether a warning was given. The shouted warning that was given in evidence during the course of the inquest was startling and incomprehensible. Soldier B conceded that the warning given to McCann and Farrell was probably useless.

5.4 No evidence was given of the arrangements that might have been expected if there were to have been either an arrest or shooting to disable rather than kill. No evidence was given of handcuffs in the possession of the soldiers. No back up arrangements were referred to in relation to emergency medical treatment or the taking into custody of uninjured suspects.

6. Events after the killings

6.1 The civilian Gibraltar police were responsible for the procedures following the shootings. No independent police investigation took place of any aspect of the operation leading to the shootings.

6.2 There was an absence of proper procedure in the assembly of forensic and witness evidence and therefore a lack of clear and certain evidence from the scenes of the killings or the post mortems (paras 126-127 and para 134). The Coroner noted in his summing up that "scenes of crime procedures appear to have been forgotten".

6.3 Further, eye witnesses were not all traced or interviewed. There were individuals who had been present at the scene of both shootings who had not been identified and who may have been able to give relevant evidence. The inquest heard that cars were passing and may have been stationary at the junction near which Sean Savage was shot. It was not disputed that twenty to thirty people were walking in the vicinity and certain individuals were described in the course of other evidence. The scene of the other shootings was overlooked by two housing estates, as described by the Coroner's officer, an amphitheatre.

6.4 It was not clear whether any consideration was given to how to react when an unusually small number of witnesses came forward. Reluctance on the part of witnesses to come forward in what was a highly inflammatory situation was not addressed by public reassurance and an arrangement such as an incident room (see para 133).

7. The inquest procedure²

7.1 The Coroner refused to allow the jury to be screened for members who were Crown servants. Thus, the jury contained at least two civil servants of Higher Executive Grade, one of whom was the foreman.

7.2 A total of eighteen witnesses gave evidence from behind a thick curtain, seen only by the lawyers examining them, the Coroner, and the jury. The majority of the witnesses so screened were not compellable, as they had left the jurisdiction immediately after the shootings. The Coroner observed: "The reality seems to be that unless the witnesses are screened I may not have a meaningful inquest and of course if they are screened it would be a flawed inquest in any case".

² See 136-155 and 191-200 of the Commission's Report.

The effect of the screening was that the public could not see the gestures and movements that the witnesses made to illustrate their evidence. The effect of the screening on the weight the jury gave to the evidence of the soldiers and other officials cannot be assessed.

7.3 The PHICs effectively limited questioning of the witnesses crucial to the deaths, curtailing an examination of the overall operation. In particular:

- (a) "O" was the intelligence officer who gave evidence of the perceived threat in Gibraltar. He admitted three crucial "errors" in his evidence. Whether these were errors of intelligence or judgment could not be tested.
- (b) The solicitor for the family was prevented from asking questions about the briefings prior to the Gibraltar meeting on the 5 March, technical questions about the type of remote control detonation device that the IRA might be expected to use, the possibility that an expert technical officer was available to advise on such matters, and on the information available from surveillance in Spain.
- (c) The effect of the limitation date of 4 March 1988 was, *inter alia*, to prevent questioning about the decision to use the SAS and the details of advisory group meetings prior to 4 March.
- (d) Central to an assessment of the use of force by the four soldiers was an understanding of their training, their use of firearms, and the exercises on arrest that they had done with the civil police. Only a general picture emerged from the limited questioning allowed on these issues.

7.4 Several issues arise regarding "equality of representation" at the inquest:

- (a) The respondent government, police and military were all represented at public expense and had a large legal team.
- (b) The families of the deceased had no legal aid and had the services of only two lawyers between them. The effect of this upon the health and stamina of Mr McGrory was noticeable, and he was not able to attend on the last day due to ill health. (see also (e) and (f) below).
- (c) Witness statements were made available in advance to the respondent government and lawyers representing the soldiers. They were not made available to the representative of the families of the deceased. The Coroner made the decision in what order to call those witnesses whom he considered relevant. The lawyers for the family were handicapped in their lack of advance knowledge of the contents of statements. As there was a lack of correlation to events and issues in the order of witnesses, this handicap was intensified.
- (d) Forensic and pathologist evidence was called towards the end of the inquest, long after the accounts of the soldiers and police, who gave their evidence at any early stage. This made it impossible to evaluate the police' and soldiers' evidence in the light of the forensic evidence and to direct examination accordingly.
- (e) When the ballistics expert for the respondent government was recalled, the families could not afford to recall their own expert to hear his evidence and advise them upon it.
- (f) The cost of the transcript of the inquest increased from 50p to £5.00 per page four days before the inquest began, on the instructions of the Gibraltar Attorney General. The daily cost was £500-700. The inquest lasted 19 court days.

7.5 The coroner did not direct the jury fully on the possibility of returning an open verdict and urged them to avoid such a verdict. Also, he did not direct the jury fully on the possibility of adding a rider and/or recommendations to their verdict. The jury were directed in such a way that there was a risk that they felt under pressure of time in reaching their verdict.

Section III - The standard set by Article 2

1. Introduction - the significance and scope of the first sentence of Article 2(1)

1.1 The first sentence of Article 2(1) provides:

"Everyone's right to life shall be protected by law."

The remainder of Article 2 is concerned with regulating the lawful intentional and unintentional deprivation of life by the State. Even in times of war or other public emergency threatening the life of the nation Article 15(2) of the Convention prohibits derogation from Article 2 (except as regards deaths resulting from lawful acts of war).

1.2 Any alleged violation of Article 2 requires the closest possible examination by the Convention organs. In paragraph 181 of its Report in this case the Commission has recognised that the interpretation of Article 2:

"must be guided by the recognition that it is one of the most important rights in the Convention, from which no derogation is possible."

The right to life is the most fundamental human right protected under the Convention.¹ As one author has commented:

"Civilized society cannot exist without legal protection of human life. The inviolability or sanctity of life is, perhaps, the most basic value of modern civilization. In the final analysis, if there were no right to life, there would be no point in the other human rights."²

In a similar vein, the Human Rights Committee established under the United Nations International Covenant on Civil and Political Rights has described the comparable provision in that instrument as "the supreme right of the human being."³ Further, the right to life has acquired the special status of a peremptory norm of general international law (*jus cogens*), so that the obligation to protect the right to life is "towards the international community as a whole".⁴

1.3 Indeed, the established case law of the Commission is that the first sentence of Article 2(1) "enjoins the State not only to refrain from taking life "intentionally" but, further, to take

¹ J. Maritan, *Man and State*, 77; J.J. Rousseau, *The Social Contract*, 48; T. Hobbes', *Man and Citizen*, 115; I. Kant, *Lectures on Ethics*, 147; Przetacznik F., "The right to life as a basic human right", *Revue des Droits de l'Homme*, Vol 9 (1976) 585.

² Dinstein Y., "The right to life, physical integrity, and liberty", in L. Henkin (ed.), *The International Bill of Rights* (1981), 114.

³ Views on Communication No. 45/1979, *Camargo/de Guerrero -v- Columbia*, Annual Report of the Committee to the General Assembly - Sixth Report, Annex XI, 398.

⁴ Judgment of the International Court of Justice in the *Barcelona Traction* case (Second Phase), ICJ Reports (1970), 3 @ 32. The Special Rapporteur to the United Nations Commission on Human Rights has stated: "The Right to Life is...a fundamental right in any society, irrespective of its degree of development or the type of culture which characterizes it, since this right forms part of *jus cogens* in international human rights law." A/37/564, para 22.

appropriate steps to safeguard life."⁵ Thus, the state must abstain from acts which needlessly endanger life.⁶ The UN Human Rights Committee and the Inter-American Court of Human Rights have similarly emphasized the state's responsibility to take positive measures to protect the right to life.⁷ Further, as one author has commented:

"The protection required must operate on several levels, having preventative as well as repressive functions: through prohibition of acts causing loss of life and through *regulation and limitation of certain risks*, as well as through provision for enforcement procedures and sanctions, in particular through criminal or civil responsibility."⁸

1.4 The broad positive duty to protect the right to life "by law" has been taken by the Commission in the present case as extending to:

- (a) The duty of the State to regulate in its domestic law "in a manner consistent with the rule of law, the permissible use of lethal force by its agents." (Para 187);
- (b) The duties of the State regarding the planning and execution of anti-terrorist operations (para 234 et seq);
- (c) Procedural "protection" in the aftermath of a killing, which as a minimum requirement must include "a mechanism whereby the circumstances of a deprivation of life by the agents of a state may receive public and independent scrutiny." (para 191 et seq);

It follows that a violation of Article 2 will be found if a respondent government cannot demonstrate that it has fully discharged each of these positive duties. The duties under (a) and (b) are considered further at paragraph 3 below. The duty at (c) above is considered in Section IV of these written comments.

1.5 Given the fundamental nature of the right to life, the state is not entitled to any margin of appreciation as regards Article 2, including the discharge of the positive obligations listed above. As one author has commented:

"[I]t is essential, to give full weight to the nature of the right to life as the *foremost* right, that it be treated as conceptually different to all others despite sharing characteristics with other rights of being subject to exceptions..."⁹

1.6 In this sense, in an Article 2 case the Convention organs must depart from their general approach in cases arising from the conflict in Northern Ireland, whereby "due account" has been taken of "the special nature of terrorist crime, the threat it poses to democratic society and the exigencies

⁵ *Association X -v- United Kingdom*, Application 7154/75, D&R 14, 31-39, @ 32. See also *W -v- United Kingdom*, Application 9348/81, D&R 32, 190, @ para 12.

⁶ *X -v- Federal Republic of Germany*, Application 5207/71, Yearbook XIV (1971), 698, @ 710.

⁷ See paras 4-5 of the UN Human Rights Committee's General Comment 6(16)d (Article 6), in Report of the Committee to the Thirty-Seventh Session of the General Assembly, A/37/40, 93; the Committee's views on Communication No. 161/1983, *Herrera Rubio -v- Columbia*, Doc A/43/40, @ paras 10.3-10.6; and the judgment of the Inter-American Court of Human Rights of 29 July 1988 in the *Velasquez Rodriguez* case, series C, No. 4, @ paras 166 et seq.

⁸ Opsahl T., "The right to life", in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights*, 207-223, @ 211 (emphasis added).

⁹ Boyle C.K., "The concept of arbitrary deprivation of life", in B.G. Ramcharan (ed.), *The right to life in international law*, 221, @ 223 (emphasis in the original).

of dealing with it."¹⁰ The fact that the Gibraltar killings relate directly to the political disorder then existing in Northern Ireland, which the Court has recently accepted as constituting "an emergency threatening the life of the nation", should not affect the Court's approach to this case.¹¹ As the UN Human Rights Committee has found in examining killings during a state of emergency, such background circumstances do not diminish the value of the human lives concerned or entitle a respondent government to benefit from a reduction in the stringent standards which apply in such cases of alleged violations of the right to life, which in any event is a non-derogable *jus cogens* right.¹² The judicial approach of the Court in cases of *intentional* deprivation of life is further considered at paragraph 4 below.

2. The scope of Article 2(2)

2.1 The construction of Article 2 has caused some confusion as to the scope of Article 2(2).¹³ The second sentence of Article 2(1) provides:

"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."

Under a strict interpretation of Article 2 the first ten words of this sentence introduce the only lawful reason under the Convention for a High Contracting Party to *intentionally* deprive anyone of their life, making the killings in the present case a flagrant violation of Article 2.

2.2 Indeed, this interpretation is not invalidated by the wording of Article 2(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."

The *travaux préparatoires* do not explain the intended scope of this provision, although it is notable that an earlier draft had the word "intentional" rather than "inflicted in contravention of this article".¹⁴ Thus, it is arguable that Article 2(2) solely regulates the lawful *unintentional* deprivation of life by the State.

¹⁰ Judgment of the Court of 28 October 1994 in *Murray -v- United Kingdom*, para 47.

¹¹ See the Court's judgment of 26 May 1993 in the case of *Brannigan and McBride -v- UK* (5/1992/350/423-424), Volume 258-B, Series A, @ paras 44-47.

¹² See the Committee's views on the *Camargo/de Guerrero* case, op. cit, where killings which occurred without warning or a chance to surrender were found to be arbitrary action in breach of Article 6 of the Covenant.

¹³ See M. O'Boyle, *The use of lethal force under Article 2 of the European Convention on Human Rights*, in Council of Europe document DH-ED (90) 9, 90, @ 91; and T. Opsahl, op. cit, @ 208-209.

¹⁴ See the *Collected Editions of the "Travaux Préparatoires" of the European Convention*, Vols I to V, (1975-1979), Vol III, 186 and 282, and Vol V, 120-122; and B.G. Ramcharan, "The drafting history of Article 2 of the European Convention of Human Rights", in B.G. Ramcharan (ed.), *The right to life in international law*, 57.

2.3 By contrast, in the case of *Stewart -v- United Kingdom*, the respondent government argued that Article 2 as a whole and Article 2(2) in particular extends only to intentional acts.¹⁵ Such a view was implicitly supported by an old Commission decision.¹⁶ In *Stewart*, the Commission found that "the exceptions enumerated in paragraph 2 indicate that this provision is not concerned exclusively with intentional killing."¹⁷ While this view clearly comprehends Article 2(2) as regulating *both* unintended and intended killings by public authorities, the Commission went on to conclude that the provision was framed mainly with unintended killings in mind:

"[T]he text of Article 2, read as a whole, indicates that paragraph 2 does not primarily define situations where it is permitted intentionally to kill an individual, but defines the situations where it is permissible to "use force" which may result, as the unintended outcome of the use of force, in the deprivation of life. The use of force - which has resulted in a deprivation of life - must be shown to have been "absolutely necessary" for one of the purposes in sub-paragraphs (a), (b) or (c) and, therefore, justified in spite of the risks it entailed for human lives."¹⁸

3. The legal test in a case of intentional deprivation of life under Article 2(2)

3.1 In *Stewart*, the Commission was concerned with unintended loss of life and, after making the finding set out above, laid down the legal test which the state must satisfy in such cases. First, the Commission discussed the term "absolutely necessary", concluding that:

"Above all, the test of necessity includes an assessment as to whether the interference with the Convention right was proportionate to the legitimate aim pursued. Finally, the qualification of the word "necessary" in Article 2 para. 2 by the adverb "absolutely" indicates that a stricter and more compelling test of necessity must be applied."¹⁹

Then, the Commission laid down the general test under Article 2(2) "that the force used is strictly proportionate to the achievement of the permitted purpose."²⁰ While this test is equally applicable to unintended and intended loss of life, the assessment of strict proportionality will be different depending on whether the killing was intentional or unintentional. In *Stewart*, the Commission gave guidance in the latter case:

"In assessing whether the use of force is strictly proportionate, regard must be had to the nature of the aim pursued, the dangers to life and limb inherent in the situation *and the degree of the risk that the force employed might result in loss of life*. The Commission's examination must have due regard to all the relevant circumstances surrounding the deprivation of life."²¹

¹⁵ Application 10444/82, D&R 39, 162, @ 169.

¹⁶ *X -v- Belgium*, Application 2758/66, Yearbook 12, 174.

¹⁷ Op cit, 170.

¹⁸ Ibid.

¹⁹ Ibid, 170-171, reference omitted.

²⁰ Ibid, 171.

²¹ Ibid, emphasis added.

3.2 In the present case, the Commission does not appear to have considered whether the test it had previously enunciated in *Stewart* is adequate in the case of an intentional killing (see paras 182-183 and 217). The Court will wish to reach its own determination on this issue, in particular whether it is sufficient to merely ignore the words "and the degree of the risk...loss of life" in the case of an intentional killing.

3.3 The Court will wish to enunciate a legal test in cases of intentional killings which will enable the Convention organs to assess whether any particular intentional killing was absolutely unavoidable in the sense required by Article 2. In short, the highest possible standard must apply in the exceptional case where a public authority intentionally deprives someone of their life. The requirement for a higher standard in cases of intentional killing is implicit in The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders ("the UN Use of Force Principles") in Havana, Cuba, on 7 September 1990.²² Principle 9 provides:

"Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. *In any event, the intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.*" (emphasis added)

3.4 Further, as one author has commented, different situations may "call for safeguards which are specific and tailored to the situations confronted."²³ Thus, where, following a pre-planned security operation, the force used by highly trained military personnel is intended to be lethal, as it was in each killing in the present case (see para 202 of the Commission's Report), the test of absolute necessity when combined with the requirement to protect everyone's right to life "by law", must be sufficiently stringent to allow for:

- (a) an assessment of whether the state adequately regulates in its domestic law "in a manner consistent with the rule of law, the permissible use of lethal force by its agents." (see para 187 of the Commission's Report in the present case); **and**
- (b) a determination as to whether the state was sufficiently careful in the planning and execution of the operation up to the point that the force was used (see para 234 et seq of the Commission's Report); **and**
- (c) a close examination of the genuineness and reasonableness of *each* killer's

²² The full text of these Principles appears as Annex 2 to these written comments. They were welcomed by the UN General Assembly in resolution 45/121 of 14 December 1990, where it invited all governments to be guided by them in the formulation of appropriate legislation and practice and to make efforts to ensure their implementation.

²³ Duffy P., "International standards on the use of force by law enforcement personnel", in W.E. Butler (ed.), *The Non-Use of Force in International Law*, 161, @ 170-171.

belief that the decision to kill the person was absolutely unavoidable.²⁴

(a) **Regulation in a manner consistent with the rule of law of the permissible *intentional* use of lethal force by agents of the state**

3.5 First, having established the appropriate legal test, the Convention organs will wish to consider whether the state has regulated in its domestic law in a manner consistent with the rule of law, the permissible *intentional* use of lethal force by its agents, in conformity with the first sentence of Article 2(1) (cf. para 187 of the Commission's Report). Commenting on the parallel provision in the UN Covenant on Civil and Political Rights, the UN Committee of Human Rights has stated that:

"The requirements that the right shall be protected by law and that no-one shall be arbitrarily deprived of his life mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the State."²⁵

3.6 In examining whether intentional deprivation of life was adequately "protected by law", the provisions of civil and criminal law are relevant. It is not suggested that the Convention requires a state's criminal law to define murder so as to include a case where a state agent held a genuine and reasonable belief that he or she had to kill someone to prevent them from killing others. However, where that belief was reached due to operational carelessness the Convention organs should expect there to at least be civil liability on the part of the state. Having said this, when examining domestic criminal law the Convention organs will apply an autonomous standard of "absolute necessity":-

"(C)riteria which may be relevant in domestic law, such as whether the use of force was 'excessive' or 'unreasonable', or whether the death was caused by gross or simple negligence or was accidental, are irrelevant under the Convention. In particular the standard of 'absolute necessity' must be applied as autonomous. It indicates a test perhaps stricter than such terms suggest, and in principle overrides them."²⁶

3.7 In particular, the Convention organs will be guided by the UN Use of Force Principles. Principles 1, 7 & 11 are of particular relevance.²⁷ Principle 11 provides:

"Rules and regulations on the use of firearms by law enforcement officials should include guidelines that:

- (a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;
- (b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;
- (c) Prohibit the use of those firearms and ammunition that cause unwarranted

²⁴ This is particularly so where, as here, it is not known whether one particular soldier involved in one or more killing fired the fatal shot or shots.

²⁵ Views on Communication No. 45/1979, *Camargo/de Guerrero -v- Columbia*, op cit., @ 401.

²⁶ Opsahl T, op cit, @ 217.

²⁷ See Annex 2 for the text of Principles 1 and 7.

- injury or present an unwarranted risk;
- (d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;
- (e) Provide for warnings to be given, if appropriate, when firearms are to be discharged;
- (f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty."

3.8 The Court will also wish to refer to the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions ("the UN Prevention Principles").²⁸ These Principles set out a code for the prevention and investigation of extra-legal, arbitrary and summary executions. They are expanded upon in the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions ("the Manual"), which was drawn up by the Minnesota Lawyers International Human Rights Committee as a guide to implementing the UN Prevention Principles. The Principles and the Manual, taken together, suggest four headings for consideration of procedural safeguards for the protection of life:

- (i) Prevention (Principles 1-8).
- (ii) Investigation (Principles 9-11 and 15-17).
- (iii) Autopsy procedures (Principles 12-14 and 16).
- (iv) Legal proceedings (Principles 18-20).

3.9 The "prevention" heading is considered here, while the other headings are considered in detail in Section IV of these written comments. The Court need not consider as a preliminary issue whether an extra-legal, arbitrary or summary execution has actually taken place in a given case in order to have regard to the UN Prevention Principles. It is only necessary that the facts of a given case give rise to that possibility. This is because, first, the UN Prevention Principles themselves incorporate standards which assist in determining whether a killing comes within the definition and, second, the Principles are designed to vindicate governments where a state killing is lawful. A reading of the facts found by the Commission and Section II above clearly demonstrates that the UN Prevention Principles are relevant in the present case.

3.10 Principle 4 requires "effective" judicial protection against summary executions, while Principle 1 requires governments to:

"prohibit by law all extra-legal, arbitrary or summary executions and...ensure that any such executions are recognised as offences under their criminal law, and are punishable by appropriate penalties which take into account the seriousness of such offences."

3.11 In the present case, the Convention organs will therefore wish to consider, *inter alia*, whether section 3 of the Criminal Law Act 1967 and its practical application meets the above requirements. The Court is invited to refer to Annex 1 to these written comments for a detailed examination of this statutory provision in the context of Northern Ireland. As the Court will observe, the wording of the legislation and its application in the cases discussed in Annex 1 indicates that the law does

²⁸ The Principles were adopted by the Economic and Social Council of the United Nations on 24 May 1989, by Resolution 1989/65. The full text of the Resolution and the Principles is set out at Annex 3 of these written comments.

not adequately protect people from intentional deprivation of life, and raises concerns about the respondent government's compliance with Principle 4 of the UN Prevention Principles.²⁹ As the government-appointed Standing Commission on Human Rights in Northern Ireland concluded in 1993:

"There is substantial divergence between the legal standard for the use of force in the United Kingdom...and the prevailing international standards."³⁰

(b) The positive preventative duty to protect the right to life when planning anti-terrorist operations

3.12 Second, the Convention organs will wish to examine in detail the planning and execution of the operation leading up to the killing. To be able to conduct this examination adequately, the Convention organs will need to be provided with the maximum possible operational and intelligence information. In this sense, there is a clear *evidential* burden to be discharged by a respondent government. Indeed, this is part of a more *general burden of proof* as to providing evidence as to the lawfulness of a killing under Article 2, which a state must discharge where its agents were involved. The UN Human Rights Committee has clearly enunciated this requirement in several cases:

"With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4(2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, especially when such allegations are corroborated..., and to furnish to the Committee the information available to it. In cases where the author has submitted to the Committee allegations supported by substantial witness testimony...and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party."³¹

Also, as was stated in a dissenting opinion of the Commission in a recent case:

"Admittedly, we do not know all the facts, but this uncertainty is also imputable to the Government, since in the case of a violent death...we are entitled to expect a thorough investigation."³²

Thus, if vital information has been improperly withheld or has never been collected, it is open to

²⁹ The Court will also note that the domestic law, while generally prohibiting the intentional deprivation of life, does not specifically prohibit summary executions in the manner required by Principle 1.

³⁰ Annual Report, 1992-93, 12.

³¹ Views on Communication No. 30/1978, *Bleier -v- Uruguay*, Doc A/37/40, 109, @ para 13.3. See also the Committee's views on: Communication No. 161/1983, *Herrera Rubio -v- Columbia*, Doc A/43/40, @ para 10.5; and Communication No. 146/1983 and 148-154/1983, *Kanta Baboeram-Adhin -v- Suriname*, HRJ Vol 6 Nos. 2-4 (1985) 234, @ para 14.2.

³² Application No. 16988/90, *Antonio Diaz Ruano -v- Spain*, Report adopted on 31 August 1993, dissenting opinion of Mr Stefan Treschel, joined by Messrs Soyer, Rozakis and Gozubuyuk, and Mrs Thune.

the Convention organs to find a violation of Article 2 purely on the basis that the burden of proof has not been discharged.

3.13 Further, it is open to the Convention organs to find a violation of Article 2 purely on the basis a lack of sufficient care in the planning and execution of an operation. To that extent, the state of mind of an individual killer is only relevant insofar as insufficiently careful planning may have brought about a (dangerously) erroneous belief. This objective approach is consistent with the judicial approach adopted by the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case:

"134. The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible."

...

"173. Violations of the Convention cannot be founded upon rules that take psychological factors into account in establishing individual culpability. *For the purposes of analysis, the intent or motivation by the agent who has violated the rights recognized in the Convention is irrelevant* - the violation can be established even if the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent or punish those responsible. Thus, the court's task is to determine whether the violation is the result of a State's failure to fulfil its duty to respect and guarantee those rights...

"174. The State has a legal duty to take reasonable steps to prevent human rights violations...

"175. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the safeguard of human rights and ensure that any violations are considered and treated as illegal acts..."³³

3.14 The Court will note that, in the present case, the Commission has failed to adopt this approach. In particular, the Commission has erred in deciding to consider issue (c) below (see paras 217-233 of the Report in the present case) in advance of the positive duty to protect life when planning operations of this kind. We respectfully suggest that the Court consider these issues in the order suggested in these comments and adopting the objective judicial approach of the Inter-American Court of Human Rights.

3.15 Thus, a State may have violated Article 2 although the individual concerned has committed no criminal offence. The Court will find a violation of Article 2 in such cases if it determines that the state did not take sufficient care in placing its agents in a particular situation.

3.16 In short, a state will only have complied with Article 2 in the case of an intentional killing if a killer's (correct or mistaken) belief that lethal force was absolutely unavoidable was both genuinely

³³ Judgment of 29 July 1988, series C, No. 4. Quotes taken from the report in the Human Rights Journal, Vol. 9, No. 2-3, 212, @ 233 and 241 (emphasis added).

and reasonably held and that belief (if mistaken) arose despite the care taken in planning the operation right up until the use of lethal force, including the care taken to supply the killer with relevant and accurate facts.

3.17 In considering the planning of such an operation, the Court will wish to have regard to, *inter alia*, the UN Prevention Principles. Principle 2 requires governments to "ensure strict control, including a clear chain of command over all state agents responsible for...arrest...as well as those officials authorised by law to use force", while Principle 3 renders unlawful any order to carry out summary executions.

(c) **The genuineness and reasonableness of *each* killer's belief that the decision to kill the person was absolutely unavoidable**

3.18 Third, the Convention organs will wish to examine the strict proportionality of the lethal force used, allowing for legitimate error only where a mistaken belief was objectively justified (ie a "very reasonable" test). Again, the Convention organs will be assisted in this task by the UN Use of Force Principles. In addition to the provisions cited above, the Court will wish to refer to Principle 10 regarding the requirements of self-identification and the use of warnings, and Principle 5, which provides:

"Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

(a) *Exercise restraint* in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;

(b) *Minimize damage and injury, and respect and preserve human life*;

(c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment..." (emphases added)

4. The judicial approach of the Convention organs in a case of intentional deprivation of life under Article 2(2)

4.1 To afford discretion to a respondent government in the case of intentional killings would have a direct impact on other situations protected by Article 2, as it implies a widening discretion in "less serious" cases.

4.2 In *Stewart* the Commission stated that situations in which deprivation of life may be justified under Article 2 "are exhaustive and must be narrowly interpreted, being exceptions to, or indications of the limits of, a fundamental Convention right."³⁴ The Commission confirmed this approach at paragraph 182 of its Report in the present case.

4.3 Thus, the Convention organs can not allow a respondent government any discretion in conforming with Article 2, particularly in the case of an intentional killing. Indeed, the *jus cogens* status of the right to life re-inforces the need to apply the strictest possible standards to any permissible deprivation of that right, without allowing a respondent government any margin of appreciation in this respect.

³⁴ Op cit., 169 (reference omitted).

Section IV - The procedural protections required by Article 2

1. Introduction

- 1.1 As the Commission has found in the present case, the phrase "protected by law" in Article 2 imposes a positive obligation on a State not only to refrain from taking life intentionally but to take appropriate steps to safeguard life (para 187). Furthermore, as the Commission found, procedural safeguards, in particular an effective *ex post facto* inquiry, are necessary to give effect to the legal protection envisaged by Article 2 (paras 192-193).
- 1.2 In the present case, the Commission examined the role of the inquest as an effective inquiry in this case (paras 194-200). It concluded that the inquest "provided sufficient procedural safeguards for the purposes of Article 2 of the Convention" (para 200).
- 1.3 However, the Court will wish to reach its own assessment of the events which followed the shootings, particularly the inquest. When examining the standards and procedures necessary for an adequate inquiry, the Court will want to take into account all the relevant international material. Specifically, the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions ("the UN Prevention Principles"), which were adopted by the United Nations to assist Member States in their duty to protect the right to life.¹ The Principles are expanded upon in the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions ("the UN Manual").²
- 1.4 Although the UN Prevention Principles were adopted after the events which are the subject of this case (ie May 1989), they reflect the summation of international experience over many preceding years. Since 1982 a Special Rapporteur reported annually to the UN Commission on Human Rights on the subject of summary or arbitrary executions; in 1986 he specifically set out:

"the need to develop international standards designed to ensure that investigations are conducted into all cases of suspicious death and in particular those at the hands of the law enforcement agencies."³
- 1.5 Thus, in reaching its own determination on the adequacy of the inquest as a "full investigation", the Court will have regard to the UN standards. The Court will wish to compare the UN Prevention Principles with the procedural and legal restrictions of the inquest system as a whole, and this inquest in particular.

¹ See paras 3. in Section III above of these written comments. The full text of the UN Prevention Principles appears as Annex 3 to these written comments.

² See para 3.8 of Section III above.

³ See the UN Manual, 7.

1.6 The Court will find a violation of Article 2 where it finds serious differences between the UN standards and the inquest and other investigations. The Court may find that no inquest could have fulfilled the criteria considered necessary under the Principles, due to limitations within the system. The Court may also find that this inquest in particular failed to fulfil the criteria, due to factors specific to the hearing in Gibraltar.

2. The application of the UN Prevention Principles

2.1 As was explained at para 3.9 of Section III above of these written comments, the UN Prevention Principles apply to all cases which give rise to the possibility that a killing amounted to an extra-legal, arbitrary or summary execution.

2.2 The Court will note that it is not disputed that the victims were killed by the army and that the killings were sanctioned by the respondent government. In such a situation, according to the Principles, any government should ensure the fullest possible investigation and should not place any obstacles in its path. In this context, the Court will want examine the failure of the police to carry out a proper investigation, apparently because they assumed that no crime had been or might have been committed, and the use by the respondent government of Public Interest Immunity Certificates ("PIICs"), which shielded the planning of the operation from scrutiny at the inquest and subsequently.⁴

2.3 Principles 1-8 of the UN Prevention Principles were considered at paras 3.9-3.12 and 3.18 of Section III above of these written comments. The comments that follow focus on the three remaining issues covered by these Principles, which concern the *ex post facto* procedural safeguards for the protection of life:

- (i) Investigation (Principles 9-11 and 15-17).
- (ii) Autopsy procedures (Principles 12-14 and 16).
- (iii) Legal proceedings (Principles 18-20).

3. Investigation - Principles 9-11 and 15-17

3.1 The duty of the state to properly investigate the circumstances of alleged violations of the right to life by its agents was widely recognised in international human rights jurisprudence prior to the adoption of the UN Prevention Principles. In particular, the Court will wish to have regard to the views of UN Human Rights Committee in a number of cases, where it has stressed the duty of states to investigate in good faith all allegations of violations of the right to life.⁵ The Inter-American Court of Human Rights has also provided relevant guidance as to the duty to investigate:

⁴ See paras 2.1 and 7.3 of Section II above of these written comments.

⁵ See para 3.13 in Section III above and the views of the Committee in the following cases: Communication No. 30/1978, *Bleier -v- Uruguay*, Doc A/37/40, 109, @ para 13.3; Communication No. 161/1983, *Herrera Rubio -v- Columbia*, Doc A/43/40, @ para 10.5; and Communication No. 146/1983 and 148-154/1983, *Kanta Baboeram-Adhin -v- Suriname*, HRJ Vol 6 Nos. 2-4 (1985) 234, @ para 14.2.

"The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the state as its own legal duty, not as a step taken by private interests which depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation."⁶

- 3.2 Further, Principle 9 of the UN Prevention Principles requires a "thorough, prompt and impartial investigation" in all cases where a summary execution is suspected, including "where complaints by relatives...suggest unnatural death" of that kind. Principle 9 also lays down a requirement for an "adequate autopsy, collection and analysis of all physical and documentary evidence, and statements from witnesses". All of these requirements are spelled out in considerable detail in the model protocols contained in the UN Manual.
- 3.3 The Court will wish to determine whether the basic duty to properly investigate was discharged by the respondent government in the present case, having regard to the fact that the Gibraltar killings were investigated by the Gibraltar police, who were themselves involved in the operation which led to the deaths (raising a question as to the impartiality of the investigation) and the serious defects in the investigation procedures (paras 126-7, 134 and 195-196 of the Commission's Report).⁷
- 3.4 Principle 9 also provides that the purpose of the investigation shall be to determine the cause, manner and time of death, and the person responsible. The Court will note that, in the present case, the inquest was precluded by law from reaching any conclusion as to responsibility for the killings. As the Commission has pointed out in its Report, the inquest was also precluded by law from making any findings of fact (para 175).
- 3.5 Principle 10 sets out the powers which should be made available to the investigative authority, including the capacity "to oblige officials allegedly involved in any such executions to appear and testify", to summons witnesses and "to demand the production of evidence". The Court will note that the issuing of three PIICs at the inquest in the present case, while they did not prevent any witness from appearing, prevented them from testifying as to certain crucial aspects of the planning of the operation which led to the killings (paras 137-138 of the Commission's Report).⁸

⁶ Velasquez Rodriguez -v- Honduras, Judgment of 29 July 1988, series C, No. 4, para 177. Quotes taken from the report in the Human Rights Journal, Vol. 9, No. 2-3, 212, @ 242.

⁷ See also para 6 of Section II above of these written comments.

⁸ The Court will also note (para 2.2 of Section II of these written comments) that the Gibraltar Coroner did not have the power to subpoena Spanish police witnesses, who could have given evidence on whether the deceased had been under continuous surveillance until they reached the Gibraltar border and whether the Gibraltar authorities had been informed of their movements.

- 3.6 Principle 16 stipulates that families of the deceased and their legal representatives shall be informed of any hearing, and have access to it and "to all information relevant to the hearing". In this regard, the Court will wish to consider the effect of the PIICs in the present case.⁹ Further, the rules on the conduct of inquests will need to be considered, as they prevented the families' legal representative from having access to all the witness statements available. Indeed, the Court will wish to consider whether the families' had adequate access to the hearing, given the lack of equality between the families' legal representative and those of the respondent government.¹⁰
- 3.7 Principle 17 provides that a written report on the investigation shall be made publicly available and shall include conclusions and recommendations. Governments must then either respond to the report or indicate what steps they will take in response. The Court will note that because an inquest jury can only deliver one of a limited number of verdicts, with the capacity to add riders only where relevant to preventing future fatalities, and because there was no other public inquiry into the killings, none of these aspects of the Principles were complied with by the respondent government in the present case. The respondent government was under no obligation to respond to the inquest's findings, limited though they were.
- 3.8 As to an inquest constituting an appropriate form of investigation, the Court is also referred to Principle 11, which provides that, where there are doubts as to the impartiality of an investigation, a commission of inquiry independent of any "institution, agency or person" under investigation should be established. The Court is referred to para 7.1 of Section II of these written comments: there must be some doubt about the impartiality of the jury at the inquest, given the Coroner's refusal to screen the jury for members who were Crown servants. While the Coroner can not be faulted legally, as pre-existing evidence of bias has to be demonstrated before a juror can be challenged, this very restriction on jury screening within the inquest system appears to fly in the face of the UN Prevention Principles. The Court will wish to take into account the outcome in the present case.
- 3.9 Finally, Principle 11 identifies other factors which must trigger a special investigation. These include where "the established investigative procedures are inadequate" for the following reasons:
- (i) lack of expertise;
 - (ii) lack of impartiality;
 - (iii) the importance of the matter;
 - (iv) the apparent existence of a pattern of abuse;
 - (v) complaints from the family of the victim about these inadequacies ..."

The Court will wish to consider whether any of the above issues apply to the present case. If so, a special investigation should have taken place under the terms of the UN Prevention Principles and the failure to hold one will constitute a violation of Article 2.

⁹ See para 7.3 in Section II of these written comments.

¹⁰ See para 7.4 of Section II of these written comments.

4. Autopsy procedures - Principles 12-14 and 16

4.1 Principles 12 to 14 lay down the rules for conducting autopsies, and the UN Manual includes a Model Autopsy Protocol which expands on these Principles. The Court will wish to assess the significance of the breakdown in proper autopsy procedures in the present case, particularly as regards the inadequate scene-of-crime procedures described by the Commission in its Report (paras 126-127 and 195-196), including the removal of the bodies from the scene of death without examination by the pathologist, and the removal of the deceaseds' clothing before the autopsy took place, which impaired the pathologist's ability to determine the range at which the deceased had been shot.

5. Legal proceedings - Principles 18-20

- 5.1 The Court is respectfully referred to paras 3.5-3.11 in Section III above and to Annex 1 to these written comments. In addition to the matters raised there, the Court will wish to have regard to the UN Prevention Principles. Principle 18 imposes a duty on governments to bring to justice the perpetrators of such executions. In the present case, the respondent government has relied on the inquest jury's verdict of "lawful killing" as exonerating its agents who were responsible for the deaths. However, the Court will note that to independent observers, the Coroner's summing up contained serious errors of law which have the effect of casting doubt on the jury's verdicts. The Court will therefore wish to be cautious in accepting the verdict as an exoneration of the shootings.
- 5.2 Also, Principle 19 declares that superior orders may not be invoked to justify such executions, and that superiors who fail to prevent them can be held accountable for the actions of those under their authority. The Court will wish to consider whether this important principle was made inoperable in the present case by the terms of the PIICs.
- 5.3 Finally, Principle 20 provides that the families of victims of such executions should receive fair and adequate compensation. The Court will note that in this case the families' action for compensation in the Northern Ireland High Court was struck out on the application of the Ministry of Defence after the Foreign Secretary issued certificates exempting the respondent government from any liability.