Artikel 2 en de bestrijding van terrorisme: noot bij EHRM, 27-9-1995

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ARTIKEL 2 EVRM EN DE BESTRIJDING VAN TERRORISME; BRITSE WREVEL OVER HET HOF

Europees Hof voor de Rechten van de Mens, 27 september 1995
(Grand Chamber: Ryssdal (President), Bernhardt, Thór Vilhjálmsson, Gölcüklü, Russo, Spielmann, Valticos, Palm, Pekkanen, Morenilla, Sir John Freeland, Baka, Lopes Rocha, Mifsud Bonnici, Makarczyk, Repik, Jambrek, Küris, Lõhmus): McCann e.a. tegen het Verenigd Koninkrijk (Series A, nr. 324)

De Britse autoriteiten beschikken over aanwijzingen dat de IRA een bomaanslag in Gibraltar voorbereidt. Wanneer drie IRA-leden in Gibraltar arriveren worden zij door eenheden van de Britse SAS onderschept en doodgeschoten. In de eerste zaak waarin het Hof zich uitspreekt over artikel 2 EVRM, komt het tot het oordeel dat het recht op leven is geschonden – een uitspraak die de wrevel van Groot-Brittannië opwekt.

DE FEITEN

'The shooting took place on a fine Sunday afternoon': het had Ernest Hemingway kunnen zijn, maar hier is het Europees Hof voor de Rechten van de Mens aan het woord in een poging de dood van de IRA-leden McCann, Farrell en Savage te reconstrueren.

In 1988 schemerde door dat de IRA een bomaanslag in Gibraltar voorbereidde. Doelwit zou de wisseling van de wacht zijn, die elke dinsdag door een Brits regiment wordt uitgevoerd. Volgens de informatie zouden de IRA-leden McCann, Farrell en Savage de aanslag uitvoeren. McCann en Farrell waren eerder tot gevangenisstraffen veroordeeld in verband met terroristische activiteiten; Savage stond bekend als bom-expert. Elk werd geacht 'vuurgevaarlijk' te zijn. Een aantal soldaten van de *Special Air Service (SAS)* werd in Gibraltar gestationeerd teneinde de aanslag te verijdelen. Een aantal scenario's werd besproken; aangenomen werd dat de terroristen zouden trachten een auto in de buurt van de ceremonie te parkeren, om vervolgens de daarin verstopte explosieven met een radio-signaal tot ontploffing te brengen.

Op zondag 6 maart, twee dagen voórdat de aanslag naar verwachting zou plaatsvinden, werd het drietal in Gibraltar gesignaleerd. Er was geen poging gedaan de drie aan te houden bij het oversteken van de grens tussen Spanje en Gibraltar, want (zo stelde een van de betrokken officials): 'in this particular case, we are talking about dangerous terrorists. We are talking about a very, very major and delicate operation – an operation that had to succeed. I think the only way it could have succeeded is to allow the terrorists to come in'. Zou men de drie aan de grens aanhouden, dan bestond het risico dat er onvoldoende bewijs tegen hen kon worden ingebracht. Zo kon Savage zijn auto parkeren in de buurt van het verwachte doelwit. Na nog enige tijd in de auto te hebben gerommeld verliet hij de wagen, om zich even later bij McCann en Farrell – die te voet Gibraltar waren binnengekomen – te voegen. Intussen bekeek een agent in bur-

ger de achtergelaten wagen. Hij merkte niets bijzonders op, behalve een antenne die sterker geroest was dan men bij een auto van die leeftijd zou verwachten. Omdat hij niet kon uitsluiten dat de auto een bom bevatte – de antenne zou daarop kunnen duiden – gaf hij door aan de leiding van de operatie dat de wagen verdacht was. De operatie-leiding gaf daarop vier SAS-soldaten opdracht het drietal te arresteren op verdenking van poging tot moord. Daarbij werd de indruk gewekt dat zich naar alle waarschijnlijkheid explosieven in de auto bevonden, die – mogelijk met een enkele druk op een knop – door elk van de drie tot ontploffing zouden kunnen worden gebracht.

De arrestatie liep uit op de dood van de drie IRA-leden. Een soldaat, die vlak achter McCann en Farrell liep, trok zijn pistool en maande hen stil te staan. Toen beiden een abrupte beweging maakten losten de soldaat en zijn collega een aantal schoten, vrezend dat de verdachten een wapen zouden pakken of de autobom tot ontploffing zouden brengen. McCann en Farrell werden door vijf respectievelijk acht kogels getroffen. Zij overleden ter plaatse. Savage, die inmiddels een andere weg was ingeslagen, hoorde het schieten. Hij draaide zich om en keek twee SAS-soldaten recht in het gezicht. Ook hier een abrupte beweging, gevolgd door een ware kogelregen: Savage werd door 16 kogels getroffen en overleed eveneens ter plaatse. Sommige getuigen verklaarden dat de soldaten doorgingen met schieten terwijl de slachtoffers al op de grond lagen. Een patholoog-anatoom concludeerde uit de lijkschouwing dat Savage meermalen in het hoofd moet zijn geschoten terwijl hij op de grond lag.

Achteraf bleek dat de drie slachtoffers ongewapend waren; zij hadden geen afstandsbediening bij zich. De auto bevatte ook geen explosieven. Wel werd naderhand in Spanje een auto aangetroffen met ruim 60 kilo semtex en ontstekingsapparatuur. In het Verenigd Koninkrijk overheerste aanvankelijk opluchting over het feit dat een terroristische aanslag met mogelijk afschuwelijke gevolgen was voorkomen. Niet lang daarna werd de vraag echter opgeworpen of de toepassing van dodelijk geweld werkelijk noodzakelijk was geweest. Een TV-documentaire, *Death on the Rock*, zaaide de nodige twijfel.

In september 1988 vond in Gibraltar een onderzoek ('inquest') naar het incident plaats. Het onderzoek duurde 19 dagen; 79 getuigen werden gehoord, maar de autoriteiten schermden bepaalde vertrouwelijke informatie af. De jury kwam uiteindelijk met negen tegen twee stemmen tot het oordeel dat hier sprake was geweest van 'lawful killing'. Na de 'inquest' in Gibraltar vingen de nabestaanden in Noord-Ierland een schadevergoedingsactie aan. Tevergeefs: de Britse Minister van Buitenlandse Zaken kon op basis van de *Crown Proceedings Act (1947)* verhinderen dat het optreden van de autoriteiten buiten het Verenigd Koninkrijk aan een rechterlijk oordeel werd onderworpen.

In augustus 1991 dienden enkele nabestaanden een klacht over schending van artikel 2 EVRM in bij de Europese Commissie voor de Rechten van de Mens (Appl. No. 18984/91). De Commissie was verdeeld: met elf tegen zes stemmen kwam zij tot het oordeel dat artikel 2 niet is geschonden. Op 20 mei 1994 werd de zaak aan het Hof voorgelegd. Het arrest is reeds zakelijk weergegeven in *NJCM-Bulletin* 20-8 (1995), pp. 1115-1117. Zie voor commentaar ook S. Joseph,

'Denouement of the Deaths on the Rock: The Right to Life of Terrorists', in: *Netherlands Quarterly of Human Rights* vol. 14/1 (1996), pp. 5-22.

DE UITSPRAAK

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

145. The applicant alleged that the killing of Mr McCann, Ms Farrell and Mr Savage by members of the security forces constituted a violation of Article 2 of the Convention which reads:

> '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 conviction of a crime for which this penalty is provided by law.
> 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 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.'

A. Interpretation of Article 2

1. General approach

146. The Court's approach to the interpretation of Article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, *inter alia*, the *Soering* v. *the United Kingdom* judgment of 7 July 1989, Series A no. 161, p. 34, § 8, and the *Loizidou* v. *Turkey* (Preliminary objections) judgment of 23 March 1995, Series A no. 310, p. 26, § 72).

147. It must also be borne in mind that, as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 3 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, it also enshrines one of the basic values of the democratic societies making up the Council of Europe (see the above-mentioned *Soering* judgment, p. 34, § 88). As such, its provisions must be strictly construed.

148. The Court considers that the exceptions delineated in paragraph 2 indicate that this provision extends to, but is not concerned exclusively with, intentional killing. As the Commission has pointed out, the text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to 'use force' which may result, as an intended outcome, in the deprivation of life. The use of force, however, must be more than 'absolutely necessary' for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) (see application no. 10444/82, *Stewart* v. *the United Kingdom*, 10 July 1984, Decisions and Reports no. 39, pp. 169-171).

149. In this respect the use of the term 'absolutely necessary' in Article 2 § 2 indicates 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 paragraph 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.
150. In keeping with the importance of this provision 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 all the surrounding circumstances including such matters as the planning and control of the action under examination.

2. The obligation to protect life in Article 2 § 1
(a) Compatibility of national law and practice with Article 2 standards
151. The applicants submitted under this head that Article 2 § 1 of the Convention imposed a positive duty on States to 'protect' life. In particular, the national law must strictly control and limit the circumstances in which a person may be deprived of his life by agents of the State. The State must also give appropriate training, instructions and briefing to its soldiers and other agents who may use force and exercise strict control over any operations which may involve the use of lethal force.

In their view, the relevant domestic law was vague and general and did not encompass the Article 2 standard of absolute necessity. This in itself constituted a violation of Article 2 § 1. There was also a violation of this provision in that the law did not require that the agents of the State be trained in accordance with the strict standards of Article 2 § 1.
152. For the Commission, with whom the Government agreed, Article 2 was not to be interpreted as requiring an identical formulation in domestic law. Its requirements were satisfied if the substance of the Convention right was protected by domestic law.
153. The Court recalls that the Convention does not oblige Contracting Parties to incorporate its provisions into national law (see, *inter alia*, the *James and Others* v. *the United Kingdom* judgment of 21 February 1986, Series A no. 98, p. 47, § 84, and the *Holy Monasteries* v. *Greece* judgment of 9 December 1994, Series A no. 301-A, p. 39, § 90). Furthermore, it is not the role of the Convention institutions to examine *in abstracto* the compatibility of national legislative or constitutional provisions with the requirements of the Convention (see, for example, the *Klass and Others* v. *Germany* judgment of 6 September 1978, Series A no. 28, p. 18, § 33).
154. Bearing the above in mind, it is noted that Article 2 of the Gibraltar Constitution (see paragraph 133) is similar to Article 2 of the Convention with the exception that the standard of justification for the use of force which results in the deprivation of life is that of 'reasonably justifiable' as opposed to 'absolutely necessary' in paragraph 2 of Article 2. While the Convention standard appears on its face to be stricter than the relevant national standard, it has been submitted by the Government that, having regard to the manner in which the standard is interpreted and applied by the national courts (see paragraphs 134-135), there is no significant difference in substance between the two concepts.
155. In the Courts' view, whatever the validity of this submission, the difference between the two standards is not sufficiently great that a violation of Article 2 § 1 could be found on this ground alone.
156. As regards the applicants' arguments concerning the training and instruction of the agents of the State and the need for operational control, the Court considers that these are matters which, in the context of the present case, raise issues under Article 2 § 2

concerning the proportionality of the State's response to the perceived threat of a terrorist attack. It suffices to note in this respect that the rules of engagement issued to the soldiers and the police in the present case provide a series of rules governing the use of force which carefully reflect the national standard as well as the substance of the Convention standard (see paragraphs 16, 18 and 136-137).

(b) Adequacy of the inquest proceedings as an investigative mechanism

157. The applicants also submitted under this head, with reference to the relevant standards contained in the UN Force and Firearms Principles (see paragraphs 138-139), that the State must provide an effective *ex post facto* procedure for establishing the facts surrounding a killing by agents of the State through an independent judicial process to which relatives must have full access.

Together with the *amici curiae*, Amnesty International and British-Irish Rights Watch and Others, they submitted that this procedural requirement had not been satisfied by the inquest procedure because of a combination of shortcomings. In particular, they complained that no independent police investigation took place of any aspect of the operation leading to the shootings; that normal scene-of-crime procedures were not followed; that not all eyewitnesses 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.

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 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.

158. The Government submitted that the inquest was an effective, independent and public review mechanism which more than satisfied any procedural requirement which might be read into Article 2 § 1 of the Convention. In particular, they maintained that it would not be appropriate for the Court to seek to identify a single set of standards by which all investigations into the circumstances of death should be assessed. Moreover, it was important to distinguish between such an investigation and civil proceedings brought to seek a remedy for an alleged violation of the right to life. Finally, they invited the Court to reject the contention by the intervenors British-Irish Rights Watch and Others that a violation of Article 2 § 1 will have occurred whenever the Court finds serious differences between the UN Principles on Extra-Legal Executions and the investigation conducted into any particular death (see paragraph 140).

159. For the Commission, the inquest subjected the actions of the State to extensive, independent and highly public scrutiny and thereby provided sufficient procedural safeguards for the purposes of Article 2 of the Convention.

160. The Court considers that it is unnecessary to decide in the present case whether a right of access to court to bring civil proceedings in connection with deprivation of life can be inferred from Article 2 § 1 since this is an issue which would be more appropriately considered under Articles 6 and 13 of the Convention – provisions that have not been invoked by the applicants.

161. It 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.
162. However, it is not necessary in the present case for the Court to decide what form such an investigation should take and under what conditions it should be conducted, since public inquest proceedings, at which the applicants were legally represented and which involved the hearing of seventy-nine witnesses, did in fact take place. Moreover, the proceedings lasted nineteen days and, as is evident from the inquest's voluminous transcript, involved a detailed review of the events surrounding the killings. Furthermore, it appears from the transcript, including the Coroner's summing-up to the jury, that the lawyers acting on behalf of the applicants were able to examine and cross-examine key witnesses, including the military and police personnel involved in the planning and conduct of the anti-terrorist operation, and to make the submissions they wished to make in the course of the proceedings.
163. In light of the above, the Court does not consider that the alleged various shortcomings in the inquest proceedings, to which reference has been made by both the applicants and the intervenors, substantially hampered the carrying of a thorough, impartial and careful examination of the circumstances surrounding the killings.
164. It follows that there has been no breach of Article 2 § of the Conention on this ground.

B. Application of Article 2 to the facts of the case

1. General approach to the evaluation of the evidence

165. While accepting that the Convention institutions are not in any formal sense bound by the decisions of the inquest jury, the Government submitted that the verdicts were of central importance to any subsequent examination of the deaths of the deceased. Accordingly, the Court should give substantial weight to the verdicts of the jury in the absence of any indication that those verdicts were perverse or ones which no reasonable tribunal of fact could have reached. In this connection, the jury was uniquely well placed to assess the circumstances surrounding the shootings. The members of the jury heard and saw each of the seventy-nine witnesses giving evidence, including extensive cross-examination. With that benefit they were able to assess the credibility and probative value of the witnesses' testimony. The Government pointed out that the jury also heard the submissions of the various parties, including those of the lawyers representing the deceased.
166. The applicants, on the other hand, maintained that inquests are by their very nature ill-equipped to be full and detailed inquiries into controversial killings such as in the present case. Moreover, the inquest did not examine the killings from the standpoint of concepts such as 'proportionality' or 'absolute necessity' but applied the lesser tests of 'reasonable force' or 'reasonable necessity'. Furthermore, the jury focused on the actions of the soldiers as they opened fire as if it were considering their criminal culpability and not on matters such as the allegedly negligent and reckless planning of the operation.

167. The Commission examined the case on the basis of the observations of the parties and the documents submitted by them, in particular the transcript of the inquest. It did not consider itself bound by the findings of the jury.
168. The Court recalls that under the scheme of the Convention the establishment and verification of the facts is primarily a matter for the Commission (Articles 28 § 1 and 31). Accordingly, it is only in exceptional circumstances that the Court will use its powers in this area. The Court is not, however, bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it (see, *inter alia*, the *Cruz Varas and Others* v. *Sweden* judgment of 20 March 1991, Series A no. 201, p. 29, § 74, and the *Klaas* v. *Germany* judgment of 22 September 1993, Series A no. 269, p. 17, § 29).
169. 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 although they differ fundamentally as to the conclusions to be drawn from them under Article 2 of the Convention.

Having regard to the submissions of those appearing before the Court and to the inquest proceedings, the Court takes the Commission's establishment of the facts and findings on the points summarised in paragraphs 13 to 132 to be an accurate and reliable account of the facts underlying the present case.
170. As regards the appreciation of these facts from the standpoint of Article 2, the Court observes that the jury had the benefit of listening to the witnesses at first hand, observing their demeanour and assessing the probative value of their testimony.

Nevertheless, it must be borne in mind that the jury's finding was limited to a decision of lawful killing and, as is normally the case, did not provide reasons for the conclusion that it reached. In addition, the focus of concern of the inquest proceedings and the standard applied by the jury was whether the killings by the soldiers were reasonably justified in the circumstances as opposed to whether they were 'absolutely necessary' under Article 2 § 2 in the sense developed above (see paragraphs 120 and 148-149 above).
171. Against this background, the Court must make its own assessment whether the facts as established by the Commission disclose a violation of Article 2 of the Convention.
172. The applicants further submitted 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 grant the State authorities the benefit of the doubt as if its criminal liability were at stake.
173. The Court, in determining whether there has been a breach of Article 2 in the present case, is not assessing the criminal responsibility of those directly or indirectly concerned. In accordance with its usual practice therefore it will assess the issues in the light of all the material placed before it by the applicants and by the Government or, if necessary, material obtained of its own motion (see the *Ireland* v. *the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 64, § 160, and the above-mentioned *Cruz Varas and Others* judgment, p. 29, § 75).

2. *Applicants' allegation that the killings were premeditated*

174. The applicants alleged that there had been a premeditated plan to kill the deceased. While conceding that there was no evidence of a direct order from the highest authorities in the Ministry of Defence, they claimed that there was strong circumstantial evidence in support of their allegation. They suggested that a plot to kill could be achieved by other means such as hints and innuendoes, coupled with the choice of a military unit like the

SAS which, as indicated by the evidence given by their members at the inquest, was trained to neutralise a target by shooting to kill. Supplying false information of the sort that was actually given to the soldiers in this case would render a fatal shooting likely. The use of the SAS was, in itself, evidence that the killing was intended.

175. They further contended that the Gibraltar police would not have been aware of such an unlawful enterprise. They pointed out that the SAS officer E gave his men secret briefings to which the Gibraltar police were not privy. Moreover, when the soldiers attended the police station after the shootings, they were accompanied by an army lawyer who made it clear that the soldiers were there only for the purpose of handing in their weapons. In addition, the soldiers were immediately flown out of Gibraltar without ever having been interviewed by the police.

176. The applicants referred to the following factors, amongst others, in support of their contention:

- The best and safest method of preventing an explosion and capturing the suspects would have been to stop them and their bomb from entering Gibraltar. The authorities had their photographs and new their names and aliases as well as the passports they were carrying;

- If the suspects had been under close observation by the Spanish authorities from Malaga to Gibraltar, as claimed by the journalist, Mr Debelius, the hiring of the white Renault car would have been seen and it would have been known that it did not contain a bomb (see paragraph 128);

- The above claim is supported by the failure of the authorities to isolate the bomb and clear the area around it in order to protect the public. In Gibraltar there were a large number of soldiers present with experience in the speedy clearance of suspect bomb sites. The only explanation for this lapse in security procedures was that the security services knew that there was no bomb in the car;

- Soldier G, who was sent to inspect the car and who reported that there was a suspect car bomb, admitted during the inquest that he was not an expert in radio signal transmission (see paragraph 53). This was significant since the sole basis for his assessment was that the radio aerial looked older than the car. A real expert would have thought of removing the aerial to nullify the radio detonator, which could have been done without destabilising the explosive, as testified by Dr Scott. He would have also known that if the suspect had intended to explode a bomb by means of a radio signal they would not have used a rusty aerial – which would reduce the capacity to receive a clear signal – but a clean one (see paragraph 114). It also emerged from his evidence that he was not an explosive expert either. There was thus the possibility that the true role of Soldier G was to report that he suspected a car bomb in order to induce the Gibraltar police to sign the document authorising the SAS to employ lethal force.

177. In the Government's submission it was implicit in the jury's verdicts of lawful killing that they found as facts that there was no plot to kill the three terrorists and that the operation in Gibraltar had not been conceived or mounted with this aim in view. The aim of the operation was to effect the lawful arrest of the three terrorists and it was for this purpose that the assistance of the military was sought and given. Furthermore, the jury must have also rejected the applicants' contention that Soldiers A, B, C and D had deliberately set out to kill the terrorists, whether acting on express orders or as a result of being given 'a nod and a wink'.

178. The Commission concluded that there was no evidence to support the applicants' claim of a premeditated plot to kill the suspects.

179. The Court observes 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.

180. In the light of its own examination of the material before it, the Court does not find it established that there was an execution plot at the highest level of command in the Ministry of Defence or in the Government, or that Soldiers A, B, C and D had been so encouraged or instructed by the superior officers who had briefed them prior to the operation, or indeed that they had decided on their own initiative to kill the suspects irrespective of the existence of any justification for the use of lethal force and in disobedience to the arrest instructions they had received. Nor is there evidence that there was an implicit encouragement by the authorities or hints and innuendoes to execute the three suspects.

181. The factors relied on by the applicants amount to a series of conjectures that the authorities must have known that there was no bomb in the car. However, having regard to the intelligence information that they had received, to the known profiles of the three terrorists, all of whom had a background in explosives, and the fact that Mr Savage was seen to 'fiddle' with something before leaving the car (see paragraph 38), the belief that the car contained a bomb cannot be described as either implausible or wholly lacking in foundation.

182. In particular, the decision to admit them to Gibraltar, however open to criticism given the risks that it entailed, was in accordance with the arrest policy formulated by the Advisory Group that no effort should be made to apprehend them until all three were present in Gibraltar and there was sufficient evidence of a bombing mission to secure their convictions (see paragraph 37).

183. Nor can the Court accept the applicants' contention that the use of the SAS, in itself, amounted to evidence that the killing of the suspects was intended. In this respect it notes that the SAS is a special unit which has received specialist training in combating terrorism. It was only natural, therefore, that in light of the advance warning that the authorities received of an impending terrorist attack they would resort to the skill and experience of the SAS in order to deal with the threat in the safest and most informed manner possible.

184. The Court therefore rejects as unsubstantiated the applicants' allegations that the killing of the three suspects was premeditated or the product of a tacit agreement amongst those involved in the operation.

3. *Conduct and planning of the operation*

(a) Arguments of those appearing before the Court

(1) The applicants

185. The applicants submitted that it would be wrong for the Court, as the Commission had done, to limit its assessment to the question of the possible justification of the soldiers who actually killed the suspects. It must examine the liability of the Government for all aspects of the operation. Indeed, the soldiers may well have been acquitted at a criminal trial if they could have shown that they honestly believed the ungrounded and false information they were given.

186. The soldiers had been told by Officer E (the attack commander) that the three suspects had planted a car bomb in Gibraltar, whereas Soldier G – the bomb-disposal expert – had reported that it was merely a suspect bomb; that it was a remote-control bomb; that each of the suspects could detonate it from anywhere in Gibraltar by the mere flicking of a switch and that they would not hesitate to do so the moment they were challenged. In reality, these 'certainties' and 'facts' were no more than suspicions or at best dubious assessments. However, they were conveyed as facts to soldiers who not only

had been trained to shoot at the merest hint of a threat but also, as emerged from the evidence given during the inquest, to continue to shoot until they had killed their target.

In sum, they submitted that the killings came about as a result of incompetence and negligence in the planning and conduct of the anti-terrorist operation to arrest the suspects as well as a failure to maintain a proper balance between the need to meet the threat posed and the right to life of the suspects.

(2) The Government

187. The Government submitted that the actions of the soldiers were absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 § 2(a) of the Convention. Each of them had to make a split-second decision which could have affected a large number of lives. They believed that the movements which they saw the suspects make at the moment they were intercepted gave the impression that the terrorists were about to detonate a bomb. This evidence was confirmed by other witnesses who saw the movements in question. If it is accepted that the soldiers honestly and reasonably believed that the terrorists upon whom they opened fire might have been about to detonate a bomb by pressing a button, then they had no alternative but to open fire.

188. They also pointed out that much of the information available to the authorities and many of the judgments made by them proved to be accurate. The three deceased were an IRA active service unit which was planning an operation in Gibraltar; they did have in their control a large quantify of explosives which were subsequently found in Spain; and the nature of the operation was a car bomb. The risk to the lives of those in Gibraltar was, therefore, both real and extremely serious.

189. The Government further submitted that in examining the planning of the anti-terrorist operation it should be borne in mind that intelligence assessments are necessarily based on incomplete information since only fragments of the true picture will be known. Moreover, experience showed that the IRA were exceptionally ruthless and skilled in counter-surveillance techniques and that they did their best to conceal their intentions from the authorities. In addition, experience in Northern Ireland showed that the IRA is constantly and rapidly developing new technology. They thus had to take into account the possibility that the terrorists might be equipped with more sophisticated or more easily concealable radio-controlled devices than the IRA had previously been known to use. Finally, the consequences of underestimating the threat posed by the active service unit could have been catastrophic. If they had succeeded in detonating a bomb of the type and size found in Spain, everyone in the car-park would have been killed or badly maimed and grievous injuries would have been caused to those in adjacent buildings, which included a school and an old people's home.

190. The intelligence assessments made in the course of the operation were reasonable ones to make in the light of the inevitably limited amount of information available to the authorities and the potentially devastating consequences of underestimating the terrorists' abilities and resources. In this regard the Government made the following observations:

- It was believed that a remote-controlled device would be used because it would give the terrorists a better chance of escape and would increase their ability to maximise the proportion of military rather than civilian casualties. Moreover, the IRA had used such a device in Brussels only six weeks before.

- It was assumed that any remote-control such as that produced to the Court would be small enough to be readily concealed about the person. The soldiers themselves successfully concealed radios of a similar size about their persons.

- As testified by Captain Edwards at the inquest, tests carried out demonstrated that a bomb in the car-park could have been detonated from the spot where the terrorists were shot (see paragraph 116).

- Past experience strongly suggested that the terrorists' detonation device might have been operated by pressing a single button.

- As explained by Witness O at the inquest, the use of a blocking car would have been unnecessary because the terrorists would not be expected to have any difficulty in finding a free space on 8 March. It was also dangerous because it would have required two trips into Gibraltar, thereby significantly increasing the risk of detection (see paragraph 23 (point e)).

- There was no reason to doubt the *bona fides* of Soldier G's assessment that the car was a suspect car bomb. In the first place his evidence was that he was quite familiar with car bombs. Moreover, the car had been parked by a known bomb-maker who had been seen to 'fiddle' with something between the seats and the car aerial appeared to be out of place. IRA car bombs had been known from experience to have specially-fitted aerials and G could not say for certain from an external examination that the car did not contain a bomb (see paragraph 48). Furthermore, all three suspects appeared to be leaving Gibraltar. Finally the operation of cordoning off the area around the car began only twenty minutes after the above assessment had been made because of the shortage of available manpower and the fact that the evacuation plans were not intended for implementation until 7 or 8 March.

- It would have been reckless for the authorities to assume that the terrorists might not have detonated their bomb if challenged. The IRA were deeply committed terrorists who were, in their view, at war with the United Kingdom and who had in the past shown a reckless disregard for their own safety. There was still a real risk that if they had been faced with a choice between an explosion causing civilian casualties and no explosion at all, the terrorists would have preferred the former.

(3) The Commission

191. The Commission considered that, given the soldiers' perception of the risk to the lives of the people of Gibraltar, the shooting of the three suspects could be regarded as absolutely necessary for the legitimate aim of the defence of other from unlawful violence. It also concluded that, having regard to the possibility that the suspects had brought in a car bomb which, if detonated, would have occasioned the loss of many lives and the possibility that the suspects could have been able to detonate it when confronted by the soldiers, the planning and execution of the operation by the authorities did not disclose any deliberate design or lack of proper care which might have rendered the use of lethal force disproportionate to the aim of saving lives.

(b) The Court's assessment

(1) Preliminary considerations

192. In carrying out its examination under Article 2 of the Convention, the Court must bear in mind that the information that the United Kingdom authorities received that there would be a terrorist attack in Gibraltar presented them with a fundamental dilemma. On the one hand, they were required to have regard to their duty to protect the lives of the people in Gibraltar including their own military personnel and, on the other, to have minimum resort to the use of lethal force against those suspected of posing this threat in the light of the obligations flowing from both domestic and international law.

193. Several other factors must also be taken into consideration.

In the first place, the authorities were confronted by an active service unit of the IRA composed of persons who had been convicted of bombing offences and a known explosives expert. The IRA, judged by its actions in the past, had demonstrated a disregard for human life, including that of its own members.

Secondly, 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 were obliged to formulate their policies on the basis of incomplete hypotheses.

194. Against this background, in determining whether the force used was compatible with Article 2, the Court must carefully scrutinise, as noted above, 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. The Court will consider each of these points in turn.

(2) Actions of the soldiers

195. It is recalled that the soldiers who carried out the shooting (A, B, C and D) were informed by their superiors, in essence, that there was a car bomb in place which could be detonated by any of the three suspects by means of a radio-control device which might have been concealed on their persons; that the device could be activated by pressing a button; that they would be likely to detonate the bomb if challenged, thereby causing heavy loss of life and serious injuries, and were also likely to be armed and to resist arrest (see paragraphs 23, 24-27, and 28-31).

196. As regards the shooting of Mr McCann and Ms Farrell, the Court recalls the Commission's finding that they were shot at close range after making what appeared to Soldiers A and B to be threatening movements with their hands as if they were going to detonate the bomb (see paragraph 132). The evidence indicated that they were shot as they fell to the ground but not as they lay on the ground (see paragraphs 59-67). Four witnesses recalled hearing a warning shout (see paragraph 75). Officer P corroborated the soldiers' evidence as to the hand movements (see paragraph 76). Officer Q and Police Constable Parody also confirmed that Ms Farrell had made a sudden, suspicious move towards her handbag (*ibid.*).

197. As regards the shooting of Mr Savage, the evidence revealed that there was only a matter of seconds between the shooting at the Shell garage (McCann and Farrell) and the shooting at Landport tunnel (Savage). The Commission found that it was unlikely that Soldiers C and D witnessed the first shooting before pursuing Mr Savage who had turned around after being alerted by either the police siren or the shooting (see paragraph 132).

Soldier C opened fire because Mr Savage moved his right arm to the area of his jacket pocket, thereby giving rise to the fear that he was about to detonate the bomb. In addition, Soldier C had seen something bulky in his pocket which he believed to be a detonating transmitter. Soldier D also opened fire believing that the suspect was trying to detonate the supposed bomb. The soldiers' version of events was corroborated in some respects by witnesses H and J, who saw Mr Savage spin around to face the soldiers in apparent response to the police siren or the first shooting (see paragraphs 83 and 85).

The Commission found that Mr Savage was shot at close range until he hit the ground and probably in the instant as or after he had hit the ground (see paragraph 132). This conclusion was supported by the pathologists's evidence at the inquest (see paragraph 110).

198. It was subsequently discovered that the suspects were unarmed, that they did not have a detonator device on their persons and that there was no bomb in the car (see paragraphs 93 and 96).
199. All four soldiers admitted that they shot to kill. They considered that it was necessary to continue to fire at the suspects until they were rendered physically incapable of detonating a device (see paragraphs 61, 63, 80 and 120). According to the pathologists' evidence Ms Farrell was hit by eight bullets, Mr McCann by five and Mr Savage by sixteen (see paragraphs 108-110).
200. The Court accepts that the soldiers honestly believed, in the light of the information that they had been given, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life (see paragraph 195). The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives.

It considers that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.

It follows that, having regard to the dilemma confronting the authorities in the circumstances of the case, the actions of the soldiers do not, in themselves, give rise to a violation of this provision.
201. The question arises, however, whether the anti-terrorist operation as a whole was controlled and organised in a manner which respected the requirements of Article 2 and whether the information and instructions given to the soldiers which, in effect, rendered inevitable the use of lethal force, took adequately into consideration the right to life of the three suspects.

(3) Control and organisation of the operation
202. The Court first observes that, as appears from the operational order of the Commissioner, it had been the intention of the authorities to arrest the suspects at an appropriate stage. Indeed, evidence was given at the inquest that arrest procedures had been practised by the soldiers before 6 March and that efforts had been made to find a suitable place in Gibraltar to detain the suspects after their arrest (see paragraphs 18 and 55).
203. 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 at the early arrival of the three suspects, they had a surveillance team at the border and an arrest group nearby (see paragraph 34). 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 (see paragraph 33).
204. On this issue, the Government submitted that at that moment there might not have been sufficient evidence to warrant the detention and trial of the suspects. Moreover, to release them, having alerted them to the authorities' state of awareness but leaving them or others free to try again, would obviously increase the risks. Nor could the authorities be sure that those three were the only terrorists they had to deal with or of the manner in which it was proposed to carry out the bombing.

205. 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. In its view, either the authorities knew that there was no bomb in the car – which the Court has already discounted (see paragraph 181 above) – 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.

The decision not to stop the three terrorists from entering Gibraltar is thus a relevant factor to take into account under this head.

206. The Court notes that at the briefing on 5 March attended by Soldiers A, B, C and D it was considered likely that the attack would be by way of a large car bomb. A number of key assessments were made. In particular, it was thought 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 a button; that it was likely that the suspects would detonate the bomb if challenged; that they would be armed and would be likely to use their arms if confronted (see paragraphs 23-31).

207. In the event, all of these crucial assumptions, apart from the terrorists' intentions to carry out an attack, turned out to be erroneous. Nevertheless, as has been demonstrated by the Government, on the basis of their experience in dealing with the IRA, they were all possible hypotheses in a situation where the true facts were unknown and where the authorities operated on the basis of limited intelligence information.

208. In fact, insufficient allowances appear to have been made for other assumptions. For example, since the bombing was not expected until 8 March when the changing of the guard ceremony was to take place, there was equally the possibility that the three terrorists were on a reconnaissance mission. While this was a factor which was briefly considered, it does not appear to have been regarded as a serious possibility (see paragraph 45).

In addition, at the briefing or after the suspects had been spotted, it might have been thought unlikely that they would have been prepared to explode the bomb, thereby killing many civilians, as Mr McCann and Ms Farrell strolled towards the border area since this would have increased the risk of detection and capture (see paragraph 57). It might also have been thought improbable that at that point they would have set up the transmitter in anticipation to enable them to detonate the supposed bomb immediately if confronted (see paragraph 115).

Moreover, even if allowances are made for the technological skills of the IRA, the description of the detonation device as a 'button job' without the qualifications subsequently described by the experts at the inquest (see paragraphs 115 and 131), of which the competent authorities must have been aware, over-simplifies the true nature of these devices.

209. It is further disquieting in this context that the assessment made by Soldier G, after a cursory external examination of the car, that there was a 'suspect car bomb' was conveyed to the soldiers, according to their own testimony, as a definite identification that there was such a bomb (see paragraphs 48 and 51-52). It is recalled that while Soldier G had experience in car bombs, it transpired that he was not an expert in radio communications or explosives; and that his assessment that there was a suspect car bomb, based on his observation that the car aerial was out of place, was more in the nature of a report that a bomb could not be ruled out (see paragraph 53).

210. In the absence of sufficient allowances being made for alternative possibilities, and the definite reporting of the existence of a car-bomb which, according to the assessments

that had been made, could be detonated at the press of a button, a series of working hypotheses were conveyed to Soldiers A, B, C and D as certainties, thereby making the use of lethal force almost unavoidable.

211. However, the failure to make provisions for a margin of error must also be considered in combination with the training of the soldiers to continue shooting once they opened fire until the suspect was dead. As noted by the Coroner in his summing-up to the jury at the inquest, all four soldiers shot to kill the suspects (see paragraphs 61, 63, 80 and 120). Soldier E testified that it had been discussed with the soldiers that there was an increased chance that they would have to shoot to kill since there would be less time where there was a 'button' device (see paragraph 26). Against this background, the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill.

212. Although detailed investigation at the inquest into the training by the soldiers was prevented by the public interest certificates which had been issued (see paragraph 104, at point 1 (iii)), 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 which had been drawn to their attention and which emphasised the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement (see paragraphs 136 and 137).

This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation.

213. In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to 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 to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that 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.

214. Accordingly, it finds that there has been a breach of Article 2 of the Convention.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

215. Article 50 of the Convention provides as follows:

> 'If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.'

216. The applicants requested the award of damages at the same level as would be awarded under English law to a person who was unlawfully killed by agents of the State. They also asked, in event of the Court finding that the killings were both unlawfully and deliberate or were the result of gross negligence, exemplary damages at the same level

as would be awarded under English law to a relative of a person killed in similar circumstances.

217. As regards costs and expenses, they asked for all costs arising directly or indirectly from the killings, including the costs of relatives and lawyers attending the Gibraltar inquest and all Strasbourg costs. The solicitor's costs and expenses in respect of the Gibraltar inquest are estimated at £ 56,200 and his Strasbourg costs at £ 28,800. Counsel claimed £ 16,700 in respect of Strasbourg costs and expenses.

218. The Government contended that, in the event of a finding of a violation, financial compensation in the form of pecuniary and non-pecuniary damages would be unnecessary and inappropriate.

As regards the costs incurred before the Strasbourg institutions, they submitted that the applicants should be awarded only the costs actually and necessarily incurred by them and which were reasonable as to quantum. However, as regards the claim for costs in respect of the Gibraltar inquest, they maintained that (1) as a point of principle, the costs of the domestic proceedings, including the costs of the inquest, should not be recoverable under Article 50; (2) since the applicants' legal representatives acted free of charge, there can be no basis for an award to the applicants; (3) in any event, the costs claimed were not calculated on the basis of the normal rates of the solicitor concerned.

A. Pecuniary and non pecuniary damage

219. The Court observes that it is not clear from the applicants' submissions whether their claim for financial compensation is under the head of pecuniary or non-pecuniary damages or both. In any event, having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court does not consider it appropriate to mae an award under this head. It therefore dismisses the applicants' claim for damages.

B. Costs and expenses

220. The Court recalls that, in accordance with its case-law, it is only costs which are actually and necessarily incurred and reasonable as to quantum that are recoverable under this head.

221. As regards the Gibraltar costs, the applicants stated in the proceedings before the Commission that their legal representatives had acted free of charge. In this connection, it has not been claimed that they are under any obligation to pay the solicitor the amounts claimed under this item. In these circumstances, the costs cannot be claimed under Article 50 since they have not been actually incurred.

222. As regards the costs and expenses incurred during the Strasbourg proceedings, the Court, making an equitable assessment, awards £ 22,000 and £16,700 in respect of the solicitor's and counsel's claims respectively, less 37,731 French francs received by way of legal aid from the Council of Europe.

FOR THESE REASONS, THE COURT

1. *Holds* by ten votes to nine that there has been a violation of Article 2 of the Convention;

2. *Holds* unanimously that the United Kingdom is to pay to the applicants, within three months, £ 38,700 (thirty-eight thousand seven hundred) for costs and expenses incurred in the Strasbourg proceedings, less 37,731 (thirty-seven thousand seven hundred and thirty-one) French francs to be converted into pounds sterling at the rate of exchange applicable on the date of delivery of the present judgment;
3. *Dismisses* unanimously the applicants' claim for damages;
4. *Dismisses* unanimously the applicants' claim for ousts and expenses incurred in the Gibraltar inquest;
5 *Dismisses* unanimously the remainder of the claims for just satisfaction.

NOOT

Britse wrevel over het Hof

1. 's Hofs oordeel dat het optreden van de SAS in Gibraltar als een schending van artikel 2 EVRM moet worden gezien, leidde tot commotie in het Verenigd Koninkrijk. De uitspraak werd in de boulevard-bladen afgeschilderd als een overwinning voor de terroristen. Maar ook de regering liet zich niet onbetuigd. Kenmerkend was de reactie van premier John Major, die de uitspraak afdeed als 'irresponsible and defying common sense'.[1] Toen enige weken na *McCann* het jaarlijkse Conservatieve partij-congres plaatsvond, werd de uitspraak dankbaar aangegrepen om de kritiek op 'Europa' – waarbij Straatsburg, Luxemburg en Brussel voor het gemak op één hoop werden gegooid – kracht bij te zetten. Bij die gelegenheid veroordeelde minister van Defensie Portillo de uitspraak van het Hof opnieuw in scherpe bewoordingen.

2. Binnenlands-politieke elementen daargelaten, kan men zich gezien de context van de zaak voorstellen dat de felle reacties althans ten dele authentiek zijn geweest. Ernstig is intussen wèl dat vice-premier Hesseltine aankondigde 'not to take the slightest notion of this ludicrous decision'. Desgevraagd weigerde hij zelfs nadrukkelijk uit te sluiten dat het Verenigd Koninkrijk het EVRM zou opzeggen. Zo'n respons gaat ver. Zij is wellicht niet direct in strijd met volkenrechtelijke verplichtingen, maar de wijze waarop de Britse regering publiekelijk naliet enig begrip of zelfs maar respect te tonen voor het Straatsburgse oordeel, is evenmin te goeder trouw en strekt niemand tot voorbeeld.[2] Nog afgezien van

1 Zie o m *The Independent* van 28-9-1995 De respons doet denken aan de nasleep van de *Brogan*-zaak (A-145-B), toen de Britse regering in reactie op een Straatsburgse veroordeling de noodtoestand uitriep Zie daarover EHRM, 26-5-1993, *Brannigan & McBride – VK* (A-248-B), m nt J P Loof in *NJCM-Bulletin* 18-7 (1993), pp 793-810

2 De president van het Hof, Ryssdal, gaf onlangs aan dat 'to date judgments of the European Court of Human Rights have always been complied with by the Contracting States concerned There have been delays, perhaps even some examples of what one might call minimal compliance, but no instances of non-compliance' (R Ryssdal, 'The Enforcement System set up under the European Convention on Human Rights', in M K Bulterman & M Kuijer, *Compliance with Judgments of International Courts* (1996), p 67)

de vraag of het Verenigd Koninkrijk wèrkelijk zover zou willen gaan het arrest te negeren, zou een dergelijke 'contempt of court' naar mijn mening ter discussie moeten worden gesteld in het Comité van Ministers, dat op grond van artikel 54 EVRM toezicht houdt op de naleving van 's Hofs arresten. Juist in een periode waarin de Raad van Europa sterk is uitgebreid en men kan verwachten dat de kracht van het Straatsburgse toezichtmechanisme op de proef zal worden gesteld, mag de autoriteit van de Straatsburgse organen niet ter discussie staan. Hun uitspraken lenen zich per definitie voor diepgaande meningsverschillen, maar die behoren door de verdragspartijen zakelijk te worden benaderd.

3. In eerste instantie leek ook Britse soep minder heet te worden gegeten dan dat zij wordt opgediend. De door het Hof vastgestelde schadevergoeding werd binnen de gestelde termijn betaald. Toen in januari 1996 de Britse erkenning van het individueel klachtrecht en aanvaarding van de rechtsmacht van het Hof verliepen, liet het Verenigd Koninkrijk niet na zijn verklaringen te vernieuwen.[3]

Toch is de kou hiermee niet uit de lucht. Nadat het Hof ook nog eens Britse verdragsschendingen had geconstateerd in de zaken *John Murray*, *Hussain*, *Singh* en *Goodwin* was de maat vol. Het *Foreign Office* verklaarde dat 'the British government has been concerned about some recent judgments of the Court and would like to see certain changes to promote fairness and to ensure that the Strasbourg institutions take all factors into account'. In een memorandum worden aanpassingen voorgesteld van de procedure voor het Hof; de andere verdragspartijen worden uitgenodigd onderling te overleggen bij de voordracht van rechters. Met een verwijzing naar de 'margin of appreciation' worden Commissie en Hof gemaand tot een meer terughoudende opstelling.[4] En zo zijn we in de paradoxale en verontrustende situatie terecht gekomen dat met spanning wordt gekeken naar de gevolgen van de recente toetreding van Midden- en Oosteuropese staten tot de Raad van Europa – terwijl 'oude democratieën' in wezen het politieke draagvlak van het Hof verzwakken. Wie zal tegenwicht bieden aan de Britse wrevel? Ligt in artikel 90 Grondwet – 'de regering bevordert de ontwikkeling van de internationale rechtsorde' – niet een opdracht aan de Nederlandse regering besloten?[5]

3 In beide gevallen gebeurde dat met de voor het Verenigd Koninkrijk gebruikelijke periode van vijf jaar Overigens is het Verenigd Koninkrijk reeds partij bij Protocol Nr 11 Indien dit protocol in werking treedt (hetgeen zal geschieden zodra het is geratificeerd door alle verdragspartijen) komt het facultatieve karakter van het individuele klachtrecht en de rechtsmacht van het (nieuwe) Hof te vervallen Had het Verenigd Koninkrijk zijn verklaringen thans niet verlengd, het zou te zijner tijd 'vanzelf' weer met individuele klachten en het Hof zijn geconfronteerd

4 Zie de *Financial Times* van 3-4-1996, p 9 Opmerkelijk is dat het Verenigd Koninkrijk tezelfdertijd een enigszins vergelijkbaar initiatief heeft genomen ten aanzien van het Hof van Justitie van de Europese Gemeenschappen

5 Ik dank prof mr T Heukels voor deze suggestie

De interpretatie van artikel 2 EVRM

4. Waar ging alle ophef nu over? Het arrest *McCann* is, afgezien van de gepolitiseerde context, vooral relevant omdat het Hof zich voor het eerst buigt over artikel 2 EVRM. De zaak *Cyprus – Turkije*, waarin de Commissie tot het oordeel kwam dat de executie van 12 Grieks-Cyprioten door Turkse soldaten een schending van artikel 2 opleverde, is nooit aan het Hof voorgelegd: Turkije had indertijd de rechtsmacht van het Hof nog niet aanvaard.[6] In *Díaz Ruano* (A-285-B) klaagde een Spaanse burger over het feit dat zijn zoon tijdens een politieverhoor was doodgeschoten. Bij haar onderzoek van de zaak betrok de Commissie (nota bene *ex officio*) artikel 2, maar een meerderheid oordeelde dat het recht op leven niet was geschonden. Tot een uitspraak van het Hof kwam het ook nu niet: de zaak werd geschikt terwijl zij bij het Hof aanhangig was. Andere klachten, merendeels afkomstig uit Noord-Ierland, strandden in de ontvankelijkheidsfase of liepen uit op een minnelijke schikking.[7]

5. De algemene benadering van artikel 2 verrast niet. Het artikel, zo leert ons § 147 van het onderhavige arrest, behoort tot de meest fundamentele bepalingen van het verdrag. Het recht op leven is een wezenlijk kenmerk van de democratische samenlevingen waaruit de Raad van Europa is samengesteld. Hieruit vloeit voort dat het gebruik van geweld met dodelijke afloop aan een stringente test moet onderworpen; ook de redactie van artikel 2 wijst in deze richting.[8] Hoewel de belofte van een stringente toets zeker wordt ingelost, zij tegelijkertijd opgemerkt dat de karakterisering als 'fundamenteel' en 'wezenlijk' enigszins aan inflatie onderhevig lijkt. Eerder heeft het Hof immers bepaald dat die kwalificaties ook van toepassing zijn op onder meer het verbod van foltering en wrede of on-

6 ECRM, 10-7-1976, *Cyprus – Turkije* (Appl Nos 6780/74 en 6950/75), zie *European Human Rights Reports* vol 4 (1983), pp 533-536 Het Comité van Ministers beperkte zich tot de globale constatering dat 'events which had occurred in Cyprus constitute violations of the Convention' (Res DH (79) 1, *Yearbook* vol 22 (1979), p 440)

7 Zie voor een overzicht G Guillaume, 'Article 2', in E L Pettiti e a (eds), *La convention européenne des droits de l'homme* (1995), pp 143-154, en voorts de literatuur genoemd in noot 15 *infra* Art 2 kwam overigens wèl zijdelings ter sprake in EHRM, 29-10-1992, *Open Door – Ierland* (A-246-A, m nt J van Nieuwenhove in *NJCM-Bulletin* 18-6 (1993), pp 700-715), §§ 65-66 De uitspraak van het Inter-Amerikaanse Hof voor de Rechten van de Mens in de zaak *Neira Algria – Peru* (19-1-1995) is het vergelijken waard Bij het neerslaan van een gevangenisopstand in 1986 vielen ruim 100 doden Het Hof achtte het geweldsgebruik disproportioneel en constateerde een schending van het recht op leven (zie Human Rights Law Journal, vol 16 (1995), pp 403-414, § 76)

8 Zie §§ 149-150 Soortgelijke opmerkingen zijn we overigens eerder tegengekomen zie EHRM, 30-10-1991, *Vilvarajah – VK* (A-215, m nt H J Simon in *NJCM-Bulletin* 17-5 (1992), pp 563-572), § 108, waarin het Hof aangeeft dat het onderzoek naar de vraag of een reeel risico bestaat dat een individu, in strijd met art 3, door uitzetting wordt blootgesteld aan mishandeling 'must necessarily be a rigorous one in view of the absolute character of this provision' Zie ook EHRM, 26-11-1991, *Sunday Times – VK (no 2)* (A-217), § 51, en EHRM, 4-12-1995, *Ribitsch* (A-336), elders in dit *Bulletin* geannoteerd door M Kuijer, § 32

menselijke behandeling en bestraffing, het recht op vrijheid, het recht op een eerlijk proces, het legaliteitsbeginsel, de vrijheid van gedachte, geweten en godsdienst, en de vrijheid van meningsuiting.[9] Het is al met al maar de vraag of wij nog wel kunnen spreken van een zinvol onderscheid tussen 'fundamentele' en 'andere' rechten en vrijheden.

6. Artikel 2 beperkt zich niet tot de situatie waarin een burger opzettelijk van het leven wordt beroofd. Ook het gebruik van geweld dat onbedoeld kan resulteren in het doden van een burger wordt door de bepaling bestreken (§ 148). Artikel 2 lid 2 ziet op beroving van het leven door overheidsdienaren.[10] Dat blijkt niet expliciet uit de tekst van de bepaling, maar het Hof spreekt meermalen nadrukkelijk van het verbod op 'arbitrary killing by the agents of the State' (§§ 150, 161, 200). Daarmee is uiteraard niet gezegd dat de burger geen bescherming kan verwachten tegen inbreuken op zijn recht op leven zijdens andere burgers. In de eerste zin van artikel 2 lid 1 ligt de opdracht besloten het recht op leven bij wet te beschermen. Met deze dwingend voorgeschreven wijze van 'indirecte horizontale werking' vormt artikel 2 een uitzondering binnen het EVRM.

7. Het Hof stelt zich echter terughoudend op als het zich buigt over de verplichting het recht op leven bij wet te beschermen. De klagers hadden gewezen op de discrepantie tussen de vereisten van artikel 2 en die van de toepasselijke nationale regeling, maar het Hof vindt dat verschil onvoldoende om op die grond alleen tot schending van artikel 2 te concluderen (§ 155).[11] Tussen neus en lip-

9 Zie over art 3 EHRM, 7-7-1989, *Soering – VK* (A-161, m nt B P Vermeulen in *NJCM-Bulletin* 14-7 (1989), pp 846-871), § 88, over art 5 *Brogan, supra* noot 1, § 58; over art 6 *Soering*, § 113, en daarvoor reeds in EHRM, 12-2-1985, *Colloza* (A-89), § 32, over art 7 EHRM, 22-11-1995, *S W – VK* (A-335-B), §§ 34-36, over art 9 EHRM, 25-5-1993, *Kokkinakis – Griekenland* (A-260-A, m nt B Labuschagne in *NJCM-Bulletin* 19-6 (1994), pp 699-709), § 31, over art 10 EHRM, 7-12-1976, *Handyside – VK* (A-24), § 49

10 Anders, maar m i onterecht J Velu & R Ergec, *La convention européenne des droits de l'homme* (1990), p 186, § 232 Verg art 5 lid 1, dat een vergelijkbare structuur kent in de eerste zin is een algemene (positieve) verplichting neergelegd de vrijheid en veiligheid van een persoon te beschermen, óók tegen handelingen van derden, terwijl de tweede zin zich exclusief richt op vrijheidsberoving door de overheid (verg het rapport van de ECRM in *Nielsen*, A-144, p 38, § 102)

11 Het argument ten overvloede dat het niet de taak van de Straatsburgse organen is om nationale wetgeving *in abstracto* te beoordelen (§ 153), overtuigt in dit verband overigens niet Weliswaar vormt het een terugkerend credo in de jurisprudentie, maar het Hof heeft zich bij verschillende gelegenheden gebogen over de kwaliteit van nationale wetgeving als zodanig Juist de constatering dat de nationale wetgeving onvoldoende waarborgen tegen misbruik bevat, heeft meer dan eens aanleiding gegeven tot het oordeel dat het verdrag was geschonden Zie bv EHRM, 24-4-1990, *Kruslin – Frankrijk* (A-176-A, m nt E Myjer in *NJCM-Bulletin* 15-6/7 (1990), pp 704-714), §§ 35-36, EHRM, 25-2-1993, *Funke – Frankrijk* (A-256-A, m nt E Myjer in *NJCM-Bulletin* 18-5 (1993), pp 584-592), § 57 In de zaken *Klass* (nota bene aangehaald in § 153 van het onderhavige arrest) en *Leander* (A-112) beoordeelde het Hof eveneens het systeem van waarborgen tegen misbruik *in abstracto* Verg Y Klerk, *Het ECRM-toezichtmechanisme* (diss , 1995), pp 214-231

pen door bevestigt de *Grand Chamber* dat de verdragspartijen niet verplicht zijn het EVRM in de nationale rechtsorde te incorporeren (§ 153).

8. Daarmee is niet gezegd dat het Hof in het geheel geen positieve verplichtingen onder artikel 2 aanvaardt. Het laat immers de mogelijkheid open dat de bepaling wordt geschonden door een wettelijke regeling die wezenlijk afwijkt van artikel 2 (§ 155). Daarnaast moet er een procedure bestaan teneinde de rechtmatigheid van geweldsgebruik met dodelijke afloop te toetsen (§ 161). De omvang van deze procedurele waarborg blijft onduidelijk. Wel kan men uit §§ 161-163 afleiden dat het onderzoek effectief, grondig, onpartijdig en zorgvuldig moet zijn. Onzeker is of 'some form of effective official investigation' de mogelijkheid omvat dat nabestaanden een actie wegens schadevergoeding kunnen instellen. Juist tegen die achtergrond valt het op dat het Hof stilzwijgend voorbij gaat aan het feit dat de klagers na de 'inquest' in Gibraltar tevergeefs hebben getracht een onrechtmatige-daadsactie in Noord-Ierland aanhangig te maken.[12]

9. Het zwaartepunt van het arrest ligt bij de beoordeling van het feitelijk optreden van de SAS. De Britse regering legde de nadruk op de uitgebreide 'inquest'. Het argument dat de jury bij uitstek tot oordelen bevoegd was (§ 165) doet denken aan de redenering die het Hof er in de *Handyside*-zaak toe bracht een 'margin of appreciation' aan de nationale autoriteiten toe te kennen: 'By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them'.[13] Het Britse argument vindt weerklank bij de 'dissenters', maar de meerderheid van het Hof is bereid tot een zelfstandige toetsing van het optreden van de SAS. Het Hof doet dat uitvoerig. De integraal uit het Commissie-rapport overgenomen reconstructie van de gebeurtenissen maakt op de lezer een nauwgezette indruk. En waar het op de toetsing aankomt, wekken passages als §§ 203-205 niet bepaald de indruk dat een ruime 'margin of appreciation' aan de nationale autoriteiten is gelaten. Het beeld dat verdragspartijen de nodige bewegingsvrijheid krijgen toegemeten als de nationale veiligheid en de bestrijding van terrorisme in het geding zijn[14], vindt geen bevestiging in het meerderheidsoordeel in *McCann*.

12 De merkwaardige redenering van § 160 duidt wellicht op meningsverschillen Het Hof meent dat het niet noodzakelijk is om na te gaan of art 2 een recht op 'access to court' impliceert *omdat* die vraag beter onder de artt 6 en 13 had kunnen worden opgeworpen (hetgeen de klagers hadden nagelaten) Van tweeen één, lijkt mij òf art 2 omvat een zelfstandig recht op toegang tot de rechter (en dan doet het niet ter zake of de klager zich ook op de artt. 6 en 13 beroept), òf men ziet de artt 6 en 13 als *lex specialis* (en dan hoeft het Hof geen beslissing over de reikwijdte van art 2 uit de weg te gaan)

13 *Handyside*, *supra* noot 9, § 48

14 Zie bv *Leander*, *supra* noot 11, § 59, *Brannigan & McBride*, *supra* noot 1, § 43 (zij het dat in dat arrest art 15 van toepassing was), en vooral EHRM, 28-10-1994, *Murray – VK* (A-300-A), § 47 In deze zin ook J G C Schokkenbroek, *Toetsing aan de vrijheidsrechten van het EVRM* (diss , 1996), pp 131 en 158, maar zie diens nuancering op p 162, noot 370

10. Een gevaar is dat men zich bij de beoordeling van het SAS-optreden laat leiden door 'wijsheid achteraf'. Gaat men van de wetenschap uit dat McCann c.s. ongewapend waren en hun auto geen bom bevatte, dan is de kogelregen van de SAS buiten iedere proportie. Het probleem is uiteraard dat de autoriteiten in het duister tastten: op basis van onvolledige informatie en hypothesen moesten in korte tijd ingrijpende beslissingen worden genomen. Dat veronderstelt overigens dat er nog wel afwegingen te maken vielen. Het Hof laat zich niet verleiden tot de uitspraak dat de Britten doelbewust op een eliminatie van de drie IRA-leden aanstuurden (§§ 174-184). In het tumult dat na de uitspraak in het VK ontstond, werd dit element van het arrest grotendeels over het hoofd gezien – terwijl hier toch in wezen de goede trouw van de Britten ter discussie stond.

11. Het Hof staat allereerst stil bij het optreden van de individuele SAS-ers. Een controversieel punt is in hoeverre het door hen toegepaste geweld proportioneel is gebleven. Als zij bleven doorschieten terwijl de drie al zwaargewond op de grond lagen – zoals de klagers en enkele getuigen stelden – was er eerder sprake van een executie dan van 'absolutely necessary' geweld. De waarheid kan in het midden blijven (§ 197); tijdens de 'inquest' hadden de soldaten al met zoveel woorden toegegeven dat zij schoten om te doden. Die handelswijze lijkt per definitie haaks te staan op het in de literatuur herhaaldelijk verdedigde standpunt dat het gebruik van vuurwapens om een arrestatie te bewerkstelligen slechts ten doel mag hebben de betrokkene te neutraliseren; de dood kan naar de mening van de meeste auteurs slechts een onbedoeld gevolg van de actie te zijn.[15] Het Hof aanvaardt echter dat de SAS-ers er – op basis van de aan hen doorgegeven informatie – van overtuigd waren dat de drie beschikten over apparatuur waarmee zij een autobom tot ontploffing konden brengen. Tegen die achtergrond meent het Hof dat het optreden van de soldaten te rechtvaardigen is onder artikel 2 lid 2.[16] Het Hof hanteert hier een deels subjectieve, deels objectieve toets: de toepassing van geweld was gebaseerd op 'a honest belief which is perceived, for good reasons, to be valid at the time'. Overigens is – juist in deze context – de verwijzing naar 'obedience to superior orders' overbodig en ongepast. Maar

15. Zie bv. S. Joseph, 'Denouement of the Deaths on the Rock: The Right to Life of Terrorists', in: *NQHR* vol. 14/1 (1996), p. 15; D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (1995), p. 52; M. Villiger, *Handbuch der Europäischen Menschenrechtskonvention (EMRK)* (1993), p. 173; Velu & Ergec, *supra* noot 10, p. 187, § 233; J. Frowein & W. Peukert, *Europäische Menschenrechtskonvention* (1985), pp. 25-26. Van Dijk & Van Hoof menen dat het 'gebruik van geweld de dood ten gevolg hebbend niet gerechtvaardigd [is ...] ten behoeve van een arrestatie, wanneer van betrokkene in redelijkheid geen ernstig gevaar te duchten is; (*De Europese conventie in theorie en praktijk* (1990), p. 248).

16. Zie § 200; merk op dat het Hof in het midden laat welk onderdeel van art. 2 lid 2 het op het oog heeft. De 'dissenters' in de Commissie gingen hier verder: zij meenden dat de SAS, die de drie IRA-leden gedurende langere tijd had geobserveerd, zich ervan had kunnen vergewissen dat althans McCann en Savage geen detonator bij zich hadden *kunnen* dragen: zo'n apparaat is tamelijk omvangrijk, terwijl bv. McCann slechts in spijkerbroek en shirt gekleed ging. Daarmee zou de noodzaak van een 'shoot-to-kill' actie zijn komen te vervallen. Alleen Farrell, die een tas bij zich had, zou in het bezit van een detonator kunnen zijn.

dat neemt niet weg dat de Britten opnieuw op een belangrijk punt in het gelijk worden gesteld.

12. Het Hof laat het hier echter niet bij. Het feit dat de individuele soldaten geen verwijt valt te maken, impliceert niet dat staatsaansprakelijkheid is uitgesloten.[17] Bij de beoordeling van de controle over de SAS-operatie, en de organisatie ervan, constateert het Hof 'a lack of appropriate care'. En zo komt het uiteindelijk dan toch tot het gewraakte oordeel dat artikel 2 EVRM is geschonden. In essentie komt de kritiek van het Hof neer op drie punten. De verantwoordelijke autoriteiten hebben de situatie dusdanig laten escaleren, dat de fatale schietpartij mogelijk – zo niet waarschijnlijk – werd. McCann c.s. hadden bij de grens kunnen worden gearresteerd, zodat de schietpartij was uitgebleven. Het argument dat daarmee de operatie was 'stukgemaakt' en de drie wellicht wegens gebrek aan bewijs vrijuit hadden kunnen gaan, wordt door het Hof verworpen. Hier worden de Britten met de eigen argumentatie om de orde geslagen. De Britse regering had het optreden van de SAS immers vooral verdedigd met een beroep op de verplichting het leven van de inwoners van Gibraltar te beschermen – des te pregnanter was het dat de autoriteiten doelbewust besloten de drie IRA-leden tot Gibraltar toe te laten (§ 205). Daarnaast verwijt het Hof de Britten dat een aantal veronderstellingen (de auto bevat een bom; deze kan van afstand tot ontploffing worden gebracht, etc.) voor waar werd aangenomen, en als zodanig aan de soldaten doorgegeven. Ten onrechte werd geen ruimte gelaten voor alternatieve assumpties (§§ 206-210). En tot slot – toch – het optreden van de SAS-ers. Nu zij waren getraind om te schieten tot de dood er op volgt, dienden de autoriteiten uiterst zorgvuldig om te gaan met het doorgeven van informatie. In voorzichtige bewoordingen stelt het Hof vervolgens vraagtekens bij de opleiding en wijze van optreden van de SAS-ers. Door te spreken van een 'reflex action' beoogt het Hof waarschijnlijk de verwijtbaarheid van hun optreden te omzeilen en in plaats daarvan de nadruk te leggen op de opleiding van de soldaten.

13. Resteert de vraag naar de schadevergoeding ex artikel 50. De vergoeding van de kosten van rechtsbijstand is niet bijzonder. Opmerkelijk is wel § 219, waarin het Hof zonder omhaal – en unaniem – zegt dat het niet gepast zou zijn de nabestaanden een schadevergoeding toe te kennen, nu McCann c.s. het voornemen hadden een bomaanslag te plegen. Dit standpunt lijkt minder door juridische rechtlijnigheid te zijn ingegeven dan door een open oog voor de politieke dimensies van de zaak. Indien men het standpunt huldigt dat het niet 'absoluut noodzakelijk' was om de drie IRA-leden te doden en dat het optreden van de SAS niet met de vereiste zorgvuldigheid gepaard ging, en indien men daaraan de zwaarwegende conclusie verbindt dat het 'fundamentele' artikel 2 EVRM is geschonden, dan lijkt schadevergoeding voor de nabestaanden op zijn plaats – te meer daar de toegang tot de rechter in Noord-Ierland was afgesneden. Dat later in Spanje een autobom werd ontdekt doet aan deze constatering niet af; dat is

17. Verg. *Ribitsch*, *supra* noot 8, § 34.

immers wijsheid achteraf die ook niet in de weg stond aan de conclusie dat artikel 2 EVRM is geschonden. Met de beslissing geen schadevergoeding toe te kennen – en de uitdrukkelijke motivering ervan – lijkt het misbruik-van-recht verbod van artikel 17 EVRM op een verkapte manier te zijn binnengehaald.[18]

14. Tot slot de stemverhoudingen. Het Hof komt met de kleinst mogelijke meerderheid tot het hier beschreven oordeel. De negen 'dissenters' leggen – niet voor het eerst[19] – de nadruk op de conclusies van de nationale autoriteiten. Interessant is hun toevoeging dat ook de Commissie had geoordeeld dat er geen schending had plaatsgevonden: 'it would be mistaken for the Court, at yet one further remove [sic, RL] from the evidence as given by the witnesses, to fail to give due weight to the report of the Commission, the body which is primarily charged under the Convention with the finding of facts and which has, of course, great experience in the discharge of that task'. De Commissie zal verheugd zijn met dit complimentje uit onverwachte hoek. In het verleden hebben de betrokken rechters niet geaarzeld andere conclusies dan de Commissie te trekken. De toekomst zal uitwijzen of zij thans van gedachten zijn veranderd, of dat we hier toch met een gelegenheidsargument te maken hebben (een argument overigens dat de vaststelling van de feiten en het beantwoorden van de vraag of het EVRM geschonden is, gemakshalve bijeenraapt). Daarnaast brengt de minderheid meer begrip op voor de moeilijke situatie waarin de autoriteiten zich geplaatst zagen, en aanvaardt zij dat zo zorgvuldig is gehandeld als de omstandigheden toelieten. In tamelijk scherpe bewoordingen ontleedt en bekritiseert zij de cruciale redenering van §§ 202-214.

15. Anders dan men uit de Britse reacties zou kunnen opmaken, levert de benadering van het Hof voor de effectieve bestrijding van terrorisme al met al geen onaanvaardbare obstakels op. Het gebruik van geweld de dood tot gevolg hebbend kan gerechtvaardigd zijn als de redelijke en oprechte overtuiging bestaat dat dit absoluut noodzakelijk is om levens te redden; ook indien de informatie waarop die overtuiging was gebaseerd achteraf gezien onjuist blijkt. Het Hof kent weliswaar geen zichtbare 'margin of appreciation' toe als het optreden van de nationale autoriteiten aan artikel 2 wordt getoetst, maar het is – althans in *McCann* – bereid de goede trouw van de staat als uitgangspunt te nemen. Het verschil

18. De lezing van Joseph (*supra* noot 15, p. 21: 'This judgment somehow equates the award of damages for the loss of life with the perceived quality or worth of the life lot. It indicates that the life of a terrorist is worth nothing') lijkt mij echter wat kort door de bocht.

19. De 'dissenters' zijn Ryssdal, Bernhardt, Thór Vilhjálmsson, Golcüklü, Palm, Pekkanen, Morenilla, Freeland, Baka en Jambrek. Zie over de stroming in het Hof die in het algemeen geneigd is een ruimere 'margin of appreciation' over te laten aan de nationale autoriteiten, mijn opmerking in *NJCM-Bulletin* 20-5 (1995), p. 573, n. 40. Terzijde zij opgemerkt dat van de 'nieuwe' (d.w.z. Midden- en Oosteuropese) rechters vier leden voor een schending stemden (de Pool Makarczyk, de Slowaak Repik, de Litouwer Kūris en de Est Lõhmus), en twee tegen (de Hongaar Baka en de Sloveen Jambrek). In de Britse pers werd wel gesuggereerd dat de Britse 'nederlaag' vooral te wijten was aan het stemgedrag van de Oosteuropese (lees: niet in de democratische beginselen geverseerde) rechters.

tussen meerderheid en minderheid spitst zich toe op de sterk met de feiten verweven vraag of de operatie zorgvuldig werd gepland en geleid. Beziet men dit geheel, dan is het moeilijk zich in te leven in de Britse ophef over dit arrest.

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