

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 18984/91

Margaret McCANN, Daniel FARRELL and John SAVAGE

against

the United Kingdom

REPORT OF THE COMMISSION

(adopted on 4 March 1994)

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I. INTRODUCTION	
1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.	
A. The application	
2. The applicants are Margaret McCann, Daniel Farrell and John Savage who are Irish and United Kingdom citizens born in 1945, 1914 and 1952 respectively and resident in Belfast. They are represented by Mr. Douwe Korff, Counsel, and Mr. P.J. McGrory & Co., Solicitors practising in Belfast.	
3. The application is directed against the United Kingdom. The Government are represented by their Agent, Mrs. Audrey Glover, of the Foreign and Commonwealth Office.	
4. The case concerns the applicants' complaint that the killings of Daniel McCann, Mairead Farrell and Sean Savage (aged respectively 30, 31 and 24) by members of the SAS (Special Air Service) in Gibraltar on 6 March 1988 were in violation of Article 2 of the Convention.	
B. The proceedings	
5. The application was introduced on 14 August 1991 and registered on 24 October 1991.	
6. On 20 February 1992, the Commission decided to communicate the application to the respondent Government for their written observations on the admissibility and merits of the application.	

7. The Government submitted their written observations on 11 August 1992. The applicants submitted their written observations in reply on 13 January 1993.
8. The Commission granted the applicants legal aid on 23 October 1992.
9. On 2 April 1993, the Commission decided to invite the parties to an oral hearing on the admissibility and merits.
10. At the hearing which was held on 3 September 1993, the Government were represented by Mrs. Audrey Glover, Agent, Mr. Stephen Richards, Counsel, Mr. James Eadie, Counsel, Mr. Nicholas Lavender, Counsel, and Mr. David Pickup, Mr. Michael Venables and Mr. David Seymour as advisers. The applicants were represented by Mr. Douwe Korff, Counsel, and Mr. P.J.B. McGrory, Solicitor.
11. On 3 September 1993, the Commission declared the application admissible. The parties were then invited to submit any additional observations on the merits of the application.
12. On 12 November 1993, the Government submitted further observations on the merits. On 16 and 17 November 1993, the applicants submitted additional observations.
13. After declaring the case admissible, the Commission, acting in accordance with Article 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. Consultations with the parties took place between 10 September 1993 and 12 November 1993. In the light of the parties' reactions, the Commission now finds that there is no basis on which a friendly settlement can be effected.

C. The present Report

14. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
Mrs. G.H. THUNE
Sir Basil HALL
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
M.P. PELLONPÄÄ
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO

15. The text of the Report was adopted by the Commission on 4 March 1994 and is now transmitted to the Committee of Ministers in accordance with Article 31 para. 2 of the Convention.
16. The purpose of the Report, pursuant to Article 31 para. 1 of the Convention, is

- 1) to establish the facts, and
- 2) to state an opinion as to whether the facts found disclose

a breach by the State concerned of its obligations under the Convention.

17. A schedule setting out the history of the proceedings before the Commission is attached hereto as APPENDIX I and the Commission's decision on the admissibility of the application as APPENDIX II.

18. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. Introduction

19. The events in this case have been surrounded with considerable controversy. They are however to a large extent not in dispute between the parties to this application. With regard to the circumstances surrounding the deaths of the three terrorist suspects, the Commission has established the facts from the evidence at its disposal, including the observations, documents and exhibits submitted by the parties and the transcript of the Inquest into the deaths held on Gibraltar.

20. The evidence given in the Inquest is summarised in the section below. Insofar as there is need to resolve conflicts of evidence in the determination of the issues under the Convention, the Commission's findings appear in its Opinion (see paras. 172-251).

B. Particular circumstances of the case

Background to the events on Gibraltar

21. Prior to 4 March 1988, and probably from at least the beginning of the year, the United Kingdom, Spanish and Gibraltar authorities were aware that the Provisional IRA (PIRA) were planning a terrorist attack on Gibraltar. From the intelligence received and from observations made by the Gibraltar police, it became apparent that the target was to be the assembly area south of Ince's Hall where the Royal Anglian Regiment usually assembled to carry out the changing of the guard every Tuesday at 11.00.

22. Prior to 4 March 1988, an advisory group was formed to advise and assist Mr. Joseph Canepa, the Gibraltar Commissioner of Police ("the Commissioner"). It consisted of Soldier F (senior military adviser and officer in the Special Air Service or "SAS"), Soldier E (SAS attack commander), Soldier G (bomb disposal or EOD adviser), Mr. Colombo (Acting Deputy Commissioner of Police), Detective Chief Inspector Ullger, attached to Special Branch and Security Service officers. The Commissioner issued instructions for an operational order to be prepared to deal with the situation.

23. Soldier F and his group, including Soldier E and a number of other SAS soldiers, had arrived in Gibraltar prior to 4 March 1988. Preliminary briefings had been conducted by the Ministry of Defence in London. According to the Rules of Engagement issued to Soldier F by the Ministry of Defence, the purpose of the military forces being in Gibraltar was to assist the Gibraltar police in arresting the PIRA ASU (active service unit) should the police request such military intervention. The Rules also instructed F to operate as directed by the Commissioner.

24. The Rules also specified the circumstances in which the use of force by the soldiers would be permissible:

"Use of force

4. You and your men will not use force unless requested to do so

by the senior police officer(s) designated by the Gibraltar Police Commissioner; or unless it is necessary to do so in order to protect life. You and your men are not then to use more force than is necessary in order to protect life...

Opening fire

5. You and your men may only open fire against a person if you or they have reasonable grounds for believing that he/she is currently committing, or is about to commit, an action which is likely to endanger your or their lives, or the life of any other person, and if there is no other way to prevent this.

Firing without warning

6. You and your men may fire without warning if the giving of a warning or any delay in firing could lead to death or injury to you or them or any other person, or if the giving of a warning is clearly impracticable.

Warning before firing

7. If the circumstances in paragraph 6 do not apply, a warning is necessary before firing. The warning is to be as clear as possible and is to include a direction to surrender and a clear warning that fire will be opened if the direction is not obeyed."

25. The Operational Order of the Commissioner, which was drawn up on 5 March 1988, stated that it was suspected that a terrorist attack was planned in Gibraltar and that the target was highly probably the band and guard of the First Battalion of the Royal Anglian Regiment during a ceremonial changing of the guard. It stated that there were "indications that the method to be used is by means of explosives, probably using a car bomb". The intention of the operation was then stated to be

- "a. To protect life
- b. To foil the attempt
- c. To arrest the offenders
- d. The securing and safe custody of the prisoners"

26. The methods to be employed were listed as police surveillance, having sufficient personnel suitably equipped to deal with any contingency, to arrest the offenders using the minimum force and by disarming the offenders and the gathering of subsequent evidence for a court trial. Annexed to the order were, inter alia, lists of attribution of police personnel, firearms rules of engagement (see Relevant Domestic Law and Practice) and a guide to firearms use by police.

27. A plan for evacuation of the expected area of attack was drawn up on 5 March 1988 by Chief Inspector Lopez. It included a plan to evacuate and cordon off the area to a radius of 200 metres, identified the approach roads to be closed, detailed the necessary traffic diversions and listed the personnel to implement the plan. The plan was not however distributed.

Conduct of the operation in Gibraltar

28. The operation in Gibraltar to counter the expected terrorist attack was run from a joint operations room in or about the centre of Gibraltar. In the operations room there were three distinct groups - the army or military group (comprising the SAS and bomb disposal personnel), a police group and the surveillance or security service group. Each had its own means of communication with personnel on the ground operated from a separate control station. The two principal means of communication in use were however the two radio-communication

networks known as the surveillance net and the tactical or military net. There was a bomb disposal net which was not busy and while the police had a net, it was not considered secure and a telephone appears to have been used for necessary communications with the Central Police Station.

First sighting of the suspects in Spain on 4 March 1988

29. On 4 March 1988, there was a reported sighting of the ASU in Malaga in Spain.

Operational Briefing on 5 March 1988

30. At midnight on 5 March 1988, the Commissioner held a briefing which was attended by officers from the Security Service (including from the surveillance team Witnesses H, I, J, K, L, M and N), military personnel (including Soldiers A, B, C, D, E, F and G) and members of the Gibraltar police (Officers P, Q and R and Detective Chief Inspector Ullger, Head of Special Branch, and Detective Constable Viagas).

31. The Commissioner conducted the police aspect of the briefing, the members of the Security Service briefed on the intelligence aspects of the operation, the head of the surveillance team covered the surveillance operation and Soldier E explained the role of the military if they were called on for assistance. It then appears that the briefing split in smaller groups, E continuing to brief the soldiers under his command but in the same location.

32. The Commissioner explained the rules of engagement and firearms procedures. He also expressed the importance to the police of gathering evidence for a subsequent trial of the terrorists - a particular concern mentioned was the fact that the members of the Security Service had stated that they did not normally give evidence in court and most would leave Gibraltar at the end of the operation.

33. The briefing by the representative of the Security Services included the following assessments:

a. PIRA intended to attack the changing of the guard ceremony on the morning of Tuesday 8 March 1988;

b. An ASU of 3 would be sent to carry out the attack, consisting of Daniel McCann, Sean Savage and a third member, later positively identified, as Mairead Farrell. McCann had been previously convicted and sentenced to 2 years' imprisonment for possession of explosives. Farrell had previously been convicted and sentenced to 14 years' imprisonment for causing explosions. She was known during her time in prison to have been the acknowledged leader of the IRA wing of prisoners. Savage was described as an expert bomb-maker. Photographs were shown of the three suspects.

c. The three individuals were believed to be dangerous terrorists who would almost certainly be armed and who, if confronted by security forces, would be likely to use their weapons.

d. The attack would be by way of a large car bomb.

e. Use of a blocking car

34. Consideration was given in the intelligence assessment as to whether a blocking car would be used, ie. that the terrorists would drive a car into Gibraltar before 8 March to ensure that when the car carrying the bomb arrived a parking space would be available. According to O (the senior Security Services Officer who did not attend the briefing but had briefed the representative who presented the assessment on his behalf) this possibility was discounted as less likely since it would mean the terrorists having to make 2 trips; it

would not be necessary since parking spaces would be available on the night before or early on Tuesday morning itself; there was the possibility that the blocking car would itself get blocked by careless parking and also it would need two drivers which might render them more conspicuous. Use of a blocking car, on this view, seemed over-complicated and risky and so the assessment was that it was more likely that the ASU would drive in at the last moment Monday night or on Tuesday.

35. Soldier F also recalled that the intelligence assessment was that terrorists would not employ a blocking car, but would bring the bomb in early. He however thought it would probably be at some time over the weekend or at the latest on Monday 7 March. Soldier E also thought that a blocking car was discounted and that the car which came in would contain the bomb.

36. O's assumption that there would be no problem in respect of the terrorists finding a parking place was contradicted by Chief Inspector Lopez. He had not been at the briefing but at the Inquest stated that while the operation was geared for Monday or Tuesday, he himself would not have brought in a bomb on Tuesday since it would be busy and difficult to find a parking place.

f. Mode of detonation of bomb

37. Various methods of detonation of the bomb were mentioned : by timing device, by RCIED (radio-controlled improvised explosive device) and by command wire. This last option which required placing a bomb connected to a detonator by a wire was discounted as impractical in the circumstances. The use of a timer was, according to O, considered highly unlikely in light of the recent IRA explosion of a bomb by timer device at Enniskillen which had resulted in a high number of civilian casualties. Use of a remote control device was considered to be far more likely since it was safer from the point of view of the terrorist who could get away from the bomb before it exploded and was more controllable than a timer which once activated was virtually impossible to stop.

38. The recollection of the others present at the briefing differs on this point.

39. The police witnesses remembered both a timer and remote control device being discussed. The Commissioner's recollection of the briefing was that detonation would be either by timer or remote control and was prepared for either. Deputy Commissioner Colombo, briefed by the Commissioner, was also expecting either type of device. Officer R and Chief Inspector Ullger recalled specific mention of the remote device as being more likely since it would be a more reliable and effective method. Officer P was the only officer who did not recall a timer being mentioned. Chief Inspector Ullger also recalled being shown photographs of positions on the Rock which could be suitable for a line of sight detonation.

40. The surveillance officers at the briefing thought an emphasis was put on the use of a remote control device, with the timer being secondary. M stated that the remote control device would probably be used but that it was not definite.

41. The military witnesses in contrast appear to have been convinced that it would certainly be a remote control device. Soldier F made no mention of a timer but stated that they were briefed that it was to be a "button job" ie. radio controlled so that the bomb could be detonated at the press of a button. He referred in cross-examination at the Inquest to earlier briefings with intelligence sources concerning possible methods of detonation, stating that he believed that there had been a Provisional Army Council directive not to repeat the carnage of Enniskillen and to keep the loss of life to innocent civilians to a

minimum. It was thought that the terrorists knew that if it rained the parade would be cancelled and in that event, if a timer was used, they would be left with a bomb that would go off indiscriminately.

42. Soldier E also stated that at the briefing they were informed that the bomb would be initiated by a "button job". In answer to a question by a juror, he stated that there had been discussion with the soldiers that there was more chance that they would have to shoot to kill in view of the very short time factor which a "button job" would impose. Soldier G said that at the briefing they were told that it was going to be a radio-controlled car bomb. He denied that there had been discussion as to whether a radio-controlled device or a timer would be used.

43. Soldier A recalled that they were told at the briefing that the device would be radio-controlled though from the context of the question is not apparent whether the soldiers were told this at the general briefing or by E. A stated that he remembered only the gist of the briefing, his recollections of various briefings being mixed up. Soldier B recalled being told that there was a threat from a radio-controlled bomb. Soldier C said that a timer was never mentioned and that Soldier E stressed to them that it would be a "button job". Soldier D stated initially that they were told that it would probably be a remote controlled device but on further question by the Coroner stated it would be a remote controlled device. He referred to having received daily updates or discussions with E.

g. Use of device by the ASU to detonate on arrest

44. If the means of detonation was by radio control, it was possible that the suspects might, if confronted, seek to detonate the device. This was the assessment given by O.

45. Soldier F also recalled that the assessment was that any one of the three could be carrying a device. In answer to a question pointing out the inconsistency of this proposition with the assessment that the IRA wished to minimise civilian casualties, F stated that the terrorists would detonate in order nonetheless to achieve some degree of propaganda success. He stated that the briefing by the intelligence people was that it was likely if the terrorists were cornered they would try to explode the bomb.

46. Soldier E confirmed that they had been told that the three suspects were ruthless and if confronted would resort to whatever weapons or "button jobs" which they carried. He had particularly emphasised to his soldiers that there was a strong likelihood that at least one of them would be carrying a button job.

47. Soldier B recalled being told by E that one or possibly all three would be carrying a device. They were warned that the suspects were highly dangerous, dedicated and fanatical. He did not remember being told that they would attempt to detonate if arrested but was aware of that possibility in his own mind. Soldier C said that he was told by E that the three suspects were very experienced terrorists who would not hesitate to use weapons or to detonate the bomb. His understanding was that all three would have carried a detonator. Soldier D also confirmed being told that all three might have carried a gun and detonator and that they were dangerous and fanatical.

48. It does not appear that there was any discussion at the briefing as to the likely size, mode of activation or range of a remote control device that might be expected. The soldiers appear to have received information at their own briefings. Soldier F did not know the precise size a radio detonator might be, but had been told that the device would be small enough to conceal on the person. Soldier D was told that the device could come in a small size and that it could be detonated by the pressing of just one button.

49. As regarded the range of the device, Soldier F said that the military were told that the equipment which PIRA had was capable of detonating a radio-controlled bomb over a distance of a mile and a half.

Events on 6 March 1988

50. Members of the surveillance teams were on duty in the streets of Gibraltar as were Soldiers A, B, C and D and members of the police force involved in the operation. Soldiers A, B, C and D were in civilian clothing and were each armed with a 9mm Browning which was carried in the rear waistband of their trousers. Each also carried a radio concealed on their person. They were working in pairs. In each pair, one was in radio communication on the tactical net and the other on the surveillance net. Police officers P, Q and R, who were on duty to support the soldiers in any arrest, were also in plain clothes and armed.

51. The operations room opened at 8.00. The Commissioner was on duty there from 10.30 to 12.30. When he left, Deputy Commissioner Colombo took his place.

Surveillance at the border

52. On 6 March 1988, at 8.00, Detective Constable Huart went to the frontier to keep observation for the three suspects from the computer room at the Spanish immigration post. He was aware of the real names of the three suspects and had been shown photographs. The Spanish officers had photographs. The computer room was at some distance from the frontier crossing point itself. The Spanish officers at the immigration post showed him passports by means of a visual aid unit. It appears that they only showed him the passports of those cars containing two men and one woman. Several pictures were flashed up for him during the course of the day but he did not recognise them. At the Inquest, under cross-examination, he at first did not recall that he had been given any of the aliases that the three suspects might be employing. Then, however, he thought that he remembered the name of Coyne being mentioned in relation to Savage and that at the time he must have known the aliases of all three, as must the Spanish officers. Chief Inspector Ullger, who had briefed Huart however, had no recollection of the name of Coyne being mentioned before 6 March and he only recalled the name of Reilly in respect of McCann. However, if Huart recalled it, he did not doubt that it was so.

53. On the Gibraltar side of the border, the customs officers and police normally on duty were not informed or involved in the surveillance on the basis that this would involve information being provided to an excessive number of people. No steps were taken to slow down the line of cars as they entered or to scrutinise all passports since it was felt that this might put the suspects on guard. There was however a separate surveillance team at the border and, in the area of the airfield nearby, an arrest group. Witness M who led a surveillance team at the frontier expressed disappointment at the apparent lack of co-operation between the various groups involved in Gibraltar but he understood that matters were arranged that way as a matter of security. The Coroner commented on this aspect of the evidence in his summing-up to the jury.

54. At the Inquest, Chief Inspector Ullger stated, when pressed about the failure to take more scrupulous measures on the Gibraltar side, "in this particular case, we are talking about dangerous terrorists. We were 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 and for the terrorists to have been dealt with in the way they were dealt with as far as the surveillance is concerned."

55. While Soldiers E and F made reference to the preferred military option as being to intercept and arrest the suspects in the frontier area, it appears not to have been pursued with any conviction, on the assumption that identification would not be possible in light of the brief time available for identification to be made (10-15 seconds per car) and the alleged lack of prior warning from the Spanish side.

Arrest options: Advisory Group policy

56. Soldier F stated that the military option had been refined down to the preferred option of arresting the suspects when they were on foot in the assembly area. He referred also to four key indicators formulated by the Advisory Group with a view to guiding the Commissioner in determining how the arrest operation was to run:

- i. if a car was driven into Gibraltar and parked in the assembly area by an identified member of the ASU;
- ii. (slight variation on i.) if a car was driven in by ASU member without prior warning;
- iii. the presence in Gibraltar of the other members of the ASU;
- iv. if there was clear indication that terrorists having parked their car bomb intended to leave Gibraltar ie. they were heading for the border.

57. The plan was for the arrest was to be carried out once all the members of the ASU were present and identified and they had parked a car which they intended to leave. Any earlier action was considered premature as likely to raise suspicion in any unapprehended members of the ASU with possible risk resulting and as leaving no evidence for the police to use in court.

Sighting of Savage

58. Detective Constable Viagas was on surveillance duty in a bank which had a view over the area in which the car driven in by the terrorists was expected to be parked. At about 12.30, while Viagas was letting into the premises another person from security service, he heard a report over the surveillance net that a car had parked in a parking space in the assembly area under observation. A member of the Security Service commented that the driver had taken time to get out and fiddled with something between the seats. Viagas saw the man lock the car door and walk away towards the Southport Gate. One of the Security Service officers present consulted a colleague as to possible identification but neither was sure. A field officer was requested to confirm the identity. Viagas could not himself identify the man from his position. Within half an hour, the field officer reported that the driver was not one of the suspects. This information does not appear to have been received or recalled by the personnel in the operations room.

59. Witness N of the Security Service team on surveillance in the car park in the assembly area recalled that at 12.45 a white Renault car drove up and parked, the driver getting out after 2-3 minutes and walking away.

60. A young man resembling Savage was spotted next at about 14.00 in the area. Witness H, who was sent to verify his identification, saw the suspect at about that time and recognised him as Savage without difficulty. Witness N also saw the suspect at the rear of John Mackintosh Hall and at 14.10 reported over the radio to the operations room that he identified him as Savage and also as the man who had earlier parked the car in the assembly area.

61. Officer Q who was on duty on the street recalls hearing over the surveillance net at about 14.30 that Savage had been identified.

62. The Commissioner however did not recollect being notified about the identification of Savage until he arrived in the operations room at 15.00. Colombo did not recall hearing anything about Savage either until it was reported that he had met up with two other suspects at about 14.50. Soldiers E and F recalled however that a possible sighting of Savage was reported at about 14.30. Soldier G also refers to the later sighting at 14.50 as the first identification of Savage.

63. There appears to have been a certain lag in information between information on the ground either being received in the operations room or in being passed on. Soldiers E and F may have been more aware than the Commissioner of events since they were monitoring closely the information coming in over the nets which apparently was not audible to the Commissioner where he sat at a table away from the control stations.

64. Savage was followed for approximately an hour by Witness H who recalled that the suspect was using anti-surveillance techniques such as employing devious routes through the side streets. Witness N was also following Savage, for an estimated 45 minutes, and considered that Savage was alert and taking precautions, for example, stopping round the corner at the end of alleyways to see who followed.

Sighting of McCann and Farrell

65. Witness M who was leading the surveillance at the border stated that two suspects passed the frontier at about 14.30 though apparently they were initially not clearly identified. They were on foot and reportedly taking counter-surveillance measures (Farrell looking back frequently). Their progress into Gibraltar was followed.

66. At 14.30, Soldiers E and F recall a message being received that there was a possible sighting of McCann and Farrell entering on foot. Colombo rang the Commissioner from the operations room stating that two persons believed to be McCann and Farrell had been seen crossing the border on foot.

Sighting of three suspects in assembly area

67. At about 14.50, it was reported to the operations room that the suspected McCann and Farrell had met with a second man identified as the suspect Savage and that the three were looking at a white Renault car in the car park in the assembly area. It is at this point Colombo and Soldier F recall being told that Savage was the man who had parked the car. Soldier E remembers the time as being 15.00.

68. Witness H stated that the three suspects spent some considerable time staring across to where a car had been parked, in his assessment as if they were studying it to make sure it was absolutely right for the effect of the bomb.

69. Detective Constable Viagas also witnessed the three suspects meeting in the area of the car park, stating that all three turned staring towards where the car was parked. He gave the time as about 14.55. He stated that the Security Services made identification of all three at this moment.

70. At this moment, with the three suspects static in the area of a car driven in by one of them, the possibility of effecting arrest was considered. There are different recollections. Colombo stated that he was asked whether he would hand over control to the military for the arrest but that he asked whether the suspects had been positively identified; he was told that there was 80% identification. Almost immediately the three suspects moved away from the car through

Southport gates. Colombo recalled that the movement of the three suspects towards the south gave rise to some discussion as to whether this indicated that the three suspects were on reconnaissance and might return for the car. It was for this reason that the decision was taken not to arrest at this point. He considers that he did not pass control at all to the military. Soldier F thought that control did pass but that, when the three moved away, control was returned. Soldier E also thought control passed though for not more than a few seconds. Both Soldiers A and B were informed of this apparent passing of control: at this time they were in the Main Street area not far away from the location of the suspects.

71. At 15.00, Colombo rang the Commissioner to inform him that it was more and more likely to be McCann and Farrell. When the Commissioner arrived shortly afterwards, Colombo informed him that McCann and Farrell had met up with a third person thought to be Savage and that an arrest had almost been made.

72. The Commissioner asked for positive identification of the three suspects. Identification was confirmed by 15.25 when it was reported to the operations room that the three suspects had returned to the assembly area and gone past looking at the car again. The three suspects continued north and away from the car. Soldiers E and F recalled that control was passed a second time to the military but immediately taken back as the Commissioner requested further verification of the identities of the suspects. The soldiers on the ground were also aware of this momentary change of control but the Commissioner did not refer to it in his account of events at the Inquest. The confirmation of identity which the Commissioner had requested was received almost immediately.

Examination of the suspect car in the assembly area

73. After the three suspects' identities had been confirmed and they had moved away from the assembly area, Soldier G went down to examine the suspect car. He conducted an examination from the exterior without touching the car. He described it as a newish-looking white Renault. He detected nothing untoward inside the car or anything visibly out of place or concealed under the seats. He noted that the aerial of the car, which was rusty, was out of place with the age of the car. He was in the area for less than 2 minutes. He returned to the operations room and reported to the Commissioner that he regarded the car as a "suspect car bomb". At the Inquest, he explained that this was a term of art for a car parked in suspicious circumstances where there is every reason to believe that it is a car bomb and that without tearing it apart it could not be said that it was not a car bomb - "it is suspicious".

74. The Commissioner recalled that G had reported that it was a suspect bomb since there was an old aerial situated centrally of a relatively new car. He stated that as a result they treated it as a "possible car bomb".

75. Soldier F referred to the aerial as rendering the car suspicious and stated that this information was passed on to all the parties on the ground.

76. Soldier E was more categorical and stated that as far as G could tell "from a cursory visual examination he was able to confirm our suspicion that they were dealing with a car bomb".

77. Soldier A stated that he believed 100% that there was a bomb in the debussing area, that the suspects had remote control devices and were probably armed. This was because of what he had been informed over radio. Soldier C recalled that it had been confirmed by Soldier E that there was a device in Ince's Hall area which could detonated by one of three suspects who was more likely to be Savage because he had been seen fiddling with the car earlier. He had also been told of the

indication of an old aerial on a new car. Soldier D said that it had been confirmed to him by Soldier E that there was a bomb there. To his recollection, no-one told them that there was a possibility that the three suspects might not be carrying the remote control devices with them on the Sunday or that possibly they had not brought a bomb in. He had been told that there was a bomb in the car and he believed that a bomb was there because he had been informed of this by Soldier E whom D fully trusted.

78. At the Inquest Soldier G was described as being the bomb disposal adviser. He had experience of car bombs from Northern Ireland but at the Inquest, he stated in reply to various questions that he was neither a radio communications expert nor an explosives expert. He had not thought of de-activating the suspect bomb by unscrewing the aerial from the car. When it was put to him in cross-examination, he agreed that to have attempted to unscrew the aerial would have been potentially dangerous.

Passing of control to military for arrest

79. After receiving the report from Soldier G and in view of the fact that the three suspects were continuing northwards leaving the car behind, the Commissioner decided that the three suspects should be arrested on suspicion of conspiracy to murder. At 15.40, he signed a form requesting the military to intercept and apprehend the suspects. The form, which had been provided in advance by the military, stated:

"I, Joseph Luis Canepa, Commissioner of Police, having considered the terrorist situation in Gibraltar and having been fully briefed on the military plan with firearms, request that you proceed with the military option which may include the use of lethal force for the preservation of life."

80. After the form was signed, Soldier F walked across to the tactical net and issued instructions that the military should intervene.

81. Soldier E ascertained the positions of the soldiers by radio. Soldiers C and D had been visually monitoring the movement of the three suspects up Line Wall Road and Smith Dorrien Avenue. Soldiers A and B were making their way north through Casements Square and into the Landport tunnel. The soldiers were informed that control had passed to them to make an arrest.

82. The evidence at the Inquest given by the soldiers and a police witness was that the soldiers had practised arrest procedures on several occasions with the police. According to these rehearsals, the soldiers were to approach the suspects to within a close distance, cover the suspects with their pistols and shout "Stop. Police. Hands up." or words to that effect. They would then make the suspects lie on the ground with their arms away from their bodies until the police moved in to carry out a formal arrest.

83. On reaching the junction of Smith Dorrien Avenue with Winston Churchill Avenue, the three suspects crossed the road and stopped on the other side talking. Officer R, observing, saw them appear to change newspapers. At this point, Soldiers C and D were approaching the junction from Smith Dorrien Avenue. Soldiers A and B emerging from Landport tunnel also saw the three suspects at the junction from their position where the pathway to the tunnel joined Corral Road.

84. As the soldiers converged on the junction however, Savage split away from McCann and Farrell turning south towards the Landport tunnel. McCann and Farrell continued north up the righthand pavement of Winston Churchill Avenue.

85. Savage passed Soldiers A and B, brushing against the shoulder of B. B was about to turn to effect the arrest but A told him that they should continue towards McCann and Farrell, knowing that C and D were in the area and that they would arrest Savage. Soldiers C and D, aware that A and B were following McCann and Farrell, crossed over from Smith Dorrien Avenue and followed Savage.

McCann and Farrell shootings

86. The evidence of Soldiers A and B at the Inquest was as follows.

87. Soldiers A and B continued north up Winston Churchill Avenue after McCann and Farrell, walking at a brisk pace to close the distance. McCann was walking on the right of Farrell on the inside of the pavement. He was wearing white trousers and a white shirt, without any jacket. Farrell was dressed in a skirt and jacket and was carrying a large handbag.

88. When Soldier A was approximately 10 metres (though maybe closer) behind McCann on the inside of the pavement, McCann looked back over his left shoulder. McCann appeared to look directly at A and the smile left his face, as if he had a realisation of who A was and that he was a threat.

89. Soldier A drew his pistol, intending to shout a warning to stop at the same time, though he was uncertain if the words actually came out. McCann's hand moved suddenly and aggressively across the front of his body. A thought that he was going for the button to detonate the bomb and opened fire. He shot one round into McCann's back from a distance of 3 metres (though maybe it may have been closer). Out of the corner of his eye, A saw a movement by Farrell. Farrell had been walking on the left of McCann on the side of the pavement next to the road. A saw her make a half turn to the right towards McCann grabbing for her handbag which was under her left arm. A thought that she was also going for a button and shot one round into her back. He did not disagree when it was put to him that the forensic evidence suggested that he may have shot from a distance of 3 feet (see para. 144). Then A turned back to McCann and shot him once more in the body and twice in the head. A was not aware of B opening fire during this. He fired a total of 5 shots.

90. Soldier B was approaching directly behind Farrell on the roadside of the pavement. He was watching her. When they were 3-4 metres away and closing, he saw in his peripheral vision that McCann turned his head to look over his shoulder. He heard what he presumed was a shout from A which he thought was the start of the arrest process. At almost the same instant, there was firing to his right. Simultaneously, Farrell made a sharp movement to her right, drawing the bag which she had under left arm across her body. He could not see her hands or the bag and feared that she was going for the button. He opened fire on Farrell. He deemed that McCann was in a threatening position and was unable to see his hands and switched fire to McCann. Then he turned back to Farrell and continued firing until he was certain that she was no longer a threat, namely, her hands away from her body. He fired a total of 7 shots.

91. Both soldiers denied that Farrell or McCann made any attempt to surrender with their hands up in the air or that they fired at the two suspects when they were lying on the ground. At the Inquest in response to questions by Mr. P.J. McGrory, Soldier A stated expressly that his intention had been to kill McCann "to stop him becoming a threat and detonating that bomb".

92. The shooting took place on the pavement in front of a Shell petrol station in Winston Churchill Avenue.

93. After the shooting, the soldiers put on berets so they would be

recognised by the police. They noticed a police car, with its siren going, coming south from the sundial down the far side of Winston Churchill Ave. A number of policemen jumped out of the car and leapt the central barrier. Soldier A still had his pistol in his hand. He put his hands up in air and shouted "Police". A recalled hearing shooting from behind as the police car was approaching.

94. While neither of the soldiers were aware of the police car or siren until after the shooting, the majority of witnesses, including the police officers P, Q and R who were in the vicinity to support the soldiers in the arrest and a number of the surveillance team as well as civilian witnesses, recalled that the sound of the police siren preceded, if only by a very short time, the sound of the gunfire. Officers P and Q, who were watching from a relatively close distance, considered that Farrell and McCann reacted to the sound of the siren: Q was of the opinion that it was the siren that caused Farrell and McCann to stop and turn.

95. The arrival of the police car at the scene was an unintended occurrence. After the Commissioner had handed over control to the military at 15.40, he instructed Colombo to ensure that there was police transport available. Colombo telephoned Chief Inspector Lopez at the Central Police Station, who in turn instructed the Controller Police Constable Goodman to recall the duty police car. The Controller recorded the call at 15.41. He radioed the patrol car informing the officers that they were to return immediately. He did not know where the car was at the time or what the reason for the recall was. When Inspector Revagliatte who was in the car asked if it was urgent, the Controller told him it was a priority message and further instructions would be given on arrival.

96. At the time of the message, the police car was waiting in a queue of traffic in Smith Dorrien Avenue. Revagliatte told the driver to put on siren and beacons. The car pulled out into the opposite lane to overtake the queue of traffic. They cut back into the proper lane at the lights at the junction with Winston Churchill Avenue and continued north along Winston Churchill Avenue in the outer lane. As they passed the Shell garage, the four policemen in the car heard shots. Revagliatte instructed the driver to continue. When he looked back, he saw 2 persons lying on the pavement. The car went round the sundial roundabout and returned to stop on the other side of the road opposite the Shell garage. The police siren was on during this time. When the car stopped, the four policemen got out, three of them jumping the central barrier and Revagliatte walking round to arrive at the scene.

97. Officers P, Q and R were in the vicinity of the Shell petrol station and also arrived quickly on the scene of the McCann and Farrell shootings. Officer P and R placed their jackets over the bodies. Officer P dropped his gun while crouched and had to replace it in his holster. Officer Q and Revagliatte carried out a search of the bodies.

Eye-witness accounts

98. The shooting took place on a fine Sunday afternoon, when there were many people out on the streets and the roads were busy with traffic. The Shell garage was also overlooked by a number of apartment buildings. The shooting consequently was witnessed by a considerable number of people, including police officers involved in the operation, police officers who happened to pass the area on other duties, members of the surveillance team and a number of civilians and off-duty policemen.

99. Almost all the witnesses who gave evidence at the Inquest recalled that Farrell had carried her bag under her right arm, not as stated by Soldiers A and B under her left arm. The Coroner commented in his summing-up to the jury that this might have had significance with regard to the alleged justification of the soldiers for opening

fire, namely, the alleged movement of the bag across the front of her body.

100. More significantly, three witnesses, two of whom gave an interview on the controversial documentary concerning the events "Death on the Rock" gave evidence which suggested that McCann and Farrell had been shot while lying on the ground. They stated that they had witnessed the shooting from apartment buildings overlooking the Shell petrol station.

101. Mrs. Celecia saw a man lying on a pavement with another nearby with his hands outstretched: while she did not see a gun she heard shots which she thought came from that direction. After the noise, the man whom she had thought was shooting appeared to put something inside his jacket. When shown a photograph of the aftermath of the scene, Mrs. Celecia failed to identify either Soldier A or B as the man whom she thought that she had seen shooting.

102. Mr. Proetta saw a girl put her hands up though he thought it was more in shock than in surrender. After she had been shot and fallen to the ground, he heard another fusillade of shots. He assumed that the men nearby were continuing to fire but agreed that there was an echo in the area and that the sound could have come from the Landport tunnel area.

103. Mrs. Proetta saw a man and a woman raise their hands over their shoulders with open palms. They were shot, according to her recollection, by men who jumped the barrier. When the bodies were on the ground, she heard further shots and saw a gun in the hand of a man crouching nearby, though she did not see any smoke or cartridges ejecting from the gun. She assumed since she saw a gun that the shots came from it. It also appears that once the bodies fell they were obscured from her view by a low wall and all she saw was a man pointing in their direction.

104. Mr. Bullock recalled seeing a man reeling backwards under fire with his hands thrown back.

105. None of the other witnesses saw McCann or Farrell put their hands up or the soldiers shoot at the bodies on the ground.

106. Witness I, a member of the surveillance team, stated that he saw McCann and Farrell shot when they were almost on the ground, but not on the ground.

107. While the soldiers were not sure that any words of warning were uttered by Soldier A, four witnesses (Officers P and Q, Witness K and Police Constable Parody) had a clear recollection of hearing words "Police, stop" or words to that effect.

108. Officer P, who was approaching from the north and had reached the perimeter wall of the Shell garage, states that he saw McCann make a move as if going for a gun and that Farrell made a move towards her handbag which made him think that she was going for a detonator. Officer Q, who was watching from the other side of the road, also saw Farrell make a move towards her handbag, as did Police Constable Parody an off-duty policeman watching from an overlooking apartment.

The shooting of Savage

109. At the Inquest the evidence of Soldiers C and D was to the following effect.

110. After the three suspects had split up at the junction, Soldier D crossed the road and followed Savage who was heading towards the Landport tunnel. Savage was wearing jeans, shirt and a jacket. Soldier C was briefly held up on the other side of the road by traffic on the

busy road but was catching up as D closed in on Savage. D intended to arrest by getting slightly closer, drawing his pistol and shouting "Stop. Police. Hands up". When D was about 3 metres away, he felt that he needed to get closer because there were too many people about and there was a lady directly in line. Before D could get closer however, he heard gunfire to the rear. At the same time, C shouted "Stop". Savage span round and his arm went down towards his right hand hip area. D believed that Savage was going for a detonator. He used one hand to push the lady out of line and opened fire from about 2-3 metres away. D fired 9 rounds at rapid rate, initially aiming into the centre of Savage's body, with the last 2 at his head. Savage corkscrewed as he fell. D acknowledged that it was possible that Savage's head was inches away from the ground as he finished firing. He kept firing until Savage was still on the ground and his hands were away from his body.

111. Soldier C recalled following after Savage, slightly behind D. Savage was about 8 feet from the entrance to the tunnel but maybe more. C's intention was to move forward to make arrest when he heard shots to his left rear from the direction in which Farrell and McCann had headed. Savage span round. C shouted "Stop" and drew his pistol. Savage moved his right arm down to the area of jacket pocket and adopted a threatening and aggressive stance. C opened fire since he feared Savage was about to detonate the bomb. He saw something bulky in Savage's right hand pocket which he believed to be a detonator button. He was about 5-6 feet from Savage. He fired 6 times as Savage spiralled down, aiming at the mass of his body. One shot went into his neck and another into his head as he fell. C continued firing until he was sure that Savage had gone down and was no longer a threat to initiate device.

112. At the Inquest, both soldiers stated under cross-examination that once it became necessary to open fire they would continue shooting until the person was no longer a threat. C agreed that the best way to ensure this result was to kill. D stated that he was firing at Savage to kill him and that this was the way that all soldiers were trained. Both soldiers however denied that they had shot Savage while he was on the ground.

113. The soldiers put on berets after the incident to identify themselves to the police.

Eyewitness accounts

114. Witnesses H, I and J had been involved in surveillance of the three suspects in or about the Smith Dorrien/ Winston Churchill area.

115. Witness H had observed Soldiers A and B moving after McCann and Farrell up Winston Churchill Avenue. He moved to follow Savage whom he noticed on the corner about to turn into the alleyway leading to Landport tunnel. He indicated Savage to Soldiers C and D who were accompanying him at this point. While he was moving to follow Savage, H saw the McCann and Farrell shooting from a distance. He continued to follow after Savage who had gone into the alleyway. He heard a siren, a shout of "stop" and saw Savage spin round. The soldiers were 5 feet away from Savage. H then turned away and did not witness the shooting itself.

116. Witness I had met with Witness H and Soldier D and had confirmed that Savage had gone towards the Landport tunnel. Witness I entered the alleyway after the shooting had begun. He saw 1-2 shots being fired at Savage who was on the ground. He saw only one soldier firing from a distance of 5, 6 or 7 feet. He did not see the soldier put his foot on the chest of Savage while shooting.

117. Witness J had followed after Savage when he had split from McCann and Farrell. When Savage was 20 feet into the alleyway near a large tree, she heard noise of gunfire from behind and at that same time a

police siren in fairly close proximity. Savage span round very quickly at the sound of gunfire, looking very stunned. J turned away and did not see the shooting. When she turned round again, she saw Savage on his back and a soldier standing over him saying "Call the police".

118. Mr. Robin Mordue witnessed part of the shooting but as he fell to the ground himself and later took cover behind a car he saw only part of the incident. He did not recall Savage running. When he saw the soldier standing over Savage, there were no more shots.

119. The evidence of Mr. Kenneth Asquez was surrounded by most controversy. A handwritten statement made by him appears to have been used by Thames Television in its documentary "Death on the Rock" (see para. 135). The draft of an affidavit, prepared by a lawyer acting for Thames Television who interviewed Mr. Asquez but not approved by him, was also used for the script of the programme. In them, he alleged that while in a friend's car on the way to the frontier via Corral Road, he passed the Landport tunnel. He heard "crackers" and saw a man bleeding on the floor. He saw another man showing an ID card and wearing a black beret who had his foot on the dying man's throat and was shouting "Stop. It's OK. It's the police." At that instance, the man fired a further 3-4 shots. At the Inquest, he stated that the part of the statement relating to the shooting was lies made up by him. He appeared considerably confused and contradicted himself frequently. When it was pointed out to him that until the Inquest it had not become known that the soldiers wore berets (no newspaper report had mentioned the detail) he supposed that he must have heard it in the street. When asked at the Inquest why he had made up the statement, he referred to previous illness, pressure at work and the desire to stop being telephoned by a person who was asking him to give an interview to the media.

120. Miss Treacy claimed that she was in the path leading from the tunnel and that she was between Savage and the first of the soldiers as the firing began, though not in the line of fire. She recalled that Savage was running and thought that he was shot in the back as he faced towards the tunnel. She did not see him shot on the ground. Her account contained a number of apparent discrepancies with the evidence of other witnesses; she said the soldier shot with his left hand whereas he was in fact right-handed; no-one else described Savage as running; and she describes the body as falling with feet towards the nearby tree rather than his head which was the way all the other witnesses on the scene described it. The Coroner in his summing-up thought that it might be possible to reconcile her account by the fact that Miss Treacy may have not been looking at Savage as he span round to face the soldiers and that by the time she did look he was spinning round towards the tunnel in reaction to the firing.

121. Mr. Bullock and his wife stated that a man pushed past them as they walked up Smith Dorrien Avenue to the junction and that they saw that he had a gun down the back of his trousers. They saw him meet up with another man, also with a gun in his trousers, on the corner of the alleyway to the Landport tunnel. The men were watching the shooting outside the Shell garage and when the shooting stopped, they turned and ran out of sight. After that there was another long burst of shooting.

122. Another witness, Mr Jerome Cruz, however, who was in a car in the traffic queue in Smith Dorrien Avenue and who remembered seeing Mr. Bullock dive for cover, cast doubts on his version. In particular he stated that Mr. Bullock was not near the end of Smith Dorrien Avenue but further away from the Shell garage (more than 100 yards away) and that he had dived for cover as soon as there was the sound of shooting. He agreed that he had also seen persons crouching looking from behind a wall at the entrance to the pathway leading to the tunnel.

Aftermath of the shootings

123. At 15.47-15.48, E received a message in the operations room that

apprehension of the three suspects had taken place. It was not clear at that stage whether they had been arrested or shot. By 16.00-16.05, the report was received in the operations room that the three suspects had been shot.

124. At 16.05-16.06, Soldier F handed a form to the Commissioner returning control. According to the transcript of the evidence given by the Commissioner at the Inquest, this form addressed to him by Soldier F stated that, "at 16.06 on 6 March a military assault force was completed at the military option in respect of the terrorist bombing ASU in Gibraltar. Control is hereby handed back to the Civil Power". Deputy Commissioner Colombo telephoned to Central Station for the evacuation plans to be put into effect. Instructions were also given with a view to taking charge of the scenes of the incidents. Soldier G was also instructed to commence the clearance of the car.

125. After the shooting, the bodies of the three suspects and Farrell's handbag were searched. No weapons or detonating devices were discovered.

126. At the Shell garage scene, the shell cases and cartridges were picked up without marking their location or otherwise recording their position. The positions of the bodies were not marked.

127. At the scene of the Savage shooting, only some of the cartridge positions were marked. No police photographs were taken of the bodies' positions. Inspector Revagliatte had made a chalk outline of the position of Savage's body. Within that outline, there were 5 strike marks, three in the area of the head.

128. Chief Inspector Lopez ordered a general recall of personnel and went directly to the assembly area to begin cordoning it off. The fire brigade also arrived at the assembly area. The bomb disposal team opened the suspect White Renault car but found no explosive device or bomb. The area was declared safe between 19.00 and 20.00.

Post incident investigation

129. Chief Inspector Correa was appointed in charge of the investigation.

130. Inside Farrell's handbag was found a key ring with two keys and a tag bearing a registration number MA9317AF. This information was passed at about 17.00 to the Spanish police who commenced a search for the car on the suspicion that it might contain explosives. During the night of 6-7 March, the Spanish police found a red Ford Fiesta with that registration number in La Linea. Inside the car were found car keys for another car registration no. MA2732AJ with a car rental agreement indicating that the car had been rented at 10.00 on 6 March by Katharine Smith, the name on the passport carried in Farrell's handbag.

131. At about 18.00 on 8 March, a Ford Fiesta car with registration number MA2732AJ was discovered in a basement car park in Marbella. It was opened by the Malaga bomb disposal squad and found to contain an explosive device in the boot concealed in the spare wheel compartment. The device consisted of 5 packages of Semtex explosive (altogether 64 kg) to which were attached 4 detonators and around which were packed 200 rounds of ammunition. There were two timers marked 10 hrs 45 mins and 11 hrs 15 mins respectively. The device was not primed or connected.

132. In the report compiled by the Spanish police on the device dated Madrid 27 March 1988, it was concluded that there was a double activating system to ensure explosion even if one of the timers failed; the explosive was hidden in the spare wheel space to avoid detection on passing the Spanish/Gibraltarian customs; the quantity of explosive

and use of cartridges as shrapnel indicated the terrorists were aiming for greatest effect; and that it was believed that timing of the device was set to explode at the time of the military parade on 8 March 1988.

133. Chief Inspector Correa, who acted also as Coroner's Officer, traced and interviewed witnesses of the shooting of the three suspects. Police officers visited residences in the area knocking on doors and returning a second time where persons were absent. The Attorney General made two or three appeals to the public to come forward. At the Inquest, Correa commented that the public appeared more than usually reluctant to come forward to give statements to the police.

134. A post mortem was conducted in respect of the three deceased suspects on 7 March 1988. Professor Watson, a highly qualified pathologist from the United Kingdom, carried out the procedure. His report was provided to a pathologist, Professor Pounder, instructed by the applicants. Comment was later made at the Inquest by both pathologists with regard to defects in the post mortem procedures. In particular, the bodies had been stripped before Professor Watson saw them, depriving him of possible aid in establishing entry and exit wounds, there had been no X-ray facilities and Professor Watson had not later been provided either with a full set of photographs for reference, or the forensic and ballistics reports.

"Death on the Rock"

135. On 28 April 1988, Thames Television broadcast a documentary entitled "Death on the Rock" during which a reconstruction was made of the alleged surveillance of the terrorists' car by the Spanish police and witnesses to the shootings described what they had seen, including allegations that McCann and Farrell had been shot while on the ground. A statement by an anonymous witness was read out to the effect that Savage had been shot by a man who had his foot on his chest. The Independent Broadcasting Authority had rejected a request made by the Foreign Secretary to postpone the programme until after the holding of the inquest into the deaths.

The Gibraltar Inquest

136. An Inquest by the Gibraltar Coroner into the killings was opened on 6 September 1988. The families of the deceased (which included the applicants) were represented, as were the SAS soldiers and the United Kingdom Government. The Inquest was presided over by the Coroner who sat with a jury chosen from the local population.

137. Prior to the Inquest, three certificates to the effect that certain information should not, in the public interest, be disclosed, were issued by the Secretary of State for the Home Department, the Secretary of State for Defence and the Deputy Governor of Gibraltar, dated respectively 26 August, 30 August and 2 September 1988. These stated that the public interest required that the following categories of information be protected from disclosure:

1. In the case of the seven military witnesses, the objection was to the disclosure of any information or documents which would reveal:

(i) their identity;

(ii) the identity, location, chains of command, method of operation and the capabilities of the units with which the soldiers were serving on 6 March 1988;

(iii) the nature of their specialist training or equipment;

(iv) the nature of any previous operational activities of the soldiers, or of any units with which any of them might at any time have served;

(v) in the case of Soldier G (the Ammunition Technical Officer), any defence intelligence information, activities or operations (and the sources of intelligence), including those on the basis of which his assessments were made and details of security forces counter-measures capabilities, including methods of operation, specialist training and equipment.

2. In the case of Security Service witnesses, the objection was to the disclosure of information which would reveal:

(a) the identities of members of the Security Service, and details of their deployment, training and equipment;

(b) all sources of intelligence information;

(c) all details of the activities and operations of the Security Service.

138. As was, however, expressly made clear in the certificates, no objection was taken to the giving of evidence by either military or Security Service witnesses as to:

(i) the nature of the information relating to the feared IRA plot, which was transmitted to the Commissioner of Police and others concerned (including general evidence as to the nature of a Provisional IRA Active Service Unit);

(ii) the assessments made by Soldier G as to the likelihood of, and the risks associated with, an explosive device and as to the protective measures which might have to be taken;

(iii) the events leading up to the shootings on 6 March 1988 and the circumstances surrounding them, including evidence relating to the transfer of control to the military power.

139. The Inquest lasted until 30 September and during the 19 days it sat, evidence was heard from 79 witnesses, including the soldiers, police officers and surveillance personnel involved in the operation. Evidence was also heard from pathologists, forensic scientists and experts in relation to the detonation of explosive devices.

Pathologists evidence at the Inquest

140. Evidence was given by Professor Watson, the pathologist who had conducted the post mortem on the deceased on 7 March 1988 and also by a pathologist Professor Pounder called on behalf of the applicants.

141. Concerning Farrell, it was found that she had been shot three times in the back, from a distance of some three feet according to Pounder. She had five wounds to the head and neck. The facial injuries suggested that either the entire body or at least the upper part of the body was turned towards the shooter. A reasonable scenario consistent with the wounds was that she received the shots to the face while facing the shooter, then fell away and received the shots to the back. Watson agreed that the upward trajectory of the bullets that hit Farrell indicated that she was going down or was down when she received them.

142. Concerning McCann, he had been shot in the back twice and had three wounds in the head. The wound on the top of the head suggested that the chest wounds came before the head wound and that he was down or very far down when it was inflicted. The shots to the body were at about a 45 degree angle.

143. Concerning Savage, he was hit by 16 bullets. He had seven wounds to the head and neck, five on the front of the chest, five on the back

of the chest, one on the top of each shoulder, three in the abdomen, two in the left leg, two in the right arm and two on the left hand. The position of the entry wounds suggests that some of the wounds were received facing the shooter. But the wounds in the chest had entered at the back of the chest. Watson agreed that Savage was "riddled with bullets" and that "it was like a frenzied attack". He agreed that it would be reasonable to suppose from the strike marks on the pavement that bullets were fired into Savage's head as he lay on the ground. Pounder also agreed that the evidence from strike marks on the ground and the angle and state of wounds indicated that Savage was struck by bullets when lying on back on the ground by a person shooting standing towards his feet. He insisted under examination by counsel for the soldiers that the 3 strike marks on ground within the chalk outline corresponded with wounds to head: "Those wounds must have been inflicted when either the head was on the ground or very close to the ground indeed" and when pressed "within inches of the ground".

Forensic evidence at the Inquest

144. A forensic scientist specialising in firearms had examined the clothing of the three deceased for, inter alia, powder deposits which would indicate that shots had been fired at close range. He found signs of partly burnt propellant powder on the upper right back of Farrell's jacket and upper left front of Savage's shirt which indicated close range firing. He conducted tests which indicated that such a result was only obtained with a Browning pistol at range of up to 6 feet. The density on Farrell's jacket indicated a muzzle to target range of 3 feet and on Savage's shirt of 4-6 feet.

Evidence relating to detonation devices

145. Issues arose at the Inquest as to whether, even if the three suspects had been carrying remote control devices, they would have been able to detonate the bomb which was approximately 1.4 km from the place where they were shot. Also it was questioned whether the soldiers could reasonably have expected that the applicants could have concealed the devices on their persons without it being apparent and whether in fact the device could have been detonated by pressing only one button.

146. Mr. Feraday gave evidence for the Crown. He was a forensic scientist employed at Explosives Forensic Laboratory at Royal Armament Research and Development Establishment, with 33 years experience of explosives. He produced a device known as ICOM IC2 as an example of device used in Northern Ireland, which was the size of a standard commercial walkie-talkie.

147. While referring to the factors which could effect the range (for example, terrain, weather conditions) Feraday stated that the equipment could in optimum conditions operate up to a 30 mile range. In his opinion, the aerial on the suspect car could have received signal though its efficiency would have been fairly poor as it was not the right length for the frequency. He considered that one would have to assume that from the distance of about a mile a bomb could be detonated by remote control using that aerial.

148. The applicants called Dr. Scott, who held a masters degree and doctorate in engineering and was a licensed radio operator. He had been involved in two IRA trials in England. He had conducted tests with similar receivers along the route taken by the three suspects. He referred to the fact that there was rising ground between the sites of the shootings and the assembly area as well as a thick wall and a considerable number of buildings. The IRA used encoders and decoders on their devices to prevent spurious signals detonating their bombs: this required that a good clean signal was received. Having regard to the aerial which "was a joke" from the efficacy point of view, the wrong length for the expected frequency and pointing along the roof rather than standing vertically, he maintained his professional opinion

that the purported receiver could not have been detonated by a transmitter in the circumstances of the case.

149. Dr. Scott also explained how the transmitter would operate. Assuming the dial setting the frequency was already set, it would be necessary to activate the on/off power switch, followed by the on/off switch on the encoder and then a third button would have to be pressed in order to transmit. While it would be possible to set the device so that it would be necessary to press one button (the transmit button) in order to detonate a bomb, this would require leaving the power switches on for both the transmitter and the encoder with the risk that the batteries would run down. There would also be the risk that the device might be set off accidentally by being bumped in the street or being hit by a bullet or by a person falling awkwardly so as to hit the edge of a pavement or bench.

150. Captain Edwards was called by the lawyer representing the soldiers to rebut this evidence. He was a member of the Royal Corps of Signals and had experience in VHF/HF radio in combat net radio spectrum. He carried out tests to see if voice communications were possible on an ICOM type radio in the area or from Shell garage to Ince's Hall. The equipment used was not identical to that of Dr. Scott. He stated that it was possible to receive both voice communication and a single audio tone at the site of the shootings from the assembly area. He did not however use an encoder and his equipment was matched and compatible. Mr. Feraday was also recalled. He gave the opinion that if a weak voice communication could be received then the signal would be sufficient to set off a bomb.

151. It appears to have been accepted by all that the IRA have developed the use of high frequency devices, which require shorter aerials and have a surer line of sight effect. These are stated to have the characteristics suitable for detonation when the operator of the device has line of sight of the bomb and carry with them less possibility of interference from other radio sources or countermeasures. No examples were known or at least given as to this type of remote control detonation being used other than in line of sight conditions.

Proceedings at the Inquest

152. At the Inquest, the representative of the applicants, Mr. P.J. McGrory, questioned the witnesses and made submissions to the effect, inter alia, that either the decision to shoot to kill the suspects had been made by the United Kingdom Government prior to the incident and the soldiers were ordered to carry out the shootings or that the operation was planned and implemented in such a way that the killing of the suspects by the soldiers was the inevitable result. In any event, in light of the circumstances, the use of lethal force by the soldiers was not necessary or, if it was necessary, the force used was excessive and therefore not justified. He maintained throughout however that he did not challenge that the Commissioner of Police and his officers had acted properly and in good faith.

153. Soldier F (the senior military commander) and Soldier E (the tactical commander) denied that there had been a plan, express or tacit, to execute the suspects. When it was put to Soldiers A, B, C and D, they also denied that they had been sent out either expressly or on the basis of "a nod or a wink" to kill the suspects.

154. At the conclusion of the Inquest, the Coroner addressed the jury in respect of the applicable law, in particular, Article 2 of the Gibraltar Constitution (see para 169). He summed up the respective propositions of the applicants' representatives and the representatives of the soldiers and the Crown referring to the evidence. He concluded from the evidence given by the soldiers that when they opened fire they shot intending to kill and directed the jury as to the range of

possible verdicts:

"...If the soldiers set out that day with the express intent to kill that would be murder and it would be right to return a verdict of unlawfully killed. Example two: were you to find in the case of Savage (or any of the other two for that matter) that he was shot on the ground in the head after effectively being put out of action, that would be murder if you come to the conclusion that the soldiers continued to finish him off. In both cases they intended to kill not in self defence or on the defence of others or in the course of arrest....so it is murder and you will return a verdict of unlawfully killed. If in this second example you were to conclude that it is killing in pursuance of force used which was more than reasonably necessary, then the verdict should also be killed unlawfully but it would not have been murder. The third example I offer is precisely of that situation. If you accept that the account that the soldiers' intention was genuinely to arrest (in the sense that they were to apprehend the three suspects and hand them over live to the Gibraltar Police force) and that the execution of the arrest went wrong and resulted in the 3 deaths because either (a) force was used when it was not necessary or (b) the force that was used was more than was reasonably necessary then that would not be murder...and the verdict would be as I say unlawfully killed. Example 4: If you are satisfied that the soldiers were acting properly but nevertheless the operation was mounted to encompass the deaths of the three suspects to the ignorance of the soldiers then you would also bring in a verdict of unlawfully killed.

...So there are only 3 verdicts reasonably open to you and these are:

- (a) Killed unlawfully, that is unlawful homicide.
- (b) Killed lawfully, that is justifiable, reasonable homicide.
- (c) Open verdict.

Remembering that you must be satisfied beyond reasonable doubt where the verdict of unlawfully killed is concerned; there are 2 situations to consider. The first concerning the soldiers themselves, the second if they have been the unwitting tools of a plot to dispose of the 3 suspects.

As to the first concerning the soldiers themselves I must tell you that if you are not satisfied beyond a reasonable doubt that they have killed unlawfully you have then to decide whether your verdict should be an open verdict or one of justifiable homicide. My direction to you is that you should bring in a verdict of justifiable homicide ie killed lawfully because in the nature of the circumstances of this incident that is what you will have resolved if you do not return a verdict of unlawful homicide in respect of the soldiers themselves. That is the logic of the situation. You may reach a situation in which you cannot resolve either way in which case the only alternative is to bring in an open verdict but I must urge you, in the exercise of your duty, to avoid this open verdict. As to the second situation where they are unwitting tools, the same applies..."

155. The jury returned verdicts of lawful killing by a majority.

Proceedings in Northern Ireland

156. The applicants were dissatisfied with these verdicts and commenced actions in the High Court of Justice in Northern Ireland against the Ministry of Defence for the loss and damage suffered by the estate of each deceased as a result of their death. The statements of

claim were served on 1 March 1990.

157. On 15 March 1990 the Secretary of State for Foreign and Commonwealth Affairs issued certificates under Section 40(3)a of the Crown Proceedings Act 1947, as amended by the Crown Proceedings (Northern Ireland) Order 1981. Section 40(2)b of the same Act excludes proceedings in Northern Ireland against the Crown in respect of liability arising otherwise than "in respect of Her Majesty's Government in the United Kingdom". A similar exemption applies to the Crown in Northern Ireland pursuant to the 1981 Order. A certificate by the Secretary of State to that effect is conclusive. The certificates stated in this case that any alleged liability of the Crown arose neither in respect of Her Majesty's Government in the United Kingdom, nor in respect of Her Majesty's Government in Northern Ireland.

158. The Ministry of Defence then moved to have the actions struck out. The applicants challenged the legality of the certificates in judicial review proceedings. Leave to apply for judicial review was granted ex parte on 6 July 1990, but withdrawn on 31 May 1991, after a full hearing, on the basis that the application had no reasonable prospects of success. Senior Counsel advised that an appeal against this decision would be futile.

159. The applicants' High Court actions were struck off on 4 October 1991.

C. Evidence before the Commission

a. transcript of the Inquest

b. statement of Chief Inspector Valenzuela

160. While invitation had been made by the Gibraltar police for a Spanish police officer to attend the Inquest to give evidence relating to the role of the Spanish police, he did not attend, apparently since he did not receive permission from his superiors.

161. The Government have provided the Commission with a copy of a statement made by Chief Inspector Rayo Valenzuela, a police officer in Malaga, dated 8 August 1988. According to this statement, the United Kingdom police had at the beginning of March provided the Spanish police with photographs of the possible members of the ASU, named as Daniel McCann, Mairead Farrell and Sean Savage. The three individuals were observed arriving at Malaga airport on 4 March 1988 but trace of them was lost as they left. There was then a search to locate the three suspects during 5-6 March 1988.

162. This statement provided by the Government was not included in the evidence submitted at the Inquest as the Coroner declined to admit it following the objection by Mr. P.J. McGrory who considered that it constituted hearsay in the absence of any police officer from Spain giving evidence in person.

c. statement of Mr. Harry Debelius

163. This statement, dated 21 September 1988 and supplied on behalf of the applicants, is by a journalist who acted as consultant to the makers of the Thames Television programme "Death on the Rock". He states that the white Renault car used by the ASU was under surveillance by the Spanish authorities as it proceeded down the coast towards Gibraltar. Surveillance is alleged to have been conducted by 4-5 police cars which "leapfrogged" to avoid suspicion, by helicopter and by agents at fixed observation points. The details of the car's movements were transmitted to the authorities in Gibraltar who were aware of the car's arrival at the border. He refers to the source of this information as being Sr. Augustin Valladolid, a spokesman for the Spanish security services in Madrid, with whom he and Mr. Julian

Manyon, a reporter for Thames Television, had an interview lasting from 18.00 to 19.20 on 21 March 1988.

164. The applicants intended submitting this statement as evidence before the Inquest. The Coroner decided however that it should also be excluded as hearsay on the same basis as the statement relied upon by the Government in paragraph 162 above.

d. exhibits provided by the parties

165. An ICOM transmitter device has been provided to the Commission by the Government with an improvised encoder attached. The dimensions of the transmitter are 18 cm x 6.5 cm x 3.7 cm: the encoder (which is usually taped to the transmitter and which can be contained in a small flat Strepsil tin) is 8 cm x 9 cm x 3 cm. The aerial from the transmitter is 18 cm long.

166. The applicants have supplied a simulated model of similar dimensions.

167. The Government have provided an ordnance survey map of Gibraltar and a street map of Gibraltar.

e. further material submitted by the applicants

168. The applicants have supplied the recent judgment of the Court of Appeal overturning a conviction on explosives charges in which Mr. Feraday's evidence as to alleged intended terrorist use of electronic timer gadgets was found to be dogmatic and open to doubt at the very least (R. v. Berry, judgment of the Court of Appeal 28 September 1993). They also attach a further opinion of Dr. Scott dated 22 October 1993 in which he reiterates his view that it would have been impossible for the three suspects to have detonated a bomb in the target area from the location where they were shot using an ICOM or any other conceivable concealable transmitter/aerial combination, which he maintains must have been well-known to the authorities. He also drew attention to the factor that the strength of a hand held transmitter is severely attenuated when held close to the human body; when transmitting it should be held well clear of the body with the aerial as high as possible.

D. Relevant domestic law and practice

169. Article 2 of the Gibraltar Constitution provides:

"2.(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.

(2) A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as a result of the use to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable:

a. for the defence of any person from violence or for the defence of property;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained...

d. in order to prevent the commission by that person of a criminal offence."

170. The relevant domestic case-law establishes that the reasonableness of the use of force has to be decided on the basis of the facts which the user of the force honestly believed to exist: this involves the subjective test as to what the user believed and an

objective test as to whether he had reasonable grounds for that belief. Given that honest and reasonable belief, it must then be determined whether it was reasonable to use the force in question in the prevention of crime or to effect an arrest (see eg. *Lynch v. Ministry of Defence* [1983] N.I. 216]

171. The document annexed to the Operational Order entitled "Firearms-rules of engagement" provided insofar as relevant:

"General Rules

1. Do not use more force than necessary to achieve your objective.

2. If you use firearms you should do so with care for the safety of persons in the vicinity.

3. Warning Before Firing

- (a) A warning should, if practicable, be given before opening fire. It should be as loud as possible and must include an order to stop attacking and a statement that fire will be opened if the orders are not obeyed.
- (b) You may fire without warning in circumstances where the giving of a warning or any delay in firing could lead to death or serious injury to a person whom it is your duty to protect, or to yourself, or to another member in your operation.

4. Opening fire

You may open fire against a hostage taker

- (a) If he is using a firearm or any other weapon or exploding a device and there is a danger that you or any member involved in the operation, or a person whom it is your duty to protect, may be killed or seriously injured.
 - (b) If he is about to use a firearm or any other weapon or about to explode an explosive device and his action is likely to endanger life or cause serious injury to you or another member involved in the operation, or any person whom it is your duty to protect...
5. If he is in the course of placing an explosive charge in or near any vehicle, ship, building or installation which, if exploded, would endanger life or cause serious injury to you or another member involved in the operation or to any person whom it is your duty to protect and there is no other way to protect those in danger..."

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

172. The Commission declared admissible the applicants' complaints concerning the killing of Daniel McCann, Mairead Farrell and Sean Savage.

B. Point at issue

173. The issue to be determined is whether there has been a violation of Article 2 (Art. 2) of the Convention.

C. Evaluation of the evidence

174. Both parties have made submissions to the Commission with regard to the approach which it should adopt in its task of assessing the factual elements relevant to its determination of the Convention issues.

175. The Government have submitted that the Inquest which took place in Gibraltar constituted an exhaustive fact-finding procedure and that the verdicts of the jury must be taken as, impliedly, containing a number of crucial findings of fact on which the Commission should base its examination of the Convention issues. The Commission notes however that the verdicts of the jury consisted solely of findings of lawful killings (see para. 155 above). The nature of a such jury verdict renders it impossible to deduce which facts were given weight or discounted. Further, the jury were not addressing themselves directly to the issues arising in the present case but to the question whether the use of lethal force was lawful in terms of the applicable domestic law.

176. Even assuming that the Inquest had, expressly or impliedly, made findings of fact with reference to the events under consideration, the Convention organs in the exercise of their supervisory jurisdiction are not in any formal sense bound by the domestic decisions but must examine the circumstances of a case as a whole to determine whether the justifications adduced are compatible with the provisions of the Convention (see eg. *Colak v. Germany*, Comm. Report 6.10.87, Eur. Court H.R., Series A no.147 p. 17, para. 144).

177. The applicants have requested the Commission to carry out its own investigation into the disputed facts of the case and have made a number of suggestions, including the proposal that the Commission hear witnesses and that it address questions to the Governments of Spain and Belgium to clarify certain matters in dispute. The Commission notes that a hearing would involve the questioning of witnesses about events which took place in March 1988, six years previously. The Commission considers it unlikely that after the passage of time the accounts of witnesses would be rendered less divergent. It is aware also that at least one of the witnesses, Soldier F who has died, is no longer available. It therefore does not consider that a hearing of witnesses would aid it in its task.

178. As regards the possibility of seeking information from the Belgian Government (with regard to the alleged find of IRA explosive devices in Brussels on 21 January 1988) and from the Government of Spain (as regards the surveillance of the suspects in Spain), the Commission considers that these matters, while perhaps of background interest, are not necessary to its formulating an opinion in this case.

179. The Commission has proceeded therefore to examine the case on the basis of the observations and documents submitted by the parties, including, in particular, the transcript of the Inquest held in Gibraltar. While it is aware that it has not had the advantage of seeing the demeanour and comportment of the witnesses as they gave their testimony and were subject to extensive cross-examination, it considers that it is nonetheless possible to identify the areas of evidence which were significantly consistent (or otherwise) or which were unchallenged. Its opinion as to the evaluation of evidence concerning the factual matters which are in dispute or the subject of conflicting material is given below where it is relevant and necessary to the examination of the Convention issues in question.

D. Article 2 (Art. 2) of the Convention

180. Article 2 (Art. 2) of the Convention provides:

"1. Everyone's right to life shall be protected by law. No one

shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article (Art. 2) 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."

E. General considerations

181. The interpretation of this Article (Art. 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 situations where deprivation of life may be justified are exhaustive and must be narrowly interpreted.

182. The use of force which has resulted in a deprivation of life must be shown to have been "absolutely necessary" for one of purposes set out in the second paragraph. In the context of the other provisions of the Convention, the test of necessity includes an assessment as to whether the interference with the Convention right in question was proportionate to the legitimate aim pursued. In the context of Article 2 (Art. 2) and the use of lethal force, the qualification of the word "necessary" by the adverb "absolutely" indicates that a stricter and more compelling test of necessity must be applied.

183. In a case concerning the use of plastic baton rounds in the course of a civil disturbance in Northern Ireland which resulted in the death of a 13 year old boy, the Commission formulated a test of strict proportionality:

"...Article 2 para. 2 (Art. 2-2) permits the use of force for the purposes enumerated in sub-paragraphs (a), (b) and (c) subject to the requirement that the force used is strictly proportionate to the achievement of the permitted purpose. 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 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 loss of life." (No. 10444/82, Dec. 10.7.84, D.R. 39 p. 162, at p. 169-171)

184. Article 2 (Art. 2) may, as other articles of the Convention, give rise to positive obligations on the part of the State (No. 9438/81, Dec. 28.2.83, D.R. 32 p. 190 at p. 200).

F. The present case

185. The applicants submit that the killing of McCann, Farrell and Savage discloses a violation of Article 2 (Art. 2) of the Convention on a number of bases. They put forward the following propositions:

1. Article 2 (Art. 2) imposes a positive duty on State parties to adopt clear and detailed rules on the use of lethal force which should strictly control and limit its use in accordance with the Convention provision. The relevant domestic law is vague and general and therefore in itself in violation of Article 2 (Art. 2).

2. Article 2 (Art. 2) should be interpreted as including a procedural element, namely, the provision of an effective procedure after the event for establishing the facts. They submit that the procedures in this case were inadequate.

3. Article 2 (Art. 2) requires States to exercise strict operational control over the use of lethal force. There is a violation in the way in which the operation was planned and executed which indicates at least serious negligence, if not actual premeditation, in respect of the killings which took place.

186. The Commission has examined the first two propositions in the context of the requirement of "protected by law" under the first paragraph (see paras. 187-191) and the third under the compatibility of the operation with the requirements of the second paragraph (see paras. 202-250).

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

187. The first sentence of Article 2 para. 1 (Art. 2-1) imposes a positive obligation on Contracting Parties. It requires a State not only to refrain from taking life "intentionally" but also to take appropriate steps to safeguard life (see eg. No. 7154/75, Dec. 12.7.78, D.R. 14 p. 31). The Commission agrees with the applicants that this requires that the domestic law of a State regulates, in a manner compatible with the rule of law, the permissible use of lethal force by its agents.

188. In the present case, the applicable law was set out in Article 2 (Art. 2) of the Gibraltar Constitution. This imposes a general prohibition on intentional killing save in defined circumstances, including the defence of persons from violence. The standard applied as to the justified exceptions is one of reasonable necessity. As the applicants point out this differs from the standard of "absolute necessity" imposed by the Convention. The Government argue that the difference is more apparent than real since the test of reasonable necessity is strictly applied in practice and in assessing that necessity, consideration is given to the proportionality of the use of force to the particular circumstances of the case.

189. The Convention however does not in general impose on Contracting States any given manner for ensuring the effective implementation of its provisions (cf. Eur. Court H.R., the Swedish Engine Drivers' Union judgment of 6 February 1976, Series A no. 20 p. 18, para. 50). The Commission does not consider therefore that it can interpret Article 2 (Art. 2) as requiring an identical formulation in domestic law. It must be sufficient that the substance of the Convention right is protected.

190. The Commission finds on examination of the applicable law in this case no indication that it fails to offer the requisite general prohibition against the arbitrary use of lethal force by state authorities. Whether or not in a particular case, the application of a test of reasonable necessity permitted a use of lethal force in violation of the Convention could only be determined by an examination of all the circumstances of a particular case. The Commission recalls in this regard that in the case of *Kelly v. the United Kingdom* (No. 17579/90, Dec. 13.1.93, D.R. 74 p. 139), which concerned the killing of a teenage joyrider by soldiers at a roadblock in Belfast, it examined the reasoning of the domestic court which had applied the test of reasonable necessity and found that in the circumstances of the case the use of force had been justified also under the terms of Article 2 para. 2 (Art. 2-2).

191. As regards the applicants' second proposition (see para. 185 above), the Commission considers that procedural protection, to the

extent that it may be relevant under Article 2 (Art. 2), must be regarded as an aspect of the criterion "protected by law". A general legal prohibition of arbitrary killing by state authorities would be rendered nugatory if, in practice, there was no mechanism for reviewing the action of the State agents. Article 2 (Art. 2) cannot be interpreted however as including a requirement of access to court in the determination of any resulting civil rights disputes or an effective remedy before the Courts where there is a complaint of deprivation of life, since these matters would rather fall to be considered under Articles 6 (Art. 6) and 13 (Art. 13) of the Convention which have not been invoked by the applicants in the present case.

192. The Commission considers however that there is force in the applicants' submissions as to the necessity for an ex post facto review of the circumstances of a killing. It must often be the case where State agents have used lethal force against an individual that the factual circumstances and the motivation for the killing lie largely, if not wholly, within the knowledge of the State authorities and that the victim's families are unlikely to be in a position to assess whether the use of force was in fact justified. It is essential both for the relatives and for public confidence in the administration of justice and in the State's adherence to the principles of the rule of law that a killing by the State is subject to some form of open and objective oversight.

193. Having regard therefore to the necessity of ensuring the effective protection of the rights guaranteed under the Convention, which takes on added importance in the context of the right to life, the Commission finds that the obligation imposed on the State that everyone's right to life shall be "protected by law" may include a procedural aspect. This includes the minimum requirement of a mechanism whereby the circumstances of a deprivation of life by the agents of a state may receive public and independent scrutiny. The nature and degree of scrutiny which satisfies this minimum threshold must, in the Commission's view, depend on the circumstances of the particular case. There may be cases where the facts surrounding a deprivation of life are clear and undisputed and the subsequent inquisitorial examination may legitimately be reduced to a minimum formality. But equally, there may be other cases, where a victim dies in circumstances which are unclear, in which event the lack of any effective procedure to investigate the cause of the deprivation of life could by itself raise an issue under Article 2 (Art. 2) of the Convention.

194. The Commission has examined whether the facts of this case disclose an absence of procedural safeguards against arbitrary deprivation of life. The Commission notes that an inquest was held in Gibraltar into the deaths of McCann, Farrell and Savage.

195. The applicants have submitted that the inquest procedure was inadequate for, inter alia, the following reasons. They complain of the shortcomings of the post incident investigation, in particular, the defective scene of crimes and post mortem procedures and a failure by the police to locate witnesses. They complain that the Coroner sat with a jury which, as it was drawn from a garrison town with close ties to the military, rendered a fair hearing unlikely. They complain that the scope of the Inquest was restricted by the public interest certificates issued by the Government and that the Coroner erred in directing the jury that they should not deliver an open verdict. They were also at a distinct disadvantage in the proceedings since they were without legal aid, had no access to the statements of the important Crown witnesses and were without resources to pay for copies of the daily transcript of the proceedings.

196. The Commission notes that the applicants' complaints as to the police handling of the investigation in the aftermath of the incident are not without foundation (see paras. 126-7 and 134). The failure to cordon off the scenes of the incidents and preserve them for proper

record was however a result of the unexpectedness of events and the lack of available and experienced police personnel rather than any sinister or improper motivation. While it may have been rendered more difficult to establish certain details of the events, the Commission does not find that it reveals such gross misconduct as would vitiate the overall investigation of the killings. It does not find substantiated the allegation that the police failed properly to make efforts to locate witnesses. Chief Inspector Correa instituted door to door enquiries and appeals were made to the public to provide information. It appears however that the public was reluctant to come forward possibly because of the intense publicity aroused by the affair in the media.

197. As regards the Inquest, the Commission is impressed by the thoroughness of its procedure. It lasted 19 days, involved the hearing in public of 79 witnesses who were subject to extensive examination and sometimes rigorous cross-examination. The applicants' objections to the use of the jury, the direction of the Coroner, the limitation on questions imposed by the certificates and the procedural inequalities experienced by the applicants do not, in the Commission's view, deprive the Inquest of its character as an effective independent and public review mechanism.

198. There is no evidence that jurors were biased. While the applicants complain that they suffered from procedural difficulties (see para. 195), they were in fact represented most ably and they had access to a copy of the transcript.

199. Further, the Commission finds that the certificates did not prevent the factual circumstances of the killings being investigated in their most immediate and relevant aspects. In particular, the soldiers, police officers and members of the security services involved in and in command of the operation in Gibraltar gave evidence. While the certificates may have prevented the applicant's representative from exploring, in particular, the planning of the operation at its earliest stages, the Commission does not consider that this prevented the issue as to the possible premeditation of the killings being raised.

200. The Commission rejects the applicants' contention that the Inquest should have furnished an exhaustive fact-finding exercise. Neither does it find that the alleged errors of law by the Coroner are material in this context. In the circumstances of this case, the Inquest as it was conducted subjected the actions of the agents of the State to extensive, independent and highly public scrutiny and thereby provided sufficient procedural safeguards for the purposes of Article 2 (Art. 2) of the Convention.

201. The Commission finds that there has accordingly been no failure to comply with the first sentence of Article 2 para. 1 (Art. 2-1) of the Convention.

H. Requirements of Article 2 para. 2 (Art. 2-2)

202. Since it is not disputed that the killings in this case constituted an intentional deprivation of life within the meaning of the second sentence of the first paragraph, the Commission has proceeded to examine the applicants' third proposition under the second paragraph of Article 2 (Art. 2-2).

203. The Government have contended that the deprivation of life to which the application relates was justified under the second paragraph of Article 2 (Art. 2-2) as resulting from the use of force which was no more than absolutely necessary in defence of the people in Gibraltar from unlawful violence.

204. The applicants submit that the use of force was not absolutely necessary for that purpose. They argue as follows:

i. there was a premeditated plan, to which the Soldiers A, B, C and D were party, to kill the three suspects when they arrived in Gibraltar; or

ii. the operation was deliberately planned in such a way that it was inevitable that the soldiers, in light of their training and information supplied to them, would kill the three suspects; or

iii. the planning and conduct of the operation disclosed reckless disregard for, or negligence in respect of, the suspects' right to life.

205. Before embarking on its examination of the issues raised, the Commission would make two observations.

206. First, a policy of shooting to kill terrorist suspects in preference to the inconvenience of resorting to the procedures of criminal justice would be in flagrant violation of the rights guaranteed under the Convention. A terrorist who is suspected of having committed or of intending to commit an act of violence continues to enjoy the protection of the right to life guaranteed by Article 2 (Art. 2) of the Convention and the right to a fair trial in the determination of any criminal charges brought against him or her as guaranteed under Article 6 (Art. 6) of the Convention.

207. Second, the Commission recognises that the United Kingdom owed a responsibility not only to the three terrorist suspects in this case but was also under a positive obligation with respect to safeguarding the lives of the people in Gibraltar. The existence of any risk and the extent of such risk to other persons must therefore be given particular significance when assessing the necessity for the use of lethal force in this case, and whether the action taken was strictly proportionate to that risk.

i. The conspiracy theory

208. The applicants have alleged that the killing of the three suspects was premeditated in that the authorities intended from the beginning to have them ambushed and killed and that the SAS soldiers were sent to Gibraltar to execute that design. In this respect, they point to the fact that the three suspects were allowed to enter Gibraltar unapprehended. They refer to the statement of Mr. Debelius to the effect that the suspect car driven by Savage was followed by the Spanish police and that the authorities in Gibraltar had prior warning of his arrival in Gibraltar (see para. 163).

209. The applicants further contend that while the Government alleges that everyone was acting in the honest and reasonable belief that there was a bomb sitting in the car in the assembly area, no steps were taken to neutralise the threat (ie. by unscrewing the aerial). Moreover, no steps were taken to evacuate the area, people being allowed to walk past the area freely for hours afterwards.

210. The Government submit that the Coroner put the plot proposition to the jury which impliedly must have rejected it in returning verdicts of lawful killing. They deny the allegation that the authorities were aware of Savage's arrival in Gibraltar or that he had been subject of surveillance by the Spanish police, relying on the statement of Chief Inspector Valenzuela (see para. 161).

211. As regards the allegation of surveillance of Savage prior to his arrival in Gibraltar, the Commission finds it unnecessary to decide which version, if either, is the more accurate. The issue is relevant to the allegation by the applicants that the authorities in Gibraltar made no real effort to stop the terrorists on arrival at the border but had intended throughout to allow them to enter for the purposes of

ambushing them within Gibraltar.

212. The Commission recalls that while there was surveillance on both sides of the border, the nature of this surveillance was somewhat lacking in thoroughness (see paras. 52-55). The Spanish immigration officers were apparently only scrutinising cars which contained two men and one woman. It does not appear that the known aliases of the suspects were passed on to those on duty at the Spanish customs post, since if they were it is remarkable that the suspects were not spotted. On the Gibraltar side, no effort was made to slow down the line of cars or to look thoroughly at passports. This would appear to have been a deliberate policy at least on the part of the authorities in Gibraltar who placed more importance on avoiding arousing the suspicions of the three suspects.

213. The Commission notes that arrest policy formulated by the Advisory Group envisaged the arrival of the suspect car bomb with or without warning and that an arrest should not be made until all three members of the ASU were present and there was sufficient evidence (in the form of a car bomb) to secure convictions of the suspects (see para. 57). This approach was supported by Chief Inspector Ullger who gave his opinion that allowing the suspects to enter was the only way to ensure the success of the operation (see para. 54). The Commission finds therefore that the suspects were effectively to be allowed to enter Gibraltar to be picked up by the surveillance operatives in place in strategic locations for that purpose. This cannot however constitute in itself evidence of a predetermined plan to execute the suspects.

214. The Commission notes that Soldiers A, B, C, D, E and F consistently denied that they were under instructions to carry out a summary execution either expressly or on the basis of "a nod or a wink" (see para. 153). As the Coroner pointed out, it is difficult to envisage that if there had been such an intention the Gibraltar police could have been unaware of it.

215. The Commission is unconvinced also by the lack of any immediate steps taken in regard to the suspected car bomb. Tampering with the aerial might have neutralised a remote control device, had there been one, but not unreasonably could have been regarded as carrying with it its own risks. Similarly, if the car was not finally regarded a suspect bomb until Soldier G returned from his examination at 15.25 (see para. 73), the delay in implementing the evacuation plan until after 16.00 may be explained by the manpower difficulties facing the Gibraltar police who had at the same time unexpectedly to cope with taking control of the scenes of two shooting incidents.

216. The Commission concludes that there is no evidence to support the applicants' contention of a premeditated design to kill McCann, Farrell and Savage.

ii. Conduct of the operation

217. The Commission has considered first the actions of the soldiers in order to determine whether in the circumstances they used disproportionate and excessive force to achieve the alleged aim of defending persons from unlawful violence. It has then examined whether the United Kingdom failed to plan and control the operation (whether deliberately, recklessly or carelessly) in such a way as to minimise the need for the use of lethal force by the soldiers.

a. The actions of Soldiers A, B, C and D

218. The applicants refer to the fact that the suspects were not armed or carrying any device and that from their own observation, the soldiers should have been aware of that. They submit that on the soldiers' own accounts no intelligible warning was given to the suspects before they opened fire and no attempt made to overpower the

suspects physically or disable them despite the soldiers' very close proximity to them - as little as 3 feet in the case of Farrell. In particular, they emphasise the devastating nature of the soldiers' reaction to what amounted to a change of expression from McCann, a movement towards her handbag by Farrell and move of the hand by Savage. The suspects were as a result riddled with bullets as they were falling and lying on the ground. This, the applicants submit, cannot be regarded as being a strictly proportionate response.

219. The Government submit that the soldiers held the honest and reasonable belief that the car in the assembly area contained a car bomb that could be detonated by a remote control device, that the three suspects were carrying a remote control device, that the bomb could be detonated by the suspects at the point at which they proposed to carry out the arrest and that the suspects before they were shot were making movements as if they were attempting to activate the remote control device. The use of lethal force was consequently a necessary response by the soldiers to prevent the disastrous consequences of an explosion in the centre of Gibraltar.

220. As regards the factual circumstances surrounding the shooting, the Commission has given careful examination to the evidence of the soldiers and the witnesses.

221. In respect of the shooting of McCann and Farrell, the Commission is of the opinion that in the general the version given by the Soldiers A and B corresponds to the event as it must have happened. While there are a number of discrepancies between the soldiers' accounts and those of the other witnesses, in particular, whether Farrell's handbag was carried under her left or right arm, the Commission considers that these are insufficient to discredit the soldiers' evidence. Further the Commission finds that in a number of important respects the soldiers' accounts receive corroboration. Four witnesses, for example, recalled hearing a warning shout. While in relation to the movements made by the suspects which the soldiers gave as their reason for opening fire, Officer P supported their evidence in recalling that McCann and Farrell had made movements which he would have regarded as dangerous in their place. Officer Q and Police Constable Parody also confirmed that Farrell made a move towards her handbag (see paras. 98-108).

222. The Commission finds no convincing support for any allegation that the soldiers shot McCann and Farrell when they were attempting to surrender or when they were lying on the ground. This is denied by the soldiers and by a number of other witnesses. The soldiers accept that they continued shooting as the suspects were falling and other witnesses confirmed this. This was also the explanation given to the wounds by the pathologists (see paras. 141-142). It is possible that those witnesses who believed that they saw the suspects shot on the ground were confusing the sounds of the subsequent shooting of Savage nearby with scene at the Shell garage immediately after the shooting of McCann and Farrell when policemen from the police car jumped the barrier and the plainclothes policemen crouched near the bodies, one of them briefly having a gun in his hand at the time (see paras. 96-97).

223. The Commission finds however that the soldiers carried out the shooting from close proximity. The forensic evidence indicates a distance of as little as 3 feet in the case of Farrell (see para. 144).

224. The Commission concludes therefore that Farrell and McCann were shot by Soldiers A and B at close range after the two suspects had made what appeared to the soldiers to be threatening movements. They were shot as they fell to the ground but not when they were lying on the ground.

225. As regards the shooting of Savage, it was in relation to this incident that arose the shocking allegation that a soldier had fired

into a suspect's body while standing over him with a foot on his throat. The source of this claim appears to have been the written statement made by Mr. Kenneth Asquez which came into the possession of Thames Television. In view of his later retraction at the Inquest, it is impossible to give his original statement any weight, unsupported as it is by any other witness (see para. 119).

226. The Commission notes that the evidence of Mr. Bullock appears to suggest that Soldiers C and D watched the scene at the Shell garage from the corner of the alleyway before moving in pursuit of Savage (see para. 121). Mr. Jerome Cruz also saw persons watching from that corner. Since however there were several members of the surveillance team at various times in that area, the Commission considers that this in itself does not contradict the other accounts. Witnesses H, I and J were in the area and H and I assisted the soldiers in pointing out the location of Savage. The persons seen watching at the corner and then following after Savage could have been Witnesses H and I who stated that they did exactly that (see paras. 115-117).

227. Whether the soldiers did watch the first shooting incident would appear to be relevant in that it contradicts their version of being unaware of the prior shooting and thereby implies a certain premeditation in the action which they took in bringing down Savage.

228. However, the general tenor of the evidence of the witnesses is that there was very little time - a matter of seconds - between the shooting in the Shell garage and the shooting at the Landport tunnel. Further it was probably either the sound of the police siren or the sound of the shooting at the Shell garage, or indeed both, which caused Savage to turn round to face the soldiers who were by then behind him in the alleyway. It does not therefore appear to the Commission to be likely that Soldiers C and D witnessed the shooting of McCann and Farrell before proceeding in pursuit of Savage.

229. In conclusion, the Commission finds that there is insufficient material to rebut the soldiers' version of the shooting which is in important particulars supported. Witnesses H and J saw Savage spin round to face the soldiers in apparent response to the sound of a police siren and/or gunfire from behind though both turned away without witnessing the immediate aftermath. However, even on their own account, Soldiers C and D continued shooting until Savage was almost on the ground and, according to one witness I, one or two shots were fired while Savage was in fact on the ground. They also opened fire from close proximity, approximately 4-6 feet (paras. 115-117 and 144).

230. The shooting however must have been over in a few seconds: recollection of the timing of events in relation to each other must be particularly problematic in this context. The Commission finds therefore that Savage was shot at close range until he hit the ground and probably in the instants as or after he had hit the ground. This conclusion is supported by the pathologists' evidence at the subsequent Inquest (see para. 143).

231. The Commission is satisfied, on the basis of their evidence at the Inquest, that Soldiers A, B, C and D opened fire with the purpose of preventing the threat of detonation of a car bomb in the centre of Gibraltar by suspects who were known to them to be terrorists with a history of previous involvement with explosives. With regard to their belief that the suspects were carrying devices, the Commission recalls that Soldier C observed an object bulging in Savage's pocket and that the applicants concede that Farrell's handbag could have contained a device. While McCann was dressed in jeans and T-shirt, it appears that the soldiers were also lightly clad yet carrying both a gun and a radio concealed on their persons. Having regard to the information given to them, in particular by their commander Soldier E, the soldiers' belief as to the existence of a car bomb and the possibility of detonation cannot be said to have been perverse or unreasonable (see paras. 43 and

47).

232. A disturbing aspect of this case however is the fact that the response of the four soldiers was to shoot to kill. This emerges from their testimony and was the conclusion of the Coroner in his summing-up to the jury. The soldiers made no attempt to overpower physically or disable the suspects since this was regarded as posing too much of a risk. It would have taken time even at a close distance to seize and immobilise a person. A person who was wounded also remained capable of the movement necessary to push a button device. On this reasoning, the soldiers considered that it was logical and necessary to continue firing until the suspects were rendered incapable of detonating a device. While the soldiers denied deliberately firing at the suspects on the ground, the Commission has found that in respect of Savage it is probable that he was hit by bullets in the instant as or after he fell to the ground (see para. 230).

233. The Commission finds nonetheless that given the soldiers' perception of the risk to the lives of the people of Gibraltar - that a car bomb could be and was about to be detonated by the activation of a remote control device - the shooting of the three suspects can be considered as absolutely necessary for the legitimate aim of the defence of others from unlawful violence. The Commission has noted that if a bomb of the dimensions found in Marbella had been brought in and detonated on 6 March there could have been a devastating loss of life.

b. Operational responsibility

234. Notwithstanding the conclusion above as to the necessity of the use of lethal force from the perspective of the soldiers, the Commission is of the opinion that the United Kingdom bears a wider responsibility for the way in which the operation was planned and executed. This case may be distinguished from the Kelly case (see para. 190) where the situation at the roadblock developed without any warning. In the present case, the authorities had been aware of the threat posed by the ASU and had been planning for months their response.

235. In these circumstances, the use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk.

236. The applicants submit that the way in which the authorities planned and carried out the operation rendered inevitable the use of lethal force by the soldiers in circumstances where it was or ought to have been known that there was no actual risk to the people in Gibraltar. In particular they criticise the erroneous assessments and assumptions made during the operation and the way in which they were relied on or distorted to provide a basis for the actions taken. These may be summarised as follows:

- the assessment that the suspects would not use a blocking car or enter Gibraltar prior to the intended date of the attack on a reconnaissance or dummy run;
- the assessment that the car in the assembly area contained a bomb;
- the assessment that the applicants were likely to bring in an explosive device which would be detonated by remote control;
- the assessment that the applicants would be likely (all three of them) to be carrying a device with them prior to the date of the attack;
- the assessment that if faced with the threat of arrest they would

attempt to detonate the device;

- the assumption that the device would be small enough to be concealed from the observation of the soldiers;

- the assumption that the device could be detonated by the pressing of one button;

- the assumption that the device could be capable of detonating a bomb from a location out of the line of sight.

237. The Government refer to the fact that in the most relevant respects the intelligence assessment was accurate: namely, that an ASU consisting of McCann, Farrell and Savage intended to bring a car bomb into Gibraltar to carry out an attack on the military parade on 8 March 1988. They submit, as Witness O did at the Inquest, that an intelligence assessment of a suspected terrorist attack must inevitably be based on incomplete information. Having regard to the existence of a genuine and very serious risk, they contend that the assessments as to the bomb being in place and the possibility of a detonation were not in the circumstances either unreasonable or irresponsible.

238. The Commission has examined the applicants' arguments. It notes that the applicants point out that in respect of a terrorist attack on a specified event in Gibraltar a timer device was more logical. To detonate a device in line of sight from, for example, the Rock behind, would leave the terrorist trapped with little chance of escape. The reason given for expecting a remote control device - that in the aftermath of the Enniskillen tragedy, where an IRA bomb activated by a timer device killed 12 civilians, the IRA wished to avoid adverse public reaction - is stated by the applicants to credit the IRA with scruples about killing civilians which is unwarranted. It also contradicts the assessment that if apprehended the terrorists would nonetheless proceed to detonate the bomb regardless of civilian casualties.

239. As shown by the car bomb found in Marbella, the ASU was intending to use a timer rather than a remote control device. As to whether those involved in the operation were justified in expecting a remote control device, the Commission notes that a difference in emphasis is discernible between the groups involved in the operation as regards this aspect of the intelligence assessment.

240. The police recall a wide range of discussion with a lack of emphasis though with some reference to the remote control device as more likely. The Commissioner of Police for example took the attitude that they should be prepared to deal with either. According to the recollection of the intelligence officers, the intelligence assessment took into account a timer but considered the remote control device more likely. As regards the soldiers, they unanimously discount any discussion of a timer but are categorical in expecting a "button job". It is perhaps of relevance that some at least of the soldiers received prior briefings in London and that before and after the briefing on 5 March there is reference to Soldiers A-D having had briefings or discussions or daily updates from their tactical commander Soldier E. Their recollection might therefore be coloured by the emphasis of earlier or subsequent information (paras. 41-43).

241. The Commission finds that a timer must in all probability have been mentioned at the Commissioner's operational briefing. For whatever reason however, it was not a factor which was taken into account in the soldiers' view of the operation. Nonetheless, it seems to the Commission that since the authorities could not know with any certainty what the ASU's intentions were, it was not irresponsible to assume that a remote control device could be used and once that possibility was admitted, the risk had to be taken into account.

242. As to the assessment whether the car in the assembly area contained a bomb, the Commission notes that Soldier G 's expertise was limited and that at most he gave the car a cursory visual inspection which revealed nothing more suspicious than an aerial which was rusty. However the conclusion drawn that it was a suspect car bomb meant that it had to be regarded as suspect until proper examination disclosed otherwise. Since the car had been driven into Gibraltar by Savage who was the known bomb maker, the Commission considers that it can only have been prudent to regard the car with serious concern.

243. In respect of the assumptions that the suspects were carrying detonating devices which were concealable and which could have been activated by the pressing of one button, the Commission has had the benefit of the submissions of the parties, the transcript of the evidence given by the experts at the Inquest and sight also of a ICOM device with encoder attached supplied by the Government and a simulated device provided by the applicants.

244. The Commission agrees with the applicants that it was unlikely that the suspects would have all been carrying a remote control device. However it was always possible that one would and the soldiers would not necessarily have known which one it would have been. While the transmitter and encoder of the size and dimensions of the devices supplied by the parties could not have been easily concealed about the person (see para. 165), it would not have been impossible (see also para. 231).

245. The evidence does indicate that generally a device could not be detonated by merely pressing one button (see para. 149). However, if the power switch and the switch on the encoder were activated, it would only require the transmit button to be pressed. This would be unlikely, the applicants submit, as it would cause the batteries to run down and risk accidental detonation if the device was knocked. The Government state that in the experience of the security services the IRA have the practice of "hot-gluing" the various dials on the transmitter so that the dials cannot be moved and a potential malfunction from accidental re-setting be avoided. They submit that while it would still be necessary to activate the power switches on the transmitter and encoder they could and almost certainly would be switched on prior to the terrorist entering the target area. This would appear to the Commission to be a possibility that could not be discounted.

246. The applicants have been adamant that it would not have in any event been possible for the suspects, if they had wished to embark on such an uncharacteristically suicidal action, to detonate the bomb from where they were. They refer to the topography of Gibraltar, the numerous obstructions over the 1.4 km distance, the unsuitability of the suspected aerial receiver and the tests carried out by Dr. Scott on location in Gibraltar (see para. 149) The applicants have also made submissions casting doubt on the reliability of Mr. Feraday's evidence at the Inquest to the effect that the possibility of a detonation could not be excluded. It is pointed out that his evidence at the Inquest revealed limited expertise in the realm of radio communications and though he has extensive experience, he has only technical not academic qualifications (see also para. 168).

247. The Commission recalls that Captain Edwards carried similar tests albeit with differing equipment and received signals from the assembly area at the Shell garage and from even further away (see para. 150). The applicants point out that these tests take no account of the likely use of an encoder and decoder which would not accept ambiguous signals that might still be audible to the human ear. However, since the authorities could not know what equipment might be employed by an ASU, the Commission considers that the authorities' assumption that detonation was possible from that area was not unjustified.

248. The applicants have drawn the Commission's attention to the way in which the assessments made as to the likelihood of a remote control device being used and the suspicions existing as to the presence of a car bomb in the assembly area were unjustifiably transformed into certainties when passed on to the soldiers on the ground (see paras. 73-77). It seems to the Commission however that, once the risk was found to exist, the soldiers would necessarily have had to act on that basis. The nature of the risk was such as to render irrelevant consideration as to the degree of probability of that risk, ie. whether detonation of a bomb was possible or highly likely.

249. In that context, the Commission recalls that a 64 kg explosive device was found in Marbella in a car hired in the false name used by Farrell. The report of the Spanish police indicates that the timers were set for the time of the military parade in Gibraltar and that ammunition appeared to have been packed round the device to give an added shrapnel effect to the blast. As was stated at the Inquest, if the terrorists had succeeded in exploding the bomb in the centre of Gibraltar, it would have been one of the most devastating outrages committed by the IRA.

250. Having regard therefore to the possibility that the suspects had brought in a car bomb on 6 March, 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 Commission finds that the planning and execution of the operation by the authorities does not disclose any deliberate design or lack of proper care which might render the use of lethal force against McCann, Farrell and Savage disproportionate to the aim of defending other persons from unlawful violence. Consequently, the Commission is satisfied that the deprivation of life resulted from the use of force that was no more than "absolutely necessary" for that purpose.

CONCLUSION

251. The Commission concludes, by 11 votes to 6, that there has been no violation of Article 2 (Art. 2) of the Convention.

Secretary to the Commission

President of the Commission

(H.C. KRÜGER)

(C.A. NØRGAARD)

Or. English

DISSENTING OPINION OF MR. S. TRECHSEL JOINED BY MR. F. ERMACORA

To my regret, I cannot share the opinion expressed by the majority of the Commission. I have come to the conclusion that in the present case there has been a violation of Article 2.

First, I am not convinced that the operation was prepared with the necessary regard for the lives of McCann, Farrell and Savage. I find some merit in the applicants' criticisms insofar as I understand them to allege that the soldiers were briefed in a slightly biased way which created an atmosphere of extreme alarm leading to exaggerated aggressiveness. In addition, I take issue with the assumption that the terrorists had placed the car bomb ready to explode at the pressure of a button in the assembly area almost two full days before it was intended to explode.

Second, there was ample opportunity to carefully observe the terrorists from all sides. I cannot accept that it would not have been possible to ascertain (and inform the soldiers accordingly) that McCann was carrying neither a fire-arm nor a detonator. With regard to Savage, the same observation could be made with at least a high degree of probability. The only likely place for the rather bulky detonator

to be hidden was the bag which Farrell was carrying. Thus, it would have sufficed to prevent her from reaching into it.

Third, as far as Savage is concerned, it must be assumed that the shots fired at McCann and Farrell could be heard by him before he was himself shot at. Had he been in possession of a detonator, which could explode a bomb at the touch of a button, he could have done so before the soldiers started to attack him. The fact that he had not was a very strong indication indeed that the hypothesis under which the soldiers opened fire was wrong.

Finally, the decisive element is, in my view, the fact that the use of firearms by the soldiers automatically involved shooting to kill. Thus, from the outset, they were not trained or instructed to reflect whether it would not have been sufficient merely to wound their targets. However, in view of the very short distance between the soldiers and the terrorists, I do not accept that this was not a highly valid alternative, particularly with regard to Savage who was alone against two soldiers who furthermore enjoyed the benefit of surprise. In the specific circumstances of the present case and taking due account of the dangerousness of the terrorists and the gravity of the danger which they presented, I have formed the opinion that the way in which the soldiers fired at McCann, Farrell and Savage constituted excessive use of force and, therefore, that Article 2 of the Convention has been violated.

Or. English

DISSENTING OPINION OF MRS. J. LIDDY JOINED BY MR. REFFI AND NOWICKI

1. However abhorrent the murder and maiming planned by the I.R.A., the members of their so-called Active Service Unit (ASU) were entitled to have their right to life respected by agents of the United Kingdom. Mass-murderers have the same entitlement to the guarantees of the Convention relating to the right to life, freedom from torture, the right to a fair trial etc. as does the law-abiding person.

2. A total of 27 shots were fired by soldiers with the intention of killing three suspected bombers in Gibraltar on 6 March 1988 and the suspects subsequently turned out to be neither armed nor in possession of the means to detonate a bomb. There was no bomb in Gibraltar.

3. With hindsight, the force used was more than "absolutely necessary ... in defence of persons from unlawful violence", as required by Article 2 (2)(a) of the Convention. The question is whether, at the time, appropriate precautions and care would have avoided an erroneous assessment that it was necessary.

4. The operation to foil the suspected plot to detonate a bomb in Gibraltar was planned from an undisclosed date prior to 4 March 1988, apparently some months before that date. It is therefore necessary to examine each link in the chain of responsibility which led the four SAS soldiers on the ground to open fire on the three suspects and to continue firing until they were dead. Specifically, how did it come about that the four SAS soldiers thought that each of the three suspects was carrying a detonating device which, at the press of one button, would cause an explosion in the centre of Gibraltar, and how seriously did those soldiers themselves take their responsibility under the Convention as agents of the Government not to kill unless it was absolutely necessary?

5. Contracting States must bear responsibility for the way in which operations which result in the deprivation of life are planned and executed. In the present case the authorities had been aware of the threat posed by the so-called ASU and had been planning their response apparently for months. In these circumstances, the use of lethal force would be rendered disproportionate if a Contracting State failed,

whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk.

6. I note that, in employing in the intended arrest operation SAS soldiers, who are trained when they open fire to do so to kill (see para. 112 of the Report), and in sending them out with the belief that the suspects would and could detonate a bomb by the mere pressing of a button, there must have been an inherently high probability that the operation would result in the use of lethal force. In this regard, I recall that the document signed by the Commissioner expressly referred to the military option including the use of lethal force. Moreover, on a question put by the jury, Soldier E agreed 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. In light of this, the authorities owed a particular duty of care with regard to the information and instructions which were supplied to the soldiers.

7. At paragraphs 236 and 237 the majority have summarised the parties' relevant submissions, and at paragraphs 238 to 241, the majority address the first major question: why was it assumed that there would be a remote control device rather than the more likely use of a timer? The majority have rightly pointed to the contradiction between saying on the one hand that the IRA would use a timer to avoid civilian casualties and, on the other hand, that the IRA would detonate a bomb if apprehended regardless of civilian casualties. The majority have nonetheless concluded that it was not irresponsible to assume that a remote controlled device could be used. Thus far, I agree. But the four SAS soldiers said they were certain that a remote controlled device would be used. They, who were responsible in domestic law for the ultimate decision as to whether to shoot to kill, failed therefore to allow for the possibility (and fact) that the so-called ASU did not have the means to detonate any bomb. Their briefing was inadequate. This connotes a degree of carelessness, serious in the circumstances.

8. At paragraph 242 the majority consider the erroneous assessment that the car in the assembly area contained a bomb. They note that it was considered suspect after a cursory visual examination which revealed nothing more suspicious than a rusty aerial. However, at no stage was it considered established by soldier G that there was a bomb in the car. Yet, the four SAS soldiers, A, B, C and D were consistent in maintaining that they had been informed by E over the radio that there was definitely a bomb in place. They who were responsible in domestic law for the ultimate decision as to whether to shoot to kill, failed therefore to allow for the possibility (and fact) that there was no bomb in Gibraltar. The information given to them was misleading and inaccurate. This connotes a serious degree of carelessness

9. At paragraph 244 the majority consider the assumption that a detonating device would be concealable on the persons of the suspects and conclude that it would not have been impossible. The sample transmitter and encoder supplied by the Government to the Commission were, respectively, 18 cm x 6.5 cm x 3.7 cm and 8 cm x 9 cm x 3 cm, with an aerial 18 cm long. I have inserted this bulky and heavy object into a pocket on a rather heavy jacket and profoundly disagree with the conclusion of the majority. The object dragged down my pocket and obtruded upwards from it in a highly ostensible fashion. I cannot see how the two male suspects, dressed as they were, could have hidden it, although I accept that it could have been hidden in a sturdy handbag of the requisite size. The Government allege that the soldiers who were also lightly clad hid a gun and radio on their persons. However, two of the eye-witnesses noticed these guns which the soldiers had placed in the rear waistband of their trousers.

10. The soldiers do not appear to have been given any information about the likely size of the device beyond that it would be of a size

which could be concealed. Nor were they instructed to attempt to verify by observation whether a suspect was carrying a device. The soldiers, for their part, do not appear to have considered that they had any responsibility to ask to see the likely size of a device or to assess the size of any bulges or note the absence thereof. These omissions are inexplicable in the context of an operation where the use of lethal force was foreseen in writing.

11. At paragraph 245 the majority consider the assumption that a detonating device could be activated at the pressing of a single button and conclude that this was a possibility that could not be discounted, if the device was present. However since the attack was not expected until Tuesday 8 March and the assessment was that the IRA wished to avoid indiscriminate civilian deaths there appears no reason why the suspects should be carrying a pre-set device, or indeed any device with them on Sunday 6 March.

12. Moreover there is a fundamental inconsistency between, on the one hand, the decision to shoot to kill for fear that the IRA were about to embark on an uncharacteristically suicidal action which would cause massive loss of life and, on the other hand, the lack of concern on the part of all the soldiers that any one of the 27 bullets fired would strike the button, thereby detonating a bomb, or that any of the 3 bodies when falling to the ground would cause the button to make contact with the corner of the pavement, with the same tragic result. The soldiers decided to shoot and to continue shooting until the suspects were dead because each of the three suspects made movements. Those movements were the change of expression on the part of a man who turns around to find he is being scrutinised followed by the movement of a hand, the instinctive movement of a woman to clutch her bag closer to her on being startled in the street and the moving of hands by a man who turns around on hearing gunfire to find himself faced by two armed men. The soldiers failed to allow for innocent movements and erroneously assessed those movements as dangerous. Their reaction in itself, on the basis of their own erroneous assessment, risked activation of any detonator as a direct result of their bullets. This connotes a degree of recklessness.

13. There are other major questions left unanswered. The possibility that on Sunday 6 March the car which was driven in was a blocking car to ensure parking space or that the so-called ASU might be on a reconnaissance was effectively discounted in the intelligence assessment (see para. 34). Deputy Commissioner Colombo recalled that the possibility that the three suspects were on reconnaissance was discussed in the operation room after 14.50 when the three suspects had met in the assembly area. The decision not to arrest at that point was based on the consideration that they were on reconnaissance. However the reconnaissance possibility was no longer taken into account when at approximately 15.40 Savage broke away from McCann and Farrell to return south.

14. There is also a basic inconsistency in the decision to allow a suspected car-bomb into Gibraltar on Sunday 6 March and sit in the assembly area without instituting an immediate evacuation, notwithstanding that the authorities were of the view that on an attempt to arrest being made the suspected bomb might be detonated by remote control. However one resolves the predicament of the dramatically conflicting information provided by the parties from Spanish authorities as to whether or not the car was under surveillance as it approached the border (see paras. 160-164 of the Report) the fact remains that no effective efforts were made to stop the car in the controlled environment of a border where the risks of casualties and damage would be less. At the time the four soldiers were authorised to proceed to an arrest, the risk of detonation suddenly assumed urgent proportions and was perceived as such an immediate threat as to justify the use of lethal force. At the same time, no immediate effort was made to evacuate the square.

15. There was an undisclosed but considerable number of plainclothes personnel on the ground at the time of the operation, comprising SAS soldiers, police and surveillance agents. There is no adequate explanation as to why all these people were not instructed to attempt at a given signal to surround and pinion the suspects either in the assembly area at 14.50 or in the course of the following hour or so. The only explanation seems to be that the soldiers role did not come into play until control was passed to them at 15.40. This does not answer the question as to why plans were not made for the obvious means of arresting and bringing to trial the suspects while at the same time ensuring that no detonating device was activated, that is, to pinion their arms.

16. At paragraphs 231-233 the majority isolate the role of the four soldiers and effectively exonerate them on the basis that they were acting on the briefing they had received from their superior officers. It is understandable that a juror could reach that conclusion if asked to convict the soldiers of murder, rather than a lesser offence. However, the fact is that the final, decisive link in the chain of lack of care, omissions, errors and misleading information is represented by the four soldiers' decisions to open fire and to shoot to kill. They must be regarded as links in the chain of responsibility attributable to the Government. To allow the invocation by one person of "briefing by superior officers" is not far removed from allowing a defence of superior orders. Such an approach would be operable at each isolated link in the chain of expertise or other responsibility and could logically lead to the conclusion that a Government could shirk responsibility for a series of acts of carelessness on the part of its agents. Article 2 requires each person with responsibility to do what is within his or her power to ensure that lethal force is not used unless it is absolutely necessary.

17. In sum, I am of the opinion that the planning and execution of the operation disclosed a failure properly to balance the possible risks represented by the suspects on 6 March against their right to life. The three suspects could have been arrested without the use of lethal force and insufficient care was taken to ensure that that was the course adopted. The use of lethal force against the three suspects was disproportionate to the aim of defending other persons from unlawful violence. The deprivation of life was consequently not the result of the use of force which was no more than "absolutely necessary" for that purpose.

18. I conclude that there was a violation of Article 2.

Or. English

DISSENTING OPINION OF MR. L. LOUCAIDES

I find myself unable to agree with the majority in this case. My conclusion is that Article 2 has been violated in respect of the killing of McCann, Farrell and Savage.

The right to life is the most fundamental human right. The Convention expressly forbids intentional deprivation of life save in certain exceptional cases and under certain well-defined conditions. Exception clauses must be interpreted narrowly and strictly, especially so when they concern the right to life, for in such a case misapplication of the exception results in the tragic, irretrievable loss of human life.

In this case, three persons were intentionally killed by agents of the respondent Government. The Government sought to justify these killings by invoking paragraph 2 (a) of Article 2 of the Convention which provides as follows :

"...

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 ;
..."

The facts of this case show that the deprivation of the life of all three suspects was in reality not necessary for the "defence of any person from unlawful violence". The suspects were intentionally killed because those responsible for the relevant operation believed that they were planning to detonate by means of a remote control device, a bomb in a car parked in a busy area of Gibraltar. Such belief was wrong. The suspects at the material time did not have any detonating device on them and there was no bomb in the car in question.

Under the Convention, States have a primary duty to protect life. If they deprive any person of his life, they have to prove that their action was strictly within the permissible exceptions both as a matter of law and as a matter of fact. In this case, the respondent Government has not proved that the killing in question fell within the exception invoked by them ; rather, they contend that they honestly and reasonably believed that they were acting in accordance with the prerequisites of the exception provided under paragraph 2 (a) of Article 2 of the Convention while in actual fact this proved not to be so.

The question then arises whether and to what extent a bona fide reasonable mistake or error may exonerate a State from responsibility under the Convention. Such responsibility should not be confused with individual responsibility, criminal or civil, under national legal systems - though it is to be noted that in many civil systems such mistakes do not constitute a defence to torts which are the result of physical attacks. The question whether there has been a breach of the obligations provided in the Convention has to be determined on the basis of the terms and conditions of the Convention itself. These obligations are not comparable with those governed by norms of criminal or civil laws.

The Convention provides that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms" defined in the Convention. The terms of the Convention do not appear to allow mistakes or errors as a justification or defence for failing to secure the rights in question. The test of whether there is a violation of such right is objective. A violation is sufficiently established if it is proved that the State concerned has actually caused the interference with a right or failed to secure the right in circumstances that do not satisfy strictly the conditions of any permissible justification. In this sense, State liability under the Convention for breach of its provisions is strict.

Mistakes by State agents, however honest and reasonable they may be, cannot excuse the State unless, of course, the mistake is the result of an act of the individual complaining of the breach in which case the complainant may be responsible for causing himself the situation for which he complains. The State may then escape liability not by virtue of the mistake as such, but by reason of the fact of not being itself responsible for causing the violation complained of. For instance, when a complainant threatens the police with a false grenade he and not the police, will be responsible for any physical attack on him by the police. One can think of many other relevant examples.

The fact that the mistake can exculpate the agents of the State labouring under it from personal criminal responsibility under the domestic law cannot be sufficient to exculpate also the State from

responsibility under the Convention. Indeed to accept otherwise would lead to absurd results in respect of State responsibility for interferences with the rights set out in the Convention (e.g. Article 5) and in particular as regards the application of permissible limitations and restrictions on such rights.

Therefore I believe that in this case the killing of the three suspects cannot legally be justified on the ground of an honest and reasonable mistake; and so long as it amounted to an intentional deprivation of life which did not fall within any of the exceptions provided under Article 2 of the Convention, it was a breach of that Article in respect of all three suspects.

I consider it useful to add that even if I assume that an honest and reasonable mistaken belief could in law be sufficient to bring a case within the ambit of Article 2(2)(a), I find that on the basis of the facts of the present case the respondent Government has failed to establish (a) that the assumption that the three suspects were at the time of the killing ready and in a position to detonate a bomb in the car parked in the town of Gibraltar was a reasonable assumption; and (b) that the deliberate killing of the suspects was no more than absolutely necessary in order to avoid the assumed explosion.

In reaching these conclusions I have taken into account the following :

(a) that no sufficient evidence was produced to establish that those who organised the relevant operation on behalf of the Government had concrete and convincing proof that the three suspects were at the material time carrying such special detonating devices that would enable them to detonate a bomb in the car by a single quick touch of a button without such device being visible from a distance of as little as 3-6 feet ie. the distance to which those who killed the suspects had approached at the time without noticing any detonating device on the suspects;

(b) no sufficient evidence was produced to prove that those who organised the killing operation had any concrete evidence justifying a belief, reaching the degree of certainty and not of mere suspicion, that the suspects were at the material time ready to detonate a bomb in the car as aforesaid;

(c) it was not proved that nothing short of actual killing of the suspects could have avoided their assumed plans. In this respect it should be borne in mind that the team responsible for the killing was basically trained to kill terrorists and not to arrest or otherwise prevent terrorists from using the assumed violence without actually killing them.

It is, I think, the duty of the States under the Convention when undertaking an operation aimed at preventing unlawful violence to take all necessary measures to avoid causing the death of any person : both on the side of those threatened with such violence as well as on the side of those threatening to use it. This is how I understand the duty of the states to protect human life. And when any of the exceptions provided in paragraph 2 of Article 2 is invoked then the deprivation of life must be proved to have been inevitable for the achievement of the relevant purpose provided therein. This, I believe, has not been proved in the present case even on the basis of the facts erroneously assumed to be correct by the agents of the respondent Government.

For all the above reasons I find that there has been a breach of Article 2 in respect of the killing of McCann, Farrell and Savage.

Appendix I

HISTORY OF THE PROCEEDINGS

Date	Item
14.08.91	Introduction of the application
24.10.91	Registration of the application
Examination of admissibility	
29.02.92	Commission's decision to invite the parties to submit observations on the admissibility and merits
11.08.92	Government's observations
23.10.92	Commission's grant of legal aid
13.01.93	Applicant's observations in reply
02.04.93	Commission's decision to invite the parties to an oral hearing
03.09.93	Hearing on admissibility and merits
03.09.93	Commission's decision to declare the application admissible
Examination of the merits	
03.09.93	Commission's deliberations
12.11.93	Government's observations
16.11.93	Applicant's observations
17.11.93	Applicant's additional submissions
15.01.94	Consideration of the state of proceedings
04.03.94	Commission's deliberations on the merits, final votes and adoption of the Report