

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

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REVISITING THE RIGHT TO LIFE: ABSOLUTE NECESSITY AND STATE RESPONSIBILITY IN MCCANN V UNITED KINGDOM

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Introduction

Maiming, gore, hatred, bombs, shootings and abhorrent murders are symbols in the case of *McCann and Others v United Kingdom*.¹ This seminal case, first one of its kind about lethal use of force, concerns the killing of innocents by soldiers, public functionaries, agents of the state, leading to deprivation of life, uprooting the sacrosanctness of the body and right to life. Article 2² of the European Convention of Human Rights codifies the universal “Right to Life”, sets out circumstances when deprivation is justified either intentionally or unintentionally by use of force, and states the object and purpose of state functionaries outlining the procedural rights to be followed when deprivation takes place for instance the death penalty provisions in Singapore, Indonesia and Malaysia. Specifically, clause 2 sub-clause (c) in action lawfully taken for the purpose of quelling a riot or insurrection. In an attempt to destabilize the government or state, the right to life cannot be held in abeyance. Article 2 is a fundamental provision, emphasizing that life is sacred and sacrosanct and is therefore protected in international treaties and domestic constitutions. The legal problem/question in this case discusses whether the deprivation of Right to life was justified under Article 2(2) by the United Kingdom Government in the killing of 3 suspected terrorists.

Daniel McCann, Mairead Farrell and Sean Savage were members of the Irish Republican Army (IRA) active service unit and were shot dead by soldiers of the Special Air Service in Gibraltar on suspicion of terrorist activity. The IRA was notoriously known to have fought against the British government historically, especially during the Birmingham bombings in 1980. The Judgment rendered ‘tip of an iceberg of Britain’s war in Ireland.’³

¹ *McCann and Others v United Kingdom* (1995) 21 EHRR 97, ECHR.

² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 2.

³ Peter Cumper, 'When the State Kills - *McCann and Others v. United Kingdom*' (1995) 4 Nottingham LJ 207,

The object and purpose of the Convention is for the protection of individual human beings. Thus, the application and interpretation of Article 2 must be instrumentalized to make the above-mentioned safeguards practical and effective.⁴ Being the most important right, derogation is impossible, the threshold is very high and there exists no elasticity for justification. The prohibition of extra judicial killings also follows under this provision, becoming the sole reason for the recent persecution of former Philippine President Duterte of such killings under the "war on drugs" campaign.⁵ The situations described to deprive life are exhaustive and interpreted narrowly.⁶ The use of force is applicable only when "absolutely necessary".⁷ The applicable tests are whether the State acted in good faith with honest intention, no alternative exists in the factual context, test of absolute necessity and whether the interference of the said right is proportionate to the legitimate aim pursued.⁸

"Everyone's right to life shall be protected by law"⁹ imposes a positive obligation on Contracting Parties. Domestic law should be compatible with the rule of law or the body of principles and the permissible limits of the use of lethal force by its agents.¹⁰ The Rule of Law, often viewed through euphemisms and aphorisms, must always be respected as these principles sets safeguards preventing law being arbitrary. The justification of actions must take place through law. Public authority cannot exceed the foundation of law and does not possess power to coerce citizens. The Rule of Law implies that people must have a basic set of minimum legal rights, have recourse in law including the right to fair trial and to an attorney, protection from physical violence, as without these principles social existence is not different from an exercise of raw power. The state cannot have absolute power over civilians resulting in injustice, political tyranny and political instability. The substance of the right must be protected in domestic law, as was upheld in Article 2 of the Gibraltar Constitution.

213.

⁴ *McCann* (n 1).

⁵ Human Rights Watch, 'Philippines: Hearings Expose Duterte-Era Killings' (3 October 2024) <https://www.hrw.org/news/2024/10/03/philippines-hearings-expose-duterte-era-killings> accessed 20th September 2025.

⁶ *McCann* (n 1) [181].

⁷ *ibid* [182].

⁸ *ibid*.

⁹ ECHR art 2(1).

¹⁰ *McCann* (n 1) [187].

The European Commission's appraisal

The procedural aspect of the right is stated as 'protected by law'. The Commission agreed that all the factual circumstances and the motivation for the killing is part of knowledge of the State authorities, thus the State is subject to open and objective oversight in lieu of public and independent scrutiny. The lack of any effective procedure to investigate the cause will raise issues under Article 2.¹¹ The European Commission held that there were substantial procedures laid down and were in accordance with law and the errors made did not have a material impact on the inquest.¹²

The State argued that for the defense of the people in Gibraltar from unlawful violence, use of force was absolutely necessary.¹³ The applicants argued that the Soldiers had foresight by firing, having intention to take their lives. The soldiers were carrying out overt surveillance, thereby encouraging state sponsored murder. There was a reckless disregard for, or severe negligence in respect of the victims' right to life.¹⁴ Dignity in life must have the utmost respect even if they are perceived terrorists. The United Kingdom owed a responsibility not only to the three suspected terrorists in this case but was also under a positive obligation with respect to safeguarding the lives of the people in Gibraltar.¹⁵ Subsequently, the Commission held that there was no premeditated design to kill McCann, Farrell and Savage.¹⁶

The lack of a premeditated plan and intention, confirmation of the soldiers' accounts after corroboration from four witnesses about a warning shout, reason for opening fire stated, the dangerous movements made by the suspects, the Commission held the case in favor of the Government. The interpretation of the purpose of open fire was to prevent the threat of harm to civilians in relation to terrorists.¹⁷ Thus, shooting was considered as absolutely necessary for the legitimate aim of the defense of others from unlawful violence.¹⁸

However, several dissenting opinions exist, where several members believed that has been a gross violation of Article 2. Mr. S. Trechsel and Mr. F. Ermacora contend that the biased way

¹¹ *McCann* (n 1) [193].

¹² *ibid* [196].

¹³ *ibid* [203].

¹⁴ *ibid* [204].

¹⁵ *ibid* [207].

¹⁶ *ibid* [216].

¹⁷ *ibid* [231].

¹⁸ *ibid* [233].

in which soldiers were briefed led to exaggerated aggressiveness, the hypothesis under which the soldiers' opened fire was clearly wrong, a valid alternative would have been to merely wound their targets.

Mrs. J. Liddy joined by MM. Reffi and Nowicki opined that the 3 victims of the IRA were entitled to have their right to life respected by agents of the United Kingdom. A total of 27 shots were fired with the intention of killing and evidently the force used was more than "absolutely necessary". There was a certain serious degree of carelessness of the public functionaries where the suspicion of a car bomb was based on a rusty aerial and the fact that the terrorist organization did not have the means to detonate any bomb. The Government failed to allow for the existence of the possibility that there was no bomb in Gibraltar. The soldiers failed to contemplate that the information given to them was misleading and inaccurate. Additionally, the dimensions of a sample transmitter and encoder constituting a detonating device would have been clearly visible in the dressing of the suspects as they could in no way have hidden it. Such omissions of facts are honestly inexplicable. The case also leaves several major questions answered, thus in the IRA's planning and execution of the operation there was a failure properly to balance the possible risks represented and most importantly, the use of lethal force against the three suspects was disproportionate to the aim of defending other persons from unlawful violence, and disclosed actual unlawful violence.

Mr. L. Loucaides also concluded the same as they were intentionally killed, based on a wrong belief, there was no detonating device and no bomb in the car. Thus, the real question the commission should have dealt with is to what extent a bona fide reasonable mistake or error may exonerate a State from its obligations. The fact that an exculpation can take place where the agents of the State kept from personal criminal responsibility under domestic law cannot be sufficient to exculpate also the State from responsibility under the Convention. He opined that the killings in this case cannot legally be justified on the grounds of an honest and reasonable mistake. There was intentional deprivation of life which did not fall within any of the exceptions provided under Article 2 of the Convention, constituting a breach of that Article in respect of all three victims.

The Judgment of the European Court of Human Rights

The European Court of Human Rights, in contrast to the Commission, made its own assessments of the facts and finally held, by a bare majority of ten to nine, a breach of Article 2 of the convention.¹⁹ All four soldiers shot to kill to prevent the explosion, and the organization and the control of the entire operation of the anti-terrorist movement lacked adherence to the requirements in Article 2. The action taken was in stark contrast with the standards of due care.²⁰ The two contentions of whether controlling the security operation were guilty of a "serious miscalculation" as against a premeditated policy to kill the terrorists was considered, where the former proved to be the issue. There was also no arrest made once the three suspects arrived at the border. Indeed, the authorities had no intention of arresting or allowing them to live or follow the criminal procedures, a decision that was heavily criticized.²¹ Instead they waited to conduct surveillance to a point where a serious miscalculation rendered them dead. McCann was shot five times, Farrell was shot eight times, and Savage 16 times.²² The Court states that the failure to make provision for a margin of error especially in light of the training of the soldiers to continue shooting once they opened fire until the suspect was dead, depicts lack of appropriate care and a failure of the authorities' duties. Thus, the killing of McCann, Farrell and Savage convincingly did not constitute force that was 'absolutely necessary in defense of persons from unlawful violence' and fell outside the meaning of Article 2(2)(a) of the Convention.²³

Judge Pikis commented that even if there is an attack on social order, the operation which presupposes a risk of harm must be planned and controlled such that elimination of all the foreseeable unnecessary risks of death with States obligated to react to the use of force that is proportional to such risks.²⁴ Additionally, State organs must restrict the circumstances in which force can be used, and effects must be minimized if force is used.²⁵ The decision gathered a lot of press and tribulations in society, Dr Joe Hendron MP remarking that "all reasonable people knew that these young people had been summarily executed" and the victim's brother

¹⁹ *ibid* [214].

²⁰ Darija Martinov, 'McCann and Others v. the United Kingdom and Positive Obligations Pertaining to the Planning and Control of the Operations of Law Enforcement in Line with Article 2 of the ECHR' (2021) 2021 *Glasnik Bar Ass'n Vojvodina* 682, 690.

²¹ *ibid* 689.

²² *ibid* 691.

²³ *McCann* (n 1).

²⁴ Darija Martinov (n 20) 691.

²⁵ *ibid* 691.

stating that the ruling shows that "the British Government has blood on its hands".²⁶

The Dissenting judges stated a danger of a terrorist attack of large proportions and UK's obligations to protect civil society. The decision not to arrest the suspects only after they entered Gibraltar was reached for practical reasons, to collect evidence and was not a "seriously mistaken estimate."²⁷ The possible hypotheses along with a number of facts being unknown and the information of limited scope, the use of deadly force was "virtually unavoidable".²⁸ They took the position that lethal force was absolutely given the heated, life threatening circumstances of this case.

Conclusion

This case places emphasis on the Right to life and its significance in a democratic society. Any provisions allowing for a limitation of the rights must be tightly construed. It also held that a 'stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society".'²⁹ It set a precedent and established new obligations for States party to the Convention when it comes to planning and conducting law enforcement operations.³⁰

The precedent of *Kelly v. the United Kingdom*³¹ was relied upon, where the domestic courts applied the test of reasonable necessity to shooting as the only way of preventing the escape of reasonably suspected terrorists and the use of force had been justified in line with the terms of Article 2(2).³² Paul Kelly had been shot dead by soldiers after a stolen car tried to evade an army checkpoint in Belfast as they assumed the passengers in the car were terrorists. This case shows the reluctance to castigate authorities who were involved in the use of deadly force.³³

After the McCann case, the Court in later cases has a 'tendency to find that the police have not

²⁶ Peter Cumper, 'When the State Kills - McCann and Others v. United Kingdom' (1995) 4 Nottingham LJ 207, 208.

²⁷ Joint Dissenting Opinion of Judges Ryssdal, Bernhardt, Thór Vilhjálmsson, G61 culikn, Palm, Pekkanen, Sir John Freeland, Baka and Jambrek in the case McCann and Others v. the United Kingdom, (App. no. 18984/91), 27. 9. 1995. para 8.

²⁸ Darija Martinov (n 20) 694.

²⁹ *McCann* (n 1) [149].

³⁰ Darija Martinov (n 20) 682.

³¹ *Kelly and Others v UK* (Application no 30054/96) (2001) 34 EHRR 12.

³² *McCann* (n 1) [190].

³³ Peter Cumper (n 26).

failed in their Convention duties'.³⁴ In *Andronicou and Constantinou v Cyprus*³⁵, the police were trying to rescue a woman from a hostage situation, where the force used was well within the ambit of Article 2, based on an honestly, sincerely and reasonably believed that it was necessary to eliminate all risks. The Court expanded the domain of the application of the rules about the necessity of caring about the right to life during the planning and control of operations of the security organs in cases involving terrorists.

Additional jurisprudence surrounded the standards laid down in *McCann*. In *Güleç v. Turkey*³⁶ the court emphasized a balance between the prescribed goal and the means to achieve it. In *Ergi v. Turkey*³⁷, even if security forces do not take all precautionary measures, the state is still responsible for not fulfilling its positive obligation by exercising a proper degree of care in the planning and control of operations. These are strict requirements to be complied with. In cases of *Isayeva, Yusupova and Bazayeva v. Russia*³⁸ and *Iseyava v. Russia*³⁹, where there exists a high degree of disproportionality in the use of force, even if a legitimate goal exists, the Court rejected that the operation was planned and executed with the required care for the lives of civilians.

In my opinion, there was a clear violation of Article 2 and the tenets of the right laid down. The case set standards of evaluation in cases of use of lethal force of the authorities' planning and control of the operation, the soldiers' degree of caution with the use of firearms, the interests of the democratic society, and a degree of haste and caution to be exercised where this is inevitability of the use of force. Protecting national security and human rights poses a dual burden, a burden that the State must balance. In this case, the UK had failed sufficiently to discharge this duty.⁴⁰ In light of this decision, States must take active steps to protect the rights guaranteed by this Convention.⁴¹

³⁴ Juliet Chevalier-Watts, 'A Rock and a Hard Place: Has the European Court of Human Rights Permitted Discrepancies to Evolve in Their Scrutiny of Right to Life Cases?' (2010) 14 *International Journal of Human Rights* 300 <https://doi.org/10.1080/13642980802538405>.

³⁵ *Andronicou and Constantinou v. Cyprus* (App. no. 25052/94) 1997.

³⁶ *Güleç v Turkey* (App. no. 54/1997/838/1044) 1998 ECHR.

³⁷ *Ergi v Tiskey* (App. no. 66/1997/850/1057) 1998 ECHR.

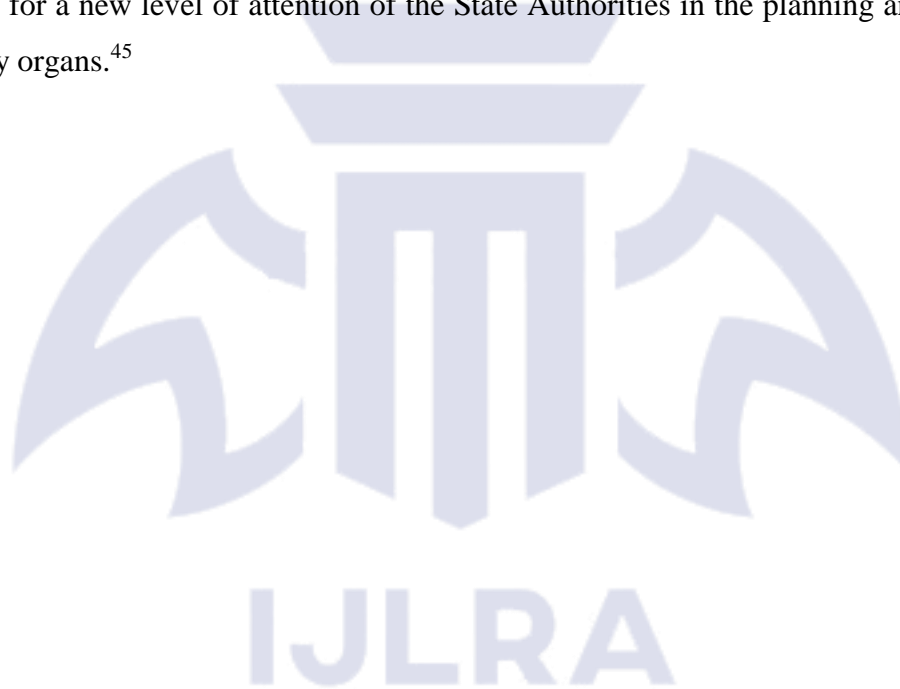
³⁸ *Isayeva, Yusupova and Bazayeva v Russia*, (App. nos. 57947/00, 57948/00 и 57949/00) 2005 ECHR.

³⁹ *Isayeva v Russia* (App. no. 57950/00) 2005 ECHR.

⁴⁰ Peter Cumper (n 26) 211.

⁴¹ Darija Martinov (n 20) 682.

Just like was held in the case of *R v Dudley Stevens*⁴², there exists no exception in the law for murder even for the reason of self-preservation. Murder is defined as the lawful killing of a Human Being, a deprivation of Right to Life. The Blue Star Operation in 1984, the infamous Golden temple incident, that led to the loss of thousands of lives, calls for a control and accountability of State' violation of Human Rights. A substantive right, curtailed in the most exceeding circumstances, the State must refrain derogation to the utmost extent. The court is applauded for its dealing with the complex and multifaceted case and rendering an innovative judgment.⁴³ This case for the first time addressed the "human fallibility of the members of state organs and difficult operational circumstances in which they operate and react."⁴⁴ It set role model standards, set forth a domain of application expanding over time, and the Court's foundation for a new level of attention of the State Authorities in the planning and control of the security organs.⁴⁵



⁴² *R v Dudley and Stephens* (1884) 14 QBD 273.

⁴³ *Darija Martinov* (n 20) 684.

⁴⁴ *ibid* 692.

⁴⁵ *ibid* 297-298.