Lethal Force, Policing and the ECHR: *McCann and Others v UK* at Twenty

Workshop at Doughty Street Chambers, 25th March 2015

Summary

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1. McCann v UK: the Stories Behind the Case
– Jonathan Cooper, Doughty Street Chambers

Jonathan Cooper's presentation introduced the background to the *McCann* case and the broader context of the situation in Northern Ireland, IRA activities up to the late 1980s, and the aftermath of the Gibraltar shootings. The presentation included the following timeline of events (and a series of powerpoint slides – see separate document).

McCann v UK: A Timeline

November 5th 1987: Daniel McCann arrived in Spain travelling on a false Irish passport. The Spanish had been notified by the British authorities that an IRA group could be trying to operate on Spanish soil, giving them a list of names, descriptions and possible aliases. The Spanish Ministry of the Interior decided to help the British Authorities as part of an agreed European strategy on terrorism. The Spanish security forces agreed to track the movements of the IRA members and keep the British fully informed of their movements.

Mid-November 1987: By sifting through hotel records of tourists, the Spanish authorities pinpointed three suspected terrorists: Daniel McCann, Sean Savage and another woman terrorist whom police in Britain and Spain refused to name but travelled under the alias 'Mary Parkin'. Authorities were unaware of Farrell's involvement at this time. Police managed to evedrop on the IRA team and overheard them planning a bomb attack, though the target was not yet clear.

15th November 1987: McCann and Savage flew back to Dublin. They were allowed to leave by Spanish authorities after consultation with London.

9th December 1987: According to 'Death on the Rock', Home Secretary Douglas Hurd met with interior ministers of other EEC countries in Copenhagen. Hurd warned this group, known as Trevi Group on Terrorism, that the IRA might be preparing to attack British institutions on the continent.

23rd February 1988: Among tourists at the Gibraltar changing of the guard, the IRA's intended target, was the fourth member of the IRA team, 'Mary Parkin'. Authorities tailed her to the parade and saw her studying the parade in detail.

1st March 1988: 'Mary Parkin' seen again at changing of the guard.

2nd March 1988: Sean Savage flew Dublin-Brussles-Barcelona. Apparently entered Spain undetected. Flew to Malaga early next morning.

3rd March 1988: Sean Savage checked into hotel in Torremolinos. Hotel failed to register Savage.

4th March 1988: Savage hires red Ford Fiesta. Daniel McCann arrives in Torrelmolinos. 'Death on the Rock' claimed thatMcCann under surveillance by Spanish police all the way from Ireland to Spain.

5th March 1988: Savage and McCann staying in same hotel, both under constant surveillance. But Spanish authorities had completely missed third member of the team.According to 'Death on the Rock' at 12 noon an urgent message from London arrived at police headquarters in Malaga. It said that there was a third terrorist, and her name is Maireid Farrell. On the basis of this British tip off the Spanish police began to hunt for her.

6th March 1988: Farrell hires car in Marbella under false name just 5 hours before the shootings. A few minutes later she drove the white Ford Fiesta into an underground carpark in the centre of Marbella and drove it down to the lower level of the car park.

6th March 1988: Savage and McCann set off from Torremolinos and met with Farrell in Marbella and the IRA team then set off for Gibraltar in two separate cars. Spanish police in 'Death on the Rock' said that both cars were under surveillance by Spain's plain clothes police officers from the elite counter terrorism squad and that the movements of the IRA members were radioed directly back to British authorities. The first IRA car was a white Renaut 5 driven by Savage. Later police reported the white Ford with Farrell and McCann.

6th March 1988: Spanish police in 'Death on the Rock' stated that the two cars met up under the eyes of the Spanish police. British authorities have maintained that the trio actually slipped onto the Rock unnoticed but were picked up by MI5 surveillance experts and Gibraltar police.This was a hotly contested piece of evidence in the case. Savage drove on towards Gibraltar in the white Renaut, leaving the red Ford and the other two terrorists behind in Spain.

6th March 1988: Just before 1:00 pm, Savage drove into the boarder checkpoint and the Spanish police allowed him to pass through. On the Gibraltar side British security officials took over surveillance, and they too allowed the Savage to pass through unhindered.Savage drove into street where the parade ends, parking the car beside the ancient city wall.

6th March 1988: 2.30 pm, McCann and Farell crossed into Gibraltar by foot and were allowed to enter unimpeeded.

6th March 1988: 3.30 pm, The three met in a street near the parked car. They all left the area on foot, leaving the parked white car behind them. Geoffrey Howe Statement in House of Commons: "Their presence and actions near the parked Renault car gave rise to strong suspicion that it contained a bomb which appeared to be corroborated by a rapid technical examination of the car." The car was later found to contain no explosive device. As it turned out, the three were seemingly conducting a reconnaissance for the final mission. The white Renault had been placed in Gibraltar to hold the parking spot for another car that was to contain the bomb. Spanish authorities found the actual bomb later in Marbella. Inside the car was 144 pounds of Semtex explosive surrounded by 200 rounds of AK-47 ammunition and a timer that would have initiated the bomb at 11.40am, when the military parade would have been vulnerable. It is likely that the Renault was reserving the space, to be replaced by the Ford shortly in advance of the ceremony on 8th March.

6th March 1988: 3.30 pm, Gibraltar authorites passed control over to the SAS. Thethree IRA members began to walk back towards the border. They left the old town and were more than a mile from the parked car when Farrell and McCann, who were 100 yards on front of Savage, stopped at a petrol station which was closed on Sunday.

6th March 1988: Just before 4:00 pm, Farrell and McCann shot by Soldiers A and B. Soldier A shot one round into McCann's back from a distance of three metres. He then shot one round into Farrell's back. Soldier A turned back to McCann and shot him once more in the body and twice in the head. Soldier B 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 were away from her body. He fired a total of seven shots. Savage was followed by Soldiers C and D. D fired nine rounds at rapid rate, initially aiming into the centre of Savage's body, with the last two

at his head. Soldier D kept firing until Savage was motionless on the ground and his hands were away from his body. Soldier C fired six times as Savage spiraled down, aiming at the mass of his body. One shot went into his neck and another into his head as he fell. Soldier C continued firing until he was sure that Savage had gone down and was no longer in a position to initiate a device.

7th March 1988: In a statement to the House of Commons, Geoffrey Howe said that no bomb was found, and the three had made threatening movements but were subsequently found to be unarmed.

16th March 1988: Lone loyalist throws hand grenades at the funeral of the three at Milltown cemetery, Belfast. Three are killed and nearly 50 injured.

19thMarch 1988: At the funeral of one of those killed at the cemetery, two army corporals are dragged from their car and shot dead by the IRA.

28th April 1988: 'Death on the Rock' broadcast.

6th September 1988: Gibraltar Inquest began. During the five-week inquest, 18 anonymous security service and SAS men, shielded from public view by screens, gave their account of events. They made clear that they believed or had been told it contained a remote control bomb and that the trio were armed with weapons and a detonator. They stated that they shouted warnings, but the three made suspicious movements as if going for weapons. Once a decision had been made to shoot, they shot to kill. No evidence was given by the Spanish police at the inquest.

30th September 1988: After 8 hours of deliberations, jury returned verdict of 'lawful killing' by a majority of 9-2.

26th January 1989: Independent inquiry clears 'Death on the Rock' of most serious criticisms.

March 1990: Unsatisfied with findings of Gibraltar Inquest, the families of the Gibraltar Three commenced actions in the High Court of Northern Ireland against the Ministry of Defence. Secretary of State for Foreign and Commonwealth Affairs issued certificatesunder the Crown Proceedings Act 1947, as amended by the Crown Proceedings (Northern Ireland) Order 1981, which 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 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.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.

Families apply to European Commission of Human Rights alleging that the UK authorities' actions in Gibraltar violated Article 2. The European Commission of Human Rights criticised the conduct of the operation, but found that there had been no violation of Article 2. Nevertheless the Commission referred the case to the European Court of Human Rights for a final decision.

September 1995: European Court of Human Rights delivered verdict. Court held that the soldiers honestly believed for good reason that the three known IRA operatives were about to launch an attack, which in principle justified the use of force in the particular circumstances even where the belief turned out to be wrong. However, the Court found that the planning of the opertion did not take the necessary precautionary measures and consequently the use of force had not been absolutely necessary.

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2. McCann v UK at Twenty
– Sir Keir Starmer QC, Doughty Street Chambers

Sir Keir Starmer's presentation set out and considered the significance of the *McCann* ruling by the European Court of Human Rights. Underlining its importance as a landmark case in the interpretation and application of Article 2 ECHR to lethal force cases, Sir Keir highlighted three aspects of the decision:

- the interpretation of the absolute necessity test as a stricter and more compelling test of proportionality, but one that makes allowances for the belief and honest perception of the State agent involved in the incident;

- the way in which the Strasbourg Court looked behind the incident itself, to consider the planning and control of the operation. The briefings given to the State agents involved in the operation were particularly important in this regard, as the briefing outlining both the substance and apparent certainty of available intelligence was instrumental in shaping the agents' understanding;

- the development by the Strasbourg Court of the duty to investigate, which has since been extended and expanded by the Court in subsequent decisions.

Overall, noting the Court's expanded interpretation of the bare text of Article 2 as an example of the living instrument doctrine in operation, the presentation emphasised how *McCann* introduced the need for an 'upstream and downstream' application of Article 2 in lethal force

cases, extending it from the incident to preceding operational preparations and subsequent State responsibilities.

In that regard the presentation noted how the effect of *McCann* emphasized the difference between civil liberties and human rights: the former focus on protection from the State, while the latter involve both protections from the State and obligations on the State to ensure those protections are in place (so protection from and by the State).

Lastly, the presentation noted some issues to watch as the McCann principles continue to develop: the strength and direction of the living instrument doctrine; the importance of the ECHR in relation to European cross-border criminal provisions; the need to consider the effect of an armed challenge on a suspect's reaction; and the effect of terrorism in relation to the margin of appreciation.

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3. McCann and Lethal Force Cases in the English Courts
– Daniel Machover, Partner, Hickman & Rose Solicitors

The number of fatalities at the hands of UK armed police remains relatively low compared with other countries such as the US and South Africa. The concern remains that with gun crime a constant threat, the control and planning of police firearms operations in the UK will not sufficiently take into account the risks of death or serious injury to suspects, members of the public and other police officers, leading to a rise in fatal shootings. Indeed, it remains deeply concerning that eight out of the ten men killed by UK Metropolitan police over the past decade were killed during pre-planned operations (https://www.wsws.org/en/articles/2014/02/01/grai-f01.html). There is a fear of complacency creeping into the risk management of pre-planned operations in particular, where delays in the timing of an arrest can be very controversial. This is more likely to arise with a lack of accountability and the attitude of police leaders towards accountability; a feeling of siege and perhaps even triumphalism seems to emanate from senior officers downwards and from the ranks upwards when reports such as that on Mark Duggan are published. This gives rise to a concern that lessons are not being learned, as the cultural reaction is that nothing has gone wrong after a police shooting. The climate of defensiveness at the Azelle Rodney Inquiry; the militarization of British police reflected in the BBC Panorama programme in 2013 and elsewhere and the absence of instances of public accountability around planning, control and risk assessment cannot be ignored.

Where a police officer shoots and kills someone, it is for the shooter to justify their actions and that the force used was no more than absolutely necessary. The more usual forum where these issues are first addressed in public is at an inquest. Historically, police shooting inquests invite

the jury to consider the determination of lawful killing. Other conclusions as to death may include unlawful killing, or otherwise an open conclusion. In more recent times, these cases include a combination between a narrative and short-form conclusions as to death. Even if the court concludes that there were no failings that the contributed to the cause of death, a crucial aspect of the inquest will be to identify whether things could have been done better. An unlawful killing verdict will inevitably mean that the CPS will have to consider or reconsider whether or not to prosecute (*R v DPP ex p Manning and Melbourne* [2001] QB 330). The CPS will consider whether the shooter should be prosecuted for murder. It is inappropriate to consider a lesser homicide charge of manslaughter where there must have been the intention to kill or seriously harm the deceased. Arguably the main positive legal contribution of the *McCann* ruling relates to the planning and control of police operations resulting in the use of lethal force and given rise to a small number of English court cases.

If the planning of the operation failed to the greatest extent possible to minimise the risk to life or the use of lethal force then arguably there is a breach of Article 2 ECHR. *McCann v UK* established that courts must scrutinize whether the "operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force". One of the enduring principles resulting from Strasbourg's decision in *McCann* is the concept of "systemic failure" on the part of the state which meant the fatal shootings were "a foreseeable possibility if not a likelihood".

There must be systems and guidance for officers relating to a firearms operation which minimise to the greatest extent possible the risk to life (*Makaratzis v Greece* (2005) 41 EHRR 49 paras 58 and 60). Failure to inform superiors about an aspect of a firearms operation may breach article 2 (*Golubeva v Russia* App No 1062/03, 17 December 2009 para 108) as would a failure to put in place appropriate resources, including vehicles, to support an operation.

Discussed: the findings published in July 2013 of the conclusions of the Chairman of the Azelle Rodney Inquiry, retired High Court Judge Sir Christopher Holland, into the April 2002 fatal shooting of Rodney in Edgware, north London; and the 2007 prosecution of the commissioner of MPS for violating the Health and Safety at Work Act 1974; and the abortive January 2015 H&S prosecution of Sir Peter Fahy, chief constable of Greater Manchester Police (GMP), because evidence was too sensitive to be revealed to a jury in court regarding the fatal shooting of Anthony Grainger, 36, in Culcheth, Cheshire in 2012. H&S prosecutions arguably remain an important form of accountability.

Also discussed:
- the legal arguments regarding the concept of 'no more than absolutely necessary' and self defence under criminal and civil law by reference to the Criminal Law Act 1967 Section 3(1); and The Criminal Justice and Immigration Act, Section 76;

- and *E7 v Sir Christopher Holland (in his capacity as Chairman of the Azelle Rodney Inquiry)* [2014] EWHC 452 (Admin) and *R (Duggan) v HM Assistant Deputy Coroner for the Northern District of Greater London* [2014] EWHC 3343 (Admin).

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4. Effective, Independent Investigations and the Challenges: UK to Ukraine
– John Wadham, Associate, Doughty Street Chambers and CoE Human Rights Advisor

McCann was a long time ago and at the time of the judgment many people believed it would be overturned or softened by subsequent judgments, but it survived and prospered. Some of us also thought that the Conservative government would not implement it and withdraw from the ECHR. In fact, in relation to the investigatory duty the judgment established, this has now been reflected in similar positive duties in article 3, 4 and 8. Further extensions include the need to take all reasonable steps to establish racist motives or prejudices.

Ukraine

Ukraine's pro-European trajectory was abruptly halted in November 2013, when a planned association agreement with the EU was scuttled just days before it was scheduled to be signed. Street protests erupted in Kiev, and elsewhere - the largest demonstrations since the Orange Revolution. A series of laws restricting the right to protest led to hundreds of thousands taking to the streets of Kiev. In February, hundreds of protesters were released from jail as part of an amnesty. However, twenty were killed and hundreds were wounded when government forces attempted to retake Maidan square on February 18. The 25,000 protesters remaining in the square ringed their encampment with bonfires in an attempt to forestall another assault. On February 20th violence in Kiev escalated dramatically and scores more were killed and hundreds were injured. The authorities now have the challenge to comply with the duty to investigate (under article 2 and 3) – a nearly impossible task.

The Independent Police Complaints Commission (IPCC)

The IPCC never has enough of its own staff to investigate all the incidents and meet demand by victims and complainants for independent investigations. Although it can direct investigations by police forces in many cases that is not enough.

Bodies with a role in holding the government to account, protecting the rights of the citizen or promoting equality or human rights should be sponsored, supported and accountable directly to Parliament and not to government departments or to ministers.

In relation to the IPCC, the European Court of Human Rights, when assessing the independence of its predecessor, the Police Complaints Authority, and the nature of the government appointment

of the board (following exactly the same model as the IPCC) said (in Khan v UK, 12 May 2001, paragraphs 47 and 48):

> "The Court also notes the important role played by the Secretary of State in appointing, remunerating and, in certain circumstances, dismissing members of the Police Complaints Authority. In particular, the Court observes that under section 105(4) of the Act the Police Complaints Authority is to have regard to any guidance given to it by the Secretary of State with respect to the withdrawal or preferring of disciplinary charges and criminal proceedings. Accordingly, the Court finds that the system of investigation of complaints does not meet the requisite standards of independence needed to constitute sufficient protection against the abuse of authority and thus provide an effective remedy within the meaning of Article 13. There has therefore been a violation of Article 13 of the Convention [the right to an effective remedy]."

The "Police Oversight Principles" developed by police oversight bodies across Europe (and modelled on the Paris Principles) also recommends that police oversight bodies like the IPPC are accountable to parliaments and not to the executive.

Recently Nick Hardwick, the current Chief Inspector of Prisons, illustrated the problems with the current arrangements between independent bodies and their sponsors: "Told MoJ ministers & officials I won't be reapplying for my post. Can't be independent of people you are asking for a job" - this was his response in a tweet to Chris Grayling (Secretary of State for Justice) making public his decision not to renew Hardwick's five-year contract, which runs out in July 2015 (The Guardian, 2 December 2014).

Immediately after the shooting of Jean Charles de Menezes at Stockwell underground station the Chief Constable of the Metropolitan Police, Sir Ian Blair wrote a letter to the Home Office (the IPCC's sponsor) stating that "the shooting that has just occurred at Stockwell is not to be referred to the IPCC and that they will be given no access to the scene at the present time" (The Daily Telegraph, 8 November 2007, the letter - "Letter from Sir Ian Blair to Sir John Gieve following the shooting of Mr Jean Charles de Menezes" - is available on the Home Office National Archive website webarchive.nationalarchives.go.uk). Despite the fact that this refusal by the police to give the IPCC access was unlawful the IPCC then had to get into three-way negotiations with its sponsor (the Home Office) and the police before access was granted, leading to a delay of three days.

In the same case the Deputy Chair of the IPCC was "summoned" one early evening to see one of the three Permanent Secretaries of the Home Office to discuss the merits or otherwise of its decision to disclose crucial information the next day to the family of the deceased, at a time when the media was awash with speculation and erroneous accounts of how Jean Charles de Menezes had died (Stockwell Two: An investigation into complaints about the Metropolitan Police Service's handling of public statements following the shooting of Jean Charles de Menezes on 22 July 2005, August 2007, IPCC). The IPCC ignored the "advice" proffered, but the fact that the

Home Office felt it could take such a step creates its own difficulties and conflicts. It was, of course, this same Home Office that would later decide whether or not the Chair, Deputy Chair and other Commissioners would be re-appointed to their posts.

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5. Challenges in Armed Policing
– Detective Chief Superintendent Brian Dillon, Metropolitan Police Service

6. Post-Incident Procedures
– Assistant Chief Constable Simon Chesterman, National Lead for Armed Policing

British policing remains essentially an unarmed service and is appropriate because most incidents do not require an armed response. Indeed the UK armed policing model is unique because there has been investment in training a small proportion of officers to a very high standard. This is necessary to protect the public from the threat posed by crime and terrorism, but within this the Peelian principles of policing by consent remain relevant.

In England and Wales there are about 14,000 armed deployments per year and on an average of four occasions police discharge shots causing typically a fatality every other year. All armed officers are volunteers and they are neither trigger happy nor gung-ho. The level of care taken in planning operations to minimise wherever possible the recourse to lethal force is considerable, and this is borne out by the statistics. Moreover the central tenets of Article 2 run throughout the selection, training and operational practice of firearms policing.

Operational decisions are rarely simple and all too often situations contain ambiguity and at times contradictory facts, usually in a time pressured environment. Officers have to navigate their way through the confusion to determine the best option; particularly in the planning stages where the emphasis is on having foresight to identify the implications of potential action. Police also have regard to sustained public protection and need to consider how best to protect the public from harm in the long term.

Those officers at the sharp end are faced with making split-second life and death decisions in dangerous situations. This in itself is a considerable responsibility, which is then overlaid with officers knowing the scrutiny they will come under with far reaching individual consequences. It is absolutely correct and proper that the State's use of force is subject to independent examination, but this should not be conducted in a manner in which officers are criminalised as suspects.

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7. The Council of Europe and Dissemination of ECHR Standards

- Tanja Rakusic-Hadzic, Head, Criminal Law Cooperation Unit, Directorate General of Human Rights and Rule of Law, Council of Europe

With over 60 years' existence, the Council of Europe has gained significantly-acknowledged worldwide expertise and experience in the area of prisons and police. The impact of its activities in the prison and police field is the result of the synergy between standard-setting, monitoring and assistance provided to the member states.

The standards elaborated by the Council of Europe, including the European Convention on Human Rights, and the findings of its monitoring bodies, such as judgments of the European Court of Human Rights, are the basis for the technical assistance it provides, and the latter, in turn, allows the Council of Europe to be better informed on the situation in a given country, if necessary adjusting the standards or their interpretation in order better to reflect the existing laws and practices in Europe, whilst ensuring full respect for human rights.

The fact that the Council of Europe is an intergovernmental organisation that covers virtually the entire continent has several important consequences:

- Its actions and decisions are agreed, adopted and supported at the highest political level by the national authorities and the outcome of the monitoring of their implementation by the member states may also lead to political and/or legal consequences;
- By working with all European countries, the Council of Europe strives to achieve a Europe without dividing lines; a common space governed by the rule of law, based on democratic principles and the protection of human rights and fundamental freedoms;
- The Council of Europe works closely with international and local NGOs and the civil society sector, which allows information regarding the situation in member states to be gathered and regularly updated and, when necessary, measures to be taken to improve the implementation of the Organisation's standards.

The technical assistance provided is based on requests from member states to provide advice and assistance on issues relating to rule of law and human rights protection in the field of prisons and policing, areas where the above-mentioned monitoring mechanisms have revealed a need for new measures, or a change in approach in the application of the Council of Europe's instruments and standards.

Based on such requests, the Criminal Law Cooperation Unit (one of several such cooperation units within the Council of Europe) prepare projects or activities with the main objective not only to assist the implementation of concrete case law, or to address a particular recommendation of the CPT, but to equip the national authorities and their prison and police systems with knowledge and skills that will prevent further violations of human rights.

Currently, the Criminal Law Cooperation Unit implements seven fully fledged projects to a total value of over €10m, in non-EU states such as Armenia, Georgia, BiH, the "the former Yugoslav Republic of Macedonia" and Ukraine, and has an advisory role in the implementation of Norway Grants, a financial instrument set up to provide funding to 16 EU countries in central and southern Europe within 32 programme areas, among which are penitentiary and police issues as well (Bulgaria, Romania, Latvia, the Czech Republic).

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8. Lethal Force and Democracy since McCann

- Dr Stephen Skinner, Senior Lecturer in Law, Centre for European Legal Studies, University of Exeter

This presentation focused on the fundamental connection between Article 2 ECHR and the concept of democracy, which is the overarching rationale and objective that runs through the ECHR case law on the right to life, and perhaps especially in those cases relating to lethal force. As the Court emphasised in *McCann*, Article 2 (together with Article 3) 'enshrines one of the basic values of the democratic societies making up the Council of Europe' (para. 147). Although this is partly an almost self-evident product of the development and objectives of the Council of Europe and the ECHR (as set out in the preamble), it is especially significant in relation to State uses of lethal force – the intense levels of attention, public disquiet and controversy that follow deaths that occur during police operations underline the broad public and political significance of such incidents and why the issues of control, accountability and questions about the very characteristics of the State are so important.

The presentation began by briefly noting the four-fold substantive and procedural dimensions of accountability under the rule of law set up by the European Court of Human Rights in and since McCann (the absolute necessity of force used; the State's legal and regulatory framework and its compatibility with Article 2; the State's planning, control and conduct of an operation; and the duty to investigate). The main focus was then on what may be called the 'qualitative dimensions' of the Strasbourg Court's interpretation and application of Article 2 in lethal force cases and how these indicate significant cultural dimensions of democracy. These qualitative dimensions, it was argued, are significant in this area of law both for their purposive vitality in understanding the thrust of Article 2 standards, and as interpretative guides in applying the tests established by the Court.

In that light the presentation addressed three core qualitative issues:

- the question of caution in the use of weapons and the pre-eminence of respect for life
- the development through the duty to investigate of a model of democracy as a responsible, responsive and reflective system;

- the connection between the operation of the substantive and procedural dimensions of Article 2 standards and their perception by the public, that is the issues of legitimacy and public confidence.

These qualitative factors are apparently essential to the Court's standards of accountability under the rule of law, but are apparently mainly treated like democracy's oxygen - we can't point to it when required to, but we soon know when it is not there. The presentation concluded by raising two issues:

- how to identify the essence of these qualitative factors and work with them alongside the more tangible aspects of Article 2 controls;

- and the argument that how such concrete and qualitative dimensions of human rights law are complied with, and balanced with other operational concerns so as to make them feasible, ultimately reflects back on the nature of the democracy that we have.

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