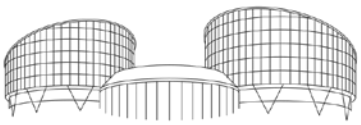

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

The Right to Life:
Twenty Years of Legal Developments since *McCann v. The United Kingdom*

Seminar organised in honour of the Deputy Registrar of the European Court of Human Rights Michael O'Boyle

13 February 2015

European Court of Human Rights
Press Room

Brief biographies of speakers and session chairs

Speaking notes

The Rt Hon Lady Justice Arden DBE

Lady Justice Arden was called to the Bar of England and Wales in 1971, became a Queen's Counsel in 1986 and a Justice of the High Court of Justice of England and Wales in 1993, being the first woman judge to be assigned to the Chancery Division. In 2000 she was appointed a Lady Justice of Appeal.

From 1 January 1996 to 31 January 1999 she was the chair of the Law Commission of England and Wales and between 1998 and 2001 she was a member of the Steering Group of the Company Law Review established by the Department of Trade and Industry from 1998 to 2001. In 2000 she acted as an *ad hoc* judge of the European Court of Human Rights. She was the chair of the Papers Committee for the Commonwealth Law Conference held in London in September 2005. From 2004 to 2006 she was chair of the Judges' Council Working Party on Constitutional Reform which was heavily involved in the draft legislation which became the Constitutional Reform Act 2005 and the Judicial Discipline (Prescribed Procedures) Regulations 2006. She is also a Member of the Permanent Court of Arbitration in The Hague.

Lady Justice Arden is Head of International Judicial Relations for England and Wales. She has travelled extensively to help promote the rule of law and to further her personal interest in meeting judges in other jurisdictions and in comparative human rights and constitutional law.

Lady Justice Arden has given numerous lectures, and written articles and books (or contributions to books) on human rights, company law, terrorism and other subjects, including *Human Rights and European Law: Building New Legal Orders* (Oxford University Press, 2015).

Sir Daniel Bethlehem, KCMG QC

Sir Daniel Bethlehem KCMG QC is a barrister in practice from Chambers in London at *20 Essex Street*, the founding Director of *Legal Policy International Limited (LPI)*, and a Consulting Senior Fellow at *The International Institute for Strategic Studies (IISS)*. From May 2006 to May 2011, he was the principal Legal Adviser of the United Kingdom Foreign & Commonwealth Office. Prior to this, he was in practice at the London Bar and Director of the Lauterpacht Centre for International Law at the University of Cambridge and a Fellow of Clare Hall, Cambridge.

Sir Daniel has extensive experience in advising governments, international and non-governmental organisations, corporations and individuals on international legal and policy issues ranging from counter-terrorism and human rights to arms limitation, diplomatic engagements and peace negotiations. He has represented States and others in political fora, such as the United Nations, European Union and Council of Europe, as well as before domestic and international courts and tribunals ranging from the International Court of Justice to the International Tribunal for the Law of the Sea, the World Trade Organisation and ad hoc arbitral tribunals.

Sir Nicolas Bratza

A graduate of Oxford University, Nicolas Bratza was called to the Bar by Lincoln's Inn (of which he is a Bencher) in 1969 and practised as a barrister specialising in commercial, public and human rights law. He was appointed as a Junior Counsel to the Crown in 1978 and became a Queen's Counsel in 1988. In 1993 he was elected as the United Kingdom member of the European Commission of Human Rights.

In 1998 he was appointed a High Court judge and elected as the first United Kingdom judge of the permanent European Court of Human Rights. In the same year, and again in 2001 and 2004, he was elected as one of the Section Presidents of the Court and in 2007 was elected as one of the Court's two Vice-Presidents. In 2011 he was elected as President of the Court, a post he held until his retirement from the Court and from the High Court in October 2012.

He is currently the chair of an International Advisory Panel overseeing the investigation into the violent events in Kyiv and Odessa, Ukraine at the end of 2013 and the early part of 2014. He is a member of the International Commission of Jurists, Chairman of the British Institute of Human Rights and a member of the Board of the International Service for Human Rights.

He is an Honorary Professor at the University of Nottingham and holds Honorary Doctorates of the Universities of Essex and Glasgow. He is an Honorary Fellow of Brasenose College Oxford and an Honorary Bencher of Kings Inns, Dublin.

Antônio Augusto Cançado Trindade

Judge of the International Court of Justice (since 2009); Former Judge (1995–2006) and President of the Inter-American Court of Human Rights (1999-2004).

Emeritus Professor of International Law of the University of Brasilia, Brazil; Former President of the Latin-American Society of International Law; Member of the *Curatorium* of the Hague Academy of International Law, and of the *Institut de Droit International*. Honorary Professor, University of Utrecht; Honorary Fellow, Cambridge University (Sidney Sussex College). Doctor *Honoris Causa*, University Panteion of Athens/Greece (2014), Central University of Chile (2003), Catholic University of Peru (2003), American University of Paraguay (2004), and University of La Plata (Argentina, 2005); Honorary Professor, Universities of San Marcos (Peru, 2001), and of Rosario (Bogotá, Colombia, 2005); Honours, National University of Mexico (UNAM, 2003), and Universities of Rio de Janeiro (UERJ, 1999), of Brasilia (UnB, 1999), and of Minas Gerais (UFMG, Brazil, 2002).

Lecturer at The Hague Academy of International Law and at the External Sessions of the Academy; Visiting Professor at the Universities of Paris-I and Paris-II, Ferrara, Columbia/N.Y., Tulane, Sevilla, Strasbourg, Deusto/Bilbao, American University/Washington, Notre Dame, Autonomous University of Madrid (UAM), among others. Guest Lecturer at the Universities of Milan, Salerno, Warsaw, Nottingham, UNAM/Mexico, Keio/Tokyo, Hiroshima, Kyoto, among others, and at Diplomatic Academies in several countries. Executive Director of the Inter-American Institute of Human Rights (1994-1996); Lecturer at International Law Courses of the OAS Inter-American Juridical Committee (1981-2014), at Annual Study Sessions of the International Institute of Human Rights (Strasbourg,

1988-2014), of the International Committee of the Red Cross in Havana/Cuba (1995-2002) and in Hong Kong and Macao (China, 1996), and at the Institute of Public International Law and International Relations of Thessaloniki/Greece (1988).

Jean-Paul Costa

Former Judge of the European Court of Human Rights (France) in 1998 - 2011; President of the European Court of Human Rights in 2007 – 2011. President of the International Institute of Human Rights René Cassin (since January 2012).

Member of the French Council of State, Rapporteur at the judicial section of the Council of State; Chairman of an arbitration tribunal for a dispute regarding computer law (1990); Chairman of the tenth chamber, judicial section of the Council of State (1993-98). Member of the European Group of Public Law ("Spetses groups") (since 1991). Lectures and conferences at Tunis (National School of Administration), Rome (University "La Sapienza"), Oxford (Nuffield College), Washington, Beijing, Athens, Barcelona, Spetses Lyon, Bordeaux, Nice, Montpellier, Strasbourg, Pamplona, London, Edinburgh, etc (since 1970).

Brice Dickson

Professor of International and Comparative Law at Queen's University Belfast since 2005. Specialises in domestic and international human rights law. Formerly taught at the Universities of Leicester and Ulster and has been a visiting professor at Fordham, Sydney and Melbourne. After the signing of the Peace Agreement in Northern Ireland in 1998 served as the first Chief Commissioner of the Northern Ireland Human Rights Commission until 2005. An independent member of the Northern Ireland Policing Board, which holds the Police Service of Northern Ireland to account.

Recent publications include *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press, 2010), *Human Rights and the United Kingdom Supreme Court* (Oxford University Press, 2013) and (as co-editor) *Human Rights in Northern Ireland: The CAJ Handbook* (Hart Publishing, 2015).

Erik Fribergh

Section Registrar of the new European Court of Human Rights, 1998-2002; Deputy Registrar of the Court, 2002-2005; Registrar of the European Court of Human Rights since 2005.

Former associate judge and judge at the Administrative Court of Appeal of Gothenburg, Sweden, 1976-1978; Deputy Secretary to the Governmental Commission against Unnecessary Bureaucracy, Ministry of Local Government (1978-79) and to the Governmental Committee on Administrative Law, Ministry of Justice (1979-1981). Head of Section, Personnel Division, Directorate of Administration, Council of Europe (1991-1993); Head of Division and then Deputy to the Secretary of

the European Commission of Human Rights (1993-1997); Deputy Secretary to the European Commission of Human Rights (1997-1998).

Christos Giakoumopoulos

Director of Human Rights in the Directorate General Human Rights and Rule of Law of the Council of Europe since 2011. He was Director of Monitoring in the same Directorate General since 2006. Before joining the Directorate General of Human Rights, he was General Counsel and General Director for Legal and Administrative Affairs of the Council of Europe Development Bank (Paris).

Since joining the Council of Europe in 1987, he held posts in the Registry of the European Court of Human Rights, the Venice Commission and was the Director of the Office of the Commissioner for Human Rights, A. Gil Robles.

Rt Hon the Baroness Hale of Richmond DBE PC LLD FBA

Baroness Hale is the most senior woman judge in the United Kingdom. She has had a varied career as an academic lawyer, law reformer and judge. She taught Law at Manchester University for 18 years, specialising in family and social welfare law, also qualifying and practising as a barrister for a short while. In 1984 she became the first woman to serve on the Law Commission, a statutory body which promotes the reform of the law. There she led the work of the family law team, resulting (among others) in the Children Act 1989 and the Mental Capacity Act 2005. She was a founder member of the Human Fertilisation and Embryology Authority and chair of its Code of Practice Committee from 1990 to 1994, when she was appointed a Judge of the Family Division of the High Court. She was promoted to the Court of Appeal in 1999 and to the House of Lords in 2004, and moved to the Supreme Court of the United Kingdom on its creation in 2009, where she is now Deputy President.

She is the author and co-author of a number of books, including *The Family, Law and Society: Cases and Materials* (6th edition 2009) and *Mental Health Law* (5th edition 2010) and retains her links with the academic world as Chancellor of the University of Bristol and Visitor of Girton College.

Françoise Hampson

Emeritus Professor, School of Law, Essex University. LLB (Newcastle), Barrister-at-Law (Lincoln's Inn).

Previously taught at the University of Dundee. Independent expert member of the UN Sub-Commission on the Promotion and Protection of Human Rights (1998-2007). Acted as a consultant on humanitarian law to the International Committee of the Red Cross and taught at Staff Colleges or equivalents in the UK, USA, Canada & Ghana. Represented Oxfam and SCF (UK) at the Preparatory Committee and first session of the Review Conference for the Certain Conventional Weapons Convention. Professor Hampson has successfully litigated many cases before the European Court of Human Rights and, in recognition of her contribution to the development of law in this area, was

awarded Human Rights Lawyer of the Year jointly with her colleague from the Centre, the late Professor Kevin Boyle. She has taught, researched and published widely in the fields of armed conflict, international humanitarian law and on the European Convention on Human Rights. She is currently working on international law issues relating to private military/security companies and on the use of an individual petition system to address what are widespread or systematic human rights violations.

Rick Lawson

Dr Rick Lawson (1964) is professor of European human rights law at the Law School of Leiden University, the Netherlands. His key areas of interest are the case-law and the institutional set-up of the European Court of Human Rights, and the protection of human rights in the EU legal order. Since 2011 he serves as Dean of Leiden Law School.

Rick Lawson studied international and European law in Leiden. His Master thesis, on the protection of human rights in times of emergency, was awarded the bi-annual François Prize by the Netherlands Society of International Law. After graduation he worked for the Netherlands Helsinki Committee. In 1999 he defended his PhD thesis, *cum laude,* on the legal position of the European Communities vis-à-vis the ECHR. The thesis was awarded the Erasmus Study Prize by the *Praemium Erasmianum*. In 2001 appointed professor in Leiden; in 2008 became head of the European Law department.

Member of the board of editors of the *Nederlands Tijdschrift voor Mensenrechten*, the leading Dutch law review in the field of human rights (since 1992), member of the board of the *Praemium Erasmianum Foundation* (since 2011), member of the Advisory Council on International Affairs (AIV), an advisory body for the Dutch government and parliament (since 2011) and member of the Royal Holland Society of Sciences and Humanities (invited 2013). He served as an expert to the Senate and the Second Chamber of Parliament on various occasions.

At the European level, founding member of the EU Network of Independent Experts on Fundamental Rights, and subsequently a senior expert of the FRALEX Network of Human Rights Experts, set up by the EU Fundamental Rights Agency. Served as an expert to the Parliamentary Assembly of Council of Europe on various occasions.

Regular lecturer in the annual *Advanced Course on the International Protection of Human Rights* in Abo (Finland) and the Summer School of the International Institute of Human Rights in Strasbourg; in 2006 taught the General Course of the Academy of European Law in Florence (Italy). Together with Henry Schermers he wrote *Leading Cases of the European Court of Human Rights*.

The Rt Hon Sir Declan Morgan, Lord Chief Justice of Northern Ireland

Sir Declan Morgan was educated at Peterhouse, Cambridge. He was called to the Bar in 1976 and took Silk in 1993. He was Senior Crown Counsel for Northern Ireland from 2002 until his appointment as a High Court Judge in May 2004. Appointed to the Family Division in January 2007 and in September 2008 became one of two judges with responsibility for judicial review. Sir Declan

was appointed Chairman of the Law Reform Advisory Committee for Northern Ireland in 2004. He was Chairman of the Northern Ireland Law Commission from April 2007 until his appointment as Lord Chief Justice of Northern Ireland in July 2009. Sir Declan is also Chairman of the Northern Ireland Judicial Appointments Commission. He was made an Honorary Bencher of Middle Temple.

Egbert Myjer

Assistant Professor of criminal law at Leiden University (1972-1979), judge at the District Court of Zutphen (1979-1991), Advocate General at The Hague Court of Appeals (1991-1995) and Chief Advocate General at the Amsterdam Court of Appeals (1996-2004). Professor extraordinary of human rights at Amsterdam Free University (2000-2012). Judge at the European Court of Human Rights (The Netherlands) in 2004-2012.

Author of many books, reports, articles and commentaries on human rights issues, among which: (together with Nicolas Cowdery and Barry Hancock) *IAP Human Rights Manual for prosecutors* (translated into 8 languages) and (together with Peter Kempees) *Jack and the Solemn Promise. A cautionary tale.*

At present a Member of the Board of Amnesty International the Netherlands, of the Netherlands University Asylum Foundation and of the International Service for Human Rights (Geneva). He is a member of the Editorial Board of the *Netherlands Quarterly of Human Rights* and a Commissioner of the International Commission of Jurists (Geneva). He is also a substitute judge at the District Court of Noord-Holland, and a vice-chair of the Netherlands Press Council.

Honours: Officer (2000), since 2012 Commander in the Order of Orange Nassau (The Netherlands), Medal of Merit Council of Europe (2001), Honorary Bencher Honourable Society of Lincoln's Inn (London) (2012).

Linos-Alexandre Sicilianos

Judge of the European Court of Human Rights (Greece) since 2011.

Masters degree in International Law, University Robert Schuman of Strasbourg, 1984; Doctor of Law, University Robert Schuman of Strasbourg, 1990. Professor, Faculty of Law, University of Athens. Member (1997-2009) and Chairman (2003-2004) of the Committee of experts of the Council of Europe for the Improvement of Procedures for the Protection of Human Rights (DH-PR). Member (2002-2009), Vice-Chairman (2004-2005) and Rapporteur (2008-2009) of the United Nations Committee on the Elimination of Racial Discrimination (CERD).

Member since 2000, then Vice-Chairman of the Greek National Commission for Human Rights, 2006-2011; Member of the European Union Network of independent experts in the field of fundamental rights, 2002-2006. Member of the Management Board since 2007 and member of the Executive Board of the Fundamental Rights Agency of the European Union, 2009-2011. Member of the *Curatorium* of the Hague Academy of International Law, since 2010. Member of the Scientific Board

of the *Revue trimestrielle des droits de l'homme* and of the *European Journal of International Law*. Member of the Administrative Board of the European Society of International Law.

Dean Spielmann

Judge of the European Court of Human Rights (Luxembourg) since 2004; President of Section (2011 to 2012); the President of the Court since 2012.

Master of Laws, Cambridge University (1990); Member of Fitzwilliam College, Cambridge since 1989. Barrister, member of the Luxembourg Bar (1989-2004), Senior Barrister (1992-2004). Lecturer and director of various courses at the Universities of Luxembourg (1996-2004) and Nancy (1997-2008). Member of the Advisory Human Rights Commission, Luxembourg, 2000-2004. Member of the European Union Network of Independent Experts in Fundamental Rights (2002-2004). Member of the *Institut Grand-Ducal*, associate in 2002-2005, full member since 2005.

Welcome and Introduction. The right to life and the abolition of the death penalty

Jean-Paul Costa, President, International Institute of Human Rights, former President of the European Court of Human Rights

The European Convention on Human Rights enshrines the right to life but, paradoxically, does not prohibit recourse to the death penalty. In a sense, Article 2 § 1 of the Convention "legitimates" recourse to the death penalty.

It is suggested that had the authors of the Convention not made the exception set out in Article 2 § 1, the chances of the adoption of the Convention and its entry into force could have been diminished. However, today Europe can be said to be a death-penalty free zone. How have we reached this point?

Firstly, the Court's case-law on the right to life has evolved over the years (initially cautiously), thanks in part to the Court's dynamic interpretation of the Convention's relevant provisions, in particular Article 3 (see *Tyrer v. the United Kingdom* and *Soering v. the United Kingdom*).

Secondly, the adoption and entry into force of Protocols Nos. 6 and 13 provided decisive impetus to the attainment of a death-penalty free zone in Europe. In fact, treaty law – the respective Protocols – has developed more rapidly than the Court's case-law. Having regard to the new resolve of the Member States of the Council of Europe to abolish capital punishment by elaborating these two Protocols, the Court as from the early part of the new century, began to take a more hostile approach to the literal interpretation of Article 2 § 1 of the Convention. The Court's judgments illustrate this new approach (*Öçalan v. Turkey*, *Al Saadoon and Mufdhi v. the United Kingdom, Ilascu and Others v. Moldova and Russia, G.B. v. Bulgaria, Bader and Kanbor v. Sweden, Al Nashiri v. Poland*).

Session I. Substantive aspects of the right to life: Principal developments since the *McCann* judgment

Issues relating to the beginning and end of life under the Convention

Baroness Hale of Richmond, Deputy President of the Supreme Court of the United Kingdom

1. It is largely as a result of cases from the United Kingdom that we now know that Article 2 contains three distinct obligations. It seems appropriate, therefore, to set the scene for today's discussions by looking at later United Kingdom cases.

2. The importance of the investigative duty established in *McCann v United Kingdom* 21 EHRR 97 has been high-lighted by a whole series of cases, both domestic and in Strasbourg, about the effectiveness of the investigations into deaths caused by the armed forces during the 'troubles' in Northern Ireland from 1968 to 1998. The result has been a notable improvement in scope and transparency of our domestic inquest procedures, but it has taken an inordinate length of time to establish this (*McCaughey v United Kingdom* (2014) EHRR 13). The Human Rights Act 1998, by translating the Convention rights into rights in UK law, has enabled the UK courts to play an important part in this process, which Parliament has seemed reluctant to do.

3. The development of the positive, protective duty established in *Osman v United Kingdom* (2000) 29 EHRR 245, has been illustrated by two cases about the prevention of suicide. In contrast to the usual way in which the 'dialogue' between Strasbourg and the UK courts is envisioned, the UK courts developed the Convention rights further than the Strasbourg court had yet done, in *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74, [2009] 1 AC 681, and *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, [2012] 2 AC 72, and may perhaps have influenced the Strasbourg court to develop its jurisprudence in the same direction, in *Reynolds v United Kingdom* (2012) 35 EHRR 55.

4. However, many crucial 'life and death' questions do not arise under article 2 but are being developed under article 8. *Pretty v United Kingdom* (2002) 35 EHRR 1 established that the right to life did not entail a right to die, but the stress on the personal autonomy has led to the recognition of a right under article 8 to determine the time and manner of one's own death, in *Haas v Switzerland* (2011) 53 EHRR 33; *Koch v Germany* (2013) 56 EHRR 6; and *Gross v Switzerland* (2014) 58 EHRR 7. A majority of the UK Supreme Court, in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 28, [2014] 3 WLR 200, thought that our present absolute prohibition on assisting suicide could be incompatible with the Convention, but disagreed about what to do about it. Justifications for interfering with this right are, of course, informed by the importance of the right to life in article 2.

5. The Strasbourg Court has reached a similar position in relation to the beginning of life. The unborn child is not herself a person with the right to life protected by article 2 (*Vo v France* (2005) 40 EHRR 12; *Evans v United Kingdom* (2008) 46 EHRR 34), but her interests may be an important factor to be taken into account in justifying an interference with the reproductive freedom of the parents under article 8 (*A v Ireland* (2011) 53 EHRR 13). This, in my view, is a sensible solution, leaving member states a wide margin of appreciation in balancing the interests involved.

Out of harm's way : the scope of positive obligations under Article 2 of the Convention

Linos-Alexandre Sicilianos, Judge, European Court of Human Rights

According to a principle affirmed already in the 1990`s, Article 2 contains not only obligations of abstention or negative obligations, but also obligations for the Contracting Parties to act proactively, to take appropriate measures so as to safeguard the lives of those within their jurisdiction. Such positive obligations of States under (the substantive limb of) Article 2 are not mentioned explicitly in the Convention. They derive from a dynamic and evolutionary interpretation by the Court. They are in conformity with the object and purpose of this provision and they have contributed to the widening of its scope.

At the same time the Court has been cautious, so as not to impose an impossible task to the national authorities. Therefore, it is important to examine the conditions under which the positive obligations come into play. Those conditions are closely related to the exact legal nature of positive obligations under Article 2. The factual context giving rise to positive obligations differs greatly from case to case: complex police operations, suicide of persons in State custody, acts of violence between private individuals, hazardous activities, environmental risks, calamities, medical negligence, etc.

Such context is decisive as to the content and scope of positive obligations in each and every category of cases.

The case-law of the Court in this particular field has opened new perspectives in the interpretation of the Convention, especially in the field of prevention of human rights violations and in the relation to the notion of "due diligence" in international law. The potential of positive obligations under Article 2 is very important, as is demonstrated by the continuous diversification of relevant examples in most recent cases.

Planning and control of operations involving the use of lethal force

Brice Dickson, Professor of Law, Queen's University Belfast

This paper on the planning and control of operations involving the use of lethal force considers the impact of the decision of the European Court of Human Rights in *McCann v UK* on this point. It selects five subsequent decisions, relating to different states (Turkey, Bulgaria, Greece, Belgium and Russia), to illustrate instances where the Court has found the planning and control of the operations to have been in violation of Article 2, following this with a selection of four decisions, again relating to different states (Cyprus, the UK, Turkey and Italy) to illustrate instances where the Court has found *no* violation of the duty to carefully plan and control the operations. In evaluating the post-*McCann* case law the paper suggests that the relevant standards on planning and control have been nuanced in five respects, regarding (1) the time available for planning, (2) the retention of documentation which explains the planning and control processes, (3) the selection of personnel for the operation and the availability of equipment and training, (4) effective communication between personnel involved in the operation, and (5) swift access to professional medical aid at the time of the operation. The paper concludes by suggesting that there are four further respects in which the Court may wish to develop the standards in this area, by requiring (1) that the appropriateness of the care exercised should be judged against the danger posed by the targets of the lethal force; (2) that the care exercised should involve consideration of other methods which could be used to avert the threat presented by the targets, including covert surveillance and pre-emptive action; (3) that state law enforcement agencies should have *policies and procedures* in place to guide their application of the legal and administrative framework concerning use of lethal force; and (4) that States should have an inspection and/or accountability system in place to ensure that the relevant laws and policies on use of lethal force are properly implemented, tested, reviewed, updated and certificated.

Session 2. Procedural obligations and the right to life

What is an effective remedy for violations of the right to life? An overview of the national practices in the Council of Europe Member States

Christos Giakoumopoulos, Director, Directorate General Human Rights and Rule of Law, Council of Europe

States Parties to the ECHR are bound to abide by the ECtHR judgments and provide redress to victims of violations of the right to life and their relatives (who are the actual applicants). To remedy these violations authorities are bound to conduct effective investigations into the circumstances of the victims' deaths. The case law of the ECtHR determines the necessary elements of the effectiveness of these investigations: they shall determine the facts, identify those responsible and bring them to justice. The investigation shall thus aim at prosecuting the perpetrators and eradicating impunity, on the one hand, and at satisfying the "right to truth" of relatives and the public in general. The CM considers that States found in breach of Article 2 are under a continuing obligation to conduct effective investigations.

In cases of massive or large scale violations of Article 2, the criminal prosecution may well include the right to truth of the relatives. However, as time goes by, even thorough investigations may not lead to criminal prosecution as the latter may be impeded by factual and/or legal obstacles, such as destruction of evidence, prescription, amnesty, or the principle of *ne bis in idem*. Both the Court and the CM admit that the obligation to conduct effective investigations is an obligation of means, not of result. Non-conclusive criminal investigations may have the adverse effect of compromising the right to truth as the investigative file may remain inaccessible to the relatives or to the public in general. On the other hand, in the framework of transitional justice, evidence is often provided against guarantees of non-prosecution. Consequently, the manifestation of the truth may lead to non-prosecution of the perpetrators.

The ECHR organs approach as shown in the cases relating to Northern Ireland, Cyprus, the former-Yugoslavia and Chechnya is cautious. In particular, the CM seems to favour two avenues of redress in parallel: the effective investigation in the framework of criminal proceedings is combined with other milder non-judicial means that aim at offering relief to the families' suffering. However, the two avenues may become gradually too distant to be pursued simultaneously, and this ambiguous positioning risks jeopardising the effectiveness of any of the two.

Whereas the traditional criminal investigations should in principle take priority, transitional justice approaches may need to take precedence in the process of redress when the prospects of success of the criminal investigations look poor. The question is raised as to when and under which circumstances the priorities will need to change. The Court gave some indications in this direction in a quasi-pilot judgment against Russia (*Aslakhanova*, 2012). Such indications, and perhaps a more systematic approach enabling to draw guidance on this question is very much needed.

Grave violations of human rights: comparison of the law and practice of international tribunals

Antônio Cançado Trindade, Judge, International Court of Justice

International human rights tribunals and international criminal tribunals have contributed to the proper handling of some procedural issues in their evolving case-law, in cases concerning grave violations of human rights and International Humanitarian Law. Thus, in face of a systematic pattern of *enforced disappearances of persons* (or else negligence or tolerance of public authorities), the IACtHR has applied a presumption in favour of the victims, not insisting on the application of the rule of exhaustion rule of local remedies. Such rule is taken into account with special attention to the needs of protection.

Local remedies form an integral part of the very system of international human rights protection, the emphasis falling on the element of redress rather than on the process of exhaustion. The local remedies rule bears witness of the interaction between international law and domestic law in the present domain of protection. We are here before a *droit de protection*, with a specificity of its own, fundamentally victim-oriented, concerned with the rights of individual human beings rather than of States.

Human rights treaties are essentially *victim-oriented*, and a recent cycle of cases of massacres afforded the IACtHR the occasion to proceed to a jurisprudential construction as to the *determination of the condition of victim*.

To this end, the IACtHR considered, in such cases, as alleged victims, besides the persons *identified* in the petition lodged with it, *those who were identifiable*, i.e., who could be identified subsequently, given that the difficulties found in their individualization led to presume that there were still victims pending of determination.

Besides giving testimony of the ineluctable *centrality of the victims*, the IACtHR has *enlarged the notion of direct victim*: thus, the relatives of the *direct victims* as a consequence of the *violation of the right to life* (that is, the relatives of the murdered victims), became, in their own right, as a direct consequence of the violent death of their beloved ones, also *direct victims* as a result of the *violation of the right to personal integrity* (psychic and moral integrity, of the relatives), followed by the *violation of the right of access to justice* and to *the due process of law*.

International human rights tribunals, keeping in mind the needs of protection, have not pursued a stringent and high threshold of proof in cases of grave violations of human rights; given the difficulties experienced in the production of evidence, they have resorted to factual presumptions and inferences, and have proceeded to the reversal of the burden of proof. The IACtHR has done so since the beginning of its jurisprudence, and the ECtHR has been doing so in more recent years. They both conduct the free evaluation of evidence. The standard of proof they uphold is surely much less demanding than the corresponding one ("beyond a reasonable doubt") in domestic criminal law. Both the ECtHR and the IACtHR have felt obliged to resort, even more forcefully in cases of systematic patterns of grave violations of human rights, to presumptions and inferences, to the ultimate benefit of the individual victims in search of justice.

According to the case-law of international criminal tribunals (ICTY and ICTR) as to the standard of proof, the intent to commit genocide can be proved, in the absence of direct evidence, by inference

from facts or circumstances, such as: a) the general context of the perpetration of grave breaches (systematically against the same group); b) the scale of atrocities committed; c) the general political doctrine which gave rise to the acts and the use of derrogatory language; d) the repetition of destructive and discriminatory acts, forming a pattern of conduct. In effect, requiring direct or explicit evidence of genocidal intent in all cases is not in line with the case-law of international criminal tribunals (ICTY and ICTR); when there is no direct evidence of intent, it can be inferred from the facts and circumstances.

Investigation into the use of lethal force: standards of independence and impartiality

Egbert Myjer, Commissioner of the International Commission of Jurists; former Judge of the European Court of Human Rights

The judgment in *McCann v. the United Kingdom* (1995) set out the obligation to investigate. The main criteria in relation to the obligation to investigate in McCann: any investigation must be *thorough, impartial and careful*. The elaborated applicable principles can now be found in the judgment *Al Skeini and Others* (2011). In the case of *McCann v. The United Kingdom* the Court also found a substantive breach of Article 2, but the material evidence may be problematic. Every now and then the Court goes so far as to try and recreate what would have been adequate in the investigation at the national level (see separate opinion in the case *Jaloud* (2014)). For impartiality, see the *Kyprianou* (2005) criteria *mutatis mutandis:* The investigator should act impartially from both a subjective and an objective perspective. Questionable finding in *Ramsahai* (2007), of violation of the procedural obligation in relation to independence.

By introducing the obligation to investigate, the Court made it clear that also this aspect of upholding human rights is first and foremost a responsibility at the national level. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. That again is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts.

Session 3. Conflicting or complementary: Interplay between international humanitarian law (IHL) and human rights law

Application of human rights law in situations of armed conflict

Rick Lawson, Professor and Dean of the Law Faculty, University of Leiden

It is quite obvious that international human rights law – and the ECHR more in particular – continues to apply in situations of armed conflict. That observation does not, however, solve all questions. Several issues arise in situations of armed conflict that require special attention: the establishment of the facts, issues of attribution, the notorious question of 'jurisdiction' (cf. Article 1 ECHR) and the question whether human rights standards should be adapted so as to accommodate the realities of the battlefield. In the latter respect it is argued that a contextual approach should be followed:

States may be expected – even (or should we say: especially) in situations of armed conflict – to take reasonable and appropriate measures to secure the basic rights of those who find themselves under the actual authority or control of their armed forces or other State agents. Sadly, it may be expected that future cases will provide opportunity to the Court to elaborate the principle stated in *Al-Skeini:* 'It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored" (…)' (*Al-Skeini a.o. v. United Kingdom,* 55721/07, GC judgment of 7 July 2011, para. 137).

When is an act of war lawful?

Sir Daniel Bethlehem, KCMG QC

This presentation will consider the interpretation and application of the phrase "resulting from lawful acts of war" in Article 15(2) of the ECHR and its implication for the relationship between the ECHR and international humanitarian law in situations of armed conflict.

New types of conflict: Human rights and anti-terrorism measures

Lady Justice Arden, Judge, Court of Appeal of England and Wales

The presentation will look at recent cases on the compatibility with human or constitutional rights of measures taken against suspected terrorists or their property, including the new rule of procedure adopted by the General Court for sanctions cases, with a view to showing the principled, sensitive and evolving approach shown by the Strasbourg court in this area.