The Right to Life and Law Enforcement Activities: The Appropriateness of a Military Response to the Problem of Terrorism

Juliet Chevalier-Watts

Abstract

This paper considers the issue of the right to life in several lethal force cases heard in the European Court of Human Rights as a result of State activity in response to terrorist and armed activity. In light of extensive judicial scrutiny, and the recent erroneous shooting dead of Brazilian electrician, Jean Charles de Menezes on the London Underground by police, this paper submits that a military response may balance the dichotomy of terrorism and the right to life. Article 2, the right to life, is the most fundamental of all the provisions of the European Convention on Human Rights; without it, all other provisions are redundant. However, this very right, in the context of lethal force and terrorism, was brought sharply into focus when Strasbourg heard the ground breaking *Death on the Rock* case, where terrorist suspects were shot dead by Special Forces soldiers in Gibraltar. Since this case, a number of lethal force cases have been heard by the European Court in relation to military and police terrorist operations. These cases have been subject to detailed scrutiny as to the application of the provisions of Article 2 of the Convention, and have produced divergent results. As a result, this paper submits that, in Europe at least, a military response acknowledges a State's authority to protect its populous and its agents, whilst at the same time entrenching the fundamental principle of the right to life, thus balancing two theoretically opposing concepts: the authority of the State and the right to life.

Key Words: Right to life, European Court of Human Rights, terrorism.

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Introduction

This paper considers the issue of the right to life in several lethal force cases heard in the European Court of Human Rights as a result of State operations in response to armed and terrorist activity.

I will submit that in light of extensive judicial scrutiny, and in light of the recent erroneous shooting dead of Brazilian electrician, Jean Charles de Menezes, on the London Underground by British police, that a military response may balance the dichotomy of terrorism and the right to life.

Before delving into the fundamental issues of the paper, it is worthwhile just taking a moment to outline the key legislative provision that is the focus of this paper, and upon which the relevant case law takes its authority.

Article 2, the right to life, is the most fundamental of all the provisions of the European Convention on Human Rights; it enshrines one of the most basic values of a democratic society.[1] Without it, all the other provisions are redundant.[2] Article 2 provides that:

(1) Everyone's right to life shall be protected. No one shall be deprived of his life intentionally...
(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
    (a) in defence of any person from unlawful violence;
    (b) in order to effect arrest or to prevent the escape of a person lawfully detained;
    (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 2 therefore affords lawful exceptions to the requirement of the right to life.

Exceptions may only occur if the High Contracting Party can show that the force was 'no more than absolutely necessary'. This is a more stringent test than that required by Articles 8–11 of the Convention. Therefore, Article 2 may be said to be a ban on unlawful killing by State agents.[3]

The obligation therefore is for the State to establish legal rules that prevent

the taking of life by any Stage agent, or indeed, any person. When a life is taken, the method of taking that life must fall within the categories outlined in Article 2.[4]

So the text of Article 2 covers intentional killings and also situations where the use of force results in a death, which is an unintended outcome. Any use of force must be no more than absolutely necessary for the achievement of the purposes set out in Article 2. Therefore the use of force must be strictly proportionate to the achievement of the permitted aims.[5]

Consequently where there has been loss of life, those actions that brought about the loss of life may be subject to scrutiny under Article 2.[6] However, such scrutiny did not begin its real evolution until relatively recently. The case of *McCann v United Kingdom*, or the *Death on the Rock* case, was the catalyst that began the exponential evolution of the jurisprudence of European case law in relation to lethal force cases.

The case of *McCann* is of particular relevance to this paper for a number of reasons. Firstly it was the case that established a number of procedural obligations with which States must comply. Secondly, the principles that were established by the European Court in this case were the basis for the Court's scrutiny of all subsequent lethal force cases. Thirdly, it is a military lethal force case. As a result, this paper submits that although Strasbourg may consider the principles established in *McCann* in each police and military lethal force case, the actual application of those principles differs depending on whether the Court is applying the principles to a police lethal force case, or a military lethal force case.

The case of *McCann* arose when three IRA suspects were shot dead by SAS operatives in Gibraltar as a result of an anti-terrorist operation. This was the first time that the European Court had had the opportunity to scrutinise a lethal force case, because prior to *McCann*, all other cases being brought under Article 2 had either been screened out for failing to comply with procedural obligations, or had been decided by the Commission, as it existed at that time.

The effect of the Court's consideration of the obligations under the Convention in this seminal case was to secure a realistic and pragmatic prohibition of arbitrary killing by State agents.[7] This was achieved by authorising the Court to examine, inter alia, the planning and control of the operation that resulted in the lethal force, and creating an obligation to carry out an effective official investigation. Such duties and obligations protect the lives of all individuals, however, such protection comes with a

price. The Court in *McCann* noted that a terrorist attack presents the State with a huge challenge. On the one hand the State must have a regard to the protection of the lives of its civilians and agents, and on the other, in light of the obligations flowing from the Convention and domestic law, it must have minimum resort to using lethal force against terrorist suspects.[8] Such an approach therefore enshrines the basic values of a democratic society,[9] that of ensuring that the Convention is an instrument to protect all individual human beings, regardless of beliefs or motives. Nonetheless, in order to achieve such protection, the safeguards must be practical and effective.[10]

This paper will now examine the approach of the Court in relation to key themes arising from police and military lethal force cases, before returning to areas of concern arising from the Jean Charles de Menezes' shooting.

Military Lethal Force

Since the case of *McCann,* the Court of Strasbourg has not shied away from posing significant questions regarding the use of military force during law enforcement operations, especially in relation to countering terrorist and insurgency activities. There has been a sense of unease about the way in which the European Court has approached such military cases as there is a belief that such cases should be judged under the law of armed conflict, or international humanitarian law, as *lex specialis.* Instead, the European Court has, arguably, applied international human rights law to address such situations.[11] It is not the purpose or remit of this paper to assess the issues of *lex specialis,* but suffice to say that it is the author's opinion that human rights law has become *lex specialis* for the European Court in right to life cases arising out of armed conflicts.[12]

As noted, the case of *McCann* created a sea change in the jurisprudence of Strasbourg, and as such provided the framework from which the Court was authorised to review the planning and control of the operation, and the obligation on a State to carry out an effective investigation following the killing. The case of *Ergi v Turkey*[13] followed on from *McCann* and not only recognised the principles established by its predecessor,[14] but also widened the application of the principles established in the *Death on the Rock* case.

The case of *Ergi* concerned the shooting dead by Turkish military security forces of the applicant's sister during a planned armed ambush operation designed to capture members of the Kurdish Workers' Party (the PKK), a guerrilla organisation. The Government in the case of *Ergi* asserted that the Court's authority to examine a case of lethal force is limited only to

circumstances as described in *McCann*. In other words, where there is clear evidence that the death was as a result of the actions of State agents.[15] Strasbourg however swiftly rebutted such a presumption, commenting that the obligation to investigate a lethal force death was not confined to cases where it had been established that the killing had been caused by a State agent.[16] Indeed, as the Court noted "mere knowledge of the killing on the part of the authorities" will actually trigger the obligation to carry out an effective investigation into the death, regardless of whether an official complaint has been lodged with the relevant authorities.[17] As a result of detailed scrutiny by the Court, the majority held that Turkey breached Article 2 on account of the planning and conduct of the security forces' operation, and in respect of its failure to carry out an adequate and effective investigation into the death of the applicant's sister.[18] What is also evidently clear from the judgment of the Court is that even though Strasbourg is eminently aware of the difficult security situation being presented by Turkey, where threats to its civilians and agents are without doubt an unpleasant reality, the Court recognises that the obligations under Article 2 entrench the fundamental ethos of the right to life. Thus "neither the prevalence of violent armed clashes nor the high incidence of fatalities"[19] can displace those obligations. As a result, a military response serves two purposes: firstly, a State may protect its national interests. Secondly, the obligations flowing from the Convention require that a State examine its procedures and conduct relation to terrorist operations so that individual rights are balanced against the seriousness of the circumstances.[20] So the case of *Ergi* entrenched the principles set forth in the case of *McCann*, whilst reiterating "effective political democracy and the safeguarding of human rights."[21]

More recently, the difficulties facing Russia and its turbulent relationship with Chechnya presented seemingly huge challenges for the European Court when the first cases from Russia were heard citing breaches of Article 2 in relation to military lethal force cases. Strasbourg had to apply those principles established in *McCann*, and entrenched in *Ergi*, to cases involving large-scale military operations in response to widespread insurgency activity.

The conflict between Chechnya and Russia is rooted in centuries of history with calls to fight the Russian conquest being recorded in the 1700s. Since that time, peace between Russia and Chechnya has been tenuous. In 1994, the Russian Federation failed to placate Chechnya when it demanded independence from Russia, and Moscow began the first Chechen war in an attempt to preserve constitutional order, although this war ended in 1996

after an agreement was signed to signify a ceasefire. Unfortunately the issue of independence was not settled and serious criminal activities flourished in Chechnya as its presidents failed to establish law and order. In 1999, the new Russian President, Putin, asserted his authority and ordered a massive military advance in Chechnya in an attempt to quash criminal armed groups and to undermine any beliefs of independence.[22] Since the second war against Chechnya began, the hostilities have included serial aerial bombing over civilian routes and villages, enforced disappearances and the use of inhumane weapons, including cluster bombs. Russia has continually denied any existence of an armed conflict, thus avoiding any breaches of the Geneva Convention,[23] and instead refers to the events plaguing Russia and Chechnya as terrorism and banditry.[24] This reflects the approaches taken by the Turkish and British Governments, who have also denied the existence of an armed conflict in relation to the activities of the PKK and the IRA respectively, and instead characterised their operations as counter-terrorism, thus to be countered with law enforcement operations. As a result, international humanitarian law was inapplicable, hence the only route available to victims' families was that of international human rights law, under the European Convention on Human Rights.[25]

Certainly Europe has no issues with regard to its authority to scrutinise such armed conflicts, regardless of the name adopted by the State, on the proviso that such conflicts "occur within the territory of the State or areas under its effective control"[26] and certainly the conflict between Russia and Chechnya falls within that construct. Nonetheless, the challenge for the Court was whether the principles enunciated so clearly in the *Death on the Rock* case could be applied coherently, and without undermining the ethos of a State's sovereignty, in military cases on such a large scale.

Although many Chechen cases have now come before Strasbourg as a result of loss of life and enforced disappearances during the conflict, this paper will concentrate on two of the the trilogy of cases whereby the Court delivered its first judgments concerning right to life violations in Chechnya. The cases of *Isayeva, Yusupova and Bazayeva v Russia*[27] (*Isayeva I*) and *Isayeva v Russia*[28] (*Isayeva II*) were delivered in February 2005.

The case of *Isayeva I* arose out of a claim that the Russians had indiscriminately bombed a civil convoy evacuating the town of Grozny via a so-called "humanitarian corridor". During the evacuation, the Russian military set up a road block along the corridor and ordered the civilians to return to the town. As the convoy was undertaking the return, Russian

military planes carried out a bombing campaign on the convoy, resulting in many deaths and injuries of civilians.[29]

In the case of *Isayeva II*, a large number of Chechen rebels entered the village of Katyr-Yurt, which was not expected by the villagers. Further, Katyr-Yurt had been declared as a "safe zone" thus attracting refugees from other districts of Chechnya. A safe passage was offered to village residents during the military operation but it is believed that the rebels prevented many people from leaving. The Russian military launched an aerial attack on the village resulting in significant civilian deaths and injuries.[30]

In both cases, the Court took time to comment that the situation that existed in Chechnya at that time called for exceptional measures to be taken by the State in order to retain control and suppress insurgency activity. As such, those measures could include military operations and indeed may justify the use of lethal force.[31] Such acknowledgement by the Court affirms State sovereignty, which is, perhaps, not a surprising approach: the underlying concept of the Convention is that of unity between High Contracting Parties, thus the Court must always have in its contemplation the voluntary nature of the obligations under the Convention. However, for such extraordinary measures to be taken by a State, there must be a balance between "the aim pursued and the means employed to achieve it".[32]

Relying on the principles established in *McCann*, the Court scrutinised both the planning and carrying out of the military operations, and also the obligation to carry out an effective investigation.

In the case of *Isayeva I*, the Court was highly critical of the Government's contentions that the use of heavy combat weapons was a legitimate pursuit of its aims, that of quashing insurgency activity, as the Government's contentions were "contradicted by a substantial mass of other evidence presented to the Court."[33] In light of this damning criticism, the Court found that Russia did not plan and execute its operation with the requisite care required and its response to the insurgency activity was disproportionate to the pursuit of its aims.[34]

In the case of *Isayeva II*, the Court was no less critical, noting that the use of such indiscriminate weapons "stands in flagrant contrast with [the] aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents."[35] Indeed, the Court went further in its criticism, noting that it was impossible to reconcile the degree of caution required of a law enforcement body with the use of massive weaponry in a populated area without evacuating

civilians in peace time.[36] It is of no surprise therefore that the Court found Russia in breach of Article 2 in relation to the planning and execution of the operation.[37]

The Court was no less scathing of Russia's attempt to conduct an effective investigation in both cases. For an investigation to be effective, the authorities must act "of their own motion once the matter has come to their attention";[38] for the investigators to be independent; and for it to lead to the determination of whether the force was justifiable and to the identification and punishment of those responsible, although this is an obligation of means, not necessarily result.[39]

Whilst the Court acknowledged that there may be circumstances that delay or make investigations difficult, a prompt and effective investigation is crucial in maintaining public confidence in the State's adherence to the rule of law and "preventing any appearance of collusion in or tolerance of unlawful acts."[40]

What is interesting to note is that in the case of *McCann*, the Court did concede that the actual investigative procedure was flawed in places, but did not consider that the alleged shortcomings substantially hampered the carrying out of an effective investigation. Neither did the Court determine it necessary to instruct what form an investigation should take, and under what conditions it should be conducted.[41]

However, the Court in the Chechen cases no longer felt so constrained by such limitations, and indeed felt compelled to comment on many aspects that rendered the investigations seriously flawed in many respects. In the case of *Isayeva I*, it was noted that the investigation did not take sufficient steps to identify victims and witnesses and that there were inordinate delays in the processes. Further, in an uncharacteristic fashion, Strasbourg even responded to the Government's assertion that the applicants undermined the investigation process by suggesting that the Government should have contemplated that the applicants would be feeling vulnerable, fearful and insecure thus would make their assistance in the investigation problematic.[42]

The Court was equally critical of the investigation carried out in the case of *Isayeva II* and saw fit to comment on the flaws in the process and how the processes may have been improved to comply with the procedural requirements of the Convention.[43]

Such an approach reflects the determination of Strasbourg to ensure accountability and enforce human rights, even when a State is facing extraordinary territorial problems. I concur with the Court's determined

examination of the State's compliance with the two procedural obligations. Such robust scrutiny allows the Court to assess the legality of a State's actions without necessarily interfering with a State's substantive responsibilities, therefore a High Contracting Party's voluntary status is respected whilst ensuring that human rights are safeguarded. It is not unreasonable therefore to assume that such rigorous scrutiny would be applied in the same manner to lethal force cases arising from police operations. This paper however submits that Strasbourg has a "tendency to find that the police have not failed in their Convention duties."[44] It is to this matter that this paper now turns.

Police Lethal Force

In the case of *Brady v United Kingdom*,[45] James Brady was shot dead by police at a club in the north east of England. The police had been informed that Brady, along with others, was planning on carrying out an armed robbery at a club, although the police were also informed that the firearm that Brady would be carrying would be an imitation firearm. However, the police officers involved in the operation were told to treat all firearms as real, unless proven otherwise, and were informed that Brady had military training.

The police discussed a number of options with regard to the planning and execution of the operation. These options were:

- An armed ambush at the club; or
- The introduction of a strong police presence in the club and the surrounding area before the operation; or
- Arresting the suspects at their homes before the armed robbery took place.[46]

The second option was rejected because the Superintendant considered that although it would prevent the robbery that night, the suspects might return at a later date, and it would also be safer to remove potential threats as soon as possible. The third option was rejected because of the possibility that there would not be enough evidence to ensure a successful prosecution against the offenders. As a result, the police selected the first option as being the most appropriate in the circumstances.

The complainant, Brady's father, argued that the first option brought about circumstances that endangered Brady's life that were unjustifiable. He submitted that those planning the operation failed to have regard to the inevitability of the use of lethal force as deploying armed officers at night

in a confined space to ambush armed suspects posed huge risks that the offenders would react defensively thus giving rise to a lethal force response by the police. Indeed, the complainant contended further that the police knew about the robbery four days in advance, yet the planning took place a mere six hours before the incident.[47]

During its considerations, the Court was not persuaded that the police's plan to carry out an armed ambush "rendered the execution of the operation incompatible with the requirements of the Convention."[48] Further, "if there had been insufficient evidence of a crime having been committed, there would have been no possibility of bringing criminal charges or a prosecution."[49]

At first sight, this approach suggests a pragmatic approach by the Court. However, this very approach is in direct contrast with that taken by the Court in the case of *McCann*. In the latter case, the British Government submitted that it would have been unreasonable to arrest the IRA suspects as:

> there might not have been sufficient evident to warrant the detention and trial of the suspects. Moreover to release them, having alerted them to the authorities' state of awareness but leaving them or others free to try again, would obviously increase the risks. Nor could the authorities be sure that those three were the only terrorists they had to deal with or of the manner in which it was proposed to carry out the bombing.[50]

This argument echoes the submissions made by the police in the case of *Brady*, and yet the Court in *McCann* was quick to rebut the Government's submission, noting that not preventing the suspects' entry to Gibraltar "must be considered to outweigh the possible consequences of having insufficient evidence to warrant their detention and trial... [a]s a result, the scene was set in which the fatal shooting...was a foreseeable possibility if not a likelihood."[51]

I am unable to distinguish between the pleadings of the two cases, except perhaps for the seriousness of the situation. In the case of *McCann*, Gibraltar was at serious risk of being subject to a terrorist attack, either at that moment, or in the near future. In the case of *Brady*, the armed robbery was to be carried out at night, away from the general public and with likely imitation firearms. I would argue therefore that it would have been even more important for the Government in the *McCann* case to have ensured that enough evidence was available to bring a secure conviction to protect the general public.[52]

The Court however was convinced that not arresting Brady was merely a reflection of the flexibility required of such operations that are subject to evolving circumstances,[53] and yet in *McCann*, not arresting the suspects prior to the operation was far from being construed as being part of flexible and evolving circumstances, and instead was condemned "as being surmountable to a poorly organised and executed operation."[54]

Such dramatic discrepancies in the approaches taken by the Court cannot easily be rationalised, and as such create a certain sense of unease about the way in which Strasbourg approaches military and police lethal force cases. Nonetheless, such discrepancies also suggest that military responses to possible terrorist activities may ensure that the right to life is more vigorously assessed.

The recent case of *Giuliani and Gaggio v Italy*[55] provides further evidence of such an approach. This case arose as a result of the death of Carlo Giuliani, a demonstrator, when he was shot dead by a member of the carabinieri[56] during violent demonstrations at the G8 Summit in 2001. The Italian Government submitted that that there was no causal link between the shot fired by the carabinieri and the actual death of Giuliani, as the bullet only struck the demonstrator as a result of "highly unusual and unforeseeable circumstances."[57] The carabinieri, having been injured in the demonstrations, was ordered to take refuge in a Landrover Defender jeep, which was then surrounded and attacked by demonstrators. The carabinieri fired two shots with his pistol, and one bullet hit Giuliani in the face, causing the fatal injury; it was not possible to determine the exact trajectory of that bullet but it is likely that it ricocheted off a stone that had been thrown by an unknown demonstrator.[58]

In its assessment the Court acknowledged that the individual who fired the shot did so in a state of panic and in belief that his life was in real and imminent danger, which falls within the scope of Article 2,[59] and also reflects the considerations of the Court in the case of *Brady*. Here too the officer believed his life to be in imminent danger when he thought that Brady was pointing a gun at him; this turned out to be erroneous although the Court noted explicitly that "[e]rrors of judgment or mistaken assessments, unfortunate in retrospect, will not per se entail responsibility under Article 2 of the Convention."[60] Such unforeseeable and unfortunate circumstances leading to the death of Giuliani in the Italian case did not lead the Court to believe that the substantive aspect of Article 2 of the Convention had been breached in that respect. This is entirely in line with the approach taken by the

Court in *McCann* also because "the use of force...where it is based on an honest belief which is perceived...to be valid at the time but subsequently turns out to be mistaken"[61] is entirely reasonable as "to hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty."[62] The paper concurs fully with the Court's approach to this issue and acknowledges that the approach is mirrored in respect to both military and police lethal force cases. However, with regard to the issue of the planning and control of the operation, Strasbourg was keen to distinguish the case of *McCann* from the present case.

It will be recalled that in the case of *McCann*, the European Court determined that the planning and the control of the operation rendered inevitable the use of lethal force, thus not adequately taking into consideration the right to life of the three terrorist suspects.[63] The Court in *McCann* did acknowledge that the authorities were not in possession of full facts, as only the terrorist suspects would have been fully aware of their plans, thus the Government could plan and control the operation on no more than the "basis of incomplete hypotheses."[64]

In the case of *Giuliani*, the Italian authorities were dealing with the G8 Summit, where they were required to ensure the safety of Heads of State, various officials, Genoese citizens and thousands of demonstrators. Although this was not an archetypal terrorist operation, the Italian authorities were very much conscious of the risk of terrorist intervention during the Summit, so the Government asserted that "substantial precautions had been taken in case the situation degenerated"[65] although it was known that violent individuals and anarchists had made it to the city of Genoa in readiness for the Summit. With this in mind, the Italian Government maintained that it would not have been possible to have foreseen exactly what circumstances would transpire, except with "the aid of a clairvoyant"[66] thus the Italian Government was operating on a similar basis to that of *McCann* and *Brady*, where operations were planned as far as was possible, but where it was acknowledged that circumstances may change rapidly as events unfolded. The Court in *Giuliani* accepted tacitly that chance must play some part in the actions of the Stage agents, as "the risk of disturbances was unpredictable and depended on how the situation developed."[67] This reflects the approach taken by the Court in the case of *Brady*. In this case, the team leader of the operation called the strike earlier than planned, meaning that other officers were not yet in position. As a result, the victim was still in the process of entering the Club via a window and in the confusion, appeared to make a threatening movement, in the belief of PC Bell;

PC Bell then shot dead Brady. As it turned out, Brady was carrying a torch, and not a gun, as perceived by PC Bell. Brady's accomplices all fled the Club on hearing the gunshot and were not prevented from leaving the scene as the police back up team had failed to arrive.[68] The Court acknowledged that the operation could have been carried out more efficiently and clearly there was an element of chance that affected the final outcome of the operation, that of the death of James Brady, but the Court failed to make any link between the elements of chance operating that caused PC Bell to shoot Brady.[69]

Yet, this element of chance was starkly ignored in the preceding case of *McCann*. In the instant case, whilst two of the SAS soldiers were closing in on two of the suspects, totally coincidentally a police car siren sounded nearby, whilst at the same time one of the suspects appeared to register the threat of the soldiers. It is likely that the sound of the siren and the realisation of the nearby State agents triggered the perceived aggressive and threatening moves by the suspects, thus leading the soldiers to open fire. The Court stated that such actions lacked the degree of caution expected from the use of firearms by State agents in a democratic society.[70] However what the Court also failed to take into consideration, as noted by the dissenters, is that shooting to wound, or attempting to arrest could have been highly dangerous because it was thought very likely that one of the suspects was about to detonate a bomb, which would have been done by merely pressing a button on a trigger device. In such circumstances, triggering the bomb would have caused devastation in the city, thus the soldiers had to ensure that the suspects were incapable of pressing the button. In the circumstances therefore, it does not seem unreasonable that when events had taken such a sudden turn for the worse that the soldiers should try to ensure the safety of themselves and civilians. What is clear however is that this militant approach adopted by the Court in *McCann* was not followed in the later police lethal force cases, even when circumstances were influenced by elements of chance, the atmosphere was volatile and there were noted shortcomings in the operations.

In the most recent case of *Giuliani*, the applicants identified a number of shortcomings in the preparation and conduct of the operation, including: the communications system that did not allow the different agents to be able to communicate directly with each other; the failure to circulate relevant information about the demonstration leading State agents to attack an authorised march; and the lack of co-ordination between the state agents.[71] The Court acknowledged that the attack on the authorised march was unlawful and arbitrary but the Court was mindful of the fact that the unlawful attack

did not have a direct bearing on the events that lead to Giuliani's death on Piazza Alimonda, as that event took place some hours after the attack on the march.[72] However, I am uncertain that such a distinction can be made so easily. The European Court relied on the opinion of the Genoa District Court, stating that the reaction of the demonstrators,"while the aforesaid arbitrary actions were occurring", were that of defending themselves, whilst the actions of the demonstrators at the event that that led to the death of Giuliani were the actions of individuals bent on revenge as a result of the earlier arbitrary attack on the march.[73] I cannot concur that the chain of causation was broken and that the shooting of Giuliani was not as a direct result of the earlier unauthorised actions of the Stage agents.

Notwithstanding the author's submission that the unauthorised attack by State agents on demonstrators is directly linked to the revenge attack by the demonstrators on the carabiniere, the Court further attempts to distance its findings from that of the observations in *McCann*. I do concur that there was no specific target at the G8 Summit, as there was in the *Death on the Rock* case, or indeed in the case of *Ergi*, however, in relation to this point, the Court notes that the "situation was somewhat ill-defined" and agencies were faced with "rapidly unfolding and dangerous situations" and as such were "required to make crucial operational decisions" and the event that led to Giuliani's death could not have been foreseen.[74] In light of the evidence, the Court was unable to establish that any shortcomings in the planning and conduct of the operation led to the death of Giuliani.

It is disquieting that in the case of *McCann*, the Court felt justified in criticising the actions of Soldier G, one of the SAS soldiers deployed in the operation. The Court took time to note that Soldier G carried out a "cursory external examination of the car" in which the suspected bomb was located, and that his suspicions that a bomb could not be ruled out led to working hypotheses on which the actions of the remaining soldiers were based, leading to almost unavoidable recourse to lethal force.[75] The Court commented that there was a failure to make provision for any margin of error.[76] However, in the case of *Giuliani*, Strasbourg discounts any State agent error as being a trigger for recourse to lethal force, even though the carabiniere responsible for the victim's death was in a state of panic and stress, had limited training and experience, and was injured.[77] The Court was swift to acknowledge that the State agents were acting under enormous strain at the end of a long day in the face of rapidly developing and dangerous circumstances. The factors acknowledged in *Giuliani* as being unfortunate but ultimately irrelevant with

regard to the death were deemed to be of critical importance in the case of *McCann*. I am unconvinced that such factors in the two cases really can be distinguished so simplistically.

My view finds support in the dissenting opinions of Judges Bratza and Sikuta in the case of *Giuliani*. The dissenters note that whilst the exact events that occurred in the Piazza Alimonda between the carabiniere and the demonstrators could not have been foreseeable, it was entirely foreseeable that where there was such a volatile situation then the occupants of the jeep would be at risk. Added to that volatile situation was a young, inexperienced carabiniere, who had sustained injury, who was by his own admission, in a state of panic and for all intents and purposes, without protection. This resulted in the recourse to lethal force, which could only have been as a result of shortcomings in the control and direction of the operation. The dissenters cannot concur that there was no direct link between the operation leading to the stranding of the jeep and its occupants and the death of Carlo Giuliani.[78]

Such apparent disparities in the Court's methods of scrutiny of police and military lethal force cases are not easily rationalised although there may be an argument that Strasbourg may be influenced in its decisions due to the differences in the perceived roles and operational methodologies of the police and the military. For instance, police are considered to be the enforcers of legislation, thus acting for and on behalf of the general public and the State, whereas the military are perceived to be in the role of defender of the State, with greater access to firepower, more autonomy than the police and therefore recourse to lethal force may be higher. Indeed, research suggests that Special Forces do operate with greater autonomy than would necessarily be expected of police forces.[79] If this is so, then perhaps it is not unreasonable for the European Court of Human Rights to impose more stringent conditions on military lethal force cases to ensure that State agent actions are contained with the requirements of the Convention.[80] This however is merely conjecture and is certainly not explicitly acknowledged in any manner by Strasbourg. Without any judicial rationale, the inconsistency in approach by the Court with regard to police and military operations is a double edged sword. On the one hand, the disparities give rise to a sense of disquiet; there may be anomalies in the manner in which the right to life is construed, which may undermine the very ethos of the Convention. On the other hand, the apparent disparity may ensure that, in some circumstances, the right to life is firmly entrenched, even in the face of the exigencies of the so-called war on terror.

With that in mind, I will return then to the issue with which this paper started, that of the shooting dead of Jean Charles de Menezes, the Brazilian electrician, on the London Underground by British police.

The Shooting of Jean Charles de Menezes

Two weeks after the London city terrorist bombings in 2007 Jean Charles de Menezes was on his way to work but unbeknownst to him he was the subject of police surveillance as he had been mistaken for Hussain Osman, a suspect from the previous day's failed suicide bombing attempt. Menezes' movements were tracked by police and at all times he proceeded at a calm pace, that was until he arrived at the Underground, and on seeing a train entering the station, he broke into a run and boarded the train. This theoretically unextraordinary action of running to catch a train tragically triggered his death. At the sight of de Menezes breaking into a run, the police initiated emergency action, boarding the train, apprehending de Menezes and shooting the Brazilian eight times.[81] Later investigations revealed a list of tragic errors throughout the execution of the operation that led to his mistaken shooting. The errors included:

- Failure to identify de Menezes positively as Hussain Osman;
- Failure to arrest de Menezes prior to entering the Underground system, as was instructed by the Commander of the operation;
- Failure to put in place alternative tactical options
- Alteration of evidence after the shooting.[82]

The Crown Prosecution Service decided that no individual police officer should face prosecution, although due to the operational errors, the Office of Commissioner, as the employer of the Metropolitan Police officers was found in breach of the *Health and Safety at Work Act 1974*, however the jury in that case noted that the operational Commander should bear no responsibility.[83] At the recent inquest into the fatal shooting, the jury found an open verdict, thus no unlawful killing, after direction by the coroner. The Independent Police Complaints Commission has also recommended that none of the senior officers be disciplined.[84]

It must be remembered that the shooting dead of Jean Charles de Menezes "occurred in the light of the growing fear of the war on terror",[85] which reflects a new era in the methods of terrorist operations and their subsequent control. Such a new era must surely focus the minds of politicians and law enforcement

agents alike and responses to perceived threats and possible attacks are led by a growing need instil public confidence and thwart the devastating consequences of terrorist attacks.[86] Nonetheless, it must also be at the forefront of law enforcement agents that whilst terrorism requires a robust response from a State, it must be balanced with the obligations under Article 2, that of the right to life. The question to be asked therefore is: did the actions of the police breach the obligations imposed under Article 2 in relation to Jean Charles de Menezes' right to life? This question has yet to be answered formally as no case has been brought to the European Court of Human Rights but one may hypothesise as to the possible outcome based on the preceding jurisprudence.

As has been noted, mistakes that have led to recourse to lethal force have been found to be Article 2 compatible by Strasbourg in a number of police lethal force operations; the opposite may be said to be true in relation to military lethal force operations. The Independent Police Complaints Commission (IPCC) noted a catalogue of errors littering the police operation that led up to the death of de Menezes, yet the IPPC has made it clear that blame should not be apportioned to specific State agents, and the public inquiry found an ambiguous open verdict, so providing no clear answer as to any avenue of responsibility. I submit that in the likelihood of de Menezes' family bringing a case successfully before Strasbourg, the Court would be bound by cases such as *Brady, Bubbins v United Kingdom*,[87] *Andronicou and Constantinou v Cyprus*,[88] and the case of *Giuliani*.[89] If the Court is to follow this line of cases, then it is unlikely that the United Kingdom would be found to have breached the Brazilian's right to life, regardless of the quality of the planning and carrying out of the operation. If this is so, then de Than's poignant remark that the European Court's "tendency to find that the police have not failed in their Convention duties"[90] will remain unchallenged once again. I am not of the opinion that this would be a satisfactory outcome, certainly in terms of the complying with the obligations under Article 2 of the Convention, yet equally I am keenly aware of the huge challenge facing the authorities when attempting to balance liberty, security and State accountability. Perhaps then it is sadly ironic that if de Menezes had died at the hands of military agents carrying out a terrorist operation, the Court would be likely to find that the United Kingdom would have breached its obligations to respect the Brazilian's right to life, thus suggesting that in certain circumstances a military response may provide a suitable method of balancing the thorny issue of terrorism and the right to life.

Notes

1 *McCann and Others v United Kingdom* (1995) 21 EHRR 97, ECHHR at [147].
2 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?" *International Journal of Human Rights* 14 no. 2 (2010): 301.
3 Ibid: 302.
4 Juliet Chevalier-Watts "Effective Investigations Under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?" *European Journal of International Law* 21 no. 3 (2010): 702.
5 *McKerr v United Kingdom* Application No.28883/95 Judgment 4 May 2001 at [110].
6 M Janis, R Kay, A Bradley *European Human Rights Law Texts and Materials* (Oxford University Press, Oxford, 3rd ed 2008), 130.
7 Alistair Mowbray "The Creativity of the European Court of Human Rights" *Human Rights Law Review* 5 no. 1 (2005): 78.
8 *McCann*, above n 1 at [192].
9 Ibid, at [147].
10 *Giuliani and Gaggio v Italy* Application No.23458/02 Judgment 25 August 2009.
11 Federico Sperotto "Violations of Human Rights During Military Operations in Chechnya" *Working Papers Human Rights and Human Welfare* 41 (2007): 5.
12 For further discussion, refer to Juliet Chevalier-Watts "Has Human Rights Become *Lex Specialis* for the European Court of Human Rights in Right to Life Cases Arising from Internal Armed Conflicts" *The International Journal of Human Rights* 14 no. 4 (2010): 584-602.
13 *Ergi v Turkey* (66/1997/850/1057) Judgment 28 July 1998.
14 Ibid at [75].
15 Ibid.
16 Ibid at [82].
17 Ibid.
18 Ibid at [35].
19 Ibid at [85].
20 Peter Rowe "Control Over Armed Forces Excercised by The European Court of Human Rights" *Working Paper Series Geneva Centre for the Democratic Control of Armed Forces* 56 (2002): 1.
21 Ibid.
22 Vesselin Popovski "Terrorising Civilian as a 'Counter-terrorist Operation': Crimes and Impunity in Chechnya" *Southeast European and Black Sea Studies* 7 no. 3 (2007): 432-433.
23 Ibid: 434.
24 William Abresch "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya" *European Journal of International Law* 16 (2005): 754.
25 Ibid: 755-756.
26 Noam Lubell "Challenges in Applying Human Rights Law to Armed Conflict" *International Review of the Red Cross* 87 no. 860 (2005): 742.

27 *Isayeva, Yusupova and Bazayeva v Russia* Applications Nos 57947/00, 57948/00 and 57949/00 Judgment 24 February 2005.
28 *Isayeva v Russia* Application No 57950/00 Judgment 24 February 2005.
29 Above n 27.
30 *Isayeva v Russia*, above n 28 at [15-28].
31 *Isayeva, Yusupova and Bazayeva v Russia* above n 27 at [178] and *Isayeva v Russia* above n 28 at [180].
32 *Isayeva v Russia* above n 28 at [181].
33 *Isayeva, Yusupova and Bazayeva v Russia* above n 27 at [192].
34 *Ibid* at [197]-[200].
35 *Isayeva v Russia* above n 28 at [191].
36 Ibid.
37 Ibid at [201].
38 *Isayeva, Yusupova and Bazayeva v Russia* above n 27 at [208].
39 Ibid at [210]-[211].
40 Ibid at [212].
41 *McCann v United Kingdom* above n 1 at [162]-[163].
42 *Isayeva, Yusupova and Bazayeva v Russia* above n 27 at [218]-[224].
43 *Isayeva v Russia* above n 28 at [221]-[223].
44 Claire de Than "European Court of Human Rights – Mistaken Belief in Self-defence May Justify Use of Lethal Force" *Journal of Criminal Law* 65 October (2001): 417.
45 *Brady v United Kingdom* Application No 55151/00.
46 Ibid at 3.
47 Ibid at 6.
48 Ibid at 9.
49 Ibid.
50 *McCann*, above n 1 at [204].
51 Ibid at [205].
52 Juliet Chevalier-Watts above n 2: 308-309.
53 *Brady* above n 45 at 9.
54 Juliet Chevalier-Watts above n 2: 309.
55 *Giuliani and Gaggio v Italy* above n 10
56 The paramilitary police force of Italy under direction of the Rome police at the time of the G8 Summit
57 *Giuliani and Gaggio v Italy* above n 10 at [173].
58 Ibid at [218].
59 Ibid at [225]-[227].
60 *Brady* above n 45 at 9.
61 *McCann* above n 1 at [200].
62 Ibid.
63 Ibid at [201].
64 *McCann* above n 1 at [193].
65 *Giuliani and Gaggio v Italy* above n 10 at [186].
66 Ibid.
67 Ibid at [238].

68 *Brady* above n 45 at 4.
69 Ibid at 9.
70 *McCann* above n 1 at [212].
71 *Giuliani and Gaggio v Italy* above n 10 at [234].
72 Ibid at [235].
73 Ibid.
74 Ibid at [237]-[238].
75 *McCann*, above n 1 at [209]-[210].
76 Ibid at [210].
77 *Giuliani*, above n 10 at [236].
78 Ibid, partly dissenting opinion of Judge Bratza joined by Judge Sikuta at [15]-[16].
79 Interview with former operation member of the SAS, interviewed 28 August 2008. Interview conducted in confidence, and name of interviewee withheld by mutual consent.
80 Juliet Chevalier-Watts above n 2: 314.
81 Independent Police Complaints Commission, Stockwell One "Investigation into the shooting of Jean Charles de Menezes at Stockwell underground station on 22 July 2005", 8 July 2007 at [12]-[13.14].
82 Ibid at [20]-[20.3] and [20.5]-[20.115].
83 Richard Edwards and Gordon Rayner "Jean Charles de Menezes inquest: Jury reaches open verdict" *The Telegraph*, December 12, 2008, http://www.telegraph.co.uk/news/uknews/law-and-order/3708063/Jean-Charles-de-Menezes-inquest-Jury-reaches-open-verdict.html accessed June 17, 2010.
84 Ibid.
85 Juliet Chevalier-Watts, above n 2: 316.
86 Peter Kennison and Amanda Loumansky "Shoot to Kill – Understanding Police Use of Force in Combatting Suicide Terrorism" *Crime, Law and Social Change* 47 (2007): 167.
87 *Bubbins v United Kingdom* Application No 50196/99 Judgment 17 March 2005.
88 *Andronicou and Constantinou v Cyprus* (86/1996/705/897) Judgment 9 October 1997.
89 For discussion on *Bubbins v United Kingdom* and *Andronicou and Constantinou v Cyprus* refer to Juliet Chevalier-Watts, above n 2: 300-318.
90 Claire de Than above n 44.

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