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The Right to Life, Democracy and State Responsibility in ‘Urban Guerilla’ Conflict: The European Court of Human Rights Grand Chamber Judgment in *Giuliani and Gaggio v Italy*

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1. Introduction

This Grand Chamber judgment resulted from the shooting of a demonstrator, Carlo Giuliani, during the mass protests that accompanied the G8 Summit in Genoa on July 2001.¹ Following an operation by a group of *carabinieri* military police against a protest march, a *carabiniere* Land Rover became isolated and was subjected to a violent attack by a crowd of demonstrators. Trapped in the back of the vehicle, suffering from the effects of tear gas and exhaustion, and panicked by the situation, *carabiniere* officer, Mario Placanica, fired his service pistol causing Giuliani’s death, apparently due to the fatal bullet ricocheting from a stone thrown by one of the attackers.² This shooting was challenged

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- 1 *Giuliani and Gaggio v Italy* Application No 23458/02, Merits, 24 March 2011.
- 2 A more detailed version of the facts is of course provided in the judgment itself, see *ibid.* at paras 11–30. For a longer summary and discussion of the initial decision given by a Chamber of the Court in *Giuliani and Gaggio v Italy* Application No 23458/02, Merits, 25 August 2009, see Skinner, ‘*Giuliani and Gaggio v Italy*: The Context of Violence, the Right to

under the right to life, Article 2 of the European Convention on Human Rights (ECHR),³ in relation to which aspects of the regulatory framework, planning and control, and investigation into the death were also called into question.

2. The Grand Chamber's Decisions

A. *The Use of Lethal Force*

With regard to the principal issue of the State agent's use of lethal force, the European Court of Human Rights ('the Court') decided (13 votes to 4) that there had been no breach of Article 2 in its substantive aspect. In reaching this decision, the Court relied in particular on its well-established principles that the absolute necessity of the use of force must be assessed in terms of the State agent's perspective at the time.⁴ Consequently, upholding the unanimous Chamber decision, it held that given the ferocity of the attack on the Land Rover ('the possibility of a lynching could not be excluded'⁵) the *carabiniere* officer's resort to a potentially lethal means of defence, his service pistol, was justified under Article 2(2)(a), due to his honest belief that he was acting 'in defence of any person from unlawful violence.'⁶ Cutting through the complex debate about the angle of the shot fired and whether or not the fatal bullet did in fact ricochet from an 'intermediate object', the Court focused on the fact that Placanica was crouching in a cramped space in the rear of the Land Rover and had a restricted field of vision and range of movements. Faced by an apparently imminent danger of potentially lethal violence, he

could only fire, in order to defend himself, into the narrow space between the spare wheel and the roof of the jeep. The fact that a shot fired into that space risked causing injury to one of the assailants, or even killing him, as was sadly the case, does not in itself mean that the defensive action was excessive or disproportionate.⁷

Life and Democratic Values' (2010) *European Human Rights Law Review* 85. See also the case commentary in (2009) *European Human Rights Law Review* 830. Both the government and the applicants requested that the case be referred to the Grand Chamber.

3 1950, ETS 5.

4 Here the Court referred to *McCann and Others v United Kingdom* A 324 (1995); 21 EHRR 97; *Andronicou and Constantinou v Cyprus* 1997-VI; 25 EHRR 491; and *Bubbins v United Kingdom* 2005-II; 41 EHRR 458.

5 *Giuliani and Gaggio*, supra n 1 at para 187.

6 Consequently the Court did not consider it necessary to address Article 2(2)(c), a decision criticised by four of the dissenting judges: *ibid.*, Joint Partly Dissenting Opinion of Judges Tulkens, Zupančič, Gyulumyan and Karakaş at para 15.

7 *Giuliani and Gaggio*, supra n 1 at para 193.

B. Regulatory Framework

The Grand Chamber decided (10 votes to 7) that there had been no breach of Article 2 in Italy's legislative, administrative and regulatory measures to reduce as far as possible the risk to life. The key arguments in this regard related to the compatibility of the applicable Italian regulations on the use of force with the ECHR and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,⁸ the issuing of lethal weapons to the law enforcement officers involved in the public order operations, and the extent to which non-lethal weapons were available.⁹ With regard to the first point, the Court adopted its usual approach, as it did in the Chamber decision, and focused on the interpretation and application of the relevant Italian law in practice, finding that despite apparent differences in the sense of certain words the overall effect was compatible with the ECHR and UN rules.¹⁰ In this connection, the applicants again challenged a provision of the Italian Penal Code (Article 53 on the legitimate use of arms) and provisions of the Public Safety Code, which covered Placanica's resort to force under domestic law, arguing that because they dated from 1930 and 1931 they reflected the authoritarian approach of that time and were therefore 'not compatible with more recent international standards or with liberal legal principles'.¹¹ Whereas in the Chamber decision the Court sidestepped this argument by refusing to engage in abstract analysis of Italian law, the Grand Chamber simply passed over it.¹²

With regard to the availability of non-lethal weapons, the Court observed that tear gas was available and raised the question whether other means should perhaps have been used, but reached its decision by emphasising that Giuliani's death resulted from a distinct and violent incident which 'posed an imminent and serious threat to the lives' of the *carabinieri* officers involved.¹³ Consequently, the Court held that there is no basis in Article 2 for 'concluding that law-enforcement officers should not be entitled to have lethal weapons at their disposal to counter such attacks'.¹⁴

8 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990.

9 *Giuliani and Gaggio*, supra n 1 at paras 198–207.

10 *Ibid.* at paras 211–5.

11 *Ibid.* at para 202. See also Skinner, supra n 2.

12 Although the Court will only consider practical compatibility issues in this area, the deeper democratic acceptability of such law with an authoritarian origin is nevertheless arguably problematic: see Skinner, supra n 2; and 'Tainted Law? The Italian Penal Code, Fascism and Democracy' (2011) *International Journal of Law in Context* (forthcoming).

13 *Giuliani and Gaggio*, supra n 1 at para 216.

14 *Ibid.*

C. Planning and Control

The Grand Chamber decided (10 votes to 7) that there had been no breach of Article 2 in the organisation and planning of the policing operations. In this regard, the Chamber had decided that, due to the inadequacies it identified in the investigation into Giuliani's death, it was unable to establish a connection between that death and the alleged failings in the planning and control of the G8 Summit policing operation.¹⁵ Before the Grand Chamber, the applicants again raised arguments about problems in the chain of command and the communications system, the use of unarmoured Land Rovers, Placanică's relative lack of training and why he had been left with a gun when he had been withdrawn from active service just before the shooting, inadequacies in the experience and training of other commanders and agents involved in the policing operations, and a purported delay in assisting Giuliani after he had been shot.¹⁶

The Italian Government disputed the veracity and relevance of the experience, training and communications issues, argued that the Land Rovers were only used in a logistical support role so did not need to be armoured, and denied that there was any delay in the emergency services' provision of aid to the victim.¹⁷ Specifically regarding Placanică's actions, it underlined the fact that the shooting was the result of an unforeseeable individual response to the situation which entailed no State responsibility.¹⁸ Perhaps most importantly, the Government argued that there was no connection between the general planning and control situation and the specific incident in which Giuliani died. The Government distinguished the G8 Summit policing operation, which it described as 'an urban guerilla-type situation lasting three days', from a 'policing operation with a precise target', such as those in the *McCann* and *Andronicou and Constantinou* cases, in order to argue that 'preventive planning was impossible' due to the overriding levels of uncertainty and unpredictability involved.¹⁹

In its Grand Chamber judgment, the Court reiterated the extent of the positive obligation on the State flowing from Article 2 with regard to risks to life and decided that in the context of mass demonstrations, States cannot be expected to provide an absolute guarantee of citizens' safety, and that States exercise discretion in choosing the means to be used in seeking to protect it.²⁰

15 Ibid. at para 243.

16 Ibid. at paras 220–9.

17 Ibid. at paras 236–42.

18 Ibid. at para 230.

19 Ibid. at paras 231–4; *McCann and Others v United Kingdom*, supra n 4; and *Andronicou and Constantinou v Cyprus*, supra n 4.

20 Ibid. at paras 244–51. The Court relied in particular on *Osman v United Kingdom* 1998-VIII; 29 EHRR 245; *Mastromatteo v Italy* Application No 37703/97, Merits, 24 October 2002; and

With regard to the arguments put forward by the parties, the Court in essence agreed with the Italian Government's position, separating the incident in which death occurred from the broader planning and control setting of the operation in general, and focusing on the suddenness and unpredictability of the fatal events. The Court found no breach of Article 2 in the use of a relatively inexperienced officer like Placanica, neither in the adequacy of his training, nor in the amount of training provided in general to the law-enforcement officers used to police the demonstrations. On the latter point the Court held:

In view of the very large numbers of officers deployed on the ground, they could not all be required to have lengthy experience and/or to have been trained over several months or years. To hold otherwise would be to impose a disproportionate and unrealistic obligation on the State. Furthermore, as the Government rightly stressed . . . a distinction has to be made between cases where the law-enforcement agencies are dealing with a precise and identifiable target . . . and those where the issue is the maintenance of order in the face of possible disturbances spread over an area as wide as an entire city, as in the instant case. Only in the first category of cases can all the officers involved be expected to be highly specialised in dealing with the task assigned to them.²¹

Consequently, due to the general level of unpredictability and emergency in the immediate events before Giuliani's death, the Court found no failings in the use of unarmoured vehicles or the operational decisions involved. Perhaps more surprisingly and without further explanation, the Court stated that it 'does not see why the fact that M.P. was injured and deemed unfit to remain on duty should have led those in command to take his weapon from him. The weapon was an appropriate means of personal defence with which to counter a possible violent and sudden attack posing an imminent and serious threat to life, and was indeed used for that precise purpose.'²²

D. Duty to Investigate

On this point the Court decided (10 votes to 7) that there had been no breach of Article 2 in its procedural aspect, namely the investigation into the death. The arguments raised in relation to this aspect of the case were numerous and detailed. In essence, the parties contested the adequacy of the autopsy, the speed with which the body had been released for cremation, the lack of

Maiorano and Others v Italy Application No 28634/06, Merits, 15 December 2009. With regard to its general concern with planning and control under Article 2, the Court referred to *McCann and Others*, supra n 4; and *Andronicou and Constantinou*, supra n 4.

21 Ibid. at para 255.

22 Ibid. at para 260.

investigation into wider policing issues relating to the incident, and the adequacy of the investigation into the death (in terms of impartiality, independence and thoroughness).²³ The Chamber decision had, by four votes to three, found a breach of Article 2 in this regard due to the problems it identified in the initial forensic analysis and the lack of a wider investigation into the broader operational issues.²⁴

In the Grand Chamber judgment, the Court reaffirmed the significance of its general principles on the effectiveness of the investigation,²⁵ but ultimately was satisfied that Italy's duty in this regard was adequately fulfilled. The Court began by underlining the link between its determination of the effectiveness of the domestic investigation and its ability to decide on the substantive aspects of Article 2. Here the Court based its decisions relating to the resort to lethal force, and to the planning and control of the policing operation, on the domestic investigation. As it was able to satisfy itself on that basis that neither involved a breach of Article 2, it held that the domestic investigation was effective.²⁶ With regard to the wider operational matters, the Court held that they had been assessed in other domestic investigations (a parliamentary inquiry and the trial of a group of demonstrators), so the fact that the investigation into Giuliani's death did not consider them was immaterial.²⁷ It then held that, although the involvement of the victim's family could have been closer, the investigation was generally satisfactory (here the Court held that family participation in the autopsy is not required by Article 2) and sufficiently prompt.²⁸ In relation to the forensic investigation, it held that although more detailed investigation into the fatal bullet, its trajectory and disintegration would have been informative, the crucial factor was the justifiability of the resort to lethal force, irrespective of the exact nature of the causal nexus with the death.²⁹ Finally, the Court was also satisfied with the impartiality of the investigation. Questions had arisen in this respect because part of the investigation into the shooting had been entrusted to the *carabinieri*, the force whose own officer had fired the gun, and because one of the ballistics experts had published an article in a weapons journal expressing the opinion that Placanica had acted in self-defence, before the legal decision on that issue had been reached. With regard to both of these, the Court held that because 'technical and objective' aspects of the investigation were involved, there was no threat to the investigation's independence or impartiality.³⁰

23 Ibid. at paras 264–70, 272–80 and 282–97.

24 *Giuliani and Gaggio* (Chamber), supra n 2 at paras 271 and 281.

25 Ibid. at paras 298–306.

26 Ibid. at paras 307–9.

27 Ibid. at para 310.

28 Ibid. at paras 311–7 and 325.

29 Ibid. at paras 318–9.

30 Ibid. at paras 321–4.

Finally, the Court held unanimously that there was no need to consider the arguments raised under Articles 3 and 6; by 13 votes to 4 that there had been no breach of Article 13; and unanimously that there had been no breach of Article 38.

3. The Right to Life, Democracy and State Responsibility in 'Urban Guerilla' Conflict

This Grand Chamber decision is the culmination of 10 years of legal (as well as political, popular and journalistic) dispute about the killing of Carlo Giuliani and the events surrounding his death. Intensively mediated and discussed, the Genoa shooting achieved a level of cultural significance that legal analysis, structured by the reductive framework of criminal law or, in this case human rights provisions, can only begin to address.³¹ Although the Grand Chamber judgment brings 'closure' in some senses, it is unlikely to achieve finality given the lingering controversies about the facts and sequence of events, but also because, as previously noted, a decision about the justifiability of a resort to lethal force is not the same as justifying a death.³² In more specific terms of human rights law, the three layers of this judgment are noteworthy, especially due to the picture that emerges about the Court's expectations in 'urban guerilla-type' public order situations.

First, the Court's decision about the resort to lethal force is, as in the Chamber decision, essentially unsurprising. The Court focuses on the necessity and proportionality of Placanica's decision to use his gun in the circumstances of an apparently violent and potentially homicidal attack on his vehicle, and sets aside the mechanics of the resulting death. Provided it was justifiable for the State agent to resort to a lethal weapon for personal protection, the actually resulting death does not mean that a breach of Article 2 has occurred. Although questions remain about why a young *carabiniere*, shocked and exhausted to the extent that his commander removed him from active duty and took away his tear gas equipment, should have been left with a firearm, the Court has satisfied itself that such a means of personal protection was not inappropriate and that its use was in fact justified by the situation that arose. It is true that had Placanica not stopped the attack by firing his weapon he may have been seriously hurt or even killed. Nevertheless, justification on the basis of available defensive means where life is lost ought perhaps to require a more critical look at the question of why only those means were

31 See, for example, McDonnell, 'The Genoa G8 and the Death of Carlo Giuliani', in Gundle and Rinaldi (eds), *Assassinations and Murder in Modern Italy: Transformations in Society and Culture* (Basingstoke: Palgrave Macmillan, 2007) 73.

32 Skinner (2010), *supra* n 2.

available. If the sign of a democratic State is caution in the use of lethal weapons,³³ minimising the likelihood of ‘last resort’ situations such as this one ought to be a priority.³⁴

The other aspect of this part of the decision is disagreement over the necessity for Placanica to fire his weapon at all, or in the way that he did. This involves the nature of the threat that he perceived, Giuliani’s role therein and the exact angle at which the gun was fired. The majority in this judgment focus on the justifiability of the resort to lethal force and hold that the angle of the shot, the purported ricochet and the exact cause of the ensuing death are immaterial. Nevertheless, an alternative view put forward by four dissenting judges is that it should have been important to establish exactly whether Placanica perceived a threat from Giuliani specifically, or from the group attack.³⁵ If the former, Placanica may have been justified in shooting at Giuliani; if the latter, the dissenting judges argue, he may only have been justified in shooting into the air in warning.³⁶ Regrettably, by excluding the significance of the causal nexus, the majority decision omits this distinction, together with the related question whether or not the use of force was justifiable under Article 2(2)(c) (‘killing to quell a riot or insurrection’),³⁷ so that the issue of the angle of fire, the purported ricochet and the precise nature of the perceived threat seem destined to remain problematic issues clouding perceptions of these events.

With regard to the duty to investigate, one apparently minor point is worth noting, namely the way the Court relies on a qualitative dimension in determining the impartiality of aspects of the forensic examination. Here, the Court adopts the view that provided that the task undertaken by the investigator(s) in question is ‘technical and objective’, then any apparent impartiality is unlikely to have a negative effect.³⁸ Arguably, it would appear *prima facie* that every aspect of a forensic investigation is technical and objective, and that what matters is the actual *and* perceived independence and impartiality of the personnel involved. However, the Court has apparently reached its decision by focusing on whether or not the challenged elements of the investigation did in fact have a negative impact in real terms. They deal with this issue briefly with regard to the involvement of the *carabinieri*, but with regard to the ballistics expert the Court emphasises that he was part of a team, and that that team was appointed by the prosecutor, so there was less of a need for him to

33 *McCann and Others*, supra n 4 at para 212.

34 See also *Giuliani and Gaggio*, supra n 1, Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Zupančič, Gyulumyan, Ziemele, Kalaydjieva and Karakaş at para 6.

35 *Ibid.*, Joint Partly Dissenting Opinion of Judges Tulkens, Zupančič, Gyulumyan and Karakaş at paras 1–14, especially para 6. See also Skinner (2010), supra n 2.

36 *Ibid.* at para 5.

37 See supra n 6.

38 See above; and supra n 1 at paras 321–24.

be absolutely impartial than if he had been a sole expert or assisting the investigating judge.³⁹ Nevertheless, although a certain amount of pragmatic flexibility in the setting of minimum standards in this area may be inevitable, elucidation of the distinction between 'technical and objective' tasks and others would be helpful in order to assist in determining when the 'tipping point' of partiality in an investigation is reached.⁴⁰

Finally, this judgment ultimately appears to hang on the way the Court interprets the events surrounding the shooting as being part of an 'urban guerilla-type' policing operation, as opposed to one with a specific target. In short, the Court emphasises the view that the maintenance of order in the context of widespread and unpredictable demonstrations and outbreaks of violence is especially demanding, imposes particular burdens on the State, and leaves the law-enforcement bodies facing a range of unforeseeable risks and sudden occurrences. On this basis the Court held that, with specific regard to Giuliani's death, the planning and control decisions in the face of rapid developments and unexpected events did not breach Article 2, and that the need to deploy large numbers of law-enforcement officers did not entail an obligation to use experienced personnel or to train them extensively, as this would 'impose a disproportionate and burdensome obligation on the State'.⁴¹

In the Chamber decision in this case, the judges expressed a high expectation of State responsibility in this sort of large-scale operation:

In general terms, the Court considers that when a State agrees to host an international event entailing a very high level of risk, it must take the appropriate security measures and deploy every effort to ensure that order is maintained. Hence, it is incumbent upon it to prevent disturbances which could lead to violent incidents. If such incidents should nevertheless occur, the authorities must exercise care in responding to the violence, in order to minimise the risk of lethal force being used. At the same time, the State has a duty to ensure that the demonstrations organised in connection with the event pass off smoothly, while safeguarding, *inter alia*, the rights guaranteed by Articles 10 and 11 of the Convention.⁴²

They went on to stress that the particular demands of such an operation required careful assessment, but despite identifying problems overall they were unable to find a breach of Article 2 due to the shortcomings they identified in the domestic investigation.

39 *Giuliani and Gaggio*, supra n 1 at paras 322–24.

40 Compare 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?' (2010) 21 *European Journal of International Law* 701 at 705 and 715.

41 *Giuliani and Gaggio*, supra n 1 at para 255.

42 *Giuliani and Gaggio v Italy* (Chamber), supra n 2 at para 231.

In the Grand Chamber, the seven dissenting judges also expressed their expectation of high standards of responsibility when the State has to police large-scale demonstrations:

... where a State accepts the responsibility of organising a high-risk international event, that obligation implies a duty to put in place the appropriate measures and strategies to maintain law and order. In that connection, it cannot be argued that the authorities were not aware of the possible dangers entailed in an event such as the G8 summit. Moreover, the number of law-enforcement officers deployed on the ground demonstrates this clearly (see paragraph 255 of the judgment). In these circumstances, Article 2 of the Convention cannot be interpreted or applied as if the case merely concerned an isolated incident occurring in the course of accidental clashes, as the majority suggest. In the case of mass demonstrations, which are becoming more and more frequent in a globalised world, the obligation to protect the right to life safeguarded by the Convention necessarily takes on another dimension.⁴³

In other words, according to this view, taking on demanding duties should entail demanding responsibilities. On that basis, the dissenters specify a number of problems with the planning and control of the policing operation that the majority deem satisfactory.⁴⁴ They also take issue with the way the majority disaggregate the decision about planning and control from the overall policing operation in order to focus on the matters that they decide relate to the death.⁴⁵ Consequently, given the closeness of the decision on this point (10 votes to 7), much appears to depend on the extent to which the majority consider that the State authorities can be expected to anticipate and be responsible for risks and rapidly evolving events, and the majority's view on the separation of the incident in question from the bigger picture.⁴⁶

It seems obvious that 'a high-risk international event' with massive demonstrations would bring with it expectable risks of the unexpected. Urban guerilla-type policing operations are not the same as those with a specific aim, but they equally raise the defining duties of a democratic State, in terms of the Court's case law on Article 2, to exercise caution and care with regard to risks to life. By their very nature such policing operations raise perhaps greater risks, which arguably demand a higher standard of care across the

43 *Giuliani and Gaggio*, supra n 1, Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Zupančič, Gyulumyan, Ziemele, Kalaydjieva and Karakaş at para 2.

44 *Ibid.* at paras 6–11. For further criticisms of the general operation, see della Porta and Reiter, 'The Policing of Global Protest: the G8 at Genoa and its Aftermath', in della Porta, Peterson and Reiter (eds), *The Policing of Transnational Protest* (Aldershot: Ashgate, 2006) 12.

45 *Giuliani and Gaggio*, supra n 1, Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Zupančič, Gyulumyan, Ziemele, Kalaydjieva and Karakaş at para 12.

46 Compare Skinner (2010), supra n 2.

board: in training, planning, control and operational contact.⁴⁷ Whilst it is true that States may not be able to police such events perfectly or with infinite resources (there is clearly a question of balance here), it is in the crucible of public order, riots and protests that policing in democratic societies—and arguably many of the features of such societies themselves—have evolved since the early nineteenth century. Moreover, in recent years such large demonstrations (sadly in some cases with accompanying outbursts of violence on both sides⁴⁸) have accompanied most major international summits,⁴⁹ and have continued to be part of citizens' interaction, peaceful and otherwise, with governments in other circumstances. Consequently, it is arguably in their responses to mass protests and rapidly shifting risks that democratic States must be judged particularly keenly, and in relation to which the right to life is so vitally important.

The Court examines State responsibilities in such circumstances through the filter of reasonableness, and the Grand Chamber in this judgment has concluded that there must not be an undue burden on the State in the context of risk and the rapid flow of events. It also separates the specific from the general and arguably decontextualises causal factors in the death from the larger operational matrix. However, it is to be hoped that the narrative of scale and specificity, the unexpected and the urban guerilla, does not permit such reasonableness and reduction to erode the high democratic standards of caution that Article 2 demands.

47 On the training issue, note De Sanctis, 'What Duties Do States Have with Regard to the Rules of Engagement and the Training of Security Forces under Article 2 of the European Convention on Human Rights?' (2006) 10 *The International Journal of Human Rights* 31 at 38–9.

48 For example, the death of Ian Tomlinson during the London G20 Summit in 2009; see Inquest, *Briefing on the Death of Ian Tomlinson* (June 2009); and Lewis, 'Police officer faces manslaughter trial over Tomlinson's death at G20 protest', *Guardian*, 25 May 2011, at 3.

49 For background, see further della Porta and Reiter, *supra* n 44.