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TAKING LIFE AND LIBERTY SERIOUSLY: RECONSIDERING CRIMINAL LIABILITY UNDER ARTICLE 2 OF THE ECHR

Abstract

What is the relationship between the right to life and criminal liability, and what should it be, given the significance we rightly attribute both to human life and to human freedom? This article explores the circumstances in which the European Court of Human Rights imposes a positive obligation to criminalise and pursue criminal forms of redress, and concludes that the Court's doctrine carries the potential of both coercive overreach *and* dilution of the right to life itself. These problems are compounded by opacity in the Court's doctrine. I propose a way forward that takes both the right to life and human freedom seriously.

Keywords: right to life – State killings – criminal liability – *Da Silva v UK* – rule of law

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INTRODUCTION

It is indisputable that safeguarding human life is a key aspect of human rights in general[1] and the European Convention on Human Rights[2] in particular.[3] The negative and positive obligations emanating from the right to life, encompassed in Article 2 of the ECHR, have been the subject of extensive interpretation by the European Court of Human Rights,[4] and have reflected a long-standing, profound commitment to protecting human life. Moreover, the Court has reiterated the centrality of the value of human freedom throughout its rich jurisprudence on the Convention, and this has underpinned the extensive safeguards it has elaborated in the context of criminal justice and beyond. An examination of the circumstances in which the ECtHR imposes a positive obligation on States to criminalise and pursue criminal forms of redress, however, indicates that the Court's doctrine carries the potential of both coercive overreach *and* dilution of the right to life itself, at the expense of the protection of both human life and human freedom. These substantive problems are compounded by opacity in the Court's pronouncements. This article pursues principled coherence in ECtHR doctrine, on the understanding that the law – including human rights law – 'speaks' with integrity.[5] My

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[1] See, for instance, R. Smith, *International Human Rights* (6th edn, OUP 2014) 217.

[2] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5; hereafter referred to as ECHR or the Convention.

[3] See D. Harris, M. O'Boyle, E. Bates and C. Buckley, *Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 203.

[4] The European Court of Human Rights is hereafter referred to as ECtHR, Strasbourg, the Strasbourg Court, or the Court.

[5] In taking both the right to life and State coercion seriously, paraphrasing R. Dworkin's *Taking Rights Seriously* (Harvard University Press 1978), I pursue integrity in ECtHR doctrine – see R. Dworkin, *Law's Empire* (Hart

proposals adopt a reading of the ECHR which coheres with the values the Convention aims to safeguard, and thus take both the right to life and human freedom seriously.

The article's structure is as follows. First, I consider the character and significance of the right to life within the ECHR, and the way in which the negative obligation has been framed to closely restrict the circumstances in which State action which takes life will be considered compatible with the right to life. I then assess the way the negative obligation interacts with a category of positive obligations that is increasingly prominent in ECtHR doctrine on Article 2 of the ECHR: what I label 'duties of redress'. I explore the ways in which coercive demands in this area have interacted with a dilution of Article 2's negative obligation, noting that many of the observations made are cemented by the recent ECtHR Grand Chamber judgment in *Da Silva v UK*.[6] I then propose a principled approach which avoids both the dilution of the duty not to take life and the potential overreach of the ECtHR's coercive agenda, and reflect on how the path advocated impacts on liberal criminal theory, and the anti-impunity turn in human rights.

For the purposes of this article, I will not consider the meaning of 'life' in Article 2 ECHR.[7] My focus is chiefly on the way the Court addresses killings[8] by the State vis-à-vis individual criminal responsibility.

THE NATURE AND STRUCTURE OF ARTICLE 2 OF THE ECHR

Publishing 1998), especially chapters 6 and 7. This seeks 'order and coherence in the law', as described in G. Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) OJLS 705, 706.

[6] *Armani Da Silva v UK* App no 5878/08 (ECtHR, 30 March 2016).

[7] See E. Wicks, 'The Meaning of "Life": Dignity and the Right to Life in International Human Rights Treaties' (2012) 12(2) HRLR 199; and J. Yorke (ed), *The Right to Life and the Value of Life* (Routledge 2010), especially chapters 1-5.

[8] Killing is, of course, a loaded concept itself: consider, for example, Yorke, ibid at chapters 12-14.

Article 2 of the ECHR protects the right to life in the following terms:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
> 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 a lawful 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(2) sets out circumstances in which force resulting in the loss of life, whether death is intended or not, can be justified and found lawful.[9] Moreover, Article 15 of the ECHR, which governs the circumstances in which States may derogate from certain Convention rights in times of war or other public emergency threatening the life of the nation, provides that '[n]o derogation from Article 2, except in respect of deaths resulting from lawful acts of war…shall be made under this provision'. This arguably allows a window for lawful killings governed by the applicable *jus in bello*,[10] yet this has not been examined in any depth in the Court's substantive doctrine so far.[11]

[9] As regards Article 2(1), note that the death penalty is now proscribed across the Council of Europe in accordance with Protocols 6 and 13 of the ECHR; the ECtHR also found the death penalty to be contrary to Article 3 of the ECHR in *Al Saadoon and Mufdhi v UK* (2010) 51 EHRR 9.

[10] See D. Ehlers (ed), *European Fundamental Rights and Freedoms* (de Gruyter 2007) 90.

[11] See the brief consideration in M. Schaefer, 'Al-Skeini and the Elusive Parameters of Extraterritorial Jurisdiction' (2011) 5 EHRLR 566, 580.

Given that the State may lawfully take life in accordance with a number of exceptions to the right to life, it can be concluded that the right to life is not absolute.[12] In contrast with the right not to be subjected to torture or to inhuman or degrading treatment or punishment enshrined in Article 3 ECHR, which does not expressly provide for any circumstances in which such treatment may be justified, the right to life is displaceable.[13]

Nonetheless, the right to life enjoys a special status within the ECHR hierarchy.[14] The fundamental character of the right to life reflects the sanctity of the human person, which morally grounds human rights and informs their legal content and interpretation.[15] If any right practically embodies the interdependence of human rights, it is the right to life, given that being alive is essential to the enjoyment of other human rights.[16] The protection of human life is therefore of central significance to the human rights project, and the ECtHR's statements of principle cohere with this starting point. Indeed, the special character of the right and its implications are highlighted in frequently repeated statements to the effect that:

[12] See, on this, E. Wicks, *The Right to Life and Conflicting Interests* (OUP 2010) 81.

[13] On the non-displaceability of absolute rights, see A. Gewirth, 'Are There Any Absolute Rights?' (1981) 31 *The Philosophical Quarterly* 1; N. Mavronicola, 'What is an "absolute right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12(4) *HRLR* 723. For a piece refuting the absolute nature of Article 3 ECHR, see S. Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute" in International Human Rights Law?' (2015) 15(1) HRLR 101.

[14] See A. Ashworth, 'Security, Terrorism and the Value of Human Rights' in B. Goold and L. Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007) at 212.

[15] Consider H. Joas, *The Sacredness of the Person: A New Genealogy of Human Rights* (Georgetown University Press 2013). For current debates regarding the philosophical foundations of human rights, see R. Cruft, S. M. Liao and M. Renzo (eds), *Philosophical Foundations of Human Rights* OUP 2015). The idea of the sanctity of the human person is closely tied to human dignity – for an exploration of this concept, see C. McCrudden (ed), *Understanding Human Dignity* (OUP 2013). Lastly, the idea that the right to life is part and parcel of the 'morality of law' more broadly is suggested in J. Laws, 'The Good Constitution' (2012) 71(3) CLJ 567, 581.

[16] See M. W. Janis, R. S. Kay and A. W. Bradley, *European Human Rights Law* (3rd edn, OUP 2008) 119: 'A violation of this right makes meaningless the recognition of any other rights.'

> Article 2, which safeguards the right to life and sets out those circumstances in which deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective…[17]

Because of the right's fundamental character, the circumstances in which the State may lawfully take life must be strictly construed. Additionally, Article 2 is to be interpreted and applied in a way which renders it effective as a means to safeguard human life, a point which is foundational to the establishment of an array of positive obligations to protect the right to life.[18]

The negative and positive obligations emanating from the right to life are thus in principle meant to be both substantively stringent and rigorously applied. Yet the intersection between the negative obligation not to use lethal force except in very narrowly delimited circumstances and the positive obligation to offer redress for breaches of the right through the

[17] *Isaak v Turkey* App no 44587/98 (ECtHR, 24 June 2008), para 103.

[18] On the development of positive obligations under the right to life, see A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) ch 2.

criminal law generates a conundrum,[19] which has materialised in a problematic form in ECtHR doctrine, as the analysis below demonstrates.

THE 'NO MORE THAN ABSOLUTELY NECESSARY' TEST

State action which takes life is approached with stringency *in principle* by the ECtHR. The negative obligation to refrain from taking life encompasses a duty not to kill intentionally and a duty not to use (potentially) lethal force.[20] Recall that, per ECtHR doctrine, the circumstances in which deprivation of life may be justified - where *absolutely necessary* (a) in defence of someone from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a lawfully detained person; or (c) in action lawfully taken for the purpose of quelling a riot or insurrection[21] – must be strictly construed.[22] The Court has clarified that '[t]he use of the term "absolutely necessary"…indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention…'.[23] This affirms that the 'no more than absolutely necessary' test is more stringent than the proportionality test applicable in respect of Convention rights which allow

[19] For an instructive account of the paradoxes inherent in the relationship between human rights and criminal law, see F. Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *Journal of International Criminal Justice* 577.

[20] The Court has found breaches of the right to life in circumstances in which the force used had been capable of being lethal, without on the particular occasion resulting in death: see *Makaratzis v Greece* (2005) 41 EHRR 49; *Andreou v Turkey* App no 45653/99 (ECtHR, 27 October 2009).

[21] See Harris et al, *Law of the European Convention on Human Rights* (n 3) 221-233. On the under-explored exception under Article 2(2)(c), see H. Russell, 'Understanding "quelling a riot or insurrection" under article 2 of the ECHR' (2015) EHRLR 495.

[22] *Isaak* (n 17) para 103; *Leonidis v Greece* (2010) 51 EHRR 45, para 54.

[23] *McCann v UK* (1996) 21 EHRR 97, para 149.

for interferences insofar as necessary in a democratic society in pursuit of a legitimate aim.[24] It conveys that Article 2 demands State agents to only use lethal force, or force capable of being lethal, as a last resort.[25] In effect, despite the broader set of circumstances outlined in Article 2(2), the Court will tend not to find the use of (potentially) lethal force – such as shooting an individual in the chest or head – absolutely necessary except where the person against whom force is exerted is posing a serious threat to someone's bodily integrity.[26] The Court's approach in *Leonidis*, concerning an arrest, captures this point:

> [T]he legitimate aim of effecting a lawful arrest can only justify putting human life at risk in circumstances of absolute necessity. The Court considers that in principle there can be no such necessity where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if refraining from using lethal force may result in the opportunity to arrest the fugitive being lost.[27]

The above passage indicates that a palpable threat to life or bodily integrity must be present for force capable of killing to be justifiably used to repel such threat. This is the result of applying

[24] This is noted in Ehlers, *European Fundamental Rights* (n 10) 89-90. A detailed account of the stages of the proportionality test operating in relation to interferences with qualified Convention rights, at its most rigorously applied, can be found in B. Goold, L. Lazarus and G. Swiney, 'Public Protection, Proportionality, and the Search for Balance', Ministry of Justice Research Series 10/07, 2007.

[25] See *McCann v UK* (n 23) paras 210-214.

[26] For a consideration of non-lethal or 'less' lethal means, see Russell, 'Understanding "quelling a riot or insurrection" (n 21) 498-503. See also J.A. Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (OUP 2017) ch.4.

[27] *Leonidis v Greece* (n 22) para 55; *Nachova and others v Bulgaria* (2006) 42 EHRR 43, para 95.

the absolute necessity test in determining whether potentially lethal force is warranted, or excessive, in the circumstances.[28]

The seminal case of *McCann* established an important facet of the absolute necessity assessment, which effectively amounts to a structural extension of the negative obligation:

> In keeping with the importance of this provision (art. 2) in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.[29]

There is in this structural extension an indelible link between negative and positive obligations: the Court requires States to take steps to minimise the chances of breach of Article 2's negative obligation, but also to minimise the likelihood of circumstances arising in which the use of potentially lethal force may *become* necessary. Often paying close attention to the adequacy of the planning of State operations in the context of policing demonstrations,[30] or of effecting a

[28] A. Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing 2015) 203.

[29] *McCann* (n 23) para 150. See also B. Dickson, 'The Planning and Control of Operations Involving the Use of Lethal Force' in L. Early and A. Austin (eds), *The Right to Life under Article 2 of the European Convention on Human Rights* (Wolf Legal 2016); N. Melzer, *Targeted Killing in International Law* (OUP 2008) 102-117.

[30] See, for example, *Giuliani and Gaggio v Italy* (2012) 54 EHRR 10. See, however, the critical commentary of the Grand Chamber's application of these principles in *Giuliani*, in S. Skinner, 'The Right to Life, Democracy and State Responsibility in "Urban Guerrilla" Conflict: The European Court of Human Rights Grand Chamber Judgment in *Giuliani and Gaggio v Italy*' (2011) 11(3) HRLR 567, 573-577. See also the Joint Partly Dissenting Opinion in *Giuliani* of Judges Rozakis, Tulkens, Zupančič, Gyulumyan, Ziemele, Kalaydjieva and Karakaş.

pre-planned arrest,[31] many findings of a breach of the Article 2 negative obligation by the ECtHR have concluded with variations of the following: 'the Court observes that the respondent Government failed to indicate whether [its agents] had been given clear instructions and appropriate training in order to avoid an arbitrary and/or abusive use of potentially lethal force'.[32] In *Güleç*, for instance, the Court highlighted the absence of less than lethal tools to quell a riot in finding a breach of Article 2 in the shooting of an unarmed civilian in the context of unrest during a demonstration in Turkey.[33]

Nonetheless, as I set out below, whilst the Court *in principle* cements the stringency of Article 2's negative obligation, its doctrine has in fact unravelled in its application of these principles in certain cases. I suggest that the intersection between the Article 2 negative obligation and the elaboration of the positive obligation to criminalise (certain) takings of life lies at the heart of this problem.

POSITIVE OBLIGATIONS TO PUNISH TAKINGS OF LIFE

Much like the stringent negative obligation, positive obligations emanating from Article 2 have been elaborated in robust fashion by the ECtHR. Four types of positive obligations can be identified: general, or framework, obligations; operational duties; investigative obligations; and finally, what can be referred to as duties of redress.[34]

[31] See, for example, *McCann* (n 23); *Gül v Turkey* (2002) 34 EHRR 28; and as a key issue in the investigation of the incident in *McCaughey v UK* (2014) 58 EHRR 13.

[32] See *Andreou* (n 20) para 56. See also *Isaak* (n 17) para 95; *Erdoğan and others v Turkey* App no 19807/92 (ECtHR, 25 April 2006) para 79.

[33] *Güleç v Turkey* (1999) 28 EHRR 121, para 71. See further Russell, 'Understanding "quelling a riot or insurrection"' (n 21).

[34] Note that equivalent obligations emanate from Articles 3 and 4 ECHR – see, on this, Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights* (Council of Europe, 2007).

Framework obligations, which stem clearly from Article 2(1) ('Everyone's right to life shall be protected by law'), require States to establish domestic legal provisions, mechanisms and processes protecting individuals' lives, preventing and deterring takings of life and offering redress for unlawful takings of life.[35] Insofar as applicable to acts of State actors, the legal framework and enforcement mechanisms available are meant to reflect the absolute necessity test in reducing as far as possible the circumstances in which life is taken;[36] for instance, through stringent regulation of the police's use of force.[37] Beyond that, the law and law enforcement are to be oriented towards preventing, deterring and redressing wrongful takings of life by both State actors and non-State actors.[38]

Operational duties require the State to take reasonable measures to protect individuals from a particular risk to life which is in the actual or imputed knowledge of the authorities,[39] and these include taking action in circumstances of environmental risk, as well as risk of suicide, among others.[40] Their reach is shaped, on the one hand, by the fundamental character of the right to life and, on the other, by a recognition of the limited resources at the State's disposal, to which competing claims are constantly made;[41] the Court thus accords a degree of deference to State authorities' superior institutional competence in determining the operational

[35] See, eg, *Makaratzis* (n 20) paras 56-72; *Nachova* (n 27) paras 99-102.

[36] See Skinner, 'The Right to Life, Democracy and State Responsibility in "Urban Guerrilla" Conflict' (n 30) 569.

[37] See *Wasilewska and Kałucka v Poland* App nos 28975/04 and 33406/04 (ECtHR, 23 February 2010), paras 41-48; *Makaratzis* (n 20) paras 57-72; *McCann* (n 23) para 150.

[38] Whilst the ECtHR frequently alludes to this deterrent effect, there is significant debate on how far the criminal law attains deterrence in reality. See the nuanced discussion in A. Ashworth and J. Horder, *Principles of Criminal Law* (7th edn, OUP 2013), 16-17; on punishment and prevention, see A.P. Simester, A. Du Bois-Pedain and U. Neumann, *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing 2014) chapters 1-4.

[39] See, for example, *Osman v UK* (2000) 29 EHRR 245, paras 115-116; *Opuz v Turkey* (2010) 50 EHRR 28, paras 129-130.

[40] D. Korff, *The Right to Life: A Guide to the Implementation of Article 2 of the European Convention on Human Rights* (Council of Europe 2006) 59-85.

[41] ibid at 67. A nuanced look at the issues with particular focus on Northern Ireland can be found in B. Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (OUP 2010) 231-248.

action required.[42] Additionally, States bear an obligation to carefully plan operations which involve an amplified risk of circumstances arising which may entail the use of potentially lethal force,[43] a duty which flows from the structurally extended negative obligation outlined above.

The investigative obligation, the subject of significant judicial output since *McCann*,[44] demands an investigation into any suspicious death[45] which may involve either direct or indirect State responsibility.[46] The components of an Article 2-compliant investigation include the requirement that the investigation be independent and impartial, effective, reasonably prompt, and sufficiently open to public scrutiny; and that the next of kin of the deceased must be involved to the extent necessary to safeguard their interests.[47]

Redress emerges as an aim of the investigative duty: according to the ECtHR, the investigation must be 'effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances…and to the identification and punishment of those responsible'.[48] Thus, to be Article 2-compliant, investigative mechanisms must be capable of determining whether Article 2 was breached, and

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[42] Harris et al, *Law of the European Convention on Human Rights* (n 3) 207-212.

[43] *McCann* (n 23) para 150.

[44] See n 23 above.

[45] Near-deaths and life-endangering situations may also be caught by this obligation – Equality and Human Rights Commission, *Human Rights Review 2012: The Right to Life*, available at: http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/hrr_article_2.pdf (last accessed 26 December 2016); Harris et al, *Law of the European Convention on Human Rights* (n 3) 214.

[46] Some investigation may be necessary also into any suspicious deaths arising other than from natural causes – see Harris et al, *Law of the European Convention on Human Rights* (n 3) 214.

[47] These elements have emerged out of a number of cases, prominent ones being cases involving Northern Ireland, such as: *Hugh Jordan v UK* (2003) 37 EHRR 2; *McKerr v UK* (2002) 34 EHRR 20; *McShane v UK* (2002) 35 EHRR 23; *Finucane v UK* (2003) 37 EHRR 29. See, further, Dickson, *The ECHR and the Conflict in Northern Ireland* (n 41) 268-275. See also M. Requa and G. Anthony, 'Coroners, Controversial Deaths, and Northern Ireland's Past Conflict' [2008] *PL* 443. Failings which have led to the finding of a violation of the investigative duty under Article 2 by the ECtHR are outlined in a seminal text by Leach. See P. Leach, *Taking a Case to the European Court of Human Rights* (3rd edn, OUP 2011) 202-206.

[48] *McShane v UK* (n 47) para 96.

of securing the accountability of those responsible, including potentially through the criminal justice process.

I have opted for the term 'duties of redress'[49] to sharpen our understanding of these positive obligations, which demand the availability and pursuit of redress. The notion of redress is broader than that of *remedy*: the former more clearly accommodates recourse to both civil and criminal means of redress. Indeed, the State's duties of redress are often decoupled from the right to a remedy under Article 13, and seen to stem from Article 2 itself, particularly insofar as they are tied to recourse to the criminal law rather than compensation.[50] They are connected to the other positive obligations under Article 2.[51] According to the ECtHR, '[the framework] obligation requires the State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression *and punishment* of breaches of such provisions'.[52] Moreover, as indicated above, the Court has demanded that the investigative process under the Article 2 investigative obligation must be 'capable of leading to the identification and *punishment* of those responsible'.[53] An alternative formulation of this end-goal of the investigative process in the Court's doctrine is 'leading to the identification and punishment of those responsible *or* to an award of compensation to the injured party'.[54] Nonetheless, the ECtHR has in some instances found that the availability of civil remedies may not be adequate to redress suspected Article 2 breaches, suggesting instead that criminal

[49] The Court also frequently frames these duties as concerning 'redress' – see, for example, *Nikolova and Velichkova v Bulgaria* App no 7888/03 (ECtHR, 20 December 2007) para 64.

[50] See, for instance, *Perevedentsevy v Russia* App no 39583/05 (ECtHR, 24 April 2014) paras 74-126. This is noted in Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, ibid at 126-127.

[51] An excellent exposition, current in 2009, of the inter-related duties is provided in A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (OUP 2009) chapter 4.

[52] *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, para 218 (emphasis added).

[53] *McShane* (n 47) para. 96.

[54] *Janowiec v Russia* (2014) 58 EHRR 30, para 143 (emphasis added).

liability and the pursuit of criminal proceedings should be an option, and one which should be considered accordingly.[55]

The Court has qualified these statements of principle by clarifying that redress duties are 'duties not of result, but of means';[56] thus, 'it cannot be inferred…that art 2 may entail the right to have third parties prosecuted or sentenced for a criminal offence…or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence'.[57] This principled demarcation of redress duties rightly recognises that the pursuit of redress may, despite encompassing reasonable and adequate steps, yield no results for evidentiary or other reasons, or indeed because the facts as proven in a civil or criminal court may disclose no *individual* civil or criminal liability even within an Article 2-compatible legal framework. Yet, following this qualification, the Court has stated: 'On the other hand, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished'.[58] Ultimately, the Court assesses all the circumstances to determine:

> whether and to what extent the courts [or other empowered authority], in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by art 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined.[59]

[55] *Estamirov and others v Russia* (2008) 46 EHRR 33, para. 77; *Yasa v Turkey* (1999) 28 EHRR 408, para 74.

[56] *Mustafa Tunç and Fecire Tunç v Turkey* (Application no. 24014/05), Judgment of 14 April 2015, at para. 173. See also Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 51) 123-124. This can be somewhat contrasted with the approach taken by the Inter- American Court of Human Rights – see ibid at chapter 3.

[57] *Giuliani* (n 30) para 306.

[58] ibid. See also *Şimşek and Others v Turkey* App nos 35072/97 and 37194/97 (ECtHR, 26 July 2005), para 117.

[59] *Giuliani* (n 30) para 306.

The ECtHR has hinted at distinct treatment of different killings in its elaboration of duties of redress. For instance, the case law suggests that whilst Article 2 ECHR does not *necessarily* require criminalisation of unintentional infringements of the right to life, it *might* in some circumstances. In *Calvelli and Ciglio*, the Grand Chamber of the Court indicated that 'if the infringement of the right to life…is not caused intentionally, the positive obligation imposed by art.2 to set up an effective judicial system does not *necessarily* require the provision of a criminal–law remedy in every case'.[60] On the other hand, in *Öneryıldız*, the Grand Chamber held that where State actors fail to act to protect life despite an obvious danger to life caused by *potentially life-threatening activities*, recourse to the criminal law must be made possible.[61]

At the same time, in a case involving '*wilful ill-treatment*' – arguably contrary to Article 3 ECHR[62] – resulting in death, the Court asserted that there is an onus on the State to pursue redress by recourse to the criminal law. It opined that 'the breach of the Convention cannot be remedied exclusively through an award of compensation to the victim', suggesting that criminal redress is the way to ensure that State agents do not 'abuse the rights of those within their control with virtual impunity'.[63]

Duties of redress reflect the pre-eminent need to protect and fulfil the right to life by either preventing or remedying – to the inevitably unsatisfactory degree possible – breaches of the right to life. Insofar as redress duties require recourse to the criminal law, they represent the State's duty to communicate and enforce the paramount respect for human life encapsulated

[60] *Calvelli and Ciglio v Italy* App no 32967/96 (ECtHR, 17 January 2002), para 51.

[61] *Öneryıldız v Turkey* (2005) 41 EHRR 20, para 93.

[62] See, for example, the facts in *Mahmut Kaya v Turkey* App no 22535/93 (ECtHR, 28 March 2000); see also *Mikhalkova v Ukraine* App no 10919/05 (ECtHR, 13 January 2011).

[63] *Mikhalkova*, ibid at para 31.

in Article 2 ECHR, beyond the individual remedy for the victim.[64] Nonetheless, given the centrality of human freedom within human rights and the ECtHR's institutional limitations, it is vital that duties of redress are handled with a caution which is currently lacking, as I argue below.

PROBLEMS WITH THE ECTHR'S APPROACH: COERCIVE OVERREACH, DILUTION, UNCERTAINTY

The article began by highlighting two foundational aspects of human rights and the ECHR: the high value placed on human life within human rights, and the liberal imperative of careful delimitation of the criminalisation of individual behaviour. A further word on the latter is necessary at this stage. Deploying the criminal law is a response to serious wrongdoing which warrants punishment,[65] and in the realm of homicide this is likely to encompass the deprivation of liberty, an especially intrusive form of State coercion. Liberty, or 'human freedom', is generally seen as a fundamental value to human rights, and to the ECHR in particular;[66] both symbolically and concretely, therefore, criminal liability is a special form of censure of individual behaviour. Moreover, the principle *nullum crimen sine lege* is reflected in Article 7 of the ECHR, which enshrines a non-derogable right. Accordingly, the contours of criminality must be drawn after careful deliberation through clear and prospective legislation. Additionally, findings of individual criminal liability attracting punishment must take place

[64] See Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 51) 120; but note more nuanced account offered at 146-151.

[65] A. Ashworth, 'Conceptions of Overcriminalization' (2008) 5 *Ohio State Journal of Criminal Law* 407, 408-409.

[66] See, for instance, *Pretty v UK* (2002) 35 EHRR 1, para 65.

through a criminal justice process involving several key safeguards, many of which are encapsulated in Articles 5 and 6 of the ECHR and extensive ECtHR jurisprudence.[67]

Substantively, the criminal law is meant to capture particularly blameworthy wrongs; defences – whether partial or total – to such *prima facie* wrongs reflect the circumstances in which the legislator has considered that people should not be exposed to the punitive force of the criminal law for their actions, because their actions are justified or excused and their blameworthiness thus extinguished or diminished.[68] The criminal law's punitive force may appropriately be withheld where an individual lacked an intention to cause harm, including circumstances where they acted on an honest error; this may occur when their action may nonetheless amount to a civil wrong, such as a tort. Self-defence is another prominent defence applicable in relation to violent acts. Whilst the sanctity of life is of foundational significance to the criminal law,[69] such nuance in relation to culpability may well apply in the context of homicide offences. At the same time, approaches to the delimitation of defences vary across jurisdictions;[70] although they often include necessity and self-defence regarding action to avert equivalent harm befalling oneself or another, defences can range from exculpation to excuse, and encompass different legal and labelling implications.[71]

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[67] See, especially, R. Goss, *Criminal Fair Trial Rights* (Hart Publishing 2014).

[68] See the nuanced account of defences in criminal law in J. Gardner, *Offences and Defences* (OUP 2007), chapter 4.

[69] See the collection of essays on puzzles and controversies in this area in J. Horder (ed), *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams* (CUP 2013).

[70] J. Horder (ed), *Homicide Law in Comparative Perspective* (Hart Publishing 2007) chapter 2. Regarding different approaches to the role of self-defence, see A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007) chapters 9 and 11.

[71] See the discussion in F. Leverick, *Killing in Self-defence* (OUP 2006) chapter 1; and B. Sangero, *Self-Defence in Criminal Law* (Hart Publishing 2006) chapter 1. Note the review of the latter and nuanced points on 'forfeiture' in A. du Bois-Pedain, 'Publication Review: Self-Defence in Criminal Law' (2009) 68(1) CLJ 227. See also J. Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' (1998) 11(1) *The Canadian Journal of Law and Jurisprudence* 143.

To elaborate on the example of self-defence, proportionate self-defence in a criminal context will often allow for leeway in assessing the reaction of the person acting in self-defence, as she 'cannot reasonably be expected to make precise judgments'.[72] This is crucial: the determination of individual criminal culpability appropriately encompasses a subjective element – for instance, a subjective belief as to the type and degree of danger posed to the defendant by the victim – and/or a significant degree of leeway in the objective criterion applied, such as that of proportionality. Uniacke argues thus:

> Someone who maintains that exact proportionality would be discernable to a suitably informed impartial observer in a calm frame of mind could concede some leeway in practice given the pressures on the actor in the situation. A familiar legal specification that self-defense must not be 'substantially disproportionate' would be consistent with such a view, for instance.[73]

The stringent absolute necessity test elaborated by the Court in relation to the negative obligation under Article 2 ECHR is clearly *not* modelled on a criminal law standard of liability for homicide. The standard for State responsibility for human rights breaches can appropriately be *and is* stricter, demanding more from the State. This position is premised not only on the significant value placed on human life under human rights law, which requires that the State show a particularly high regard for human life, but also on the context in which the State obligation is located, namely the distribution of power: Article 2 operates on the presumption that, in contexts in which the State's agents may resort to force capable of being lethal, it is they – rather than their potential targets – who hold the superior capacity to kill but also to react

[72] S. Uniacke, ''Proportionality and Self-defense' (2011) 30 *Law & Philosophy* 253.

[73] ibid at 256.

to threats or acts of violence using non-lethal means or means less likely to be lethal. Indeed, the State's agents hold a monopoly on the legitimate use of certain types of potentially lethal force, such as firearms, as the ECtHR has highlighted.[74] In light of this, Article 2 places the onus on the State to offer robust justification for not only the perceived necessity, but the absolute objective necessity of lethal force.

Unfortunately, the ECtHR's doctrine on the intersection between the negative obligation under Article 2 and the positive obligation to redress Article 2-incompatible takings of life through the criminal law is taking the ECtHR down two problematic paths. One path is that of veering towards what Lazarus aptly calls 'coercive overreach'.[75] This overreach is, in my view, dual: it is both substantive and institutional. The substantive overreach involves developing positive obligations in a way which demands the penalisation of acts or omissions which might, as a matter of principle or policy, not necessarily warrant penal sanction. The institutional overreach amounts to overstepping the remit of a supranational human rights court interpreting a human rights instrument.

The other, equally problematic, route taken by the ECtHR is that, in its overzealousness to require the criminalisation and punishment of individual behaviour amounting to a breach of Article 2, it is actually diluting the right to life itself. Having made criminal redress central to the implications of (some) breaches of the right to life, the Court is tending towards applying a criminal-law standard of culpability in determining whether the State has violated its negative obligation not to take life. This carries the very serious implication that the 'no more than absolutely necessary' test is considerably weakened.

[74] *Da Silva* (n 6) at para 232.

[75] L. Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?', in L. Zedner and J. Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012) 149.

Coercive Overreach

Reflecting on the under-explored intersection between positive obligations in human rights and the criminal law, Lazarus highlights the 'coercive sting' of obligations often cast as 'protective' of individual rights, and warns of the danger of coercive overreach through human rights.[76] Moreover, she suggests that this overreach can arise both in court decisions and their immediate implications and, crucially, in the 'rhetorical assertion of coercive duties'[77] within a 'broader politics of security'.[78] She thus argues that:

> While we can accept that rights give rise to justified coercion by the state, or that the necessary correlative of a right is a duty on individuals to respect the rights of others and the state is justified in enforcing these, it is crucial that we understand how to shape the scope of the coercive duties.[79]

In view of these concerns, this piece considers the danger of coercive overreach under Article 2, and how it may be alleviated. The main danger of coercive overreach within ECtHR doctrine on Article 2 lies in the fact that the ECtHR has been leaning towards equating circumstances amounting to breach of the negative obligation under Article 2, especially when these involve deliberate killing, with circumstances demanding criminalisation and the pursuit of criminal redress under Article 2. The culmination of a body of at best ambiguous case law, excerpts from which are highlighted above, this approach is exemplified in the arguments made by the

[76] ibid at 136, 147.

[77] ibid at 149.

[78] ibid at 141.

[79] ibid at 147.

applicants and the Equality and Human Rights Commission (EHRC) before the Grand Chamber in *Da Silva v UK*.[80]

Da Silva concerned the targeting, as part of a counter-terrorism operation, and subsequent shooting of Jean Charles De Menezes by armed police officers on the London Underground during a police operation in which he was mistaken for a suicide bomber.[81] The police operation had suffered from a well-documented number of failings, which culminated in the ultimate decision taken to shoot to kill.[82] The applicant, Jean Charles de Menezes' cousin, did not complain that her cousin was killed by State agents in violation of the negative obligation under Article 2, but complained solely of the fact that no individual police officer was prosecuted following the fatal shooting. A key argument of both the applicants and the intervening EHRC in alleging that the non-prosecution of individual police officers involved in the killing constituted an Article 2 breach was that *the criminal law defence of self-defence did not mirror the test of absolute necessity found in Article 2(2) of the ECHR*,[83] and that this was a breach of the UK's positive obligations under Article 2.[84] This argument elided the distinction between individual criminal liability and State responsibility for human rights breaches. Unfortunately, although the Court in *Da Silva* stressed that duties of redress are not duties of result, but of means,[85] and ultimately found no breach of Article 2 on the basis of these arguments, it did not disavow this conflation of criminal liability and State responsibility for breaches of Article 2; rather, it went to great lengths to show that the test for breach of the negative obligation under

[80] See n 6 above.

[81] ibid at paras 12-38, 136.

[82] ibid at paras 52-58, 283-288.

[83] ibid at paras 152, 186 and 192 (applicant's arguments) and 224 (EHRC's arguments).

[84] See, for instance, ibid at paras 191, 193, 205, 225 and 226.

[85] See ibid at para 233.

Article 2 closely approximates the test for criminal liability for takings of life under English law.[86]

This is a problematic approach to follow. State liability for Article 2 breaches on the one hand, and *individual* liability *for civil or criminal wrongs* on the other, are not and should not be seen as coterminous. Holding that they are would amount to substantive coercive overreach. To elaborate: if the ECtHR were in effect to equate circumstances of breach of the negative obligation under Article 2 ECHR with circumstances in which the taking of life warrants criminal liability, it would significantly shrink the circumstances in which individuals tend to be absolved or excused in a criminal context for taking life. Seibert-Fohr aptly puts the issue thus in her monograph on prosecuting serious human rights violations:

> The argument has been made that domestic criminal law should mirror the defence standards developed by the European Court of Human Rights… But these standards were developed to determine State responsibility for the taking of life and do not mean that States parties must criminalize the acts accordingly. State responsibility should not be confused with individual criminal responsibility.[87]

The conflation of State responsibility for breach of the negative obligation under Article 2 and individual liability is accordingly a cause for concern, in that it signifies the potential for substantive coercive overreach, especially insofar as Contracting States might, on the basis of the Court's stance, view the absolute necessity test as decisive of criminal liability.

[86] See ibid at paras 244-256.

[87] Seibert-Fohr (n 51) 147, at fn 232, citing B. Emmerson, A. Ashworth and A. MacDonald, *Human Rights and Criminal Justice* (2nd edn, Sweet & Maxwell 2007) 750, 756.

Unfortunately, the way this prospect has been 'remedied' or tempered has been through the ECtHR's dilution of the absolute necessity test itself, as I argue below.

At this juncture, I should note that the proper relationship between breaches of the right to life by omission and criminal liability is even murkier, but space does not permit me to focus on this aspect of the ECtHR's doctrine.[88]

Turning to coercive overreach as a matter of the Court's institutional remit, it is worth emphasising that, as with the above, the analysis below strikes a note of caution rather than being a conclusive pronouncement of the mutation of the ECtHR's role. The ECtHR has certainly not cast itself as a supranational criminal court, where persons are tried and convicted in the style of international criminal tribunals. Nonetheless, its tendency to seek punitive redress and its occasional apparent endorsement of arguments equating Article 2 breaches with criminal offences via positive obligations is bordering on supranational criminal law-*making*. Its doctrine on redress is coming close to demanding that particular acts and omissions are criminalised and/or that criminal procedures and redress mechanisms are set in motion in a number of circumstances. Given that, in its adjudicatory function, the ECtHR has to pronounce on how such demands are applied to concrete facts, it *might* unduly come to resemble a supranational criminal tribunal, a role which it has neither the authority nor the institutional

[88] Nonetheless, it is worth mentioning that the Court's demand for the pursuit of criminal redress in circumstances such as those at play in *Öneryıldız* (n 61) might fail to appropriately delineate the circumstances in which failure to act warrants individual criminal liability, even in the context of a potentially dangerous activity. See the seminal account of some of the issues arising in this area in A. Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 LQR 424. For a consideration of manslaughter by omission in English criminal law in contexts involving private individuals, see A. Ashworth, 'Manslaughter by omission and the rule of law' (2015) *Criminal Law Review*, 563-577. On dangerous activities, see Ashworth and Horder, *Principles of Criminal Law* (n 38) 286-287. There is also significant contestation in drawing the contours of liability where negligent or, more generally, careless, acts or omissions are concerned. On negligence, see A.P. Simester, 'Can Negligence Be Culpable?' in J. Horder (ed.), *Oxford Essays in Jurisprudence* (OUP 2000). See also A.P. Simester, 'A Disintegrated Theory of Culpability' in D. J. Baker and J. Horder (eds), *The Sanctity of Life and the Criminal Law* (CUP 2013). On culpable carelessness, see F. Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (CUP 2016).

capacity to play.[89] The ECtHR's denouncement of such a path in *Avşar* is instructive on this matter:

> Where allegations are made under Arts 2 and 3 of the Convention…the Court must apply a particularly thorough scrutiny. When there have been criminal proceedings in the domestic court concerning those same allegations, it must be borne in mind that criminal law liability is distinct from international law responsibility under the Convention. The Court's competence is confined to the latter. Responsibility under the Convention is based on its own provisions which are to be interpreted and applied on the basis of the objectives of the Convention and in light of the relevant principles of international law. The responsibility of a State under the Convention, arising for the acts of its organs, agents and servants, is not to be confused with the domestic legal issues of individual criminal responsibility under examination in the national criminal courts. The Court is not concerned with reaching any findings as to guilt or innocence in that sense.[90]

What the Court establishes in the excerpt cited is twofold. On the one hand, it rightly highlights that a domestic finding of no criminal culpability of individual State agents in allegations relating to, say, inhuman treatment (an Article 3 issue) or the use of lethal force (an Article 2 issue) does not resolve the question of *State responsibility for an Article 3 or Article 2 violation*, as individual criminal liability in domestic law and State responsibility for a breach of the

[89] For a nuanced take on the ECtHR's fact-finding potential, see L. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19(1) EJIL 125, 142-144; P. Leach, C. Paraskeva and G. Uzelac, *International human rights & fact-finding: an analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights* (Human Rights & Social Justice Research Institute 2009) 57-63.

[90] *Avşar v Turkey* (2003) 37 EHRR 53, para 284 (citations omitted). See also *McCann* (n 23) para 173.

ECHR are legally distinct matters. The ECtHR can accordingly go beyond domestic criminal court findings to establish whether, on the ECtHR's own principles, there has been a breach of the relevant *human rights*. At the same time, the ECtHR is distinguishing the process and authority of establishing criminal liability from its own processes and scope of authority. The Court is neither a criminal tribunal, with the institutional infrastructure that this involves, nor a legislator. It is thus in no position either to adjudicate on criminal liability or to set up, at Convention-level, criminal offences to be transposed into the laws of Contracting States. Attempts to do either will be institutionally, and insofar as they seek to establish criminal offences replicating human rights breaches, potentially substantively, problematic.

The problem is that the ECtHR has not entirely heeded these normative fundamentals. Rather, three manifestations of the Court's tendency towards coercive overreach can be distilled from the doctrine as analysed above. First, the Court has increasingly highlighted the availability *and* pursuit of criminal redress as an essential aspect of the positive obligations emanating from Article 2.[91] Second, the ECtHR has often pronounced on cases coming before it, if not in the style of a criminal tribunal, with the clear implication that the circumstances call for the pursuit of criminal redress. Such pronouncements have been made because, in the Court's view, 'if the authorities could confine their reaction to *such incidents* by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity'.[92] These trends, which are in line with the 'anti-impunity turn' in human rights,[93] disclose a slant towards casting the duty of redress in

[91] See analysis above and see also the critical account offered by Lazarus (n 75).

[92] *Mikhalkova* (n 63) para 31 (emphasis added).

[93] See K. Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100(5) *Cornell Law Review* 1069; A. Huneeus, 'International Criminal Law by Other Means: the Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107(1) *American Journal of International Law* 1. These studies offer incisive insights on developments in this area in the case law of a number of tribunals, notably that of the Inter-American

criminal terms and pronouncing on criminal liability, with clear connotations of institutional overreach. Third, the Court's demand of the availability and pursuit of criminal redress appears to reach beyond the substantive scope of either the domestic criminal legal framework or international criminal law, and its pronouncements in these areas seem either to gloss over the *mens rea* usually demanded for criminal liability and the potential defences that might be available, or to merge criminal liability with liability for breach of Article 2. Attempts, as for example in *Da Silva*, to suggest that Article 2 demands domestic criminal offences which *mirror* the Article 2 negative obligation are therefore understandable in this light. Although the argument rightly failed, with the majority of the Grand Chamber in *Da Silva* finding that it had not been demonstrated 'that there existed any "institutional deficiencies" in the criminal justice or prosecutorial system which gave rise…to a…breach of Article 2',[94] the Court's reiteration of its mantra against 'enabl[ing] life-endangering offences to go unpunished'[95] and its assessment of English criminal law's 'compatibility' with the absolute necessity test continued to signal the coercive orientation of its accountability standard. All of these aspects of the Court's doctrine raise serious concerns regarding the overreach of its coercive agenda. These concerns are amplified in the context of today's 'politics of security', as highlighted by Lazarus,[96] which raises the prospect that the ECtHR's duties of redress may transform into a tool that legitimates oppression rather than facilitating the protection of human rights.[97]

Court of Human Rights. Huneeus' study is specifically orientated towards mass atrocities, and generally favourable to these developments. Engle's angle is considerably more critical, although also chiefly focused on serious atrocities. See also K. Engle, Z. Miller and D.M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (CUP 2016).

[94] *Da Silva* (n 6), para 282.

[95] ibid at para 261.

[96] Lazarus (n 75) at 141.

[97] ibid at 152-153.

Dilution

Coercive overreach is nonetheless not the only problematic aspect of these developments. The blurring of the boundaries between State responsibility for human rights breaches and individual criminal liability in ECtHR doctrine on Article 2 also pulls the ECtHR in another dangerous direction, and one which has already materialised: the dilution of the right to life itself. Having made criminalisation central to the implications of (some) breaches of the right to life and effectively come close to equating State liability with individual criminal liability, the Court has simultaneously taken to applying a criminal-law-styled standard of culpability to finding a breach of the right to life *by the State*. In this way, the absolute necessity test, proclaimed to be so stringent in principle, is significantly diluted.

The way this has occurred is as follows. After pronouncing that only circumstances of absolute necessity can justify the use of lethal force on the stringent principles set out above, the ECtHR proceeds to assess the State agent's use of such force through an 'honest belief' test:

> The use of force by agents of the state in pursuit of one of the aims delineated in para.2 of art.2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken.[98]

This test of 'honest belief' is not only applied to the State agent's assessment of the danger at issue, but also to their choice of reaction. It can therefore play a decisive role not only in assessing the necessity of using force to repel an attack on one of the grounds outlined in Article

[98] *Giuliani* (n 30) para 178. See also *McCann* (n 23) para 200.

2(2), but also in determining the *absolute* necessity – which requires force to be both necessary and strictly proportionate to the threat at issue – of the use of lethal force. Whilst the quoted excerpt indicates an objective element within the Court's assessment, with 'honest belief' being circumscribed by the 'for good reasons' criterion, the case law shows a readiness to find that mistaken beliefs legitimise the use of lethal force in circumstances which objectively did not disclose an absolute necessity to use lethal force or even any objectively good reasons to do so. Equating the breach of Article 2 with criminal liability, *Da Silva* cements this, with the ECtHR's Grand Chamber stating that 'the existence of "good reasons" should be determined subjectively'[99] and suggesting that 'the Court has not treated reasonableness as a separate requirement but rather as a relevant factor in determining whether a belief was honestly and genuinely held',[100] referencing prior case law in which this approach had been effectively adopted if not explicitly affirmed, such as *Bubbins v UK*.[101]

In *Bubbins*, a police-officer shot and killed an unarmed man who was mistaken for an intruder in his own home and appeared to be aiming a weapon from the window of his flat towards police-officers surrounding it. The substantive complaint on Article 2 grounds was that there had been a breach of Article 2 both in the actions of the officer who shot and killed the man, and in the overall planning and control of the operation which led to the use of lethal force which was not absolutely necessary. The Court applied the 'honest belief' test *both* on the question of whether the victim posed a danger *and* on the question whether it was (absolutely) necessary to respond to this danger by opening fire: 'The Court sees no reason to doubt that Officer B honestly believed that his life was in danger and that it was necessary to open fire on Michael Fitzgerald in order to protect himself and his colleagues.'[102] The Court

[99] *Da Silva* (n 6) para 247.

[100] ibid at para 248.

[101] *Bubbins v UK* (2005) 41 EHRR 24.

[102] *Bubbins*, ibid at para 138.

suggested that '[t]o hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and the lives of others'.[103] It also indicated that 'detached from the events at issue, it cannot substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life',[104] before concluding that 'the use of lethal force in the circumstances of this case, albeit highly regrettable, was not disproportionate and did not exceed what was absolutely necessary to avert what was honestly perceived by Officer B to be a real and immediate risk to his life and the lives of his colleagues'.[105] These prudential and institutionally grounded arguments act to insulate operational decisions from intensive scrutiny – that is, both in terms of the substantive standard of assessment and in terms of the onus of justification on the State. The deference conveyed carries a distinct 'national security' flavour,[106] one which emerged even more explicitly in the Grand Chamber judgment in *Giuliani*, which I consider below.[107]

Ashworth suggests that *Bubbins* effectively embodies a subjective test,[108] while Martin comments on the case that the 'robust stance' signified by the absolute necessity test 'was somewhat tempered…with the Court reminding itself of the risks of substituting its own assessment of events, made with the "wisdom of hindsight"', for the view of a state agent acting in the heat of the moment'.[109] Martin thus argues that '[g]iven that there were a number of

[103] ibid.

[104] ibid at para 139.

[105] ibid at para 140.

[106] Elliott, in the UK context, refers to national security as being a sphere in which 'scrutiny by British courts has traditionally been blunted by a self-imposed custom of judicial deference to the executive branch' – M. Elliott, 'United Kingdom: Detention Without Trial and the ''War on Terror''' (2006) 4(3) ICON 553, 553.

[107] *Giuliani* (n 30).

[108] Ashworth, *Positive Obligations in Criminal Law* (n 28) 205.

[109] N. Martin, '*Bubbins v United Kingdom*: Civil Remedies and the Right to Life' (2006) 69(2) MLR 242, 246 (citations omitted, emphasis added).

noticeable errors and questionable decisions made in the conduct of the operation, it would seem that the Court will require *an extremely high level of error, ineptitude or bad judgement* before it will find a breach of Art.2'.[110]

Attesting further to the problem of dilution is the case of *Giuliani*. In *Giuliani,* concerning an anti-globalisation protester who was shot by a carabiniero when a jeep carrying three carabinieri was surrounded by violent protesters including the victim during the G8 summit in Genoa, the Court reasoned similarly to *Bubbins* through the 'honest belief' test.[111] Applying it both to the question of whether circumstances called for force and the question of whether the force ultimately used by the carabiniero – shooting blindly from the jeep – was strictly proportionate to the risk posed,[112] it found no violation of Article 2. The court also found the organisational deficiencies which resulted in three highly inexperienced carabinieri armed with only lethal weapons at their disposal being surrounded by protesters in the context of a pre-planned, highly securitised event – the G8 summit – not to fall foul of its stringent standards in minimising the likelihood of loss of life.[113] Cementing the 'national security'-styled deference, the Court shrank back from a stringent application of the absolute necessity test, seen holistically to encompass the organisational aspect of the policing. Noting the Court's finding that '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',[114] Skinner suggests that, '[e]stablishing an apparent "urban guerrilla" exception, the essential point here is that the Court is prepared to distinguish among types of threat and

[110] ibid.

[111] *Giuliani* (n 30) para 178.

[112] ibid at paras 178-195.

[113] ibid at paras 244-262.

[114] ibid at para 255.

reduce its standards—or increase state leeway—based on the scale, complexity and foreseeability of the incident in question'.[115] More recently, such 'exceptionalism' was translated, in the mass-hostage crisis case of *Finogenov*, to an explicit application of a margin of appreciation in determining whether the test of 'absolute necessity' had been fulfilled in State agents' use of a poisonous gas to address a hostage situation.[116]

The Court can and should approach the question of whether there has been a breach of the negative obligation under Article 2 differently, clarifying that State liability is distinct from individual (civil or criminal) liability – and *Da Silva* highlights the need to do so urgently. Absolute necessity represents an objective standard of assessment, and not one of which only an extremely high level of error, ineptitude or bad judgement would fall foul. Whilst the subjective perception of the perpetrator may suitably play a role in determining individual criminal liability, Article 2 makes it clear that the right to life is violated where a person has been killed in circumstances where lethal force used against her was not absolutely necessary; the standard is not whether the person inflicting such force considered it, in good faith, to be (absolutely) necessary.

Thus, the objective criterion ought to take centre stage in a human rights assessment; whilst individual criminal liability may appropriately be carved through a an assessment of subjective perception and intent – an assessment which only a full Article 6-compliant criminal trial can provide and for which the ECtHR itself is not equipped – the State's responsibility for unnecessary takings of life is appropriately to be assessed by considering whether the circumstances created an objective basis for using force, amongst those outlined in Article 2(2), and whether they gave rise to an absolute necessity to use (potentially) lethal force. Moreover,

[115] Stephen Skinner, 'Deference, Proportionality and the Margin of Appreciation in Lethal Force Case Law under Article 2 ECHR' (2014) EHRLR 32, 34.

[116] See *Finogenov and others v Russia* (2015) 61 EHRR 4, paras 213-215.

in State killings, the superior competence and knowledge of the State should *burden* rather than 'absolve' the State, and the onus to show that the force used was absolutely necessary should lie with the State, which is likely to – and indeed under an investigative obligation to – be in possession of the relevant facts.

Uncertainty

Compounding the above problems, the Court's doctrine is characterised by opacity. The case law encompasses the inconsistency outlined above between abstract principle and the application of the absolute necessity test. Moreover, the doctrine instils uncertainty regarding the circumstances in which the Court demands criminalisation and the pursuit of criminal redress mechanisms in relation to takings of life.

One key area of uncertainty, for example, is how far the Court's pronouncements on duties of redress relate to acts of State actors, and how far they may be taken to relate also to acts of non-State actors. It may be that a different regime of criminal liability should pertain to the former as compared to the latter. Insofar as the Court is tending towards demanding the criminalisation of acts amounting to a breach of the negative obligation under Article 2 – a position which, I suggest above, would amount to coercive overreach – it seems even more problematic to bring the absolute necessity test to bear directly on violence occurring between non-State actors. In the context of the use of force between non-State actors, an array of different and complex circumstances may be at play, in which the distribution of power and vulnerability between victim and perpetrator may vary and where presumptions as to the distribution of 'killing' power are not appropriate.

More concrete questions include: given the ECtHR's juxtaposition between intentional and unintentional takings of life in relation to whether criminal redress is required,[117] when is an infringement of the right to life 'unintentional'? Is it when the person whose act or omission resulted in a loss of life did not intend to take life or when the person whose act or omission resulted in a loss of life did not intend to engage in the act or omission which so resulted? To tread briefly beyond the remit of this article, when is an omission sufficiently negligent or reckless to warrant criminalisation? The Court's *ex post facto* assessment of admittedly a remarkably blameworthy failure to protect individuals in *Öneryıldız*[118] offers little guidance. The case law lacks clarity on matters which tend to attract considerable nuance in domestic legislation and case law across States.

There is therefore considerable uncertainty for norm-appliers and, crucially, for individuals, including both potential perpetrators and potential victims. This is a failure to respect the rule of law, which demands clarity and predictability in the law;[119] it is especially troubling given that the Court's doctrine in this area of human rights comes with the demand for the deployment of criminal law redress mechanisms.[120] As highlighted above, non-retroactivity is not only a vital element of the rule of law, but also enshrined as a non-derogable right under Article 7 ECHR.[121] Whilst Letsas has argued that certainty is not very significant in human rights doctrine, as States do not merit the protection from legal 'surprises' that autonomous human agents are entitled to,[122] his argument disregards the capacity of human

[117] See text to n 60 above.

[118] See n 61 above.

[119] J. Raz, 'The Rule of Law and Its Virtue' (1997) 93 LQR 195.

[120] Note the concerns raised in Lazarus (n 75).

[121] See Article 7 ECHR, as well as Article 15 ECHR, which provides for derogation in times of war or other public emergency threatening the life of the nation, but not from Articles 3, 4 and 7 ECHR, or Article 2 ECHR except as concerns 'lawful acts of war'.

[122] See G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 73.

rights doctrine to lead to the coercion of individuals. Although the Court's coercive agenda ultimately involves holding the State to account for failing to institute and/or pursue adequate criminal redress, the dissonance between its approach and the non-retroactivity principle underpinning Article 7 discloses a damaging disregard for another Convention fundamental. Greater clarity and guidance from the Court is crucial if the fundamental tenets of the rule of law and individual autonomy are to be respected by the very system that claims to uphold them – and the ECtHR has certainly vaunted the Convention system as doing so.[123]

A WAY FORWARD: TAKING LIFE AND LIBERTY SERIOUSLY

The ECtHR's doctrine in this area can be salvaged. In this section, I propose a way forward which takes both the centrality of safeguarding human life and the normative limits to deploying the coercive force of the criminal law seriously.

As regards the substantive issues arising from the unravelling of the Court's doctrine, I propose the following. The Court should clarify that the circumstances in which a breach of the right to life can occur at the hands of State agents and engage the State's liability under the Convention are *broader* than those that will engage the State's positive obligation to criminalise and prosecute. That it is plausible that breaches of the right to life can occur in circumstances which do not *necessarily* call for criminal liability is clear from such seminal cases as *McCann*,[124] acknowledged but not followed through by the Grand Chamber in *Da Silva*,[125] and affirmed in a thorough and persuasive study by Seibert-Fohr.[126]

[123] See *Gillan and Quinton v UK* (2010) 50 EHRR 45, paras 76-77; *Silver and others v UK* (1983) 5 EHRR 347, paras 85-90.

[124] See n 23 above.

[125] *Da Silva* (n 6) para 238 and 284.

[126] Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 51) 147, at footnote 232.

The distinction can be elaborated as follows. The State commits a breach of the negative obligation under the right to life if its agents take life in circumstances in which the force used (which resulted in the taking of life) went beyond what was *absolutely necessary* to attain one of the aims outlined in Article 2(2), assessed through an objective test. This objective test will find the State responsible for a breach of the right to life in circumstances in which *the State has not produced objectively good reasons* for considering that force was absolutely necessary in the circumstances. This demands that the State show adequate objective reasons establishing both the need to use force and that the force used was strictly proportionate – that is, strictly not excessive – to the risk to life and limb at issue in the circumstances. The latter aspect requires alternatives, such as retreat, warnings, and other non-lethal or less-lethal means to be available, used, or considered first.[127] Such mistakes as those in *Bubbins*, *Giuliani*, or *Da Silva* might well fall foul of this objective standard.

Importantly, the State must also be found responsible for a breach of the right to life in circumstances in which the planning of a particular operation, capable of resulting in the use of such force, was mismanaged in such a way as to create the conditions for (potentially) lethal force which was not absolutely necessary to be used, even if the relevant State agent may have had good reason for his or her honest belief of the absolute necessity of using (potentially) lethal force at the fatal moment. The test should consider whether the State took all reasonable and adequate steps within its power to avert or minimise such risks.[128] Findings of an Article 2 breach in circumstances of substantial operational mismanagement of the use of lethal force entail that the *State* is liable under the Convention, not necessarily that the individual perpetrator is or ought to be held criminally liable, nor necessarily that the officials involved

[127] See Russell, 'Understanding "quelling a riot or insurrection"' (n 21) 499.

[128] This approach is generally adopted in relation to regulating policing by the ECtHR; see, for example, *Osman* (n 39) para 115; *Makaratzis* (n 20) para 58.

in directing and organising the particular operation which failed to minimise the risk to life ought to be held liable individually – on a civil or criminal basis.[129] This is the approach ultimately taken in *McCann*.[130] Applying this principled approach effectively could have been the basis for finding a breach of Article 2 in *Bubbins*, *Giuliani* and *Da Silva*, where the planning of operations exhibited substantial shortcomings,[131] which – among other things – entailed that when events escalated the State agents involved in the operations at issue felt compelled to use lethal force. Such an approach ensures that whilst individuals are not necessarily criminally punished for systemic errors – either their own or their superiors' – the State may nonetheless be found responsible for violating the right to life and proceed to refine its operations accordingly.

Whether the particular individuals who deployed the force which ultimately proved lethal ought in principle to be held criminally liable depends on a host of issues, including their subjective intent and/or perception, as well as – potentially – whether they were operating under duress or other circumstances that may be relevant to their culpability. The standard of 'no more than absolutely necessary', which conveys an objective test of very strictly construed necessity, should not be mirrored in any criminal-law standard. Conversely, the less stringent standards which tend to determine criminal liability for murder or manslaughter should not be used to dilute the 'no more than absolutely necessary' standard. More importantly, the ECtHR is not the authority responsible for setting or administering the substantive contours of criminal liability for acts or omissions endangering or resulting in loss of life in a domestic context. It must take care not to place undue pressure on States to deploy the force of the criminal law in

[129] Cf Ashworth, *Positive Obligations in Criminal Law* (n 28) 205.

[130] *McCann* (n 23) paras 213-214.

[131] In relation to *Bubbins* (n 101) these are noted in Martin (n 109). On the operation in *Da Silva* see *Da Silva* (n 6) paras 53-58; and *Da Silva*, ibid, Dissenting Opinion of Judges Karakaş, Wojtyczek and Dedov, paras 2-3, and Dissenting Opinion of Judge López Guerra.

circumstances where the right to life has been breached. Rather, subject to checks on the adequacy and effectiveness of the domestic legal frameworks, mechanisms of enforcement and investigations of suspicious deaths, with appropriately rigorous oversight of the law concerning the responsibility of State bodies, the Court may appropriately accord a margin of appreciation as to the domestic approach taken to the distribution of *individual* liability, including between criminal liability and civil liability for wrongful takings of life.

To address the structural problem of opacity, the Court should qualitatively improve the way it reasons in Article 2 cases by adopting a coherent guidance-orientated interpretation of Article 2 ECHR. A guidance-orientated interpretation is not a methodological leap – the Court is increasingly making principle-heavy pronouncements of what the Convention demands and taking the opportunity in the context of individual complaints to assess a State's general compliance with the Convention's demands, not least with a view to reducing its sizeable case load.[132] The value of clarity and certainty has been reiterated by Contracting States in the Brighton Declaration's paragraph 23, which indicates that ECtHR judgments 'need to be clear and consistent', as this 'promotes legal certainty' and 'helps national courts apply the Convention more precisely, and helps potential applicants assess whether they have a well-founded application'.[133] Such clear reasoning will better safeguard and embed Convention rights and better respect the rule of law. The importance of all these gains is amplified in the context of such a fundamental right. Indeed, the imperative of certainty is inherent in the Court's own stipulations in Article 2 cases to the effect that States' 'police

[132] Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 51) 119. See also W. Thomassen, 'The Vital Relationship Between the ECtHR and National Courts' in S. Flogaitis, T. Zwart and J. Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism Into Strength* (Edward Elgar 2013). See, for example, *Bottazzi v Italy* App no 34884/97 (ECtHR, 28 July 1999), paras 18-23.

[133] *High Level Conference on the Future of the European Court of Human Rights Brighton Declaration*, April 2012, available at http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf (last accessed 26 December 2016).

should receive clear and precise instructions as to the manner and circumstances in which they should make use of firearms',[134] highlighting the need for clear guidance from the ECtHR on Article 2-compatible uses of potentially lethal force.

Concretely, in respect of Article 2, the ECtHR could use the section of the judgment which conveys 'general principles', often designated as such in the judgment structure, in a more proactive, forward-looking manner, re-establishing the objective standard of assessment of absolute necessity and the onus of showing absolute necessity which lies with the State when its agents have used lethal force. In addition, the Court should more clearly set out the requirement of having and resorting to less lethal means of force in circumstances that raise the prospect of force becoming necessary.

The suggestions outlined above are no denouncement of the ECtHR's elaboration of extensive positive obligations, especially under Articles 2 and 3 ECHR, which has undoubtedly been a key aspect of the ECtHR's constitutionalist role.[135] Nonetheless, this is an area in which the Court would do well to make general and generalisable pronouncements, demand adequate mechanisms of accountability for potential breaches of the right to life, including criminal legal provisions and mechanisms in relation to heinous breaches of the right to life – with due reference to international criminal law for guidance[136] – and otherwise allow States to determine the precise contours of civil vis-à-vis criminal liability and punishment themselves through their domestic legislative and adjudicatory processes. Moreover, the Court should adhere to the principle that criminal law redress duties are duties 'not of result, but of means',

[134] *Şimşek and Others v Turkey* App nos 35072/97 and 37194/97 (ECtHR, 26 July 2005), para 109.

[135] On the interplay between the ECtHR's adjudicatory and constitutionalist functions, see F. de Londras, 'Dual Functionality and the Persistent Frailty of the European Court of Human Rights' (2013) 1 EHRLR 38; K. Dzehtsiarou and A. Greene, 'Restructuring the European Court of Human Rights: Preserving the Right of Individual Petition and Promoting Constitutionalism' [2013] PL 710.

[136] Valuable reflection on the subject is available in Seibert-Fohr, *Prosecution of Serious Human Rights Violations* (n 51) chapter 7.

which entails that the legal and investigative framework must be capable of leading to prosecutions where criminal offences have been committed, but not render criminal redress the expected 'remedy' for victims of breaches of Article 2 ECHR.[137] In that respect, the conclusion of the majority in *Da Silva*, including the apt observation that 'sometimes lives are lost as a result of failures in the overall system rather than individual error entailing criminal or disciplinary liability',[138] was apposite.

A final word is warranted on what this entails for what could be labelled 'liberal criminal theory'[139] and the 'anti-impunity turn' in human rights. The implications of the approach advocated for liberal criminal theory are twofold. The narrow implication is that aligning criminal wrongs with breaches of human rights to bodily integrity, such as the right to life, carries the potential of coercive overreach and, contrary to the views of some theorists,[140] ought to be rejected. The more general implication is that seeking harmonisation of (parts of) the criminal law via human rights – and particularly via supranational human rights courts – would be ill-thought, both for the criminal law, insofar as a restrictive and autonomy-orientated approach to criminal wrong-doing is seen to be desirable, and for human rights themselves.

These conclusions are instructive also for the anti-impunity agenda in human rights. Whilst there may be some scope for supranational human rights courts legitimately to demand accountability through criminal redress for international crimes which amount to grave human rights violations,[141] this article highlights the dangers of such courts overstepping their

[137] See Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 51) chapters 4 and 6.

[138] *Da Silva* (n 6) para 284; see also paras 282-288.

[139] On 'liberal criminal theory', see the *Festschrift* for Andreas von Hirsch *Liberal Criminal Theory* (n 38).

[140] See n 87 and text to n 87 above; and see the nuanced take by T. Hörnle, '"Rights of Others" in Criminalisation Theory' in Simester et al, *Liberal Criminal Theory* (n 38), who posits that the question 'Does this kind of conduct violate the right of another person?' should be the *first* step for criminalisation theory.

[141] For a critical examination of the promise and pitfalls of such pursuits, see Engle (n 93).

jurisdictional remit and unduly merging criminal liability and State responsibility for human rights violations.

CONCLUSION

Both the right to life and human freedom are fundamental to human rights in general and the ECHR in particular. This article has therefore attempted to reinstate a robust approach to safeguarding both, by highlighting the need to decouple the negative obligation under Article 2 ECHR from takings of life which ought to attract criminal liability. The 'no more than absolutely necessary' test must re-emerge as an objective, rigorously applied standard. Subjectivity, on the other hand, can be central, in the domestic context, to delimiting the criminal liability of individuals involved in the use of lethal force; as such, the ECtHR must allow leeway for tests considering honest belief to play a role in determining whether Contracting States pursue criminal liability against those deploying lethal force, while at the same time reaffirming the stringency of the standard on which it holds the State accountable for the use of lethal force by its agents. It remains for the ECtHR to restore clarity and interpret Article 2 as outlined, thus taking both the right to life and the dangers of coercive overreach seriously.