

# Coercive Overreach, Dilution and Diversion: Potential Dangers of Aligning Human Rights Protection with Criminal Law (Enforcement)

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## Chapter 9

*Coercive overreach, dilution, diversion: potential dangers of aligning human rights protection with criminal law (enforcement)*

Natasa Mavronicola

### I. Introduction

The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. Any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention...<sup>1</sup>

Protecting people from the grave wrongs proscribed by human rights law is central to the human rights project, and to the European Convention on Human Rights (ECHR) in particular.<sup>2</sup> This has been reflected in the extensive elaboration of positive obligations by the European Court of Human Rights (ECtHR).<sup>3</sup> At the same time, the ECtHR has reiterated the centrality of the value of human freedom throughout its rich jurisprudence on the Convention,<sup>4</sup> and this has underpinned the far-reaching safeguards that the Court has cemented in the context of criminal justice and beyond.

The premise of this chapter is that the ECHR should be interpreted coherently, in line with its spirit and purpose, and to make its safeguards practical and effective. In light of this starting point, this chapter examines three key dangers arising from the coercive ‘sting’<sup>5</sup> of positive duties imposed on States through ECtHR doctrine, with particular focus on Articles 2 and 3 ECHR. The dangers highlighted are those of coercive overreach, dilution, and diversion in respect of the human rights standards at play.

The chapter proceeds as follows. Part II provides an illustrative account of duties of criminalisation and criminal redress, focusing particularly on Articles 2 and 3 ECHR. Part III highlights how the coercive duties emerging from these rights tend towards coercive overreach – that is, the excessive, or otherwise inapposite, demand for criminalisation and punishment. This is followed, in Part IV, by the argument that the coercive slant of positive obligations entails a danger of *weakening* the (rightly) expansive understanding of the wrongs at issue and the stringent (negative) duties imposed on the State under these rights. Part V highlights the ways in which the coercive orientation of positive obligations under core rights can divert the Court from other practical and effective tools of protection, and concludes in favour of a protective and preventive re-orientation of the doctrine.

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<sup>1</sup> *Svinarenko and Slyadnev v Russia* App nos 32541/08 and 43441/08 (ECtHR, 17 July 2014), para 118.

<sup>2</sup> See D Harris, M O’Boyle, E Bates and C Buckley, *Law of the European Convention on Human Rights* (3rd edn, Oxford, Oxford University Press 2014) 203.

<sup>3</sup> The European Court of Human Rights is hereafter referred to as ECtHR, Strasbourg, the Strasbourg Court, or the Court.

<sup>4</sup> See, for example, the frequently reiterated idea that ‘the very essence of the Convention is respect for human dignity and human freedom’: *Goodwin v UK* (2002) 35 EHRR 18, para 90; *Pretty v UK* (2002) 35 EHRR 1, para 65.

<sup>5</sup> 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* (Oxford, Oxford University Press 2012).

## **II. Duties to mobilise the criminal law in the protection of life and personal integrity under Articles 2 and 3 ECHR**

Convention rights give rise to a range of positive duties applicable in different contexts,<sup>6</sup> which under Articles 2, 3 and 4 tend to encompass: general, or framework, duties; operational duties; and investigative duties. Duties of criminalisation and criminal redress chiefly emanate from and are shaped through the general duties to set up a law and enforcement framework that protects persons from unlawful takings of life or proscribed ill-treatment,<sup>7</sup> and the duties to investigate allegations of unlawful takings of life or proscribed ill-treatment and to provide the requisite procedures for accountability and redress (often referred to as procedural duties).<sup>8</sup> 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 the rights themselves, particularly insofar as they are tied to recourse to the criminal law rather than compensation.<sup>9</sup>

The ECtHR has elaborated on such duties under Articles 2 and 3 ECHR on various occasions. It has stated, in relation to Article 2, that

[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.<sup>10</sup>

It has also stipulated, in relation to Article 3:

Article 3 requires States to put in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions...and this requirement also extends to ill-treatment administered by private individuals...<sup>11</sup>

The significance and potency of duties of redress comes into particularly sharp relief in the Court's elaboration of relevant investigative duties, often set out in broader terms as 'procedural' duties. According to the ECtHR, the investigation into a lethal use of force must

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<sup>6</sup> See the analysis in A Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Oxford, Hart Publishing 2004); see also the interesting normative treatment in L Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Cambridge, Intersentia 2016).

<sup>7</sup> On this, see L Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights' in Y Haeck and E Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Dordrecht, Springer 2014).

<sup>8</sup> See, further, K Kamber, *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law* (Leiden, Brill 2017), chapters 2 and 4. See also Laurens Lavrysen's chapter in this volume on duties to criminalise and duties to punish.

<sup>9</sup> See, for instance, *Perevedentsev v Russia* App no 39583/05 (ECtHR, 24 April 2014) paras 74-126. This is noted in A Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford, Oxford University Press 2009) 126-127.

<sup>10</sup> *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, para 218 (emphasis added). See also *Osman v UK* (2000) 29 EHRR 245, para 115.

<sup>11</sup> *Beganović v Croatia* App no 46423/06 (ECtHR, 25 June 2009), para 71.

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’.<sup>12</sup> In the context of Article 3, too, the language is similar:

Where an individual has an arguable claim that he has been ill-treated by agents of the State, the notion of an “effective remedy” entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible...<sup>13</sup>

The ECtHR has indicated that the procedural duty reaches into prosecutorial decision-making,<sup>14</sup> as well as judicial proceedings:

While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow life-endangering offences and grave attacks on physical and moral integrity to go unpunished...<sup>15</sup>

Increasingly, this has brought the Court’s reasoning on investigative duties full circle back to the requirement of criminalisation – as the Court reasoned in *Cestaro v Italy*, for example: ‘For an investigation to be effective in practice it is a prerequisite that the State has enacted criminal-law provisions penalising practices that are contrary to Article 3’.<sup>16</sup>

The Court has taken it upon itself to ‘intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed’.<sup>17</sup> It has found, in several cases, that the penalty imposed on persons found to have committed torture or inhuman or degrading treatment or to have taken life unlawfully was inadequate.<sup>18</sup> In some instances, the Court has made such finding in connection with determining whether the applicant(s) maintain victim status following domestic proceedings and redress.<sup>19</sup> The Court has taken a particularly punitive stance in relation to the sanction meted out to persons who have been found to have engaged in what it calls ‘wilful’ ill-treatment. It has stipulated that ‘in cases of wilful ill-treatment a violation of Articles 2 or 3 cannot be remedied exclusively through an award of compensation to the victim’.<sup>20</sup>

The above account is only a cross-section of a vast domain of coercive human rights doctrine emerging from the ECtHR, much of which is covered in more detail in other chapters in this

<sup>12</sup> *McShane v UK* (2002) 35 EHRR 23, para 96.

<sup>13</sup> *El-Masri v FYROM* (2013) 57 EHRR 25, para 255.

<sup>14</sup> This is within limits. See, for example, the Article 2 judgments of *Da Silva v UK* (2016) 63 EHRR 12, paras 259-282; *Kolevi v Bulgaria* (2014) 59 EHRR 23, paras 191-215. But see the Article 3 (and 8) judgment in *MC v Bulgaria* (2005) 40 EHRR 20, paras 148-187.

<sup>15</sup> *Ali and Ayşe Duran v. Turkey* App no 42942/02 (ECtHR, 8 April 2008), paras 61-62. See also *Okkali v Turkey* App no 52067/99 (ECtHR, 17 October 2006), paras 65-66; *MC v Bulgaria* (2005) 40 EHRR 20, para 131.

<sup>16</sup> *Cestaro v Italy* App no 6884/11 (ECtHR, 7 April 2015), para 209 (citations omitted). See also *Gäfgen v Germany* (2011) 52 EHRR 1, para 117.

<sup>17</sup> *Nikolova v Bulgaria* (2009) 48 EHRR 40, para 62. See the analysis in Laurens Lavrysen’s chapter in this volume.

<sup>18</sup> See, for example, the Article 2 and Article 3 case of *Ali and Ayşe Duran v Turkey* App no 42942/02 (ECtHR, 8 April 2008), paras 59-73; and the Article 3 cases of *Gäfgen v Germany* (2011) 52 EHRR 1, paras 119-130; *Sidiropoulos and Papakostas v Greece* App no 33349/10 (ECtHR, 25 January 2018), paras 83-100.

<sup>19</sup> See, for example, *Nikolova v Bulgaria* (n 17) paras 47-64; *Gäfgen v Germany* (2011) 52 EHRR 1, paras 119-130.

<sup>20</sup> *Aleksakhin v Ukraine* App no 31939/06 (ECtHR, 19 July 2012), para 60. See, also, in relation to Article 2, the Court’s approach in *Tarariyeva v Russia* App no 4353/03 (ECtHR, 14 December 2006), para 75.

volume, notably Laurens Lavrysen's. Following this illustrative account of key elements of the doctrine, we may proceed to consider the fundamental dangers emanating from it.

### III. The danger of coercive overreach

Liora Lazarus, writing on the 'coercive sting' of obligations often cast as 'protective' of individual rights, warned of the danger of 'coercive overreach' through human rights.<sup>21</sup> She suggested that such overreach can arise within judicial doctrine and its immediate implications as well as in the 'rhetorical assertion of coercive duties'<sup>22</sup> within a 'broader politics of security'.<sup>23</sup> In this section, I focus on probing the potential for coercive overreach within the doctrine itself.<sup>24</sup> Coercive overreach within the doctrine itself would involve demanding the penalisation of acts or omissions which might, as a matter of principle or policy, not necessarily warrant penal sanction. A danger of coercive overreach within the Court's doctrine carries significance not only for the individuals who stand to face detriment from such overreach, but also for the integrity<sup>25</sup> of the Convention itself. This is because deploying the criminal law may well – in relation to killings or ill-treatment – entail the deprivation of liberty, and respect for liberty, or 'human freedom', is the 'very essence' of the Convention.<sup>26</sup> How might such coercive overreach arise?

Substantively, the criminal law is meant to capture particularly blameworthy wrongs.<sup>27</sup> Defences – whether partial or total – to such *prima facie* wrongs reflect the circumstances in which it is considered that people should not be exposed to the punitive force of the criminal law because their (in)actions are justified or excused and their blameworthiness accordingly extinguished or diminished.<sup>28</sup> The criminal law's punitive force may be withheld where someone lacked an intention to cause harm, acted on an honest error, or misjudged the proportionality of their response to a threat. In such circumstances, their action may nonetheless amount to a civil wrong, such as a tort. While the sanctity of life, for example, is of foundational significance to the criminal law,<sup>29</sup> such nuance in relation to culpability may well apply in the context of homicide offences or offences against personal integrity. Approaches to the delimitation of defences vary across jurisdictions,<sup>30</sup> 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.<sup>31</sup> For our purposes, what is important to underline is that individual criminal

<sup>21</sup> Lazarus, 'Positive Obligations and Criminal Justice' (n 5) at 136, 147.

<sup>22</sup> ibid at 149.

<sup>23</sup> ibid at 141.

<sup>24</sup> The chapters by Mattia Pinto and Liora Lazarus in this volume explore the broader implications of the doctrine within particular cultures of penality and securitisation.

<sup>25</sup> R Dworkin, *Law's Empire* (first published 1986, Oxford, Hart Publishing 1998) chapters 2 and 3.

<sup>26</sup> See, for instance, *Pretty v UK* (2002) 35 EHRR 1, para 65.

<sup>27</sup> A Ashworth, 'Conceptions of Overcriminalization' (2008) 5 *Ohio State Journal of Criminal Law* 407, 408-409.

<sup>28</sup> See the nuanced account of defences in criminal law in J Gardner, *Offences and Defences* (Oxford, Oxford University Press 2007), chapter 4.

<sup>29</sup> 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* (Cambridge, Cambridge University Press 2013).

<sup>30</sup> J Horder (ed), *Homicide Law in Comparative Perspective* (Oxford, 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* (Oxford, Hart Publishing 2007) chapters 9 and 11.

<sup>31</sup> See the discussion in F Leverick, *Killing in Self-defence* (Oxford, Oxford University Press 2006) chapter 1; and B Sanger, *Self-Defence in Criminal Law* (Oxford, 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 CLJ 227. See also J Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' (1998) 11 *The Canadian Journal of Law and Jurisprudence* 143.

liability may appropriately be shaped through an assessment of *subjective* blameworthiness,<sup>32</sup> and that the legal approach to defences may accord some leeway to the potentially flawed judgement of the individual asserting the defence. This is because it is largely not considered appropriate, for the purposes of establishing individual criminal liability, to assess the actions of a person compelled to act under pressure or in a context of violence through the eyes of a notional ‘suitably informed impartial observer in a calm frame of mind’ who thereby applies an objective test.<sup>33</sup>

Looking to Article 2 ECHR, the stringent absolute necessity test elaborated by the Court in relation to the negative obligation not to employ (potentially) lethal force is evidently not modelled on a criminal law standard of liability for homicide.<sup>34</sup> The absolute necessity test is, after all, ‘a stricter and more compelling test of necessity’ than the proportionality test ‘normally applicable when determining whether State action is “necessary in a democratic society”’.<sup>35</sup> The latter is an objective test insofar as it involves checking the adequacy of, and not just the good faith belief in, the State’s justifications for interfering with the relevant qualified right, and so – on this basis – must be the former, even more stringent test. While the subjective, potentially flawed or mistaken, perception of the perpetrator may suitably play a role in determining individual criminal liability, this is not – or should not be – the case in determining State responsibility for violating the right to life. Indeed, the State may be found to have violated Article 2 in circumstances of diffuse or systemic failings – which may sometimes not be criminally culpable – in the discharge of a (high-risk) State operation involving the deployment of (potentially) lethal force.<sup>36</sup> In respect of Article 3 ECHR, many instances of the right’s violation encompass grossly culpable conduct that would – and should – be considered a grave criminal offence across most jurisdictions. Nonetheless, Article 3 violations can also arise out of circumstances of systemic, structural or diffuse failings that may *sometimes* (not always) not involve particular persons engaging in *criminally* culpable conduct.

Accordingly, the standard for State responsibility for human rights breaches is, and can appropriately be, stricter than standards shaping individual criminal liability, with human rights law demanding more from the State *apparatus* and holding it more stringently to account than the criminal law does vis-à-vis individual actors. Anja Seibert-Fohr aptly puts the issue in the following terms 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.<sup>37</sup>

Darryl Robinson, too, in his critique of international criminal law, warned against

*substantive and structural conflation* – that is, the assumption that criminal norms must be coextensive with similar norms in human rights or humanitarian law,

<sup>32</sup> See, for example, Leverick, *ibid* at 11.

<sup>33</sup> S Uniacke, ‘Proportionality and Self-defense’ (2011) 30 *Law & Philosophy* 253, 256.

<sup>34</sup> *McCann v UK* (1996) 21 EHRR 97, para 149.

<sup>35</sup> *Pretty v UK* (2002) 35 EHRR 1, para 65.

<sup>36</sup> Eg *McCann* (n 34).

<sup>37</sup> Seibert-Fohr (n 9) 147, at fn 232, citing B Emmerson, A Ashworth and A MacDonald, *Human Rights and Criminal Justice* (2nd edn, London, Sweet & Maxwell 2007) 750, 756.

overlooking the different structure and consequences of these areas of law, and thus neglecting the special principles necessary for blame and punishment of individuals.<sup>38</sup>

Accordingly, the main danger of coercive overreach within ECtHR doctrine on Articles 2 and 3 ECHR lies in equating circumstances amounting to breach of (the negative obligations under) Articles 2 and 3 ECHR with circumstances demanding criminalisation and the pursuit of criminal redress.

The doctrine gives reason for concern in this regard. Some of the Court's pronouncements tend to suggest not only that the ECtHR assumes that violations of the prohibitions enshrined in Articles 2 and 3 automatically entail individual criminal liability, but that the Court *requires* that they do so under domestic law. Consider, again, the principle that for an investigation to be effective it is a 'prerequisite' for the State to have put in place criminal law provisions penalising 'practices that are *contrary to Article 3*'.<sup>39</sup> We know that there are practices and structures that are contrary to Article 3 even in the absence of any intention to cause suffering, anguish or humiliation,<sup>40</sup> or that are part of chronic and/or systemic problems such as those associated with certain places of detention, which may in turn be tied to (problematic) government policies. The diffuse nature of the failings at play does not, and ought not to, absolve the State of liability for the inhumanity and degradation inflicted on the victims in such circumstances. However, although there may well be several such cases where the culpability of an individual or individuals may reach a level that warrants civil and/or criminal liability, this is by no means guaranteed in all cases. Moreover, we know that excessive use of force by law enforcement authorities – that is, force that was not indispensable and proportionate in the circumstances – may be found to be inhuman or degrading and therefore in violation of Article 3 ECHR.<sup>41</sup> Although such excess may in many or even most instances tend to be characterised by a criminal level of culpability, this might not always be the case: the excessive force used may have stemmed from a genuine mistake, lack of training or equipment, or another factor that might be reasonably considered a basis for an exculpatory defence or mitigation of sentence in a State's criminal law.

In relation to Article 2 ECHR, the potential for coercive overreach can be illustrated through the case of *Da Silva v UK*, concerning 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.<sup>42</sup> The police operation had suffered from a well-documented number of failings, which culminated

<sup>38</sup> D Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925, 929; see also at 946-949. See, too, V Stoyanova, 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking' (2014) 3 *Cambridge Journal of International and Comparative Law* 407, 441. But note the positive treatment of the intersection between international criminal law and duties of criminal redress in human rights law in J D Ohlin, 'The Right to Punishment for International Crimes' in F Jeßberger and J Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law* (Cambridge, Cambridge University Press, 2020).

<sup>39</sup> *Cestaro v Italy* App no 6884/11 (ECtHR, 7 April 2015), para 209 (emphasis added).

<sup>40</sup> For example, in assessing 'degrading treatment', the Grand Chamber has affirmed that 'although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of art.3' - *MSS v Belgium and Greece* (2011) 53 EHRR 2, para 220; see also *V v UK* (2000) 30 EHRR 121, para 71.

<sup>41</sup> See, for example, *Güler and Öngel v Turkey* App Nos 29612/05 and 30668/05 (ECtHR, 4 October 2011), paras 25-31.

<sup>42</sup> *Da Silva* (n 14), paras 12-38, 136.

in the ultimate decision taken to shoot to kill.<sup>43</sup> 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 had been prosecuted following the fatal shooting. A key argument of both the applicant and an intervener in alleging that the non-prosecution constituted an Article 2 breach was that the criminal law defence of self-defence in English law did not mirror the test of absolute necessity found in Article 2(2) of the ECHR,<sup>44</sup> and that this was a breach of the UK's positive obligations under Article 2.<sup>45</sup> Although the ECtHR in *Da Silva* ultimately found no violation of Article 2, 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 Article 2 closely approximates the test for criminal liability for takings of life under English law.<sup>46</sup>

These are just some examples of how the ‘mirroring’, or ‘conflation’, warned against by Seibert-Fohr and Robinson has seeped into ECtHR doctrine and produced statements of principle which substantively overreach by demanding the criminalisation and punishment of conduct that need not, or should not, in all circumstances be deemed criminally wrongful.

Negative obligations under the fundamental human rights enshrined in Articles 2 and 3 ECHR are central to delimiting legitimate State violence; they are shaped so as to stringently limit such violence. In their substantive scope and application to particular circumstances, they are not meant to replicate the less exacting standards appropriate to the determination of individual criminal liability. Viewing State liability for Article 2 or Article 3 breaches on the one hand and *individual liability for criminal wrongs* on the other as coterminous risks coercive overreach. The capacity of the ECtHR’s doctrine to lead to conflation of State responsibility for violations of Articles 2 and 3 ECHR and individual criminal liability is accordingly a cause for concern in itself, even apart from other significant concerns surrounding the coercive implications of the ‘anti-impunity’ turn in human rights.<sup>47</sup> It also stands in tension with the commitment to human freedom that underpins the Convention and that has shaped a number of counter-carceral safeguards in the ECtHR’s case law.<sup>48</sup>

Yet besides substantive coercive overreach, the danger of *institutional* coercive overreach also inheres in the Court’s coercive duties doctrine. As the Court has put it,

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

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<sup>43</sup> ibid at paras 52-58, 283-288.

<sup>44</sup> ibid paras 152, 186 and 192 (applicant’s arguments) and 224 (EHRC’s arguments).

<sup>45</sup> See, for instance, ibid at paras 191, 193, 205, 225 and 226.

<sup>46</sup> See ibid at paras 244-256. But cf *Tekin and Arslan v Belgium* App no 37795/13 (ECtHR, 5 September 2017).

<sup>47</sup> See the discussion of ‘anti-impunity’ in the introductory chapter by Laurens Lavrysen and Natasa Mavronicola in this volume. See also K Engle, ‘Anti-Impunity and the Turn to Criminal Law in Human Rights’ (2015) 100(5) *Cornell Law Review* 1069; K Engle, Z Miller and DM Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge, Cambridge University Press 2016);

<sup>48</sup> On the tensions between liberal commitments and the coercive duties doctrine, see Mattia Pinto’s and Nina Persak’s chapters in this volume.

under examination in the national criminal courts. The Court is not concerned with reaching any findings as to guilt or innocence in that sense.<sup>49</sup>

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 a human rights violation*. This is because individual criminal liability in domestic law and State responsibility for a breach of the ECHR are meant to be legally distinct matters. The ECtHR is tasked with determining the latter. It can accordingly go beyond domestic criminal court findings to establish whether, on the ECtHR's own principles, the respondent State has committed 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 has averred that it is 'not a criminal court' and that 'in determining whether there has been a breach of Article 2 [or Article 3] of the Convention it is not assessing the criminal responsibility of those directly or indirectly concerned...because that responsibility is distinct from international law responsibility under the Convention'.<sup>50</sup> Both findings of individual criminal liability and decisions on punishment must take place through a criminal justice process involving several key safeguards protecting the *defendant*, many of which are encapsulated in Articles 5 and 6 of the ECHR and extensive ECtHR jurisprudence.<sup>51</sup> Yet where the ECtHR demands that heavier penalties be imposed, as it has done in its 'manifest disproportion' case law, it veers dangerously close to assuming the role of a tribunal tasked with administering criminal liability and punishment,<sup>52</sup> a role that it has neither the authority nor the institutional capacity to play.<sup>53</sup>

#### **IV. The prospect of weakening human rights standards**

Another grave danger that inheres in the 'mirroring' or 'conflation' identified above is the prospect of dilution. The danger is that a tendency to view human rights violations through a criminal lens might bring about a narrowing or dilution of the stringency of the obligations that the Convention imposes on the State, and create a danger of undermining practical, effective and entirely appropriate presumptions that have been developed to hold States to account.

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<sup>49</sup> *Avşar v Turkey* (2003) 37 EHRR 53, para 284 (citations omitted). See also *McCann* (n 34) para 173.

<sup>50</sup> *Dimitrov v Bulgaria* App no 77938/11 (ECtHR, 1 July 2014), para 129 (that 'the same applies in relation to Article 3' is stated in para 130 of the judgment). See also *Tekin and Arslan* (n 46) paras 81 and 109. Note André Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 ICLQ 615, 638.

<sup>51</sup> See, especially, R Goss, *Criminal Fair Trial Rights* (Oxford, Hart Publishing 2014).

<sup>52</sup> On the reality of international human rights courts' 'quasi-criminal jurisdiction', see A Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 AJIL 1. See the specific concerns outlined in respect of the Inter-American Court of Human Rights' duty to punish doctrine in FF Basch, 'The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 American University International Law Review 195, 208-221.

<sup>53</sup> 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.

The danger of dilution has to some extent materialised in Article 2 case law.<sup>54</sup> Having made criminalisation central to the implications of (some) breaches of the right to life and having come close to equating State liability with individual criminal liability, the ECtHR has come to apply a criminal-law-styled standard of culpability to determining the absolute necessity of lethal force.

Article 2 involves a strict negative obligation in principle, delineated by an objective test of absolute necessity, and structurally extended so that the assessment of absolute necessity may incorporate considerations pertaining to failings in the planning and control of State operations in violent, volatile or otherwise life-endangering situations. According to the Court in *McCann*:

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.<sup>55</sup>

In *McCann*, this translated into a finding that while the actions of the soldiers did not, in themselves, give rise to a violation of Article 2, a variety of diffuse organisational failings entailed that the killing of three individuals suspected of imminent ‘terrorist’ violence did not constitute absolutely necessary force within the meaning of Article 2(2) ECHR.<sup>56</sup> As another example, in *Güleç v Turkey*, 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.<sup>57</sup>

Yet in much of the Court’s case law, after pronouncing that only circumstances of absolute necessity can justify the use of lethal force and that ‘careful scrutiny’ is required on the stringent principles set out above, the ECtHR has proceeded to assess the 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.<sup>58</sup>

This test of ‘honest belief’ is not only applied to the State agents’ assessment of the danger at issue, but also to their choice of reaction. The ‘honest belief’ lens substantially dilutes the ‘absolute necessity’ assessment. As outlined in the above passage, the ‘honest belief’ test

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<sup>54</sup> See the further analysis in N Mavronicola, ‘Taking Life and Liberty Seriously: Reconsidering Criminal Liability Under Article 2 of the ECHR’ (2017) 80 MLR 1026.

<sup>55</sup> *McCann* (n 34) para 150; see also, for example, *Boukrourou v France* App no 30059/15 (ECtHR, 16 November 2017), para 55; and the related approach in *Haász and Szabó v Hungary* App nos 11327/14 and 11613/14 (ECtHR, 13 October 2015), para 57. See the analysis in 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* (Oxford, Oxford University Press 2008) 102-117.

<sup>56</sup> *McCann*, ibid paras 213-214.

<sup>57</sup> *Güleç v Turkey* (1999) 28 EHRR 121, para 71. See further H Russell, ‘Understanding “quelling a riot or insurrection” under article 2 of the ECHR’ (2015) EHRLR 495.

<sup>58</sup> See, for example, *Giuliani and Gaggio v Italy* (2012) 54 EHRR 10, para 178.

includes what may be considered to be an objective element, embodied in the ‘for good reasons’ criterion. However, the Grand Chamber in *Da Silva* confirmed that it considers that ‘the existence of “good reasons” should be determined subjectively’.<sup>59</sup> The Grand Chamber suggested 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*’,<sup>60</sup> referencing prior case law in which this approach had been effectively adopted if not explicitly affirmed, such as *Bubbins v UK*.<sup>61</sup>

In *Bubbins*, a police-officer shot and killed an unarmed man who was mistaken for an intruder in his own home and was wrongly thought 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 that led to the use of lethal force which was not absolutely necessary. The Court applied the ‘honest belief’ test, reasoning that ‘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’,<sup>62</sup> and concluded 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.<sup>63</sup>

Andrew Ashworth has suggested that *Bubbins* effectively embodies a subjective test,<sup>64</sup> while Neil Martin has commented that ‘[g]iven that there were a number of 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’.<sup>65</sup>

Attesting further to the problem of dilution, which reaches into the assessment of the planning of relevant operations, is the case of *Giuliani v Italy*. In *Giuliani*, concerning the shooting of an anti-globalisation protester by a carabiniero when a jeep carrying three carabinieri was surrounded by violent protesters during the G8 summit in Genoa, the Court reasoned similarly to *Bubbins* through the ‘honest belief’ test.<sup>66</sup> Applying it both to the question of whether circumstances called for force and to the question of whether the force ultimately used by the carabiniero – shooting blindly from the jeep – was strictly proportionate to the risk posed,<sup>67</sup> 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

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<sup>59</sup> *Da Silva* (n 14) para 247.

<sup>60</sup> ibid at para 248 (emphasis added).

<sup>61</sup> *Bubbins v UK* (2005) 41 EHRR 24.

<sup>62</sup> ibid at para 139.

<sup>63</sup> ibid at para 140.

<sup>64</sup> A Ashworth, *Positive Obligations in Criminal Law* (Oxford, Hart Publishing 2015) 205.

<sup>65</sup> N Martin, ‘*Bubbins v United Kingdom: Civil Remedies and the Right to Life*’ (2006) 69(2) MLR 242, 246 (citations omitted, emphasis added).

<sup>66</sup> *Giuliani* (n 58) para 178.

<sup>67</sup> ibid at paras 178-195.

of life.<sup>68</sup> In a judgment characterised by ‘national security’-styled deference,<sup>69</sup> the Court shrank back from a stringent application of the absolute necessity test, seen holistically to encompass the organisational aspect of the policing in *McCann*.<sup>70</sup>

The Court can approach the question of whether there has been a breach of the negative obligation under Article 2 differently, by re-asserting the distinction between State liability and individual (civil or criminal) liability. 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. While 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 them was not absolutely necessary. The standard is not whether the person inflicting such force considered it, in good faith, to be (absolutely) necessary.<sup>71</sup> Thus, while individual criminal liability may appropriately be carved through an assessment of (potentially flawed) subjective perception and intent – an assessment that only a full Article 6-compliant criminal trial can provide – the State’s responsibility for unnecessary takings of life is appropriately to be assessed objectively. Moreover, in State killings, the superior competence and knowledge of the State should substantially 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 be – and indeed under an investigative obligation to take reasonable steps to be – in possession of the relevant facts. This requires the State to 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 or bodily integrity at issue in the circumstances. The latter element means that (potentially) lethal force is meant to be treated as a last resort, and that alternatives, such as retreat, warnings, and other non-lethal or less-lethal means must be shown to have been made available and, where appropriate, used or considered first.<sup>72</sup>

On this approach, the State should also be held accountable under the right to life in circumstances in which the planning of a particular operation, capable of resulting in the use of lethal force, was collectively mismanaged so as *unnecessarily* to create the conditions for (potentially) lethal force to be used, even if (potentially) lethal force was ultimately necessary at the fatal moment. Findings of an Article 2 breach in circumstances of such operational mismanagement entail that the *State apparatus* is held to account, without *necessarily* demanding the criminal accountability of any of the individuals involved.<sup>73</sup> This is the approach ultimately taken in *McCann*.<sup>74</sup> Such an approach would entail that while individuals are not necessarily held criminally liable for diffuse or systemic errors or collective mismanagement, the State may nonetheless be found responsible for violating the right to life, and be compelled to revise its planning and management of high-risk operations accordingly.

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<sup>68</sup> *ibid* at paras 244-262.

<sup>69</sup> See S Skinner, ‘Deference, Proportionality and the Margin of Appreciation in Lethal Force Case Law under Article 2 ECHR’ (2014) EHRLR 32.

<sup>70</sup> See text to n 55. But note the Court’s more stringent assessment of planning and control under a ‘positive obligation’ heading in, for example, *Finogenov v Russia* (2015) 61 EHRR 4, paras 237-266.

<sup>71</sup> Jonathan Rogers observed that the tests at play are distinct in J Rogers, ‘Culpability in Self-defence and Crime Prevention’ in GR Sullivan and I Dennis, *Seeking Security: Pre-Empting the Commission of Criminal Harms* (Oxford, Hart Publishing 2012) 266.

<sup>72</sup> See Russell (n 57) 499.

<sup>73</sup> Cf Ashworth, *Positive Obligations in Criminal Law* (n 64) 205.

<sup>74</sup> *McCann* (n 34) paras 213-214.

The issue has not quite materialised in the same way in Article 3 case law. Nonetheless, the prospect of a criminal lens operating to narrow the scope of circumstances in which the State is found to be in violation of the negative obligation under Article 3 ECHR remains a worrying one. A ‘mirroring’ approach would mean that Article 3 ill-treatment is only established in circumstances in which criminally wrongful conduct has occurred. Should this path be followed, it is capable of eroding much of Article 3’s protection in a range of contexts where inhumanity or degradation may be inflicted unintentionally, by virtue of a legal regime, or as a result of structural, systemic or diffuse problems, failings or errors. Such contexts include immigration and asylum, sentencing and imprisonment, and others. Consider, for example, the imposition of a *de facto* irreducible sentence of life imprisonment,<sup>75</sup> degrading prison conditions in inadequately resourced prisons, substantively flawed asylum decisions resulting in violation of the *non-refoulement* duty, or the inadvertently excessive use of force in the conduct of an arrest by an under-trained police-officer misperceiving the threat at hand. The Court should continue to recognise violations of Article 3 in such circumstances even if no criminal wrong is necessarily made out. The human right not to be subjected to torture or inhuman or degrading treatment or punishment has been interpreted in a dynamic way to capture acts and omissions whose wrongfulness is relational and significant, indeed significant enough for them to be considered conclusively unlawful as a matter of human rights law,<sup>76</sup> but not always of a nature that is criminally culpable.

Moreover, there is cause for concern regarding what a criminal lens might entail for the approach taken to *proving* violations of rights such as those enshrined in Articles 2 and 3 ECHR. Although the Court often uses the language of ‘beyond reasonable doubt’ in determining violations of these provisions,<sup>77</sup> the evidential standard applied in Article 2 and 3 cases generally does not (and ought not to) replicate a criminal law standard.<sup>78</sup> Instead, the Court has clarified that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact and that ‘where allegations are made under Articles 2 and 3 of the Convention, the Court must apply a particularly thorough scrutiny’.<sup>79</sup> It has, in particular, adopted the position that where the events in issue ‘lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody’, a presumption of an Article 3 violation will

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<sup>75</sup> This would be contrary to Article 3 according to the Court in *Vinter v UK* (2016) 63 EHRR 1 and *Murray v Netherlands* (2017) 64 EHRR 3.

<sup>76</sup> See, generally, N Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (forthcoming, Hart Publishing).

<sup>77</sup> See, for example, *Bouyid v Belgium* (2016) 62 EHRR 32, para 82; *Güler and Öngel v Turkey* (n 41), para 26.

<sup>78</sup> See the related discussion in Nollkaemper (n 50) 627–631.

<sup>79</sup> See, for example, *Güler and Öngel v Turkey* (n 41), para 26. Indeed, the Court has elaborated on this as follows: ‘[I]n assessing evidence, the Court has adopted the standard of proof “beyond reasonable doubt”. However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States’ responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties’ submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights...’ – *Nachova and others v Bulgaria* (2006) 42 EHRR 43, para 147.

arise in respect of any injuries sustained during the relevant period.<sup>80</sup> On this basis, ‘the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation’<sup>81</sup> for the injuries to absolve themselves of responsibility.

These are entirely appropriate approaches to the evidentiary dimension of establishing State violations of human rights, and are justified not only by the superior or exclusive knowledge of the authorities but also by the ‘vulnerable position’<sup>82</sup> in which individuals confronted by the State’s law enforcement officials or similar find themselves. Such evidentiary approaches are not, however, usually adopted – and may not be appropriate in all circumstances – in the determination of individual criminal liability. The danger therefore arises, out of the ‘mirroring’ of Article 2 and Article 3 breaches and criminal liability, that the looser burden of proof and the burden’s reversal in particular circumstances may be relinquished in favour of a standard that more closely resembles the evidentiary standard employed to determine individual criminal liability for the most serious crimes. Such a change in approach would, if it did occur, impair the process of establishing human rights violations and potentially shrink the circumstances in which the State is accordingly held to account.

## V. The problem of diversion

The above account takes seriously the importance of upholding human freedom, closely constraining State violence, *and* effectively protecting persons from grave harm. Guarding against coercive overreach and dilution is required in order to maintain and promote, in coherent fashion, the ideals and values of a democratic society as demanded by the Convention, which centres human dignity and human freedom. At the same time, in view of the significance placed on making Convention safeguards practical and effective, it is worth underlining that criminalisation and criminal redress may in many circumstances be neither necessary (coercive overreach viewed from a deterrence/prevention angle<sup>83</sup>) nor sufficient<sup>84</sup> to prevent ill-treatment or unlawful takings of life or indeed more generally to protect (potential) victims of such violations. It is important to highlight, therefore, that the ECtHR’s coercive approach to positive obligations for the protection of core rights can *divert* the Court from alternative tools of protection and obscure alternative ways of conceptualising what is at stake. What I mean by the latter point is that a focus, via this coercive orientation, on the criminally wrongful dimension of human rights violations can entail that other issues might be missed or implicitly downplayed.

Thus, an application of the right to life to a litany of not-quite-criminally-culpable failings, culminating in the avoidable loss of life, that employs a criminal law lens to find that no breach has been committed, not only miscasts the test of absolute necessity but also misses the opportunity to repair – or, rather, call for the repair of – the processes, mechanisms, and structures that went awry. An emphasis in the investigation of alleged or potential human rights violations on identifying and punishing those responsible can mean that a range of crucial contributing factors or indeed a whole context conducive to the proliferation of such violations are obscured and left (sometimes conveniently) unaddressed. A finding of a procedural violation of Article 3 in respect of a State’s failure to punish (adequately) a police officer for

<sup>80</sup> *Bouyid v Belgium* (2016) 62 EHRR 32, para 83.

<sup>81</sup> *Diri v Turkey* (2010) 50 EHRR 1, para 39.

<sup>82</sup> *Bouyid v Belgium* (2016) 62 EHRR 32, para 83.

<sup>83</sup> See the account offered above, as well as Nina Peršak’s chapter in this volume.

<sup>84</sup> See, for example, Vladislava Stoyanova’s chapter in this volume.

brutally beating a Roma person may be perceived as pursuing justice, but it is only partly reparative if it fixes its gaze on a bad apple (the racist, violent officer) and misses (and seemingly implicitly absolves) the rotten orchard (an institutionally racist police force).<sup>85</sup> A pronouncement by a human rights court that presents and addresses the failure to protect a victim of domestic violence purely or mainly as a failure to criminalise and punish adequately can obscure the systems and structures at play (from misogynist institutions to patriarchal and heteronormative legal and societal norms) and can therefore skew perceptions of the problem itself as well as how to fix it.<sup>86</sup>

Another important domain in which the criminal approach, or an emphasis on individual responsibility, might limit our vision is the Court's stance on the reckoning needed after – sometimes long after – mass atrocity or conflict. The Court has favoured *criminal* investigations as the means of discharging the procedural duty under Articles 2 and 3, with the emphasis being on the investigation's capability of leading 'to the identification and punishment of those responsible'.<sup>87</sup> Even where the Court has entertained a wider conception of the duty to investigate, such a duty is still understood as seeking the apportioning of criminal, civil, administrative or disciplinary liability, and as 'leading to...an award of compensation'.<sup>88</sup> The Court's interpretation of the investigative duty under Articles 2 or 3 ECHR as requiring only proceedings leading to the apportioning of (individual) legal responsibility has had significant and limiting implications for how 'dealing with the past'<sup>89</sup> may be conceived as a matter of human rights law. In particular, the Court has held, in *Janowiec v Russia*,<sup>90</sup> that the procedural duty relates solely to 'acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party', *to the exclusion of* 'other types of inquiries that may be carried out for other purposes, such as establishing a historical truth'.<sup>91</sup> This had concrete implications in *Janowiec*, in which relatives of victims argued that Russia had not discharged its investigative obligation in respect of the disappearance of their relatives at the hands of Russian forces in 1940. The Grand Chamber found that it lacked jurisdiction *ratione temporis* because most of the relevant liability-determining proceedings had taken place prior to the ECHR entering into force in Russia and, in the Court's view, no significant investigative steps or novel information had arisen subsequently so as to establish its temporal jurisdiction over Russia's investigation.<sup>92</sup> The Court's reasoning has been extensively critiqued.<sup>93</sup> Looking beyond this particular judgment or indeed the issue of temporal jurisdiction over historical injustices, the ECtHR's understanding of the investigative duty as requiring exclusively legal-responsibility-apportioning processes arguably operates under a thin notion of justice, at the risk of crowding

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<sup>85</sup> M. Punch, 'Rotten Orchards: "Pestilence", Police Misconduct and System Failure' (2003) 13 *Policing and Society* 171.

<sup>86</sup> But cf. *Volodina v Russia* App no 41261/17 (ECtHR, 9 July 2019).

<sup>87</sup> *McShane* (n 12) para 96.

<sup>88</sup> *Aleksakhin v Ukraine* (n 20), para 60.

<sup>89</sup> See K McEvoy and L Mallinder, 'Truth, Amnesty and Prosecutions: Models for Dealing with the Past' (Queen's University Belfast 2013).

<sup>90</sup> *Janowiec v Russia* (2014) 58 EHRR 30.

<sup>91</sup> *Janowiec v Russia* (2014) 58 EHRR 30, para 143.

<sup>92</sup> *ibid* at paras 158-159.

<sup>93</sup> For a critical take on this, see C Heri, 'Enforced Disappearance and the European Court of Human Rights' *ratione temporis Jurisdiction*' (2014) 12 *Journal of International Criminal Justice* 751.

out, delegitimising, or affirmatively excluding other processes that operate under richer – or ‘thicker’<sup>94</sup> – understandings of justice.<sup>95</sup>

There is, accordingly, cause for recognising that a criminal law (enforcement) focus may address only a fraction of the wrong(s) at issue as well as of the substantial obstacles or shortcomings in protecting persons from the harms at issue. A protective and preventive re-orientation in the doctrine is needed, shaped perhaps by a re-orientation in human rights litigation agendas. A protective and preventive re-orientation would require a recalibration of the Court’s attention towards the wider, potentially non-criminal acts and omissions – encompassing laws, policies, practices and structures – involved in the violation of a fundamental human right, and a consideration of ‘practical and effective’ (to quote the Court<sup>96</sup>) tools of protection beyond criminal law (enforcement) in the specification of positive obligations. This would entail, for example, a greater readiness to hold States to account for failing to provide thorough training on the use of force and adequate defensive equipment for all State agents who may be called upon to use force or failing to plan and prepare for potentially violent State operations robustly.<sup>97</sup> But it could also entail demanding safeguards such as: effective access to justice, including through the alleviation of financial or material barriers and relating not just to criminal proceedings but also to family law, immigration, and other proceedings, for victims of domestic violence;<sup>98</sup> access to refuges for victims of such violence;<sup>99</sup> or the operation of firewalls between mechanisms of protection from abuse on the one hand and immigration control on the other,<sup>100</sup> to give a few examples. Moreover, investigative duties could be recast so as to require States to examine the wider systems and structures in which a violation occurred and thus to pursue systemic and structural measures towards securing non-recurrence. This would be vital, for example, in ensuring that States acknowledge and address issues such as institutional racism or cultures of brutality within law enforcement – thereby targeting the rotten orchard as well as the bad apples.

For the preventive and protective re-orientation to take hold, the assumptions built into the ECtHR’s coercive human rights doctrine must be challenged. There is an assumption built into the Court’s coercive human rights doctrine that criminal law (enforcement) is a ‘practical and effective’ tool of protection,<sup>101</sup> and to this should be added the assumption that other tools, those which are implicitly or explicitly excluded from the Court’s elaboration of positive obligations, are less ‘practical and effective’. It is not clear that this is the case. The case for systematically examining the (opportunity) costs of this diversion from alternative means of protection, and exploring the types of concrete alternatives that the Court has adopted and can

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<sup>94</sup> On thicker conceptions of transitional justice, see K McEvoy, ‘Beyond Legalism: Towards a Thicker Conception of Transitional Justice’ (2007) 34 *Journal of Law and Society* 411.

<sup>95</sup> Many of the contributions in Engle, Miller and Davis (n 47) consider the opportunity costs of anti-impunity in transitional justice. Miles Jackson considers the exclusion of particular transitional justice processes and settlements in a discussion on the permissibility of amnesties under ECtHR doctrine in M Jackson, ‘Amnesties in Strasbourg’ (2018) 38 *Oxford Journal of Legal Studies* 451.

<sup>96</sup> *Svinarenko and Slyadnev* (n 1) para 118.

<sup>97</sup> This has, to an extent, materialised in case law since *McCann* (n 55).

<sup>98</sup> See, on this, Report of the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ‘Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence’, UN Doc. A/74/148, para 73.

<sup>99</sup> *ibid*, paras 23 and 79.

<sup>100</sup> On the complex interplay between coercion and protection in the immigration context and the application of Article 4 ECHR, see Vladislava Stoyanova’s chapter in this volume.

<sup>101</sup> For a critical take on this, see Nina Persák’s chapter in this volume.

further adopt, is strong and indeed urgent, as examples of coercive and carceral tools failing persons in vulnerable situations abound.<sup>102</sup>

## VI. Conclusion

This chapter unpacks three key dangers inhering in the ECtHR's coercive human rights doctrine: coercive overreach, dilution, and diversion. It highlights the potential, within this doctrine, of both coercive overreach and dilution of the human rights standards at play. The danger of coercive overreach relates to the potentially excessive reach of the Court's demands of criminalisation and punishment, as well as to the institutional overreach of its assessments of criminal wrongfulness and liability. The danger of dilution emerges in the (potential) narrowing effect of conceptualising human rights violations through a criminal lens, as exemplified in the application of an 'honest belief' filter in the assessment of absolute necessity under Article 2. A danger of dilution also pertains to the prospect that the emphasis on criminal liability and punishment for violations of rights such as Articles 2 and 3 ECHR may shift the Court's current evidentiary standards in a criminal law direction that would offer States an undue benefit of the doubt.

This chapter also underlines the danger of diversion. This danger lies in the way the Court diagnoses and seeks to cure, and prospectively to curb, violations of fundamental human rights and their causes. A criminal law focus may offer an incomplete account of what has gone wrong, and how to fix it, diverting the Court from potentially more effective tools of protection. There is therefore a need to revisit the assumptions built into coercive human rights doctrine, and to examine the opportunity costs of the doctrine's coercive slant more closely.

At the heart of the warnings offered in this chapter is a preoccupation with *protection*, rather than coercion, and with upholding the Convention's integrity, so that it speaks with 'one voice'.<sup>103</sup> While the analysis in this chapter challenges the coercive 'sting' in the ECtHR's positive obligations doctrine, it by no means seeks to oppose an expansive approach to positive obligations. On the contrary, I hope that this chapter might serve as an invitation to *reimagine* positive obligations through a protective, rather than coercive, re-orientation.

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<sup>102</sup> See, for example, M Oppenheim, 'Police accused of 'systemic failure' to protect victims of domestic abuse and sexual violence', *The Independent*, 20 March 2019; M Bulman, 'Government under fire for "outrageous" treatment of modern slavery victims facing deportation from UK', *The Independent*, 11 June 2018. See Mattia Pinto's comments on this in his chapter in this volume.

<sup>103</sup> Dworkin (n 25) 213.