

Lethal Force, the Right to Life and the ECHR

Narratives of Death and Democracy

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Introduction: From Death to Democracy

On 6 March 1988 soldiers from a British military special forces unit were deployed to support the civil police in Gibraltar as part of an operation to apprehend a group of terrorists, who were thought to have planted a remote-controlled car bomb. When the suspects were located, the police called for military support to carry out the arrest. During the ensuing confrontation, the soldiers shot the suspects dead. Seven years later, and 45 years after the European Convention on Human Rights (ECHR) was signed, the incident resulted in the first judgment by the European Court of Human Rights (ECtHR) in a case about the right to life under Article 2 of the ECHR and the use of lethal force by a Member State of the Council of Europe.¹ This was the landmark ruling in *McCann and Others v The United Kingdom* (27 September 1995).

Article 2 establishes legal protection for the right to life, but that protection is not absolute, as the article makes allowances for the use of lethal force by the state in narrowly defined circumstances of absolute necessity. In *McCann*, the ECtHR faced the task of interpreting and applying this provision, not only for the first time but also in the context of a sensitive case involving one of the Council of Europe's founding members and its response to terrorism. In the introduction to the main legal analysis stage of the *McCann* judgment, the ECtHR began by declaring the importance of the right to life and the scope of the legal protection it can provide, stating that Article 2 'ranks as one of the most fundamental provisions in the Convention' and that (together with Article 3²) it 'enshrines one of the basic values of the democratic societies making up the Council of Europe'.³ The ECtHR also declared that 'in keeping with the importance of this provision

¹ The term 'lethal force' is used to mean force that results in death. Although the terms lethal, deadly and fatal are synonymous, albeit with different roots, the first of these is the predominant term in ECHR law and commentary and is used here for reasons of consistency. The term 'deadly force' appears to be favoured in US legal commentary, while the term 'fatal force' generally seems to be used less frequently. As indicated later in this chapter and discussed in Ch 4, Article 2 law also covers potentially lethal force.

² Article 3 ECHR covers the prohibition of torture, and of inhuman and degrading treatment or punishment. Although Article 2 and Article 3 are closely related, and both concern the control of state power and coercive force, this book only discusses Article 2.

³ *McCann and Others v United Kingdom* (27 September 1995) para 147, echoing on Article 3 *Soering v United Kingdom* (7 July 1989) para 88.

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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.⁴ That connection between Article 2 and democratic society was a foundational aspect of the ECtHR's analysis in *McCann* and has been repeated in all subsequent judgments on the right to life and the state's use of force. These have rapidly grown into an extensive body of case law, in which the ECtHR has enlarged Article 2's protective scope to include not only a use of lethal but also potentially lethal force by state agents, as well as the state's legal framework, its planning and control of operations and a duty to investigate deaths. Each of these aspects of the expanded interpretation of Article 2 sets criteria for assessing state compliance with the right to life, but the ECtHR has also interpreted Article 2 to allow a degree of flexibility for state action. As a result, despite the large number of judgments on Article 2 and the array of detail in decisions about what states can and cannot do when using force, the fundamental purpose of the right to life and of its conceptual connection with democratic society has not been evident in terms of core values or rigorous rationales. Rather, the law on the right to life seems to have become more a matter of deducing the technical consequences of proportionate compromise than a driving set of normative standards.

This book examines how the connections between the right to life and democratic society, as declared by the ECtHR, can be understood in Article 2 case law on uses of force in the context of situations like that in *McCann*, namely domestic policing and law enforcement operations involving civil and military agents of the state.⁵ This involves exploring why the right to life is said to be a fundamental provision in the ECHR and a basic value of the democratic societies in the Council of Europe, what the ECtHR means when it refers to 'democratic societies', and how the ECtHR uses the connection between the right to life and democratic societies when interpreting and applying Article 2. On that basis, the book considers what Article 2 and the case law on it can tell us about the nature of democratic society in relation to the deprivation and endangerment of life by the state, so as to identify fundamental values that can, it is hoped, be used to reinvigorate and strengthen the development of clear standards in this area of ECHR law.

The book addresses these issues through a combined theoretical and doctrinal analysis. Theoretically, the book draws on narrative theory to provide a

⁴ *McCann* para 150.

⁵ These terms are used to indicate internal crime prevention, public order, public assistance and security activities by civil police officers and members of military forces acting for the state, as discussed further in Part I.B below. In international law terms, most of these policing activities fall into the category of 'law enforcement': United Nations Code of Conduct for Law Enforcement Officials, adopted by UN General Assembly resolution 34/169 of 17 December 1979 and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. On the meanings of police (encompassing a range of state law-enforcement institutions) and policing (encompassing the broad range of their duties and activities) see Ralph Crawshaw, Barry Devlin and Tom Williamson, *Human Rights and Policing: Standards for Good Behaviour and a Strategy for Change* (The Hague, Kluwer Law International, 1998) 18 and Stuart Casey-Maslen and Sean Connolly, *Police Use of Force under International Law* (Cambridge, Cambridge University Press, 2017) 51–52.

conceptual framework for its discussion of Article 2 and related case law. Narrative theory focuses on the ways in which human activity and experience can be represented in an account that is intended to make sense of them by organising their interpretation around a structuring theme in order to convey a particular meaning. Discussed further in Chapter 2, theories of interpretation in ECHR law have addressed the ECtHR's analytical processes and the justification of its judgments in terms of fundamental principles and functional objectives, including democracy,⁶ and the concept of narrative itself has already received some attention in human rights scholarship.⁷ The aim here though is to complement and enhance these approaches to ECHR law by focusing in detail on a specific right and its interpretation and application by the ECtHR, developing and applying a method of analysis that goes further than those existing interpretive studies by adopting a broader, external and socially situated perspective on ECHR law that engages more closely with its construction and function as a form of narrative.⁸ This is undertaken in the context of what is perhaps the greatest challenge to legal reasoning in the human rights field, namely the deprivation of human life by the state in a democratic system.

The book bases its narrative analysis primarily on the work of Robert Cover and Paul Ricoeur. Cover's influential jurisprudential argument was that law needs to be understood in relation to the narratives that locate it in a particular context and value matrix and so give it meaning.⁹ This is used here to bring to light the ways in which ECtHR judgments on Article 2 involve narratives about core values and competing interests in terms of democratic society, including both the wider socio-political narratives to which those judgments are connected and the narratives that those judgments constitute. Ricoeur's hermeneutic theory of narrative as a human response to experience examined the layers of representation encompassed within fictional and historical narratives and how they support the production of meaning, as well as the shaping of identity.¹⁰ Ricoeur's work is referred to here in

⁶ Such as Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge, Cambridge University Press, 2006) and George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford, Oxford University Press, 2007), considered in Ch 2. Other commentary has to some extent identified the presence of teleological themes or leitmotifs in the ECHR and related case law, such as Jens Meyer-Ladewig, 'The Rule of Law in the Case Law of the Strasbourg Court' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The European Union After Lisbon: Constitutional Basis, Economic Order and External Action* (Berlin, Springer, 2012) 235 and 248.

⁷ Note especially Günter Frankenberg, *Comparative Law as Critique* (Cheltenham, Edward Elgar, 2016).

⁸ Note the argument for a culturally aware, 'socially situated' and critical approach to jurisprudence in JM Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 *Yale Law Journal* 105, 108–110, 134 and the distinction between external (social theory-oriented) and internal (law-centric) analyses of law and legal interpretation in Ronald Dworkin, *Law's Empire* (London, Fontana, 1986) 12–13.

⁹ Robert M Cover, 'Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4.

¹⁰ Paul Ricoeur (Kathleen McLaughlin and David Pellauer, trans), *Time and Narrative, Volume 1* (Chicago, University of Chicago Press, 1984), first published as *Temps et Récit* (Paris, Editions du Seuil, 1983).

order to deepen engagement with the explicit and implicit narrative components of ECtHR judgments, as well as their processes of configuration and communication of meaning, by using his primarily philosophical theory to develop a fresh (extra-legal) reflective perspective on the ECtHR's decision-making processes. The book is inspired by elements of both theories, which it draws on in tandem to guide the discussion, rather than adhering strictly to the terms of each or seeking to bend ECHR law into either theorist's specific theoretical framework. The main aims here are rather to explore the narrative dimensions of judgments on the right to life and state uses of lethal or potentially lethal force, and the overall significance of Article 2 law, in order to focus on the deeper values and meanings that can be derived from those judgments, and their significance for human rights law and democracy in contemporary Europe.

This turn to narrative theory is not intended to trivialise ECHR law by appearing to suggest that it is a mere linguistic fabrication or literary construction, abstracted to a remote conceptual dimension, and so the book's theoretical reflection is rooted in an in-depth doctrinal analysis of Article 2 and state uses of lethal and potentially lethal force. As ECHR law constitutes the highest human rights system in Europe that responds to and influences concrete experience and practice, it reflects and shapes a reality beyond the text,¹¹ mediated through the interpretation and judgment of the ECtHR. The book therefore critically discusses the scope of Article 2, including its political, philosophical, historical and legal origins, its connections with other provisions of international law, and its application by the ECtHR. Through an extensive analysis of case law, the book examines how the ECtHR's narratives have supported its extended interpretation of Article 2 to include substantive and procedural dimensions, which have been constructed around the inherent tension in that provision between protecting the right to life and allowing state action in the interests of society, as well as the ECHR requirements of effectiveness, proportionality and respect for subsidiarity. This analysis shows the importance of the ECtHR's connection between Article 2 and democratic society in developing strong protection for the right to life, whilst making practical – and not unproblematic – provision for state conduct in the policing and law enforcement context.

Overall, the book argues that the connections among lethal force, the right to life and democratic society that are identified through its combined theoretical and doctrinal analysis of ECtHR decisions on Article 2 can and should be understood to form the core of this branch of ECHR law.¹² This core encompasses the

¹¹ 'Human rights are a living force' for Christian Tomuschat, 'Democracy and the Rule of Law' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford, Oxford University Press, 2013) 469.

¹² Note also the brief outline of some doctrinal aspects of this discussion in Stephen Skinner, 'The Core of *McCann*: Lethal Force and Democracy under the European Convention on Human Rights' in Lawrence Early, Anna Austin, Clare Ovey and Olga Chernishova (eds), *The Right to Life under Article 2 of the European Convention on Human Rights: Twenty Years of Legal Developments since *McCann v The United Kingdom** (Oisterwijk, Wolf Legal Publishers, 2016) 67–73.

objectives of fostering control of the state, seeking to prevent arbitrary killing, ensuring accountability under the rule of law, and supporting essential qualitative dimensions of state conduct in relation to state agents' behaviour and the intangible implications of state practices. Addressing Article 2 law's experiential bases in the loss of life and serious harm, the book shows how this body of law reflects and expresses democratic society's (self-)defining distinction between acceptable force and unacceptable violence, and how Article 2 law's core objectives can be used to articulate its underlying ethos, in terms of democratic society's distinguishing attributes. Through a cumulative and inductive reading of the case law in narrative terms, the book argues that Article 2 law can ground a normative understanding of democratic society as a system that should be restrained, responsible and reflective. These attributes, it is suggested, can support the establishment of essential guiding principles in this area of ECHR law, to offset the emphasis on pragmatic compromise with a greater clarity of standards. The book thus analyses the role of the right to life in the relationship between death and democracy in the context of state law enforcement, and provides a new critical perspective on the content and contribution of Article 2 law through the lens of its narrative dimensions. To introduce this analysis, Part I of this chapter offers a preliminary outline of the main issues arising under Article 2 and the scope of the discussion, and Part II provides an overview of how the book is developed, chapter by chapter.

I. The Right to Life, Policing and State Power

Although Article 2 ECHR protects the right to life, in its textual formulation it appears to be predominantly about the state's power to kill. The origins, application and significance of Article 2 are explored in depth in Chapters 3–6, but some key introductory points are necessary here to orient the discussion. This section sets out the scope of Article 2 in terms of deprivation of life by the state, the range of cases examined, and the importance of these matters in broader conceptual terms of state power and society.

A. The Right to Life in the ECHR in Outline

The right to life is the most fundamental right. It reflects belief in the paramount value of human life and its protection is the precondition for all other rights. As formulated in Article 2, it is the first substantive right established in the ECHR and, under Article 15, no derogations from it are permitted in peacetime.¹³

¹³ Article 15 ECHR on Derogation in Time of Emergency states: '1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the

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Textually the same today as it was when finalised in 1949, Article 2 ECHR has two parts:

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(1) declares that the right to life must be protected by law. This aspect locks the right into the ECHR's fundamental focus and dependence on the rule of law. The wording of Article 2(1) also contains an allowance for the death penalty, which originally reflected ongoing support for capital punishment in the post-war era when it came into force. Under that provision, the only permitted circumstance in which an intentional deprivation of life by the state could be permitted was as a punishment following a criminal trial resulting in the application of a lawful penalty. Article 2(2) establishes that a deprivation of life will not breach the right to life if it is due to an absolutely necessary use of force in a limited range of narrowly defined circumstances. The terms of Article 2 thus involve both protection of the right to life and provision for killing, through capital punishment and law enforcement operations.

By the time of the *McCann* judgment the scope of Article 2(1) had evolved but the meaning of Article 2 was still unclear in the context of lethal force. With regard to Article 2(1), by 1995 most states in the Council of Europe had committed themselves under ECHR Protocol 6 to abolishing the death penalty, although states could still make provision for it in time of war.¹⁴ Consequently, at that stage for most states Article 2(2) indicated the only permissible grounds on which state agents could take life in peacetime. However, despite a number of Commission decisions, the effect of Article 2(2) on state powers to resort to lethal force had yet to be tested before the ECtHR, so the right to life was still an open question in this context in terms of its actual meaning and impact. This is why the judgment was so important.

situation, provided that such measures are not inconsistent with its other obligations under international law; 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision; 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

¹⁴ Protocol 6 (1983) has been in force since 1985. At the time of writing Russia is the only member to have signed but not ratified it, although it has a moratorium on use of the death penalty.

In *McCann* and the extensive body of case law on the right to life and state uses of force that has been developed subsequently, the ECtHR has refined the meaning of Article 2's terms and expanded its scope beyond its original wording, to include serious life-threatening but non-lethal force, the planning and control of operations and a duty to investigate incidents engaging state responsibility under this provision. Also, since 1995 the importance of these judgments has been further emphasised by an implicit revision of Article 2(1). This is due to the abolition of the death penalty in all circumstances by the majority of Council of Europe members under Protocol 13.¹⁵ Reading that Protocol together with Article 2's non-derogable status in time of peace, the ECtHR has held in its case law on Article 3 (on the prohibition of inhuman and degrading treatment and punishment) that Article 2(1) has in effect been amended so as to entail a total prohibition of the death penalty and an absolute injunction to protect the right to life by law.¹⁶ Given that the deprivation of life as a penalty following a judicial process is no longer allowed in the Council of Europe, Article 2(2) therefore now covers the only ways in which deprivation and grave endangerment of life may be permissible following action by a Member State, not in circumstances involving a court process, trial or conviction, but in the context of state agents' conduct (including actions and reactions) in the largely unpredictable and circumstantially contingent field of law enforcement activities.

Furthermore, it is important to note that the development of Article 2 law has taken place since 1995 in a shifting political landscape in the Council of Europe. In the early years of the ECHR the signatory states (High Contracting Parties) were fewer in number and generally similar in terms of the quality of their democracy and internal conditions, even though they included both established democracies and countries that had previously been dictatorships. As membership of the Council of Europe has increased, especially since the admission of former Communist states in the early 1990s, the increasingly wide range of internal conditions in High Contracting Parties has brought significant challenges. Article 2 law has thus been developed in response to uses of force in very different policing and security contexts. These have included generally pacific states with long-standing democracies, newer democracies with varying degrees of stability, and states with more contestable political credentials at the Eastern and South-Eastern fringes of the Council of Europe as well as large-scale internal problems of political turmoil and insurrection. Consequently, the ECtHR has had to develop a body of European human rights law in the name of democratic society and the rule of law for radically diverse national systems and conditions. Applying Article 2 in

¹⁵ Protocol 13 (2002) has been in force since 2003. At the time of writing Russia and Azerbaijan have not signed Protocol 13; Armenia has signed but not ratified it.

¹⁶ See *Al-Saadoon and Mufidhi v United Kingdom* (2010) para 120 and Bernadette Rainey, Elizabeth Wicks and Clare Ovey (eds), *Jacobs, White & Ovey: The European Convention on Human Rights* (Oxford, Oxford University Press, 2017) 151. In the EU context, this prohibition is echoed in Article 2.2 of the Charter of Fundamental Rights of the European Union (2012/C 326/02).

these divergent circumstances means that the ECtHR has to decide whether or not democratic (and in some cases what might diplomatically be called ‘less than democratic’) states have taken life or endangered it in a way that is compatible with ECHR standards that are supposed to support democracy. For these legal and contextual reasons, therefore, the ECtHR’s development of its interpretation and application of Article 2 in relation to state uses of force, and in terms of the narrative theme of a connection between the right to life and the concept of democratic society, demands close attention.

B. Domestic Policing and Law Enforcement Operations under Article 2 ECHR

In December 1993 a disturbed young man and his girlfriend, whom he had been holding hostage in their flat, were shot dead in Paphos by a police special operations team armed with automatic weapons. In an attempt to end the siege, the officers burst into the flat and opened fire in the belief that the man was about to use a weapon against them or his captive.¹⁷ In September 1995, police in Athens tried to stop a man who had driven his car through a security road block, resulting in a chaotic chase during which firearms were discharged, injuring him and endangering his life.¹⁸ In July 1996 in Londonderry during a ‘major disturbance’, involving clashes between protesters and the police, an armoured personnel carrier was used to clear barricades, crushing a man who fell underneath it.¹⁹ In March 2000 in Thessalonica, a police officer inadvertently discharged his weapon during an arrest, killing the young man he was trying to restrain.²⁰ In July 2001 in Genoa a police officer fired his gun to warn off a group of people attacking the vehicle in which he was sheltering, but the bullet apparently ricocheted and killed one of them.²¹ In July 2005 in London, police officers acting in the belief that they were dealing with a terrorist suicide bomber shot a man dead in a case of mistaken identity.²² In each of these incidents, as in the *McCann* case, state agents involved in domestic policing and law enforcement activities in a European country killed a person, or seriously endangered life. The examples highlight the challenges of policing in circumstances of differing degrees of difficulty, including the strains of facing armed crime and terrorism, especially the acute fear and danger of a suspected suicide bomber. As such they illustrate the conflicting interests at stake in this sort of case – those of the victim, the state agent and wider society – and the range of complex incidents to which the ECtHR has to apply Article 2.

¹⁷ *Andronicou and Constantinou v Cyprus* (1998).

¹⁸ *Makaratzis v Greece* (2004).

¹⁹ *McShane v United Kingdom* (2002).

²⁰ *Leonidis v Greece* (2009).

²¹ *Giuliani and Gaggio v Italy* (2011).

²² *Armani da Silva v United Kingdom* (2016).

The cases addressed here can be further specified as follows. In terms of the period covered, the book discusses several ECtHR judgments from September 1995 to December 2017 on Article 2 and uses of force in domestic law enforcement operations, focusing on Grand Chamber rulings and taking into account numerous other decisions, but does not purport to engage with every case on these issues.²³ All of the cases involve operations within a High Contracting Party to the ECHR, carried out primarily by officers of the civil or military police,²⁴ or by soldiers, in order to prevent or suppress a crime, stop or arrest a suspect, protect themselves or others, maintain public order, or tackle an apparent threat to security.²⁵ In other words, the focus is on cases involving uses of force in the state's exercise of its domestic policing functions. While some cases involving military force are considered in the discussion, judgments relating to large-scale military interventions and counter-insurgency operations in Turkey and Russia are not addressed.²⁶

As noted above and as subsequent chapters explore in more detail, the cases discussed include both lethal force and life-threatening force, which ECHR law addresses under the same set of Article 2 standards, so even though the principal focus is on the deprivation of life, some examples include near-fatal injury, or a use of force that otherwise caused a risk of death. The cases involve persons killed, harmed or endangered – the victim in human rights law terms – in various ways, including persons correctly identified as a threat, persons against whom force is used by mistake (involving mistaken identity or misapprehension of circumstances), and persons unexpectedly affected by a use of force (such as bystanders or other third parties). These cases also encompass planned operations and spontaneous incidents, and almost all of them involve a range of unexpected elements at different stages, affecting both the use of force and its outcomes.

In addition to these cases involving a use of lethal or potentially lethal force by a state agent in the policing context, other Article 2 decisions on positive obligations and investigations relevant to that context have been included.²⁷ However,

²³ See the table of cases and explanatory note about references. Some pre-1995 Commission decisions are also referred to.

²⁴ In English the term 'military police' often refers to the internal police body of a branch of the armed forces. Here though it is used to mean the military or paramilitary 'third forces' common in continental Europe, including the French *gendarmérie* and Italian *carabinieri*, which are part of the army.

²⁵ See n 5 above and note also Paul Tavernier, 'Le recours à la force par la police' in Christian Tomuschat, Evelyne Lagrange, and Stefan Oeter (eds), *The Right to Life* (Leiden, Martinus Nijhoff Publishers, 2010) 41, 43–52 and Casey-Maslen and Connolly, *Police Use of Force under International Law* 51–52, 81.

²⁶ For discussion of these cases and contexts see Hannah Russell, *The Use of Force and Article 2 of the ECHR in Light of European Conflicts* (Oxford, Hart, 2017) and Onder Bakircioglu and Brice Dickson, 'The European Convention in Conflicted Societies: The Experience of Northern Ireland and Turkey' (2017) 66 *International and Comparative Law Quarterly* 263.

²⁷ These other cases are discussed in Chs 4 and 5. Cases that have not been included here concern the responsibilities of state agents in relation to fatal road traffic accidents, such as *Voiculescu c Roumanie* (2019) involving a military driver or *Zavoloka c Lettonie* (2009) and *Dâmbean c Roumanie* (2013)

the study excludes cases involving disappearances and deaths following uses of force in custody (or in other forms of state care and control, such as psychiatric hospitals). The issue of disappearances is not included because it is – fortunately – not a general feature of policing and law enforcement activities across the Council of Europe and raises distinct issues that require separate treatment. Similarly, whereas deaths in custody are a significant and all too frequent occurrence across Europe, the legal and theoretical dimensions of cases involving deaths in the care of the state in the context of democratic society are also deemed to require a separate study.²⁸ Although an analysis of the use of force, human rights and narratives of democratic society in Europe would ideally cover all of these matters, this book has a more specific focus.

Lastly, while this book concentrates on one specific area of ECHR law and is contextually and conceptually focused on European systems within the Council of Europe, it is important to note that Article 2 law has wider international connections and relevance. This is partly because of the global influence of ECHR law, which as the most successful and developed system of human rights law is referred to internationally, including by the UN Human Rights Committee and the Inter-American Court of Human Rights.²⁹ Moreover, as noted in Chapters 3–5, the ECtHR itself draws on international law, including other international provisions on the right to life, such as the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights, United Nations provisions on the use of force in law enforcement and the prevention and investigation of extra-legal executions,³⁰ and occasionally key decisions of other international courts. ECtHR judgments are also drawn on at the national level outside Europe, with a notable recent example occurring in South Africa, where the report on the 2012 Marikana mine incident³¹ relied on aspects of the law developed under Article 2 ECHR.³² Consequently, the use of force, ECHR law on the

involving accident investigations by the police. Other cases excluded relate to police investigations of deaths caused by third parties, such as *Velcea et Mazăre c Roumanie* (2009), about the investigation of an off-duty police officer's presence during a homicide, and *Abdullah Yilmaz c Turquie* (2008), about army officers' responsibilities for a conscript who committed suicide during military service.

²⁸ On disappearances and deaths in custody see Rainey, Wicks and Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* 158–161.

²⁹ See Tavernier, 'Le recours à la force par la police' 61–63.

³⁰ United Nations Code of Conduct for Law Enforcement Officials, United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 24 May 1989 by Economic and Social Council Resolution 1989/65. Note also Tavernier, 'Le recours à la force par la police' 47–48, 55–56.

³¹ IG Farlam, PD Hemraj and BR Tokota, *Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the Northwest Province* (Pretoria, 31 March 2015). Note Casey-Maslen and Connolly, *Police Use of Force under International Law* 396–398.

³² The report was the result of an investigation into the events of August 2012 at the Lonmin platinum mine in Marikana where during industrial action the police opened fire and killed around 44 striking miners and injured around 70 others. In its discussion of the relevant law, the report refers to the

right to life and the question of democratic society in the European context as discussed here are interconnected with similar issues arising around the world.³³ In more general theoretical terms, these commonalities in discussions of the right to life and the use of lethal force are due to a shared concern with deprivation of life through the state's exercise of its monopoly of force and the extent to which it is, and can remain, lawful and legitimate.

C. Lethal and Potentially Lethal Force, Policing and State Power

At the risk of stating the obvious, it is essential not to lose sight of the fact that by definition, the use of lethal force by a state agent against another human being results in death, the negation of human life. As such it is the most serious and irreparable action a state can take, for which there can be no adequate or effective remedy.³⁴ Even when a state agent uses potentially lethal force, it can result in severe life-changing injury, or at least a risk of death even if no physical harm is caused. The right to life and its protection thus involve situations in which the deployment of state power risks not merely interfering with an individual's enjoyment of a right but ending her or his very existence. In addition, it is important to recall that causing a death or near-deadly harm or danger can result in severe emotional and psychological harm to others, including relatives, witnesses and bystanders, possibly also the state agents themselves, and in some cases the wider public. Very simply therefore, the impact and effect of this specific exercise of state power are what make it, and the law and legal processes relating to it, so problematic and so significant.

In addition to its impact, the state's use of lethal and potentially lethal force in exercising domestic policing and law enforcement powers involves a defining feature of the state itself, which Max Weber famously expressed as its monopoly of

decision of the Transkei High Court in the case of *Ntamo and Others v Minister of Safety and Security* (2001 (1) SA 830 (Tk HC); *Marikana Commission of Inquiry*, paras 5.7–5.19) in which it was held that in determining the proportionality of police lethal force in relation to the right to life under the South African Constitution, the principles established by the ECtHR provided 'informative and useful' guidance (2001 (1) SA 830 paras 36–38; *Marikana Commission of Inquiry*, para 5.10). This was based on the 1996 South African Constitution, s 39(1), which states that when interpreting the Bill of Rights, a court must consider international law and may consider foreign law, and s 233 states that when interpreting legislation, a court must prefer any reasonable interpretation consistent with international law: note John Dugard, 'International Law and the South African Constitution' (1997) *European Journal of International Law* 77, 84–85. The High Court in *Ntamo* referred to the planning and control responsibility of state authorities as established in *McCann* and confirmed in *Andronicou and Constantinou*, applying it to the case in hand and so adopting it as part of South African law, which was then relied on by the Commission in the Marikana report (*Marikana Commission of Inquiry*, para 5.19).

³³ Other examples are noted in the discussion in Ch 7.

³⁴ See also Stuart Casey-Maslen, 'The Use of Firearms in Law Enforcement' in Stuart Casey-Maslen (ed), *Weapons Under International Human Rights Law* (Cambridge, Cambridge University Press, 2014) 3.

the legitimate use of force.³⁵ The exercise of that monopoly is inherently related to the value system that underpins the social, political and legal order.³⁶ Policing and law enforcement powers lie at the centre of liberal-democratic social contract assumptions, involving the supposed formation of political community to protect liberty and order by ceding protection thereof to the state within limits.³⁷ In that sense a key theoretical basis of modern democratic societies is that civilised social order requires the individual right to use force – except for self-defence or the defence of others in extremis³⁸ – to be replaced by the state's monopoly, which in Weber's interpretation would be legitimate if based in legality, that is, reliance on law. The state's monopoly over the use of force will only be legitimate in a broader socio-political sense though if perceived to be exercised for good reasons, in accordance with the rule of law and not arbitrarily.³⁹ The legitimacy of state uses of force in the democratic context therefore depend, in theory, on both law and a correlation between state practice and socio-political expectations of good government. Yet it has to be noted that, as Mark Neocleous has argued, social order is not universally or naturally civilised and pacific and can be seen to be largely dependent on the state's police power to guarantee the conditions in which some sort of a social contract can even exist.⁴⁰

In the democratic context, given both the theoretical role of the state as a means for protecting the socio-political community it structures, and arguably

³⁵ Max Weber, 'Politics as a Vocation' in HH Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (London, Routledge, 1991) 77, 78. Note also PAJ Waddington, *Policing Citizens: Authority and Rights* (London, UCL Press, 1999) 30; Maurice Punch, *Shoot to Kill: Police Accountability, Firearms and Fatal Force* (Bristol, The Policy Press, 2011) 2–3 and Casey-Maslen and Connolly, *Police Use of Force under International Law* 4–5.

³⁶ Note also the introductory discussion in Maurice Punch, Ralph Crawshaw and Geoffrey Markham, 'Democratic Principles and Police Fatal Force: Avoidance of Debate, Unresolved Accountability and Human Rights' (2016) 46 *International Journal of Law, Crime and Justice* 2, 2–4. On the state as a reflection of values see Kenneth Dyson, *The State Tradition in Western Europe: A Study of an Idea and Institution* (Martin Robertson, Oxford, 1980) 206. For a comparative historical perspective on these questions note also Stephen Skinner, 'Criminal Law and the Use of Force: Ideology and State Power in Fascist Italy and England in the Interwar Period' in Stephen Skinner (ed), *Ideology and Criminal Law: Fascist, National Socialist and Authoritarian Regimes* (Oxford, Hart, forthcoming) Ch 14.

³⁷ More concretely, for a brief historical outline of aspects of modern policing see Casey-Maslen and Connolly, *Police Use of Force under International Law* 10–50.

³⁸ As well as, in some systems such as England and Wales, the entitlement to use reasonable force in the prevention of crime.

³⁹ For a critical reflection on Weber's interpretation in this regard see Anthony E Bottoms and Justice Tankebe, 'Police Legitimacy and the Authority of the State' in Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds), *Criminal Law and the Authority of the State* (Oxford, Hart, 2017) 47.

⁴⁰ Mark Neocleous, *War Power, Police Power* (Edinburgh, Edinburgh University Press, 2014) 127–32, 136–37. Compare Norbert Elias, who suggested in more general terms that the impetus of societies towards centralised states with monopolies of internal force engendered a civilizing process and a reduction in violence: *The Civilizing Process: Volume 2 – State Formation and Civilization* (Oxford, Basil Blackwell, 1982) 235–39. Experience shows though that civilization and an absence of violence are not coterminous, even in democracies: John Scott and Gordon Marshall, *The Oxford Dictionary of Sociology* (Oxford, Oxford University Press, 2009) 209; Samy Cohen, 'Introduction: Dilemmas in the War against Terrorism' in Samy Cohen (ed), *Democracies at War against Terrorism: A Comparative Perspective* (Basingstoke, Palgrave Macmillan, 2008) 1, 3–5.

implicit (although not absolute) ideological connections among democracy, consensual government, equality before the law and the goal of (predominantly) peaceful co-existence within society,⁴¹ the use of force in policing illustrates inherent tensions. According to Egon Bittner in his influential study of the police (albeit from an American perspective), that institution is ‘a corps of specially deputized officials endowed with the exclusive monopoly of using force contingently’.⁴² In that sense, as highlighted by other studies of police and policing, the agent charged with exercising that monopoly on behalf of the state is given discretionary powers to compel and coerce compliance, or to act to eliminate a threat. That is, the agent is empowered to use force in ways that would otherwise generally be forbidden for ordinary members of society,⁴³ subject to the law and his or her individual judgement, with a consequent impact on the scope of others’ rights and freedoms,⁴⁴ or even their existence. The state agent’s ability to use force thus highlights the power of the state and the imbalance between it and those against whom it is deployed. Consequently, the state’s monopoly of force can ultimately override other apparent values in the democratic context. This leads to a problematic question, as asked by Bittner: ‘How can we arrive at a favourable or even accepting judgement about an activity which is, in its very conception, opposed to the ethos of the polity that authorizes it?’, and ‘... on what terms can a society dedicated to peace institutionalize the exercise of force?’⁴⁵ Although it would be more accurate to refer to ‘a society supposedly and in principle dedicated to peace’, and cultures of policing vary across the societies that make up the Council of Europe, the fundamental issue raised by Bittner goes to the heart of the democratic social contract and the challenge of managing the conceptual and practical tension between the idea of democracy as an association of right-bearers, and the need for organised force in the hands of the state.

⁴¹ Much discussion of the link between democracy and peace is focused on external relations and war: see for example Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (Cambridge, Cambridge University Press, 2011) 60–61; James Crawford, ‘Democracy and International Law’ (1993) 64 *British Yearbook of International Law* 113; and Todd Landman, *Human Rights and Democracy: The Precarious Triumph of Ideals* (London, Bloomsbury, 2013) 136–37.

⁴² Egon Bittner, *The Functions of the Police in Modern Society – A Review of Background Factors, Current Practices, and Possible Role Models* (New York, Jason Aronson, 1975) 46. Bittner’s approach has though been challenged: for example, Jean-Paul Brodeur, ‘Police et coercion’ (1994) 35 *Revue française de sociologie* 457.

⁴³ For example, PAJ Waddington, ‘Public Order Policing: Citizenship and Moral Ambiguity’ in Frank Leishman, Barry Loveday and Stephen P Savage (eds), *Core Issues in Policing* (London, Longman, 1996) 114.

⁴⁴ Waddington, *Policing Citizens* 20–30; Quirine Eijkman, ‘A Socio-Legal Perspective on Human Rights and Policing’ (2007) 25.1 *Netherlands Quarterly of Human Rights* 5; Trevor Jones, Tim Newburn and David J Smith, *Democracy and Policing* (London, Policy Studies Institute, 1994) 1; Crawshaw, Devlin and Williamson, *Human Rights and Policing*, 35–36.

⁴⁵ Bittner, *The Functions of the Police in Modern Society*, 46–47. As addressed in F Jobard, ‘Comprendre l’Habilitation à l’Usage de la Force Policière’ (2001) 25.3 *Déviance et Société* 325, the dilemma identified by Bittner may be lessened to the extent that the use of force is only a potential attribute of policing.

In that light, a further key point here involves the role of law in circumscribing state power and supporting the legitimacy of its deployment. As discussed in Chapters 3 and 6, the rule of law in the democratic context is the principal mechanism for grounding, limiting and legitimating the exercise of state power. Human rights norms under the ECHR and their application are a vital part of that mechanism. As a legal expression of fundamental values, and a trans-national framework for holding the state to account for conduct interfering with those values to the detriment of individuals, ECHR law is a crucial element and expression of the hypothetical social contract, and the rule of law over arbitrary power. Combining legal permissibility with evaluation of the correspondence between state conduct and socio-political values, human rights law addresses elements of both legality and legitimacy, which are essential to democracy. This is nowhere more important than in the state's use of lethal or potentially lethal force in policing and law enforcement activities, which in the absence of robust accountability mechanisms can raise concerns about covert execution and the abuse of power.⁴⁶

At the same time, human rights law and its effect on legality and legitimacy can affect the operational capacity of state agents in democratic societies.⁴⁷ The application of human rights law to state policing and law enforcement operations may confirm, expand and curtail the parameters for the use of force, thus shaping the state's capability to prepare for, respond to and manage situations in which force may be needed.⁴⁸ Human rights – specifically Article 2 ECHR – are therefore a fundamental determinant of the state's domestic policing powers and its ability to perform some of its core functions.⁴⁹ In short, this area of human rights law has numerous implications in the democratic context, involving questions of life and death, the legitimacy and limits of state power, and the nature of society's politico-legal values and priorities.

II. Outline by Chapter

As the first substantive chapter, Chapter 2 lays the foundations for the rest of the book by establishing its approach to narrative analysis and showing why this is relevant in the study of human rights law. The chapter introduces the concept of narrative by outlining how it has been discussed in historiographical and legal theory, including semiotic and interdisciplinary approaches to law. It then turns

⁴⁶ For example, this point is highlighted in a reflection on the *McCann* case in 'The Observer Files – This week in 1988', *The Observer*, 11 March 2018, 60.

⁴⁷ Note also Punch, Crawshaw and Markham, 'Democratic Principles and Police Fatal Force' 2–4.

⁴⁸ Compare Peter Squires and Peter Kennison, *Shooting to Kill? Policing, Firearms and Armed Response* (Chichester, Wiley-Blackwell, 2010) 193–94.

⁴⁹ Juliet Chevalier-Watts, 'A Rock and a Hard Place: Has the European Court of Human Rights Permitted Discrepancies to Evolve in their Scrutiny of Right to Life Cases?' (2010) 14.2 *The International Journal of Human Rights* 300.

to the book's two main theoretical points of reference, which as noted above are the jurisprudential work of Robert Cover on how law needs to be understood in relation to wider networks of meaning, and the hermeneutic theory of Paul Ricoeur on the narrative structure of fiction and historiography. In its second part, Chapter 2 underlines the relevance of narrative analysis to human rights law by considering the layers of meaning that are embodied in human rights norms; the reasoning, adjudication and accountability processes through which rights are interpreted and applied; and the framework of principles and requirements in ECHR law, which are used to indicate how legal narrative plays a distinct role in its development.

Turning to the specifics of the book's subject matter, Chapter 3 discusses the ECtHR's foundational statement in *McCann* about the right to life as a fundamental provision of the ECHR and an expression of a basic value of the democratic societies making up the Council of Europe. Chapter 3's first part discusses key elements of the genesis of the right to life in the ECHR, focusing on the significance of the idea of a right to life and of legal protection for rights in relation to state power, and the development of the ECHR as a foundational instrument in post-war European democracy building. In its second part Chapter 3 addresses the concept of democratic society as the narrative theme in Article 2 case law, arguing that it has three overlapping meanings: a partially descriptive and legitimating representation of democracy and democratic standards in Europe, an interpretive principle in ECHR law involving proportionate balance in determining the scope of human rights, and a normative concept for developing the meaning of rights.

On that basis, Chapters 4–5 demonstrate how through the interpretation and application of Article 2, narratively configured in terms of democratic society, the ECtHR has produced a set of substantive and procedural standards for the state's resort to lethal and potentially lethal force that reflect the inherent tension in the right to life. Chapter 4 focuses on the substantive dimensions of Article 2 and examines how the ECtHR has relied on that right's nexus with democratic society both to refine and extend its scope, and to allow a significant degree of flexibility in its application. Chapter 5 continues this analysis by examining how and why the ECtHR has extended the meaning of Article 2 to include a procedural dimension, namely a duty to investigate deaths. The chapter explores the components of this duty, again underlining how the nexus with democratic society serves both to support standards for state accountability, whilst allowing flexibility in the democratic context.

Chapter 6 reflects on the degree of apparent flexibility in the substantive and procedural dimensions of Article 2 law discussed in Chapters 4–5, and on that basis turns to look more closely at the deeper purposes and values that can be identified in the ECtHR's case law on the right to life in relation to democratic society. The chapter focuses on two sets of issues: the importance of the rule of law and the qualitative aspects of democracy. The first encompasses core concerns with controls over state power under the rule of law and the prevention of arbitrariness

that underpin leading Article 2 judgments, and the second includes the ECtHR's concerns with the behavioural preconditions for rights protection, issues of public confidence, and values of humanity and sensitivity in right to life cases.

Chapter 7 discusses how the principal points from the analysis in Chapters 2–6 can be combined to form an overarching interpretation of the ECtHR's narratives of the relationship between the right to life and democratic society in the context of state uses of force. The chapter considers the significance of the physical and emotional impact of state uses of force in relation to the possibility of meaning-making through law, and the function of human rights law in distinguishing between acceptable and unacceptable force by constructing a justificatory narrative that seeks to confirm democracy's self-understanding. The chapter then argues that taken together, the Article 2 narratives indicate the essential attributes of democratic societies, as systems that must be restrained, responsible and reflective. These attributes, it is suggested, can usefully ground a sense of Article 2 law's fundamental ethos and strengthen the purposive thrust of protecting the right to life by law.

Chapter 8, the Conclusion, outlines the key contributions of the book's dual theoretical and doctrinal analysis, reflects on its potentially wider relevance with regard to other aspects of Article 2 and ECHR law, and points to some areas of discussion that are touched on in the book but which need further exploration. The Conclusion ends by noting the current period of uncertainty in Europe, including major challenges to democratic society and its core values, including adherence to the foundational nature of universal human rights that have been at the heart of the post-war goals to achieve and maintain peace and justice. In this volatile context, reflecting on the narrative function of human rights law, the protection of the right to life by law, and what both of them reveal about democratic identity has never been more relevant or urgent.