

From Prevention to Facilitation? Suicide in the Jurisprudence of the ECtHR in the Light of the Recent *Haas v. Switzerland* Judgment

Daniel Rietiker*

INTRODUCTION

To talk about suicide is not an easy task, even in a modern and open society. It is even more difficult for a judge to deal with this issue. More difficult still is the task of deciding such a case on an international level, far from the realities of the facts and the suffering of the people concerned.¹ The moral and ethical considerations may vary considerably from one country to another. The judge may face a broad range of situations, from cases where she must decide whether the authorities did enough to prevent a fragile person from committing suicide, to cases where she must decide whether the authorities were entitled, or even obliged, to facilitate the suicide of a person willing to die. The aim of this Article is to explain the dilemma the European Court of Human Rights (“the Court”) has faced when it has been confronted with situations involving a risk or act of suicide, and to show how the Court has dealt with these cases.

* Ph.D. (University of Lausanne, Switzerland), M.A. (Graduate Institute of International Relations, Geneva) and Member of the International Institute of Human Rights, Strasbourg. The author works as a senior lawyer at the European Court of Human Rights and the views expressed in this Article are the author’s own and do not necessarily reflect the views of the Court. The basis of the present article was a paper delivered at the conference *European Perspectives Towards Euthanasia and Assisted Suicide*, organized by the European Law Students’ Association Sarajevo, held in Sarajevo, Bosnia and Herzegovina, on March 11–13, 2011. The author expresses his gratitude to the conference organizers, particularly to Asja Borić, for inviting and receiving him so kindly and generously. He also wishes to thank James Brannan for his assistance in preparing this Article.

1. In principle, the Court tries to respect local particularities, traditions, and values of the State Party concerned. For example, in the case of *Chapman v. United Kingdom*, App. No. 27238/95 (Eur. Ct. H.R. Jan. 18, 2001), available at <http://www.echr.coe.int/ECHR/EN/hudoc>, the Roma applicant alleged that state refusal to grant planning permission for her family’s caravan violated Article 8’s right to respect for home, privacy, and family life. *Id.* at para. 3. In this case, the Court stated: “[A] margin of appreciation must, inevitably, be left to the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions. This margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions.” *Id.* at para. 91.

This dilemma is caused by the competing interests and rights at stake as embodied by the European Convention on Human Rights (“ECHR” or “the Convention”).² On the one hand, there is the fundamental right to life embodied in Article 2 of the ECHR that State authorities must protect, particularly in cases where an individual is in a situation of vulnerability. The Court considers this duty to be a positive obligation on States.³ On the other hand, a person might face a situation of extreme distress and prefer to put an end to her days rather than continue a life that she may consider undignified. Therefore, the question arises whether the State must protect the right to life of a person who does not want to live any longer. In other words, under the Convention, do people have not only a right to life, but also a right to die? If so, can such people seek assistance to end their lives?⁴ The Court examined this second question in *Pretty v. the United Kingdom*⁵ in light of Article 3’s right to life and prohibition of inhumane and degrading treatment, as well as the right to respect for private life under Article 8.

The recent case of *Haas v. Switzerland*⁶ added a third dimension to this discussion by raising the question of whether States have a “positive” obligation to facilitate suicide under certain circumstances. *Haas* differed significantly from the *Pretty* case, which the Court examined in light of a classical “negative” obligation of State authorities to abstain from interference in a guaranteed right, more precisely by waiving prosecution of an individual who assists a person in committing suicide.⁷

I will examine the development in the Court’s jurisprudence with particular regard to the different nature of the States’ obligations. I will also give special attention to the procedural aspects of the protected rights, as well as the right to an effective remedy within the meaning of Article 13, without which the substantive guarantees would remain empty words. This Article will demonstrate that the Court imposes a procedural obligation upon the State to investigate deaths that may raise an Article 2 issue.⁸

2. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, E.T.S. 5 (entered into force Sep. 3, 1953) [hereinafter European Convention on Human Rights].

3. See Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (Council of Europe, Human Rights Handbooks Ser. No. 7, 2007).

4. Douwe Korff, *The Right to Life: A Guide to the Implementation of Article 2 of the European Convention on Human Rights* 15–22 (Council of Europe, Human Rights Handbooks Ser. No. 8, 2006).

5. App. No. 2346/02, 35 Eur. H.R. Rep. 1 (2002).

6. *Haas v. Switzerland*, App. No. 31322/07 (Eur. Ct. H.R. Jan. 20, 2011), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

7. Other aspects relating to suicide have not yet been put to the Court. For instance, the Court has not resolved the question of whether it is acceptable to “provide palliative care to a terminally ill or dying person, even if the treatment may . . . contribute to the shortening of the patient’s life[.] And should the patient be consulted on this?” Nor has the Court decided whether the State can “allow the ending of life in order to end suffering, even if the person concerned cannot express his or her wishes in this respect” (so-called “mercy killing”). Korff, *supra* note 4, at 15.

8. DAVID HARRIS, MICHAEL O’BOYLE & COLIN WARBRICK, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 48–52 (2d ed. 2009).

Part I of this Article will provide background to the Convention system and the interpretive approach taken by the Court. Second, this study will examine the underlying principles and evolving jurisprudence in the domain of the Contracting Parties' obligations to prevent vulnerable persons from committing suicide, particularly under Articles 2 and 3 of the ECHR. Part II will show that the State Parties' duty to prevent vulnerable persons from committing suicide extends to numerous situations, including situations in which persons are deprived of their liberty or are conscripted to a compulsory army duty. Furthermore, in Part III, I will discuss whether, under certain circumstances, State Parties are obligated to abstain from punishing persons who assist individuals in committing suicide in light of *Pretty* and *Sanlés Sanlés v. Spain*. Part IV will analyze the *Haas* case to examine whether State Parties are obliged to facilitate suicide in certain circumstances. Finally, Section V will present overall conclusions, noting that although the Court's jurisprudence has developed some clear rules, there remain several unanswered questions related to the circumstances and conditions under which the Court would be willing to enforce a potential "right to die."

I. BRIEF INTRODUCTION TO THE ECHR SYSTEM AND RELEVANT PROVISIONS

A. *Background*

The ECHR opened for signature in Rome on November 4, 1950,⁹ and came into force on September 3, 1953.¹⁰ The Convention was drafted within the Council of Europe as part of the efforts to unify Europe in the post-war era.¹¹ The Convention was both a reaction to the grave human rights abuses committed during World War II,¹² as well as a tool to stem the tide of communism that had spread into Eastern Europe from the Soviet Union.¹³ After the fall of the Berlin Wall in 1989 and the subsequent break up of the Socialist Federal Republic of Yugoslavia, the number of Con-

9. *Id.* at 1; see also ROBIN C.A. WHITE & CLARE OVEY, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 4 (5th ed., 2010).

10. HARRIS ET AL., *supra* note 8, at 2.

11. *Id.* at 1.

12. *Id.*

13. *Id.* The Preamble of the Convention reads, *inter alia*, as follows:

[C]onsidering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of human rights and fundamental freedoms; Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend

European Convention on Human Rights, *supra* note 2.

tracting Parties to the Convention increased greatly.¹⁴ As of 2012, forty-seven States have ratified the Convention.¹⁵ As a result of this increase in contracting parties, the Convention system has become a victim of its own success, in the sense that the Court currently faces more than 152,000 pending applications.¹⁶

B. *The Convention Provisions Relevant to the Present Study*

Article 2, which sets forth the right to life,¹⁷ is a fundamental cornerstone of the Convention system and enshrines one of the core values of the democratic societies that make up the Council of Europe.¹⁸ Moreover, the right to life is considered the most basic human right of all: if one could be arbitrarily deprived of one's right to life, all other rights would become illusory.¹⁹ The fundamental nature of this right is also clear from the fact

14. HARRIS ET AL., *supra* note 8, at 2.

15. The States that have ratified the Convention include Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia (FYRM), Turkey, Ukraine, and the United Kingdom. *Id.*

16. As of August 31, 2011, 152,800 applications were pending in the Court. *Pending Applications Allocated to a Judicial Formation*, EUR. CT. HUM. RTS. (Nov. 30, 2011), http://www.echr.coe.int/NR/rdonlyres/4EF85F45-8C41-4E44-A948-A51B72CFA5DA/0/Affaires_pendantes_graphique.pdf. In response to this steadily growing number of applications, various Protocols have amended the Convention's enforcement machinery. HARRIS ET AL., *supra* note 8, at 2. The most recent Convention Protocols are the Eleventh Protocol and the Fourteenth Protocol. Protocol No. 11 to The Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, *opened for signature* May 11, 1994, E.T.S. 115 (entered into force Nov. 1, 1998) [hereinafter Protocol No. 11 to European Convention on Human Rights]; Protocol No. 14 to The Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, *opened for signature* May 13, 2004, E.T.S. 194 (entered into force June 1, 2010).

17. HARRIS ET AL., *supra* note 8, at 37.

18. *See, e.g.,* McCann v. United Kingdom, App. No. 18984/91, 21 Eur. H.R. Rep. 97, para. 147 (1995) (citing Soering v. United Kingdom, App. No. 14038/88, 11 Eur. H.R. Rep. 439, para. 88 (1987)).

19. Article 2 reads as follows:

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.

European Convention on Human Rights, *supra* note 2, art. 2. The second sentence of Article 2(1) concerns the death penalty, *id.* art. 2(1), which today is prohibited by Protocol No. 6 in times of peace, Protocol No. 6 to European Convention on Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *opened for signature* Apr. 28, 1983, E.T.S. 114 (entered into force Mar. 1, 1985), and Protocol No. 13 in all circumstances, Protocol No. 13 to European Convention on Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in all Circumstances, *opened for signature* May 3, 2002, E.T.S. 187 (entered into force July 1, 2003). For the status of State Party ratification, see the website of the Council of Europe, www.coe.int.

that it is “non-derogable”:²⁰ it may not be denied even in a “time of war or other public emergency threatening the life of the nation.”²¹ Article 2 places upon States both a negative obligation not to take life and a positive obligation to protect the right to life.²² Article 2 also imposes a procedural obligation upon States to investigate deaths, whether they occur at the hands of State agents,²³ private persons,²⁴ or persons unknown.²⁵ This obligation extends beyond violent deaths to all cases of death other than deaths from natural causes.²⁶ The State’s investigation must be adequate or capable of leading to a determination as to the cause and circumstances of the death, as to whether any use of force was justified under Article 2, and as to the “identification and punishment of those responsible.”²⁷

Article 3 protects the right not to be subjected to torture or other forms of ill-treatment and represents an absolute guarantee.²⁸ Like Article 2, it cannot be derogated from in times of war or other public emergencies.²⁹ Article 3, unlike most Convention articles, is expressed in unqualified terms,³⁰ meaning that ill-treatment within the terms of Article 3 is never permitted, even for the most compelling reasons of public interest.³¹ On this basis, it has been held that the need to fight terrorism³² or organized crime³³ cannot justify State conduct that would otherwise be in breach of Article 3.³⁴ Nor does it permit the return of an individual to another State’s territory on national security grounds where the return would involve a real

20. HARRIS ET AL., *supra* note 8, at 37.

21. European Convention on Human Rights, *supra* note 2, art. 15(1). Section 2 of this provision states however that “deaths resulting from lawful acts of war” do not constitute violations of the right to life. *Id.* art. 15(2).

22. HARRIS ET AL., *supra* note 8, at 37.

23. *McCann v. United Kingdom*, App. No. 18984/91, 21 Eur. H.R. Rep. 97 (1995).

24. *Menson v. United Kingdom*, App. No. 47916/99 (Eur. Ct. H.R. May 6, 2003), *available at* <http://www.echr.coe.int/ECHR/EN/hudoc>.

25. *Kaya v. Turkey*, App. No. 4451/02 (Eur. Ct. H.R. Oct. 24, 2006), *available at* <http://www.echr.coe.int/ECHR/EN/hudoc>; *Toğcu v. Turkey*, App. No. 27601/95 (Eur. Ct. H.R. Aug. 31, 2005), *available at* <http://www.echr.coe.int/ECHR/EN/hudoc>; *Yaşa v. Turkey*, App. No. 24495/93, 28 Eur. H.R. Rep. 408 (1998).

26. HARRIS ET AL., *supra* note 8, at 48 (citing *Calvelli v. Italy*, App. No. 32967/96 (Eur. Ct. H.R. Jan. 17, 2002), *available at* <http://www.echr.coe.int/ECHR/EN/hudoc> (concerning medical negligence)).

27. *Nachova v. Bulgaria*, App. Nos. 43577/98 & 43579/98, para. 113 (Eur. Ct. H.R. July 6, 2005), *available at* <http://www.echr.coe.int/ECHR/EN/hudoc>.

28. European Convention on Human Rights, *supra* note 2, art. 3.

29. Article 15(2) of the Convention reads as follows: “No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Article 3, 4 (paragraph 1) and 7 shall be made under this provision.” *Id.* art. 15(2).

30. Article 3 reads as follows: “No one shall be subject to torture or to inhuman or degrading treatment or punishment.” *Id.* art. 3. Article 3 is one of the shortest provisions in the ECHR and its protocols. See Aisling Reidy, *The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights* 8 (Council of Europe, Human Rights Handbooks Ser. No. 6, 2002).

31. HARRIS ET AL., *supra* note 8, at 69.

32. *Tomasi v. France*, App. No. 12850/87, 15 Eur. H.R. Rep. 1 (1992).

33. *Selmouni v. France*, App. No. 25803/94, 29 Eur. H.R. Rep. 403 (1999).

34. HARRIS ET AL., *supra* note 8, at 69.

risk of ill-treatment contrary to Article 3 in the receiving State.³⁵ In a similar fashion to Article 2, Article 3 also requires States to take measures to ensure that individuals within their jurisdiction are not subjected to torture or inhumane and degrading treatment or punishment; this State obligation extends to treatment administered by private individuals.³⁶

Article 8 places upon States the obligation to respect a wide range of personal interests,³⁷ including private life, family life, home, and correspondence.³⁸ In applying Article 8, the Court has taken a flexible approach to define the interests protected, continuously broadening the scope of this provision, which currently includes, *inter alia*, search and seizure, secret surveillance, immigration law, paternity and identity rights, child and family law, assisted reproduction, prisoners' rights, inheritance, tenants' rights, and environmental protection.³⁹ In contrast with Articles 2 and 3, the rights protected under Article 8 are subject to limitations, including limitations which are "in accordance with the law," "prescribed by law," or are "necessary in a democratic society" for the protection of one of the interests enumerated in the Article.⁴⁰

Finally, Article 13 obliges the States to provide for effective national remedies for the breach of a Convention right.⁴¹ The remedy must be effective "in practice as well as in law;"⁴² effectiveness encompasses a remedy that can prevent the alleged violation or its continuation, or one which can provide "adequate redress for any violation that has already occurred."⁴³

35. *Chahal v. the United Kingdom*, App No. 22414/93, 23 Eur. H.R. Rep. 413 (1996).

36. *See, e.g., A. v. United Kingdom*, App. No. 25599/94, 27 Eur. H.R. Rep. 611 (1998) (the child applicant had been ceded by his stepfather); *Z. v. United Kingdom*, App. No. 29392/95, 34 Eur. H.R. Rep. 3 (2002) (four child applicants were severely abused and neglected by their parents).

37. Article 8 of the Convention reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention on Human Rights, *supra* note 2, art. 8.

38. *HARRIS ET AL.*, *supra* note 8, at 361.

39. *Id.*

40. European Convention on Human Rights, *supra* note 2, art. 8(2); *see also HARRIS ET AL.*, *supra* note 8, at 344; European Convention on Human Rights, *supra* note 2, art. 9 (similar limitations to freedom of thought, conscience, and religion); *id.* art. 10 (similar limitations to freedom of expression); *id.* art. 11 (similar limitations to freedom of assembly and association).

41. Article 13 of the Convention states that: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." *Id.* art. 13.

42. *Kudła v. Poland*, App. No. 30210/96, para. 157 (Eur. Ct. H.R. Oct. 26, 2000), *available at* <http://www.echr.coe.int/ECHR/EN/hudoc>.

43. *Id.* at paras. 157-58.

C. The Four Cornerstones of the Convention System

The Convention's enforcement mechanisms are strong compared to most other international human rights treaties. Four cornerstones make the ECHR system uniquely efficient:

(1) Individual right of petition: Under Article 34, all parties accept the right of "any person, non-governmental organization or group of individuals" claiming to be a victim of a breach of the Convention, regardless of nationality, to bring an application against the breaching party.⁴⁴ In other words, every citizen of the forty-seven Member States can lodge a complaint in the Court alleging that their human rights were infringed upon.⁴⁵

(2) Interim measures: Applications before the Court do not have suspensive effect. As a result, the Court usually does not issue injunctions to restrain States from enforcing particular measures.⁴⁶ However, in exceptional circumstances where the life of the petitioner may be at stake, the Court may exercise its injunctive power by issuing interim measures.⁴⁷ Most of the cases where interim measures are requested concern expulsion or extradition from a Contracting State.⁴⁸ Interestingly, interim measures are now considered binding on Contracting Parties and State failure to abide by them may lead to a violation of Article 34 *in fine*.⁴⁹

(3) Binding nature of the rights guaranteed by the Convention and the judgments rendered by the Court: By virtue of Article 1, "the High Contracting Parties shall secure to everybody within their jurisdiction the rights and freedoms" protected under this instrument.⁵⁰ Therefore, domestic courts and all public authorities of State Parties must apply the Conven-

44. This right was made compulsory by the Eleventh Protocol as of 1998. Protocol No. 11 to European Convention on Human Rights, *supra* note 16. Prior to the Eleventh Protocol, the Convention was only applicable against those State Parties that had expressly accepted this right. European Convention on Human Rights, *supra* note 2, art. 13. Under Article 33 of the Convention, any party may bring an application alleging a breach by another party that has ratified the Convention, providing the legal basis for rare inter-State cases. *Id.* art. 33.

45. See HARRIS ET AL., *supra* note 8, at 4.

46. *Id.* at 842.

47. Rule 39 of the Rules of Court form the legal basis for such interim measures:

1. The Chamber or, where appropriate, its President may, at the request of a part or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interest of the parties or of the proper conduct of the proceedings before it. 2. Notice of these measures shall be given to the Committee of Ministers. 3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.

Council of Europe, European Court of Human Rights, Rules of Court, Rule 39 (Feb. 1, 2012), *available at* http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT_EN_2012.pdf.

48. Mamatkulov v. Turkey, App. Nos. 46827/99 & 46951/99, para. 104 (Eur. Ct. H.R. Feb. 4, 2005), *available at* <http://www.echr.coe.int/ECHR/EN/hudoc>.

49. *Id.* at para. 111; *see also* Olaechea Cahuas v. Spain, App. No. 24668/03 (Eur. Ct. H.R. Dec. 11, 2006), *available at* <http://www.echr.coe.int/ECHR/EN/hudoc>.

50. European Convention on Human Rights, *supra* note 2, art. 1.

tion's provisions.⁵¹ Individuals may directly invoke the protected rights before domestic courts.⁵² Moreover, Article 19 created a new permanent European Court of Human Rights composed of full-time judges.⁵³ The Court decides whether to exercise jurisdiction and admit an application,⁵⁴ and, if an application is admitted, the Court produces a judgment on Convention violations or lack thereof.⁵⁵ There is no doubt as to the legally binding nature of these judgments, as under Article 46(1) the Contracting Parties "undertake to abide by the final judgment of the Court in any case to which they are parties." Furthermore, in accordance with Section 2 of Article 46, the Committee of Ministers supervises the execution of the Court's judgments. In other words, not only is the Convention legally binding, but States must comply with the Court's judgments and their execution is subject to further control and supervision by another international organ.⁵⁶

(4) The Court's special approach to interpretation: As discussed in the next section, the Court maintains a teleological approach to interpretation.

51. Reidy, *supra* note 30, at 5.

52. *Id.*

53. HARRIS ET AL., *supra* note 8, at 4. According to Article 20, the Court consists of a number of judges that equal to the number of Contracting Parties. European Convention on Human Rights, *supra* note 2, art. 20. Article 21 defines the criteria for judicial office and reads as follows: "The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be juristsconsults of recognized competence. 2. The judges shall sit on the Court in their individual capacity. . . ." *Id.* art. 21. In accordance with Article 22, the judges are elected by the Parliamentary Assembly of the Council of Europe from a list of three candidates nominated by the Contracting Parties. *Id.* art. 22. By virtue of Article 23(1), judges are elected for nine years. *Id.* art. 23. In accordance with Article 23(2), terms of office expire when judges reach the age of seventy. *Id.*

54. *Id.* art. 39. Article 39 allows a friendly settlement and reads as follows:

1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto. 2. Proceedings conducted under paragraph 1 shall be confidential. 3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached. 4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

Id.

55. HARRIS ET AL., *supra* note 8, at 4–5.

56. As a general rule, the Court does not have the power to examine whether a judgment is executed in accordance with the Convention. *But see* Verein gegen Tierfabriken Schweiz v. Switzerland (No. 2), App. No. 32772/02, paras. 46–68 (Eur. Ct. H.R. June 30, 2009), available at <http://www.echr.coe.int/ECHR/EN/hudoc> (exercising jurisdiction in special circumstances when measures taken to remedy a violation raise a new issue undecided by the judgment).

D. The Court's Teleological Approach to Interpretation: Effectiveness of Rights Guaranteed

1. *Applicable Law: the ECHR as an International Treaty*

The Court's interpretation of the ECHR—an international treaty in the sense of Article 2(1)(a) of the 1969 Vienna Convention of the Law of Treaties (“VCLT”)⁵⁷—follows the logic of Article 31 of the VCLT. The Article lays down the general rule of treaty interpretation,⁵⁸ according to which a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁵⁹ Legal scholars generally agree that Article 31(1) of the VCLT is the starting point of treaty interpretation and constitutes a sound compromise between the three perception-related methods normally adopted: the objective method based on the text, the subjective method based on the intention of the drafters of the treaty, and the teleological method in accordance with the object and purpose of the treaty.⁶⁰

While the general methods of treaty interpretation found in the VCLT are fully applicable to the ECHR, the flexible formulation of Article 31(1) of the VCLT allows the Court to strike a balance between the three different methods that accounts for the nature of the treaty.⁶¹ One may nevertheless endeavor to identify some characteristics that make the ECHR a “particular” treaty such that the Court would choose to favor a teleological interpretive methodology.⁶²

2. *The Particular Nature of the ECHR*

First, the particular structure of the Convention is noteworthy, as it imposes so-called “*integral*” or “*absolute*” obligations upon State Parties. According to the second Special Rapporteur on the law of treaties, Sir Gerald Fitzmaurice, these obligations are of such a nature that their performance is altogether independent of the performance by other State Parties.⁶³ As a result of this law-making aspect of the Convention, the ECHR is often said

57. Vienna Convention of the Law of Treaties, art. 2(1), May 23, 1969, 1155 U.N.T.S. 331 (“[A] ‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”).

58. Daniel Rietiker, *The Principle of “Effectiveness” in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty Sui Generis*, 79 NORDIC J. INT’L L. 245, 247–52 (2010).

59. There is no doubt that this definition, customary in nature, applies without any restriction to the ECHR. *Id.* at 247.

60. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 70–71, 114–19 (2d ed. 1984); see also Mustafa K. Yasseen, *L’interprétation des traités d’après la Convention de Vienne sur le droit des traités*, 151 RECUIL DES COURS ACADÉMIE DE DROIT INTERNATIONAL 3, 16 (1976).

61. Rietiker, *supra* note 58, at 253.

62. *Id.* at 254.

63. G. Fitzmaurice, *Second Report on the Law of Treaties*, in 2 Y.B. INT’L LAW COMM’N 16, paras. 124–26, U.N. Doc. A/CN.4/107 (1957).

to be part of the *ordre public* of Europe.⁶⁴ A second feature of note is the institutional framework of the Convention system, as discussed above, that provides for a permanent judicial body that is authorized to render legally binding judgments pursuant to Article 46 of the ECHR.⁶⁵ Third, the guarantees flowing from the ECHR are often formulated in general terms and are secured in the interest of the international community as a whole, entailing that the protections have an *erga omnes* effect.⁶⁶ Finally, one should not undervalue the fact that because this is a regional system with well-defined geographic borders, it may have stronger solidarity among its member states than exists within a universal system.⁶⁷

The Court has understood the special nature of the ECHR as justifying a teleological approach to interpretation.⁶⁸ As early as 1968, concerning a complaint under Article 5(3), the Court held that “[g]iven that the [ECHR] is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.”⁶⁹

The “object and purpose of a treaty” constitutes the key concept for this interpretive methodology.⁷⁰ The flexibility of the “object and purpose” formula has allowed the Court to develop its own methods of interpretation that can be regarded as sub-forms, or partial aspects, of the teleological interpretation.⁷¹

64. *Id.*

65. *Id.*

66. *Id.* For a definition of *erga omnes*, see the following passage in *Barcelona Traction, Light & Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 3, para. 33 (Feb. 5, 1970):

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

67. See Study Grp. of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 102–15, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martii Koskeniemi); see also *European Convention on Human Rights*, *supra* note 2, preamble (“Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration. . .”).

68. Rietiker, *supra* note 58, at 255.

69. *Wemhoff v. Germany*, App. No. 2122/64, at 23 (Eur. Ct. H.R. June 27, 1968), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

70. Rietiker, *supra* note 58, at 255.

71. *Id.*

3. *Specific Methods of Interpretation Developed by the Court*

First, the principle adopted to interpret the ECHR must ensure that the Convention rights and freedoms are applied in ways that are of “practical and effective” use to complainants.⁷² This “principle of effectiveness”⁷³ dates back to the early case of *Marckx v. Belgium*.⁷⁴ Underpinning this approach is the notion that simply prohibiting conduct that violates the Convention might not be enough for a State to be in full compliance with the ECHR. Rather, States may be compelled to take specific actions to protect rights or ensure that individuals can take advantage of their Convention rights.⁷⁵ The *Marckx* case ultimately established the notion of “effectiveness” as a foundation for the subsequent development of many different positive obligations under the Convention.⁷⁶

A second method of interpretation taken by the Court is the “dynamic” or “evolutive” approach, which enables the Court to address the problem of time in treaty interpretation.⁷⁷ The problem may be stated thus, that the drafters of the European Convention in the late 1940s would not have been able to envision all the situations in which the Convention would be applied, and, more specifically, that they would not have been able to do so in light of the “inevitable evolution of societies and their changing values and ideologies.”⁷⁸ The dynamic or evolutive approach to treaty interpretation has been described by the former President of the Court, Judge Wildhaber, as “one of the best known principles of Strasbourg case-law.”⁷⁹

In accordance with the evolutive approach, the Court must measure whether there is a relevant development to be taken into account since the adoption of the Convention and determine what contemporary conditions

72. This formula was used by the Court for the first time in *Artico v. Italy*, App. No. 6694/74, para. 33 (Eur. Ct. H.R. May 13, 1980), available at <http://www.echr.coe.int/ECHR/EN/hudoc>. *Artico* concerned the question of legal assistance in criminal proceedings. The Court found a violation of Article 6(3)(c) which states: “Everyone charged with a criminal offence has the following minimum rights: . . . c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.” European Convention on Human Rights, *supra* note 2, art. 6(3)(c).

73. Rietiker, *supra* note 58, at 256 (referring to the “principle of effectiveness in its narrow sense”).

74. See *Marckx v. Belgium*, App. No. 6833/74, para. 31 (Eur. Ct. H.R. June 13, 1979), available at <http://www.echr.coe.int/ECHR/EN/hudoc>. In this case, the applicants, an unmarried mother and her child born out of wedlock, complained of a civil code provision on the manner of establishing the maternal affiliation of an “illegitimate” child and on the effects of establishing such affiliation with regard to both the extent of the child’s family relationship and the patrimonial rights of the child and of his mother. *Id.* at para. 13. The Court held that the State had violated Articles 8 and 14 of the Convention, and Article 1 of Protocol No. 1 (right to property). *Id.* at para. 31.

75. Rietiker, *supra* note 58, at 257.

76. *Id.*

77. *Id.* at 261.

78. *Id.*

79. Luzius Wildhaber, *The European Court of Human Rights in Action*, 83 RITSUMEIKAN L. REV. 83, 84 (2004).

necessitate. As the Court described in *Scoppola v. Italy*,⁸⁰ judges rely to a large extent on the question of whether there is a common approach of the Member States of the Council of Europe towards a certain problem or phenomenon.⁸¹ If there is an evolving consensus among member States—an unlikely situation in practice—the margin of appreciation normally granted to the States will be greatly reduced and the Court could easily decide a case by reference to the dynamic character of the Convention in response to State practice.⁸² The Court may take into account the fact that a certain rule exists only in the respondent State but not elsewhere, but this is not a decisive factor in the Court’s analysis.⁸³ On the contrary, if no consensus exists, the State Party has a broader margin of appreciation.⁸⁴ For instance, the Court has acknowledged a larger margin of appreciation with regard to issues of morality⁸⁵ or political participation,⁸⁶ and when the specific circumstances of each individual case dictate varying solutions.⁸⁷

Finally, it is a well-established principle that the “Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions.”⁸⁸ In *Verein gegen Tierfabriken Schweiz v. Switzerland (No. 2)*, the Court held that Switzerland had failed to comply with its obligation to take the necessary measures to allow a television commercial to be broadcast,⁸⁹ after its censorship had

80. App. No. 10249/03, para. 104 (Eur. Ct. H.R. Sept. 17, 2009), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

81. Rietiker, *supra* note 58, at 264.

82. *Id.*

83. *See, e.g.*, *Glor v. Switzerland*, App. No. 13444/04 (Eur. Ct. H.R. Apr. 30, 2009), available at <http://www.echr.coe.int/ECHR/EN/hudoc>. In *Glor*, the applicant successfully claimed that he had been treated in a discriminatory manner when he was declared unfit for military service due to his diabetes, but was not exempted from paying the military-service exemption tax. In its judgment, the Court noted in the section relating to the margin of appreciation that this kind of tax did not exist in any other member States of the Council of Europe. *Id.* at para. 83.

84. *See, e.g.*, *Cossey v. United Kingdom*, App. No. 10843/84, 13 Eur. H.R. Rep. 622, para. 40 (1990) (holding that standards of recognition of the new sexual identity of post-operative transsexuals were still being developed with “little common ground between the Contracting States, an area in which they enjoy a wide margin of appreciation”).

85. *See, e.g.*, *Handyside v. United Kingdom*, App. No. 5493/72, para. 48 (Eur. Ct. H.R. Dec. 7, 1976), available at <http://www.echr.coe.int/ECHR/EN/hudoc>; *see also* *Müller v. Switzerland*, App. No. 10737/84, 13 Eur. H.R. Rep. 212, para. 35 (1988).

86. The Court has held that Article 3 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms requires a particularly broad margin of appreciation for States. Rietiker, *supra* note 58, at 265 n.102; *see, e.g.*, *Yumak v. Turkey*, App. No. 10226/03, 48 Eur. H.R. Rep. 4, para. 109(ii) (“The rights enshrined in Article 3 of Protocol No. 1 are not absolute. There is room for ‘implied limitations’, and contracting states must be given a wide margin of appreciation in this sphere.”).

87. *See, e.g.*, *Adamsons v. Latvia*, App. No. 3669/03, para. 122 (Eur. Ct. H.R. June 24, 2008), available at <http://echr.coe.int/her/en/hudoc>.

88. Rietiker, *supra* note 58, at 267 n.115 (citing *Stec v. United Kingdom*, App. Nos. 65731/01 & 65900/01, para. 48 (Eur. Ct. H.R. Apr. 12, 2006), available at <http://www.echr.coe.int/ECHR/EN/hudoc>; *Klass v. Germany*, App. No. 5029/71, 2 Eur. H.R. Rep. 214, para. 68 (1978) (“The Convention is to be read as a whole and therefore, as the Commission indicated in its report, any interpretation of Article 13. . . must be in harmony with the logic of the Convention.”)).

89. *Verein gegen Tierfabriken Schweiz*, App. No. 32772/02, at para. 98.

been found to be in violation of Article 10 in 2001.⁹⁰ Thus, the Court found a fresh violation of the right to freedom of expression. Concerning the systemic interpretation of the Convention, the Court held that, “[i]n the context of the present case, the examination of whether there has been a fresh violation of Article 10 must take into account the importance in the Convention system of effective execution of the Court’s judgments in accordance with Article 46 of the Convention.”⁹¹

II. THE OBLIGATION TO PREVENT VULNERABLE PERSONS FROM COMMITTING SUICIDE (ARTICLES 2 AND 3)

In the *Haas* case, the Court was asked to balance the right of the applicant to determine the time and manner in which he ends his life, a right that he invoked under Article 8, the right to respect of private life, and Article 2, the right to life.⁹² It is crucial to reiterate that the obligation contained in the latter provision does not only impose a duty on the authorities of the Contracting States to abstain from actions that might cause the death of individuals, but also requires, in some circumstances, that States take “appropriate steps” to protect life in the sense of preventive measures.⁹³

This Part will trace the most important developments of the Court’s jurisprudence concerning positive obligations to protect life. First, this section explains the general principles developed by the Court relating to these obligations in situations where the threat to life originates from an objective danger or from a third person. The Court has subsequently applied these general principles to situations where the individual caused the threat to her own life. This group of cases concerns persons who died by their own hands, but who were vulnerable and not in a position where they could sensibly choose to die. The question arises whether a State must take appropriate steps to protect life in these circumstances, and, if such a duty exists, under what broader circumstances must it be fulfilled. This question first arose in cases in which the individual was placed in custody of the State, either as a prisoner or as a patient,⁹⁴ but was later expanded in a rather broad fashion to other situations, such as compulsory army duty.⁹⁵

90. *Id.*

91. *Id.* at para. 83.

92. See *infra* Part IV.A.2.

93. See *supra* Part I.B.

94. Korff, *supra* note 4, at 73.

95. See *infra* Part II.B.2.b.

A. *The Obligation to Take Positive Action to Protect Life: The General Principles Developed by the Court*

In *LCB v. United Kingdom*, the Court first confronted the question of whether national authorities had breached their duty to protect life by failing to take necessary positive measures.⁹⁶ In this case, the applicant claimed that her leukemia had been caused by her father's exposure to radiation from nuclear tests before she was born, while he was serving in the British armed forces.⁹⁷ Although the Court rejected the applicant's claim under Article 2, it accepted that Article 2 does impose an obligation upon the State to do "all that could have been required of it to prevent the applicant's life being avoidably put at risk."⁹⁸

The preventive obligation deriving from this case can be seen to provide the basis for several Strasbourg rulings in other situations in which an individual's life is put at risk. For instance, "the *LCB* obligation applies more commonly to the situation where an individual's life is threatened by the criminal acts of another person."⁹⁹

The case of *Osman v. United Kingdom*¹⁰⁰ concerned the shooting death of a father by a schoolteacher who had become obsessed with the man's son, a former pupil. The son was also injured in the shooting.¹⁰¹ The issue raised was whether the authorities could and should have done more to protect the victims from harm; the boy and his mother claimed that the police had received information that clearly demonstrated the potential danger the teacher posed, and that the police had failed to protect the family in light of this information.¹⁰² The Grand Chamber of the Court held that, in certain well-defined circumstances, the State is under a positive obligation "to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."¹⁰³ It was nevertheless the Court's opinion "that such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities."¹⁰⁴ Accordingly, not every claimed risk to life was considered by the Grand Chamber to require State authorities to take operational measures to prevent that risk from materializing.¹⁰⁵

96. *LCB v. United Kingdom*, App. No. 23413/94, 27 Eur. H.R. Rep. 212 (1998).

97. *Id.* at paras. 13, 36.

98. The Court opined that the information available to the authorities at the time of the nuclear tests allowed the authorities to be reasonably confident that the applicant's father had not been exposed to radiation and, in any event, the information available would not have led the authorities to believe that such exposure would cause a real risk to applicant's health. *Id.* at paras. 36–41.

99. HARRIS ET AL., *supra* note 8, at 43.

100. App. No. 23452/94, 29 Eur. H.R. Rep. 245 (1998).

101. HARRIS ET AL., *supra* note 8, at 43.

102. *Osman*, 29 Eur. H.R. Rep. 245 at para. 103.

103. *Id.* at para. 115.

104. *Id.* at para. 116.

105. *Id.* In this case, the Court found that the applicants had failed to show that the authorities knew or ought to have known that the lives of the Osman family were in real and immediate risk, or

The *LCB* and *Osman* cases concern the substantive element of the obligation in Article 2(1) to take “appropriate steps” to protect life.¹⁰⁶ The following subsection traces the Court’s application and extension of the *LCB* and *Osman* rules in its suicide jurisprudence. The procedural duty imposed by Article 2, whereby States must undertake independent investigations into an individual’s death, plays a particularly important role in cases where a person is deprived of liberty and thus much more vulnerable. As will be detailed below, in certain cases relating to the Court’s suicide jurisprudence even the procedural requirements of this provision were questioned.

B. The Application by the Court of the Obligation to Take Positive Measures to Situations of Suicide

1. *The Leading Case: Keenan v. United Kingdom*

In the 2001 case of *Keenan v. United Kingdom*,¹⁰⁷ the *Osman* obligation to take preventative operational measures to protect life was extended to cases of suicide in which State officials knew or should have known that a detainee posed a “real and immediate risk” of suicide.¹⁰⁸

The applicant Susan Keenan, a British national,¹⁰⁹ was the mother of Mark Keenan, who died in Exeter Prison, at the age of twenty-eight from asphyxia caused by self-suspension.¹¹⁰ Mark Keenan had received intermittent antipsychotic medication from the age of twenty-one, and his medical history included aggression, violence, deliberate self-harm, and symptoms of paranoia.¹¹¹ On May 15, 1993, two prison officers discovered Mark hanging from the bars of his cell by a ligature made from a bed sheet; he was

had enough evidence to either charge the perpetrator or have him committed to a psychiatric hospital. There was thus no violation of Article 2. *Id.* at paras. 128–29. However, the Court found a violation of Article 6 due to the lack of the possibility of civil action against the police, who were protected by “blanket immunity.” *Id.* at paras. 152–54.

106. *Öneryıldız v. Turkey*, App. No. 48939/99, para. 71 (Eur. Ct. H.R. Nov. 30, 2004), available at <http://www.echr.coe.int/ECHR/EN/hudoc>; *LCB v. United Kingdom*, App. No. 23413/94, 27 Eur. H.R. Rep. 212, para. 36 (1998). In the former case, “the applicants submitted that the national authorities were responsible for the deaths of their close relatives and for the destruction of their property as a result of a methane explosion on 28 April 1993 at the municipal rubbish tip in Ümraniye (Istanbul).” *Öneryıldız*, App. No. 48939/99 at para. 2. The Grand Chamber unanimously held that the State had violated Article 2 of the Convention in its substantive aspect due to the lack of appropriate steps taken to prevent the accidental death of nine of the applicant’s relatives. *Id.* at paras. 109–10. The Court also concluded that there had been a procedural violation of this provision due to the lack of adequate protection by law safeguarding the right to life. *Id.* at para. 118.

107. App. No. 27229/95 (Eur. Ct. H.R. Apr. 3, 2001), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

108. See *Tanribilir v. Turkey*, App. No. 21422/93 (Eur. Ct. H.R. Nov. 16, 2001), available at <http://www.echr.coe.int/ECHR/EN/hudoc> (finding neither a violation of Article 2 nor a violation of Article 3).

109. *Keenan*, App. No. 27229/95 at para. 1.

110. *Id.* at para. 8.

111. *Id.* at paras. 10–11.

pronounced dead half an hour later.¹¹² The applicant alleged that her son's suicide resulted from the prison authorities' failure to protect his life and that the conditions in the prison constituted inhuman and degrading treatment.¹¹³ Moreover, she alleged that she had no effective remedy for her complaint.¹¹⁴ In making these allegations she relied on Articles 2, 3, and 13 of the Convention.¹¹⁵

The Court held that

“in the context of prisoners, the Court has already emphasised in previous cases that persons in custody were in a vulnerable position and that the authorities were under a duty to protect them [however], [t]he prison authorities . . . must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned There are general measures and precautions which will be available to diminish the opportunities for self-harm, without impinging on personal autonomy In light of the above, the Court has examined whether the authorities knew or ought to have known that Mark Keenan posed a real and immediate risk of suicide and, if so, whether they did all that could reasonably have been expected of them to prevent that risk.”¹¹⁶

Whether any more stringent measures are necessary in respect of a prisoner and whether it is reasonable to apply them will depend on the circumstances of the case.¹¹⁷ When deciding whether the prison authorities did all that was reasonably expected of them in the instant case, the Court found that, on the whole, the authorities had responded reasonably to Keenan's conduct by placing him in hospital care and under watch when he showed suicidal tendencies.¹¹⁸ He was subject to daily medical supervision by the prison doctors, who on two occasions had consulted external psychiatrists with knowledge of his case.¹¹⁹ The prison doctors, who could have required

112. *Id.* On April 1, 1993, Mark Keenan was admitted to Exeter prison, initially to the prison health care center, to serve a four-month prison sentence for assaulting his girlfriend. *Id.* at para. 14. Prison authorities made several unsuccessful attempts to transfer him to the main prison, but his mental health deteriorated whenever he was transferred and he was moved back to the health care center. *Id.* at paras. 15–17. On April 30, 1993, after prison authorities again raised the question of being transferred with him, Mark assaulted two officers. *Id.* at paras. 19–20. That same day, the prison's deputy governor ordered Mark to be placed in a segregation unit of the prison punishment block. *Id.* at para. 22. On May 14, 1993, Mark was found guilty of assault and, consequently, his overall prison sentence was increased by twenty-eight days, including seven extra days in segregation in the punishment block. This sentence effectively delayed his release date from May 23, 1993, to June 23, 1993. *Id.* at paras. 36–37.

113. *Id.* at para. 2.

114. *Id.*

115. *Id.*

116. *Id.* at paras. 92–93.

117. *Id.* at para. 92.

118. *Id.* at para. 99.

119. *Id.*

his removal from segregation at any time, determined that he was fit for segregation.¹²⁰ There was no reason to alert the authorities on May 15, 1993, that he was in a disturbed state of mind and that an attempted suicide was likely.¹²¹ It was not apparent that the authorities had omitted any step that should reasonably have been taken.¹²² Therefore, the Court held that there had been no breach of Article 2.¹²³

From this case, it can be concluded that the burden imposed on a State to prevent a suicide is limited and must be assessed in light of all circumstances of each case. A certain margin of appreciation is left to the national authorities, even when the complaint concerns Article 2. For example, requiring the permanent supervision of a person detained may infringe upon her rights in an unacceptable way and might constitute a violation of her right to the private sphere protected under Article 8. Even if this possibility seems less evident in *Keenan*, the national authorities had to strike a balance between the different interests and ECHR rights at stake. The need to strike a balance between Article 2 rights and other rights contained within the Convention, particularly those associated with Article 8, was to play an important role in the subsequent cases, especially in *Haas*.

2. *The Subsequent Case Law*

a). *Regarding Persons Deprived of Their Liberty*

The Court had the opportunity to confirm and develop the requirement that States take preventative operational measures to protect life in two particularly noteworthy cases.¹²⁴ In the 2005 case *Trubnikov v. Russia*,¹²⁵ the person concerned was found dead “[hanging] by the sleeve of his jacket

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at paras. 94–102. But the Court was of the opinion that Mark Keenan’s medical treatment in the days before his death had not met the standards of care required under Article 3 of the ECHR, which prohibits inhuman and degrading treatment. *Id.* at paras. 103–16. Moreover, the Court noted that Mark killed himself a day after prison authorities imposed substantial additional punishment upon him, but that the applicant had no available remedies that could be effective before the punishment was carried out. Furthermore, the Court found that the civil remedies available to the applicant were extremely limited, and that no adequate damages would have been recoverable through them. Finally, no legal aid would have been available to pursue them. The Court therefore found that Article 13, which guarantees the right to an effective remedy, was breached on several grounds in this case. *Id.* at paras. 117–133.

124. In *Younger v. United Kingdom*, App. No. 57420/00 (Eur. Ct. H.R. Jan. 7, 2003), available at <http://www.echr.coe.int/ECHR/EN/hudoc>, the Court declared the case inadmissible and found it “manifestly ill-founded within the meaning of Article 35 §§ 3 and 4” of the Convention. *Id.* at 311. The application was introduced by a British citizen whose son “was found hanging from his shoelaces . . . while he was in [court] custody. . . .” *Id.* at 287. The applicant’s son died at the hospital the following morning. *Id.* With regard to applicant’s Article 2 claims, the Court stated that there was “no evidence of anything about [her son’s] actions or behaviour that ought to have put the authorities on notice that he was at a real and immediate risk of suicide.” *Id.* at 307–08. Moreover, the Court considered it “pure speculation to conclude that the summoning of a medical professional would have had the result that the applicant contend[ed].” *Id.* at 308. In the case, the Court held that the authorities had not breached Article 2 by failing in their positive obligation to protect the applicant’s son’s life. *Id.* at 310–11.

with another sleeve attached to a water pipe” while he served a sentence in a correctional labor colony.¹²⁶

The evening of his death, the prison governor conducted an inquest and subsequently ordered that no criminal investigation be opened, as it did not appear that a crime had been committed.¹²⁷ An autopsy report found that his death had been caused by pressure on the neck through hanging.¹²⁸ His father’s requests for a criminal investigation were not successful until after his case before the European Court of Human Rights had been communicated to the Russian Government.¹²⁹ Later, the Special Prosecutor’s office in charge of supervising penitentiary institutions terminated the criminal investigation after establishing that the deceased had committed suicide.¹³⁰

The Court did not find that, in the circumstances of the case, the Russian authorities could have reasonably foreseen the applicant’s decision to hang himself.¹³¹ Nor did the Court find that the authorities failed to provide medical assistance or monitoring of the prisoner throughout the period of his confinement such that they would have been unable to assess his situation correctly.¹³² Thus, the Court was not of the opinion that that the “authorities failed to prevent a real and immediate risk of suicide or that they otherwise acted in a way incompatible with their positive obligations to guarantee the right to life” under Article 2.¹³³

The Court went on to examine whether the Russian authorities had respected the procedural limb of this provision.¹³⁴ It held that the positive obligation to set up an “effective judicial system” did not necessarily require that the State bring criminal proceedings in every case, particularly if the right to life was not intentionally infringed upon.¹³⁵ Rather, the Court held that the procedural duty of the State might be satisfied “if civil, ad-

125. App. No. 49790/99 (Eur. Ct. H.R. July 5, 2005), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

126. *Id.* at para. 14. The Court provided a narrative of the events leading to the prisoner’s death: According to the records submitted by the [Russian] Government, on three occasions in 1994-1995 [he] had been found to be under the influence of alcohol and placed in a punishment cell. During his second disciplinary confinement, [he injured] himself, and during his third disciplinary confinement he attempted suicide . . . Following the suicide attempt, [the deceased] was placed under regular psychiatric supervision. On 13 September 1998 a prison football team, of which [he] was a member, took part in a match outside the prison. On return to the prison after the match, [he] was found to be under the influence of alcohol. At 7.15 p.m. a prison officer placed him in a punishment cell where he was to be kept in solitary confinement before his inspection by the prison warden the following morning.”

Id. at paras. 11-14.

127. *Id.* at para. 15.

128. *Id.* at para. 16.

129. *Id.* at paras. 17-26.

130. *Id.* at para. 31.

131. *Id.* at para. 76.

132. *Id.*

133. *Id.* at para. 78.

134. *Id.* at paras. 85-95.

135. *Id.* at para. 86.

ministrative or even disciplinary remedies were available to the victims.”¹³⁶ In order for such a system to be valid, the people responsible for the investigation must be independent, both in terms of hierarchical or institutional independence as well as practical independence. As such, when a person in State custody dies, the judicial system required by Article 2 necessitates an impartial official investigation “that satisfies certain minimum standards as to effectiveness.”¹³⁷ According to the Court, this degree of effectiveness is not present unless “the competent authorities . . . act with exemplary diligence and promptness and . . . of their own motion initiate investigations which would be capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved.”¹³⁸

Having established various important failings in the investigation, such as the lack of promptness and exemplary diligence on the part of the authorities, the Court held, unanimously, that Russia violated its obligation under Article 2(1) to conduct an effective investigation into the death of Trubnikov.¹³⁹ Procedural safeguards, even if their nature and legal basis are different, also played a role in the case of *Sanlés Sanlés v. Spain*, which addressed whether a relative of a deceased person can claim to be a victim of a violation of the right to life.¹⁴⁰

The Court also found a violation of the substantive aspect of the right to life in the 2008 case *Renolde v. France*.¹⁴¹ The applicant, H el ene Renolde, was a French national,¹⁴² the sister of Joselito Renolde, who died on July 20, 2000 after hanging himself in his cell in Bois-d’Arcy Prison, where he was in pre-trial detention.¹⁴³ The applicant relied on Articles 2 and 3 to allege that the placement of her brother in a punishment cell for forty-five days was excessive in light of his mental frailty, and that the French authorities had not taken the necessary measures to protect his life.¹⁴⁴

The Court found that the French authorities had known that Joselito Renolde was suffering from psychotic disorders that could cause him to commit acts of self-harm.¹⁴⁵ The Court acknowledged that the risk of Joselito Renolde attempting suicide was somewhat indeterminate, yet the

136. *Id.* (citing *Vo v. France*, App. No. 53924/00, 40 Eur. H.R. Rep. 12, para. 90 (2005); *Calvelli v. Italy*, App. No. 32967/96, para. 51 (Eur. Ct. H.R. Jan. 17, 2002), available at <http://www.echr.coe.int/ECHR/EN/hudoc>; *Mastromatteo v. Italy*, App. No. 37703/97, paras. 90, 94–95 (Eur. Ct. H.R. Nov. 24, 2002), available at <http://www.echr.coe.int/ECHR/EN/hudoc>).

137. *Id.* at para. 88.

138. *Id.*

139. *Id.* at paras. 89–95.

140. *See infra* Part III.A.

141. App. No. 5608/05 (Eur. Ct. H.R. Oct. 16, 2008), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

142. *Id.* at para. 1.

143. *Id.* at para. 26.

144. *Id.* at para. 3.

145. *Id.* at paras. 86, 89.

Court found that such a risk was indeed real and thus required careful monitoring of the prisoner in case his condition deteriorated suddenly.¹⁴⁶ The Court was “struck by the fact that, despite Joselito Renolde’s suicide attempt and the diagnosis of his mental condition, it [did] not appear that there was ever any discussion of whether he should be admitted to a psychiatric institution.”¹⁴⁷ Moreover, although the cause of Renolde’s decision to commit suicide was not known, the Court concluded that the lack of supervision of his daily taking of medication contributed to his death.¹⁴⁸ The Court also noted that three days after his suicide attempt, Renolde had been given the maximum penalty by the disciplinary board, namely forty-five days’ detention in a punishment cell.¹⁴⁹ No consideration seemed to have been given to his mental state, although he had made incoherent statements during the inquiry into the incident and had been described as “very disturbed.”¹⁵⁰ The Court therefore concluded that the authorities had failed to comply with their obligation to protect Joselito Renolde’s right to life, in breach of Article 2.¹⁵¹

In this case, it can be concluded that, unlike in *Keenan*, the imminent danger to the applicant caused by his fragile mental state was manifest and should have been assessed accordingly by the French authorities. By failing to react in an appropriate manner and having put forth no convincing arguments for the shortcomings identified by the Court, the Court found that France overstepped its margin of appreciation in this field. The margin, already narrowed for cases concerning the Article 2 right to life, appears to be even more limited in a situation where an individual is detained against her will and whose mental state is manifestly distressed.¹⁵² Nevertheless, this appreciation may differ considerably when a person’s desire to die is at stake, so long as the person is in full possession of all her mental capacities and expresses her will to die consciously and freely, as in *Pretty* and *Haas*.¹⁵³

b). Regarding Persons Serving Compulsory Army Duty

The principles that the Court initially developed in situations of detention or placement in psychiatric institutions were later extended and adapted to apply to individuals serving in the military. The Court determined that a person whose life and liberty is restricted by the constraints of compulsory military service is similarly put in a special relationship of subordination to the State.

146. *Id.* at para. 89.

147. *Id.* at para. 97.

148. *Id.* at para. 100.

149. *Id.* at para. 106.

150. *Id.*

151. “[T]he penalty imposed was not compatible with the standard of treatment required in respect of a mentally ill person and constituted inhuman and degrading treatment and punishment, in breach of Article 3.” *Id.* at paras. 109–10.

152. *Cf. id.* at para. 109.

153. *See infra* Parts III.B, IV.A.

The duty to prevent the suicide of an army member who has shown past signs of psychological weakness or fragility proves to be rather strict. The first case of this type was the 2007 case of *Kılınç v. Turkey*.¹⁵⁴ The applicants were the parents and sister of Mustafa Canan Kılınç, a conscript who committed suicide while he performed his compulsory military service.¹⁵⁵ In May 1995, Mustafa was assigned to guard the garrison prison armed with a loaded Kalashnikov rifle.¹⁵⁶ While on guard, he used the rifle to kill himself with a bullet to the temple.¹⁵⁷ The Court held that, due to his known mental condition, Mustafa's unstable conduct should have been taken seriously, as the risk that he might commit suicide could not be excluded, especially since he had mentioned his suicidal thoughts to his fellow gendarmes.¹⁵⁸ On the question of whether the Turkish authorities had done everything in their power to prevent the risk of Mustafa's self-harm from materializing, the Court noted that Turkish legislation on conscription contained no clear provisions governing the supervision of those whose fitness to perform military service was in doubt or, more importantly, did not outline the duties and responsibilities of superiors dealing with the irregular situation of conscripts who, like Mustafa, suffer from mental illness.¹⁵⁹ Accordingly, the Court held unanimously that Turkey violated Article 2 of the ECHR.¹⁶⁰

Similarly in *Ataman v. Turkey*,¹⁶¹ Mikail Ataman shot and killed himself during his guard duty with his military-issued rifle. The Court made it clear that, in situations where the authorities entrusted a weapon to an individual, they were under the obligation to ensure that the individual posed no imminent and real risk of self-harm.¹⁶² In a subsequent case,

154. App. No. 40145/98 (Eur. Ct. H.R. June 7, 2005), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

155. *Id.* at paras. 3, 9.

156. *Id.* at para. 18.

157. *Id.*

158. *Id.* at para. 48.

159. *Id.* at para. 56.

160. *Id.* at para. 57.

161. App. No. 46252/99 (Eur. Ct. H.R. July 27, 2006), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

162. *Id.* at para. 56. In this case, the Court concluded that Turkey violated the substantive as well as the procedural limb of Article 2 of the Convention. In the later case of *Salgın v. Turkey*, the Court accepted that a form of unpredictable depression had caused the son of the applicant to commit suicide while he was performing military service. App. No. 46748/99, paras. 83–84 (Eur. Ct. H.R. May 20, 2007), available at <http://www.echr.coe.int/ECHR/EN/hudoc>. Therefore, no blame could be attached to Turkey for failing to meet its obligation to protect the applicant's son. *Id.* In addition, the Court found that the exact circumstances of the applicant's son had not been duly assessed and determined. *Id.* at para. 88. It also noted that the applicant had been excluded from the investigation. *Id.* at para. 89. In those circumstances, the Court considered that the investigation carried out in this case, taken as a whole, had not been "effective." *Id.* at para. 90. Therefore, there had been a procedural violation of Article 2. *Id.* For other cases in which the Court found a violation of the procedural limb of Article 2, see, for example, *Çalışkan v. Turkey*, App. No. 13094/02 (Eur. Ct. H.R. Aug. 27, 2008), available at <http://www.echr.coe.int/ECHR/EN/hudoc>; *Bayram v. Turkey*, App. No. 75535/01 (Eur. Ct. H.R. Nov.

Yilmaz v. Turkey,¹⁶³ the Court highlighted the duty of the military authorities to establish an administrative and legislative framework of efficient prevention, as well as the obligation to ensure that the responsible persons in the army possessed the necessary competence and training in preventing dangers which are inevitably linked to the institution and special nature of the army.¹⁶⁴ In the recent case of *Gündüz v. Turkey*,¹⁶⁵ the Court held that if a State decided to submit its young citizens to compulsory military service, State authorities were under the positive obligation to effectively prevent suicides, beginning as early as recruitment.¹⁶⁶

The principles developed in the *Osman* and *LCB* cases and applied to the situations of persons detained are now used, *mutatis mutandis*, by the Court to assess whether a Contracting Party has fulfilled its obligation to ensure that a person who killed himself while serving in the army was fit to bear the special circumstances of compulsory military duty and, if the risk of suicide was foreseeable, took the necessary steps to avoid the fatal outcome.

c). *The Particular Situation of People on Hunger Strike*

Having examined the State's obligation to prevent vulnerable people from inflicting harm on themselves, I will now examine the Court's determinations on whether a State must forcibly feed a prisoner on hunger strike in order to save his life.¹⁶⁷ The question differs from the debate of assisted suicide because persons who choose to hunger strike do not aim to die, like

6, 2009), available at <http://www.echr.coe.int/ECHR/EN/hudoc>; and *Aydın v. Turkey*, App. No. 34813/02 (Eur. Ct. H.R. Feb. 25, 2009), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

163. App. No. 21899/02 (Eur. Ct. H.R. Sept. 17, 2008), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

164. *Id.* at paras. 56–57; see also *Yıldırım v. Turkey*, App. No. 13694/04 (Eur. Ct. H.R. Mar. 15, 2010), available at <http://www.echr.coe.int/ECHR/EN/hudoc>. In this case, the applicant complained of the authorities' negligence in protecting the life of his son, a schizophrenic, who committed suicide in prison when, as a young conscript convicted for deserting, he began to serve his sentence. *Id.* at paras. 21, 34. The Court held that there had been violations of both the substantive as well as the procedural limb of Article 2. *Id.* at paras. 46–69. In the case of *Bilbul v. Turkey*, there was neither a violation of the substantive limb nor the procedural limb of Article 2. App. No. 4649/05, paras. 29–43 (Eur. Ct. H.R. June 28, 2010), available at <http://www.echr.coe.int/ECHR/EN/hudoc>. In *Yiğit v. Turkey*, the Court found no violation of the substantive limb of Article 2. App. No. 20245/05, paras. 41–45 (Eur. Ct. H.R. Feb. 9, 2011), available at <http://www.echr.coe.int/ECHR/EN/hudoc>. The Court accepted that one of the deceased may have been driven to suicide by an unpredictable form of depression, but his behavior had never indicated a real and immediate risk that he would take his own life. *Id.* at para. 44. Therefore, the Court concluded that criticizing the authorities for not doing more to prevent his suicide would be tantamount to imposing an excessive burden on them in the light of the evidence and the State's obligations under Article 2. *Id.* However, the Court held that there had been a violation of the procedural limb of Article 2, since the State's investigation into the deceased's death had not been effective. *Id.* at paras. 46–52.

165. App. No. 4611/05 (Eur. Ct. H.R. Apr. 11, 2011), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

166. *Id.* at para. 68.

167. See Marlynn Wei & Rebecca W. Brendel, *Psychiatry and Hunger Strikes*, 23 HARV. HUM. RTS. J. 75, 76–109 (2010) (defining hunger strike and discussing the State's responsibility toward prisoners on hunger strike).

in *Pretty* and *Haas*; rather, by using the indirect threat to kill themselves through refusal to eat,¹⁶⁸ they seek to protest and communicate distress.¹⁶⁹

The former European Commission on Human Rights was confronted with such a situation in *X. v. Germany*.¹⁷⁰ Because the applicant only complained about forced feeding in light of Article 3, the prohibition against ill-treatment, the Commission left open the question of whether he had, under Article 2, a right to choose to die by starving himself.¹⁷¹ As of yet, the Court has not yet ruled on that issue. Nevertheless, according to Harris,

168. Inhumane or degrading conditions of detention may also constitute a justification for hunger strikes. Between 1996 and 2000, a wave of hunger strikes occurred in Turkey in which prisoners protested against a certain type of high security prison intended for individuals accused of terrorist activities. *Yıldız v. Turkey*, App. No. 22913/04, paras. 16, 36, 37, 51, 52, 74 (Eur. Ct. H.R. Feb. 10, 2006), available at <http://www.echr.coe.int/ECHR/EN/hudoc>. On the basis of two *ad hoc* visits to Turkey in 2000 and 2001, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”) of the Council of Europe adopted a report; the findings concerning hunger strikers stated:

at the time of [the visits], no prisoner had yet reached a stage where it was necessary to take a decision on possible artificial feeding against his/her wishes. However, cases of artificial feeding have subsequently occurred. Ministry of Health officials informed the CPT’s delegation during [a subsequent] visit that they were not aware of any cases of forced feeding of prisoners who were conscious, but that prisoners had been artificially fed after losing consciousness.

As was acknowledged in the preliminary observations . . . , the issue of artificial feeding of a hunger striker against his/her wishes is a delicate matter about which different views are held, both within Turkey and elsewhere To date, the CPT has refrained from adopting a stance on this matter. However, it does believe firmly that the management of hunger strikers should be based on a doctor/patient relationship. Consequently, the Committee has considerable reservations as regards attempts to impinge upon that relationship by imposing on doctors managing hunger strikers a particular method of treatment.

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 16 December 2000 and 10 to 15 January 2001 and from 18 to 21 April and 21 to 24 May 2001*, CPT/Inf (2001) paras. 31–33, <http://www.cpt.coe.int/documents/tur/2001-31-inf-eng.pdf>.

169. *Id.* at 76.

170. App. No. 10565/83, 7 Eur. H.R. Rep. 152 (1984).

171. The Commission held:

When, as in the present case, a detained person maintains a hunger strike, this may inevitably lead to a conflict between an individual’s right to physical integrity and the High Contracting Party’s obligation under Article 2 of the Convention—a conflict which is not solved by the Convention itself. The Commission recalls that under German law this conflict has been solved in that it is possible to force-feed a detained person if this person, due to a hunger strike, would be subject to injuries of a permanent character, and the forced feeding is even obligatory if an obvious danger for the individual’s life exists. The assessment of the above-mentioned conditions is left for the doctor in charge but an eventual decision to force-feed may only be carried out after judicial permission has been obtained At Wittlich prison the applicant was examined the very day he arrived and the doctor in charge reached the conclusion that the applicant’s situation necessitated forced feeding The Commission is satisfied that the authorities acted solely in the best interests of the applicant when choosing between either respect for the applicant’s will not to accept nourishment of any kind and thereby incur the risk that he might be subject to lasting injuries or even die, or to take action with a view to securing his survival although such action might infringe the applicant’s human dignity.

Id. at 153.

O'Boyle and Warbrick, "a state should not be liable under Article 2 for an omission that respects the will and physical integrity of a person who is capable of taking a decision as to matters of life and death."¹⁷²

This study assumes that similar principles to those developed in the above-mentioned cases might, *mutatis mutandis*, be applicable to a situation of a person on hunger strike. First, the question of whether the person is capable of appreciating the consequences of her decision to go on or continue a hunger strike must be assessed. The possible failure of the national authorities to comply with this duty might raise a serious issue under Article 2. This question arose in the *Haas* case.¹⁷³ If an examination of the mental conditions of the person reveals that her decision was not made consciously and freely, the authorities might be obliged to intervene and stop the hunger strike by force-feeding the person. Such a scenario may be comparable to the *Renolde* case and the cases against Turkey concerning suicides in the army analyzed above,¹⁷⁴ namely situations where vulnerable individuals faced situations of distress and pressure. If the assessment of all circumstances shows that the person's decision was made consciously and freely, *mutatis mutandis* like in the cases of *Pretty* and *Haas*, the assessment might be different and it would likely be more difficult to justify State intervention under Articles 2 or 8. The appreciation of the situation by the national authorities, and later by the Court, would have to include the exact reason given by the individual for the hunger strike. This is because States' obligations differ depending on the underlying factual circumstances. For example, a person who claims that she has been wrongly sentenced to a prison term may go on a hunger strike to oppose a criminal sanction imposed by an independent and impartial tribunal after due process in accordance with international standards. On the other hand, an individual may go on a hunger strike because of her disproportionate sentence after a criminal process that lacked the basic guarantees of the right to a fair trial or was in breach of the presumption of innocence, guaranteed by Article 6 of the Convention.

If the State authorities decide to force-feed, they must comply with the Convention as a whole, in particular ensuring that the measure does not "involve degrading elements" that could violate Article 3.¹⁷⁵ This particular issue was raised in *Nevmerzhitsky v. Ukraine*.¹⁷⁶ In this case, the Court concluded that there had been a breach of this norm since the medical necessity to force-feed the applicant to save his life had not been shown and the applicable procedural safeguards had not been complied with.¹⁷⁷ Be-

172. HARRIS ET AL., *supra* note 8, at 46.

173. *Haas v. Switzerland*, App. No. 31322/07, para. 58 (Eur. Ct. H.R. Jan. 20, 2011); *see infra* Part IV.A.

174. *See supra* Part II.B.2.a.

175. *Nevmerzhitsky v. Ukraine*, App. No. 54825/00, para. 93, 43 Eur. H. R. Rep. 32 (2006).

176. *Id.*

177. *Id.* at para. 96.

yond this finding, and quite unusually, the Court found that the measures inflicted to force-feed the applicant, which involved handcuffs, a mouth widener, and a rubber tube inserted forcibly, gave rise to suffering equivalent to torture.¹⁷⁸

C. Conclusion

The positive obligation of the State authorities to prevent distressed and vulnerable individuals from self-inflicted harm or death seems well-established and confirmed by the Court's Article 2 jurisprudence. Therein, the procedural limb of this provision must be considered as important as the substantive aspect of the right to life. The duty to investigate aims, *inter alia*, to identify and punish the persons responsible for the self-inflicted deaths, and might be relevant in situations of alleged assistance to suicide as well.

Persons deprived of their liberty—in particular prisoners or individuals placed in psychiatric hospitals—are vulnerable and are more easily exposed to arbitrary treatment by the authorities. Moreover, their confinement puts them under extra mental stress, which may make these people suicidal even if they would not normally be, and thus State authorities are under a special duty of care towards them.¹⁷⁹ A similar duty may arise in the cases of young people serving compulsory army duty or detained persons on hunger strike, situations that have not yet been assessed fully by the Court.

Finally, the positive obligation of a State to protect life is limited and must be balanced with other interests at stake, in particular with the right to private life guaranteed by Article 8. The State authorities enjoy a certain margin of appreciation in determining which preventative actions to take, which differs in accordance with the rights at stake and depends on whether the person at risk is fully capable of making the decision to end her life or needs to be protected from her own potentially fatal actions.

III. AN OBLIGATION TO ABSTAIN FROM PUNISHING PERSONS ASSISTING SUICIDE?

Other questions arise in situations in which a person wants to end her life and is capable of fully measuring the consequence of this decision, but is physically unable to realize this decision. This question touches upon the delicate issue of the criminal responsibility of a family member, a relative, or a friend who assists a suicide. Criminal penalties put in place by the

178. *Id.* at paras. 97–98. In *Yildiz v. Turkey*, the Court found a violation of Article 3 since the applicant, who had been on hunger strike before and whose fitness for detention had previously been denied by the Turkish experts, had later been readmitted to prison, although his medical problems persisted. App. No. 22913/04, paras. 18–22 (Eur. Ct. H.R. Nov. 10, 2005), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

179. Korff, *supra* note 4, at 18.

national legislature, as well as their application by the prosecutor in a concrete case, must balance the interest of the person who would not wish to continue an undignified life and the public interest of avoiding abuse in assistances of suicide. In this section, I will examine the issue of assisted suicide and assess why the margin of appreciation enjoyed by the States is rather wide in this field. As only two cases related to this issue have been decided by the Court to date, one of which was declared inadmissible, States have a great deal of discretion.

A. *Sanlés Sanlés v. Spain*¹⁸⁰

In *Sanlés Sanlés v. Spain*, the applicant, a Spanish national, was the sister-in-law of Mr. Sampedro,¹⁸¹ a deceased tetraplegic who had previously brought an action in the Spanish courts requesting that his general practitioner be authorized to prescribe him the medication necessary to relieve him of the pain, anxiety, and distress caused by his condition “without that act being considered under the criminal law to be assisting suicide or to be an offense of any kind.”¹⁸² Spanish courts refused Sampedro’s request on the ground that Spanish law did not allow a court to authorize a third party to help a person die or to bring about that person’s death, the inevitable consequence of this authorization. Sampedro ended his own life as the domestic proceedings were still pending.¹⁸³

The applicant complained, *inter alia*, that Sampedro’s request for medical assistance to put a painless end to the suffering caused by his paralysis fell within the scope of his right to private life guaranteed under Article 8.¹⁸⁴ The applicant also alleged a violation of Articles 2 and 3 of the Convention, as Mr. Sampedro had claimed the right to a dignified life—or alternatively, non-interference with his wish to put an end to his undignified life—because his total paralysis had been a source of constant and intolerable suffering for him.¹⁸⁵

In its decision of October 26, 2000, in which the Court dismissed the application as incompatible *ratione personae*, the Court explained that it was not required to rule on whether or not there was a right under the Convention to a dignified death or a dignified life.¹⁸⁶ It admitted that the applicant might claim to have been very affected by the circumstances surrounding Sampedro’s death despite the lack of close family ties,¹⁸⁷ however the rights

180. *Sanlés Sanlés v. Spain*, 2000-XI Eur. Ct. H.R. 495.

181. *Id.* at 495.

182. *Id.* at 497.

183. *Id.* at 497–98.

184. *Id.* at 500.

185. *Id.* at 501.

186. *Id.* at 502, 503.

187. *Id.* at 503.

claimed by the applicant under Articles 2, 3, 5,¹⁸⁸ 8, 9¹⁸⁹ and 14¹⁹⁰ of the Convention belong to the category of non-transferable rights.¹⁹¹ Consequently, the applicant could not rely on those rights on behalf of Sampedro in the context of his action in the domestic courts.¹⁹² The Court noted, moreover, that Sampedro had ended his life when he wanted to and that the applicant could not be substituted for Sampedro with respect to his claims for recognition of his right to die in dignity, since such a right, supposing that it can be recognized in domestic law, was in any event of an “eminently personal and non-transferable nature.”¹⁹³

The Court concluded that the applicant could not act on Sampedro’s behalf and claim to be a victim of Articles 2, 3, 5, 8, 9 and 14 of the Convention, as required by Article 34.¹⁹⁴ In other words, the Court held that, because Sampedro had died before the proceedings in Spain had come to an end and the relative that he had appointed as successor to his claim had been held by the Spanish courts to have no standing in the matter, the applicant could not be regarded as a “victim” of the alleged violations of the Convention.¹⁹⁵

Thus, in *Sanlés Sanlés* the issue of the criminal responsibility of a person who assists someone who is willing to end her life was left in suspense due to admissibility obstacles. The question subsequently came before the Court in the 2002 case of *Pretty v. the United Kingdom*.¹⁹⁶

B. *Pretty v. the United Kingdom*

1. *The Facts of the Case*

Diane Pretty, a United Kingdom national, was born in 1958.¹⁹⁷ In 2002, she was dying of motor neuron disease, an incurable degenerative disease that affects the muscles.¹⁹⁸ Her disease was at an advanced stage: the applicant was paralyzed from the neck down and her life expectancy was very short.¹⁹⁹ However, her intellect and capacity to make decisions remained

188. Article 5 protects the right to liberty and security. European Convention on Human Rights, *supra* note 2, art. 5.

189. Article 9 guarantees freedom of thought, conscience and religion. *Id.* art. 9.

190. Article 14 forbids discrimination in the enjoyment of Convention rights. *Id.* art. 14.

191. *Sanlés Sanlés*, 2000-XI Eur. Ct. H.R. at 503.

192. *Id.*

193. *Id.* at 504.

194. *Id.* at 505.

195. *Id.*; see also Korff, *supra* note 4, at 18. The question of victim status will be reassessed in the case of *Koch v. Germany*, which is currently pending before the Court and will be addressed later in this article. App. No. 497/09, Admissibility Decision (May 31, 2011), available at <http://www.echr.coe.int/ECHR/EN/hudoc>.

196. App. No. 2346/02, 35 Eur. H.R. Rep. 1 (2002).

197. *Id.* at para. 7. Following the judgment of the Court, the applicant began to have breathing difficulties and was moved to a hospice, where she slipped into a coma and died twelve days after the ruling. Korff, *supra* note 4, at 22.

198. *Pretty*, 35 Eur. H.R. Rep. 1, at para. 7.

199. *Id.* at paras. 7–8.

unimpaired.²⁰⁰ Given that the final stages of motor neuron disease were distressing and undignified, the applicant wished to be able to control how and when she died and to be spared the suffering and indignity of her disease.²⁰¹

Although British law does not criminalize suicide, the applicant was unable to end her own life without assistance due to her disease.²⁰² Assisting another to commit suicide constitutes a crime under Section 2(1) of the British Suicide Act of 1961.²⁰³ Pretty wished to be assisted by her husband in committing suicide, but the Director of Public Prosecutions (DPP) refused her request to guarantee her husband freedom from prosecution if he did so.²⁰⁴ Her domestic appeals against that decision had all been unsuccessful.²⁰⁵

2. *The Applicant's Complaints and the Reasoning of the Court*

When deciding on the merits of the case, the Court referred to Recommendation 1418 of the Parliamentary Assembly of the Council of Europe, in which it is recommended, *inter alia*:

that the Committee of Ministers encourage the Member States of the Council of Europe to respect and protect the dignity of terminally ill or dying persons in all respects:

. . .

(c) by upholding the prohibition against intentionally taking the life of terminally ill or dying persons, while:

(i) recognising that the right to life, especially with regard to a terminally ill or dying person, is guaranteed by the Member States, in accordance with Article 2 of the European Convention on Human Rights which states that 'no one shall be deprived of his life intentionally';

(ii) recognising that a terminally ill or dying person's wish to die never constitutes any legal claim to die at the hand of another person;

(iii) recognising that a terminally ill or dying person's wish to die cannot of itself constitute a legal justification to carry out actions intended to bring about death.²⁰⁶

200. *Id.* at para. 8.

201. *Id.*

202. *Id.* at paras. 9, 16.

203. *Id.*

204. *Id.* at paras. 10–11.

205. *Id.* at paras. 11–15.

206. *Id.* at para. 28 (quoting EUR. PARL. ASS. *Recommendation 1418: PROTECTION OF THE HUMAN RIGHTS AND DIGNITY OF THE TERMINALLY ILL AND THE DYING*, 24th Sess., Doc. No. 8421 (1999)).

a). *Right to Life (Article 2)*

The Court, in a unanimously adopted judgment, dismissed the applicant's claim that Article 2 should be read to grant individuals a "right to die" as a negative aspect of the right to life.²⁰⁷ The Court found that there had been no breach of the right to life because Article 2 contains no implied right to die; thus, the applicant's husband would be subject to prosecution for a criminal offense under British law if he helped her die.²⁰⁸ The Court emphasized the Article 2 obligation of the State to protect life.²⁰⁹ In the opinion of the Court, Article 2 was "unconcerned with issues to do with the quality of living or what a person chose to do with his or her life."²¹⁰ While recognizing that quality of life and autonomy in life decisions might be "so fundamental to the human condition that they require protection from State interference," the Court noted that these interests were reflected in other provisions of the ECHR and various international human rights instruments.²¹¹ The Court concluded that Article 2 could not, "without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor could it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life."²¹²

The Court nevertheless stressed that its conclusion did not mean that a particular State's recognition of a right to die would *ipso facto* be contrary to Article 2; nor did its conclusion mean that if a specific State's recognition of a right to take one's own life were held to be consonant with Article 2, that such a holding would imply that the applicant in the present case should also be granted the right to die.²¹³

b). *Prohibition of Ill-treatment (Article 3)*

In *Pretty*, the applicant also complained under Article 3 that the United Kingdom was obligated to refrain from inflicting inhumane and degrading treatment, and also was under the obligation to take positive steps to protect persons within their jurisdiction from being subjected to such treatment by non-government actors.²¹⁴

In response to this complaint, the Court expressed sympathy to *Pretty's* fear that "without the possibility of ending her life she face[d] the prospect of a distressing death."²¹⁵ However, the Court held that the applicant's claim that the DPP's refusal to refrain from prosecuting her husband placed

207. *Id.* at para. 39.

208. *See id.* at para. 40.

209. *Id.* at para. 39.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at para. 41.

214. *Id.* at para. 44.

215. *Id.* at para. 55.

a “new and extended construction” on the concept of “treatment.”²¹⁶ The Court stressed that Article 3 must be read in conjunction with Article 2, which was principally a prohibition on the use of lethal force or other conduct that might lead to the death of a human being and did not confer any claim on an individual to require a State to permit or facilitate her death.²¹⁷ The Court concluded that there had been no violation of Article 3 in the circumstances of the present case.²¹⁸

c). Right to Respect for Private Life (Article 8)

The applicant further relied on Article 8, arguing that this provision explicitly recognizes the right to self-determination.²¹⁹ The Court took a much more positive approach to the applicant’s case under this provision.²²⁰ National law prevented the applicant from realizing her decision to avoid what she regarded as “an undignified and distressing end to her life.”²²¹ In examining the applicability of Article 8 to the case, the Court was not prepared to exclude the possibility that this constituted an interference with her right to respect for private life as guaranteed under Article 8(1).²²²

The Court recalled that an infringement upon the exercise of an Article 8 right will conflict with Article 8(2) unless it is “in accordance with the law,” has aims that are legitimate under that provision, and is “necessary in a democratic society” to attain such aims.²²³ The parties disputed the proportionality of the State’s interference in the right to respect for private life as embodied by the prohibition on assisted suicide.²²⁴ In this connection, the applicant had complained of “the blanket nature of the ban on assisted suicide.”²²⁵ The Court, however, did not consider the ban to be disproportionate.²²⁶ Rather, the Court focused on the degree of flexibility available to State authorities in their application of the ban. It recalled that the British legal regime provided for flexibility in individual cases by requiring consent from the DPP to bring a prosecution and by the fact that sentencing guidelines allowed lesser penalties to be imposed as appropriate.²²⁷ Between 1981 and 1992 there were only twenty-two cases in which “mercy killing” was an issue, and of these only one resulted in conviction for murder while the others contained charges for lesser offenses and most had resulted in probation or suspended sentences.²²⁸ Therefore, the Court did not consider

216. *Id.* at paras. 54, 56.

217. *Id.* at para. 54.

218. *Id.* at para. 56.

219. *Id.* at para. 58.

220. Korff, *supra* note 4, at 20.

221. *Pretty*, 35 Eur. H.R. Rep. 1, at para. 67.

222. *Id.* at para. 68.

223. *Id.*

224. *Id.* at para. 72.

225. *Id.*

226. *Id.* at para. 76.

227. *Id.*

228. *Id.*

it arbitrary for the law to reflect the importance of the right to life by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence.²²⁹

3. *The Court's Methods of Interpretation: Preferencing Literal and Systemic Interpretive Approaches over an "Evolutive" Approach*

The Court's findings in *Pretty*, adopted unanimously and without any separate opinions, clearly articulated that the right to life, as guaranteed under Article 2, does not include a "right to die." In other words, the applicant, who was not capable of ending her life by her own hands, could not rely on the Convention to seek impunity for the person whom she wished to assist in her suicide. This judgment dates back to 2002 and has been commented on extensively.²³⁰ In my analysis of the case, I restrict

229. *Id.* Finally, the Court rather swiftly dismissed the applicant's remaining arguments. First, under Article 9, which protects the right to freedom of thought, conscience, and religion, the applicant complained that the failure to provide a lawful scheme for allowing assisted suicide violated her right to manifest her beliefs. *Id.* at para. 80. The Court found that "[t]o the extent that the applicant's views reflect her commitment to the principle of personal autonomy, [this] claim is a restatement of the complaint under Article 8." *Id.* at para. 82. Thus, no separate issue had to be examined by the Court and there was no violation of Article 9. *Id.* at para. 83. Secondly, under Article 14, which prohibits discrimination in the enjoyment of the Convention rights, she argued that the blanket prohibition on assisted suicide discriminated against those who were unable to commit suicide without assistance, whereas the able-bodied were able to exercise the right to die under domestic law. *Id.* at para. 85. In this respect, the Court was convinced that there was an "objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide." *Id.* at para. 89. "The borderline between the two categories would often be a very fine one and to seek to build into the law an exemption for those judged to be incapable of committing suicide would seriously undermine the protection of life which [British law] was intended to safeguard." *Id.*

230. See, e.g., Gilles Armand, *La dignité des malades en fin de vie (réflexions à partir de l'arrêt Pretty du 29 avril 2002)*, in LA PORTÉE DE L'ARTICLE 3 DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 181 (Catherine-Amélie Chassin ed., 2006); Oliver De Schutter, *L'aide au suicide devant la Cour européenne des droits de l'homme (à propos de l'arrêt Pretty c. le Royaume-Uni du 29 avril 2002)*, 14 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 71 (2003); Carole Girault, *La Cour européenne des droits de l'homme ne reconnaît pas l'existence d'un droit à la mort*, 77 LA SEMAINE JURIDIQUE 676 (2003); John Keown, *European Court of Human Rights: Death in Strasbourg – Assisted Suicide, the Pretty Case, and the European Court on Human Rights*, 1 INT'L J. CONST. L. 722, 730 (2003) (concluding that *Pretty* is another persuasive rebuttal of an attempt to establish a right to assisted suicide through the courts, and that although there are European countries that permit euthanasia or physician-assisted suicide, such as the Netherlands, this does not mean that the others must follow this example); L.A. Minelli, *Zum Urteil "Diane Pretty gegen England"*, 84 MENSCH UND RECHT 1–4 (2002) (arguing that the Court rather swiftly excluded the applicability of Articles 2 and 3 of the Convention and that the Court, in the balance of the different interests at stake, did not give enough weight to the right to self-determination); D. Morris, *Assisted Suicide Under the European Convention on Human Rights: A critique*, 1 EUR. HUM. RTS. L. REV. 65, 91 (2003) (claiming that the Court's consideration of applicant's Article 8 arguments, in particular its analysis of the proportionality question, is open to criticism, and that it seems difficult, or even impossible, to see how it can be concluded that section 2(1) of the Suicide Act is necessary in a democratic society; an outright prohibition of assisted suicide is not necessary for the aims which the state is seeking to achieve, yet a right to assistance in suicide should be exercisable at least to some degree under Article 8); Janna Satz Nugent, "Walking into the Sea" of Legal Fiction: An Examination of the European Court of Human Rights, *Pretty v. United Kingdom and the Universal Right to Die*, 13 J. TRANS-

myself to three remarks relating to the methods of interpretation used by the Court.

The Court's main argument to dismiss the complaint under Article 2 was that this provision could not, "without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die."²³¹ This text demonstrates the Court's hesitancy to apply a "dynamic" or "evolutive" interpretation of the Convention that would allow it, under certain circumstances, to depart from a purely literal interpretation of the Convention rights.²³² It must be stressed that the "living instrument" doctrine is not a *passe-partout* and must be applied with some caution. With legal certainty, foreseeability, and equality before the law as guiding principles, the Court has pointed out in prior decisions that it should not depart, without cogent reasons, from its previous case law with regard to assisted suicide.²³³ Moreover, in theory at least, the Court is not entitled to interpret the Convention in response to "present-day conditions" so as to introduce into it a right that was not intended to be included by the drafters.²³⁴ But the line between necessary and permissible judicial interpretation and more controversial judicial legislation can be difficult to draw. It suffices to recall the States' obligations in the field of environmental protection: they may be regarded both as a simple enlargement of the scope *ratione materiae* of Article 8 or as new obligations imposed on the Contracting Parties that were not intended by the drafters of the Convention.²³⁵ But in the case of *Pretty*, the Court seems well justified in its argument that reading a right to die as implicit in the right to life would, even in the light of the "evolutive" nature of the Court's jurisprudence, stretch the wording of Article 2 too far.

Regarding the doctrine of margin of appreciation,²³⁶ it may seem surprising that the Court did not, as it normally does and as it did in *Haas*,²³⁷ provide for a comparative picture of how the question is approached in the different Member States of the Council of Europe. It is possible that the Court did not consider such a comparative approach indispensable because

NAT'L. L. & POL'Y 183 (2003) (arguing *inter alia* that Court's deference to Member States weakened the effectiveness of the Convention and that granting a broad margin of appreciation was not helpful in the instant case). See also M.A. Sanderson, *Pretty v. United Kingdom*, 96 AM. J. INT'L. L. 943, 947 (2002) (noting that there is no reason to conclude that the ruling in *Pretty* has any implications concerning the acceptability of fair and non-discriminatory arrangements for the provision of euthanasia in other states, and that "[a]lthough Article 2 continues to require, in general, the criminal prosecution of intentional killing, it is quite possible that the Court may, when presented with a different case, find the euthanasia of willing, competent, and terminally ill patients to be within states' margin of appreciation despite its having found statutory schemes such as that of the United Kingdom to be in compliance with Article 2").

231. *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. H.R. Rep. 1, para. 39 (2002).

232. See *supra* Part I.D.3.

233. See, e.g., *Scoppola v. Italy* (No. 2), App. No. 10249/03, para. 104 (Eur. Ct. H.R. Sep. 17, 2009), available at <http://echr.coe.int/echr/en/hudoc>.

234. HARRIS ET AL., *supra* note 8, at 7.

235. *Id.* at 7–8.

236. See *supra* Part I.D.3.

237. See *infra* Part IV.A.

the spectrum of state practice was clearly evident from the Parliamentary Assembly's Recommendation 1418 of 1999, which reflected the Member States' opinions at that time and placed more emphasis on the right to life than on the self-determination of (even) terminally ill persons.²³⁸ In any event, the Court properly noted that there was no consensus of state practice within Europe that would have prevented the United Kingdom from adopting its own position on the issue, as the United Kingdom's position would likewise not have prevented another State from adopting rules that reflected the wishes of *Pretty*.²³⁹

Finally, another problem raised by the "evolutive" approach to interpretation is the necessity of coherence in the interpretation of the Convention as a whole, such that it constitutes a single harmonious system of rights and obligations. The Court sought to maintain that coherence while examining *Pretty*'s claims by interpreting Article 3 in light of Article 2.²⁴⁰ The Court normally refers to other Convention rights and freedoms for guidance on the interpretation of ambiguous provisions that may broaden the scope of a certain right's application. But viewed in light of its practice in the *Pretty* case, this "systemic" approach to interpretation may in some cases actually restrict the ambit of a Convention guarantee. While it may be reasonable to interpret the Convention "as a whole," it is also logical that in doing so, when a fundamental right such as the right to life is at stake, other provisions of the Convention that are in conflict with it will rarely be successfully invoked. This was the case in *Pretty*, where not only the complaint under Article 3, but indeed all the other complaints were dominated, and superseded, by the Court's Article 2 findings. By holding Article 2 supreme, the Court obliges the States to investigate all deaths and thereby provides the legal basis for the criminal punishment of a person who assists a suicide.

In 2002, the legal and moral landscape of the Court was not ready to oblige a State to allow a person who assists a suicide to go unpunished, even in favor of a terminally ill person who is unable to commit suicide by her own hands. Nevertheless, the Court came to this conclusion from a purely legal perspective, giving emphasis to a literal and systemic interpretation and eschewing a more "dynamic" or "evolutive" approach. The Court's stance was justified by the lack of European consensus on this topic.

This Article presents the Court's legal reasoning in *Pretty*, but the issues raised by this case and other cases of assisted suicide are complex and necessarily guided by moral, ethical, and other considerations. Thus, this domain is more controversial than the obligation of States to prevent a person from self-inflicting harm or death in a situation of distress and whose decision is not necessarily made freely and consciously. As a result, the Court con-

238. EUR. PARL. ASS., *Recommendation 1418*, *supra* note 206.

239. *Pretty*, 35 Eur. H.R. Rep. 1, at para. 41.

240. *Id.* at para. 54.

cluded in *Pretty* that the margin of appreciation of the Contracting States in assessing their duties and the different interests at stake, in particular under Article 2, is broader for cases of assisted suicide.²⁴¹

IV. AN OBLIGATION TO FACILITATE SUICIDE IN CERTAIN CIRCUMSTANCES?

Following *Pretty*, the Court did not seriously confront the issue of suicide until almost a decade later, in the 2011 judgment of *Haas v. Switzerland*.²⁴² Unlike in *Pretty*, the applicant, Mr. Haas, did not suffer from a physical handicap that would prevent him from dying by his own hands. It raised a different legal issue: whether there is a possible “positive” obligation to facilitate a desired suicide within a well-defined set of conditions.

One of the applicant’s main arguments was that an individual should enjoy, in certain circumstances, practical access to measures that facilitate the implementation of his will to die. This section analyzes the Court’s answer, its reasoning, and findings.

A. *Haas v. Switzerland*

1. *Principal Facts*

Applicant Ernst G. Haas, a Swiss national, was born in 1953.²⁴³ He suffered from a serious bipolar affective disorder for approximately twenty years, and, as a result, he believed that he could no longer live in a dignified manner.²⁴⁴

After attempting suicide on two occasions, Haas sought to obtain sodium pentobarbital, the administration of which in a sufficient quantity would enable him to end his life in a safe and dignified manner.²⁴⁵ Since the substance was only available by prescription, he approached several psychiatrists to obtain it, but was unsuccessful in his attempts.²⁴⁶ In June 2005, Haas approached various federal and cantonal authorities to seek permission to obtain sodium pentobarbital from a pharmacy without a prescription.²⁴⁷ When addressing these authorities, he argued that Article 8 of the ECHR imposed a “positive obligation” on the State to create the conditions for suicide to be committed without the risk of failure and without pain.²⁴⁸ These authorities rejected his application, and his appeal was also denied by the Federal Department of the Interior and the Zurich Administrative

241. *See id.* at 71–78.

242. *Haas*, App. No. 31322/07 (Eur. Ct. H.R. Jan. 20, 2011).

243. *Id.* at paras. 1, 6.

244. *Id.* at para. 7.

245. *Id.*

246. *Id.*

247. *Id.* at paras. 8–9.

248. *Id.* at para 10.

Court.²⁴⁹ Haas then appealed to the Federal Court.²⁵⁰ In a November 2006 judgment, the Federal Court also rejected his appeals.²⁵¹ This court found, in part, that a distinction had to be made between the right to choose one's own death—which was not at issue—and the right to commit suicide assisted by the State or a third party.²⁵² The Federal Court found that the second case could not be derived from the Convention, which did not guarantee the right to assisted suicide.²⁵³

Following that judgment, in May 2007, Mr. Haas wrote to 170 psychiatrists stating his case and asking if they would produce a psychiatric report on him and issue a prescription for sodium pentobarbital.²⁵⁴ None of the doctors acquiesced.²⁵⁵

2. *The Applicant's Complaint and the Court's Findings*

Relying on Article 8, Haas argued before the Court that his right to end his life in a safe and dignified manner had been violated in Switzerland by the State-mandated conditions for obtaining sodium pentobarbital.²⁵⁶ He claimed that his right to choose when and how he died was “theoretical and illusory,”²⁵⁷ and thus clearly in conflict with the “principle of effectiveness” as developed in the *Marckx* case.²⁵⁸

The Court acknowledged that the right of an individual to decide how and when to end her life was one aspect of the right to respect for private life, provided that said individual was in a position to make up her own mind and to take the appropriate action.²⁵⁹ However, the dispute in Haas's case concerned another matter: whether under Article 8 the State had a “positive obligation” to enable the applicant to obtain, without a prescription, a substance enabling him to end his life without pain and without risk of failure.²⁶⁰

The Court also noted that the Council of Europe Member States were far from consensus with regard to the right of an individual to choose how and when to end her life.²⁶¹ In Switzerland, according to the Criminal Code, incitement to commit or assistance with suicide were only punishable where the perpetrator committed such acts for selfish motives.²⁶² The vast

249. *Id.* at paras. 11–12.

250. *Id.* at para. 13.

251. *Id.* at para. 14.

252. *Id.* at para. 16.

253. *Id.*

254. *Id.* at para. 17.

255. *Id.* at para. 18.

256. *Id.* at para. 32.

257. *Id.* at paras. 33, 60.

258. App. No. 6833/74 (Eur. Ct. H.R. June 13, 1979).

259. *Haas*, App. No. 31322/07, at para. 51.

260. *Id.* at para. 53.

261. *Id.* at para. 55.

262. *Id.* For the text of the relevant article of the Criminal Code, see *id.* at para. 19.

majority of Member States, however, appeared to place more weight on the protection of an individual's life under Article 2 than on the right to end one's life pursuant to Article 8.²⁶³ The Court concluded that the States had a wide margin of appreciation in this respect.²⁶⁴

The Court also examined specific legislation in Belgium and Luxembourg that allows individuals to have access to substances that can be used to facilitate suicide.²⁶⁵ In Belgium, pharmacists who issue euthanasia agents are not liable to prosecution when they do so based on a prescription in which the doctor expressly states that he or she is acting in accordance with the particular piece of legislation.²⁶⁶ The rules lay down precautionary criteria and the conditions governing the prescription and issuing of the medicines in question; they must also contain provisions to ensure the availability of euthanasia agents.²⁶⁷ Similar legislation in Luxembourg decriminalized euthanasia and assisted suicide.²⁶⁸ Under the Luxembourg law, doctors may lawfully have access to medicines for use in committing suicide only where this forms an integral part of the process of euthanasia or assisted suicide.²⁶⁹

Although the Court recognized that Haas may have wished to commit suicide safely, with dignity and without excessive pain, it nevertheless stated that the requirement under Swiss law for a medical prescription in order to obtain sodium pentobarbital had the legitimate aim of preventing abuse and protecting individuals from making hasty decisions.²⁷⁰ That statement was all the more true in a country such as Switzerland, which readily allowed assisted suicide.²⁷¹

The Court considered that the risk of abuse inherent in a system that facilitated assisted suicide could not be underestimated.²⁷² The Court agreed with the Swiss Government's argument that the restriction on access to sodium pentobarbital was intended to protect health and public safety and to prevent crime.²⁷³ It also shared the view of the Federal Court that the right to life obliged States to establish a procedure apt to ensure that a decision to end one's life did in fact reflect free will.²⁷⁴ The Court considered that the need for a prescription, issued on the basis of a full psychiatric report, constituted a means of fulfilling that requirement.²⁷⁵

263. *Id.* at para. 55.

264. *Id.*

265. *Id.* at paras. 30–31, 55.

266. *Id.* at paras. 30, 55.

267. *Id.*

268. *Id.* at paras. 31, 55.

269. *Id.*

270. *Id.* at para. 56.

271. *Id.* at para. 57.

272. *Id.* at para. 58.

273. *Id.*

274. *Id.*

275. *Id.*

The Court was not persuaded by Haas's claim that he had been unable to find a specialist willing to assist him.²⁷⁶ Thus, the Court held that the applicant had not proved that his right to choose when and how he died was purely theoretical or illusory.²⁷⁷ The Court particularly emphasized that the steps taken by Haas to obtain the lethal substance—writing to 170 psychiatrists unfamiliar with his case to ask for a prescription for sodium pentobarbital—raised doubts.²⁷⁸ Given the above considerations and the margin of appreciation enjoyed by the national authorities on this issue, the Court concluded, unanimously, that there had been no violation of Article 8 in this case.²⁷⁹

3. Comments

The Court was prudent enough, in the first paragraph of its legal reasoning, to sharply distinguish the instant case from that of *Pretty v. United Kingdom*.²⁸⁰ The Court pointed out that *Haas* did not directly concern criminal impunity of a person assisting an individual wishing to die, but instead asked whether the applicant could obtain sodium pentobarbital without a medical prescription,²⁸¹ a condition that the applicant considered too restrictive and illusory in practice.²⁸² The *Haas* case thus raised the question of a possible positive obligation under Article 8 for the State to facilitate suicide under certain circumstances.²⁸³ Moreover, contrary to the *Pretty* case, Haas not only complained that his life was difficult and painful, but also that if he did not have access to this substance, the method of suicide he would have to choose might be inhumane and uncertain.²⁸⁴ Another difference lies, in the eyes of the Court, in the fact that the applicant was neither handicapped nor facing a degenerative and incurable illness that would prevent him from dying by his own hands.²⁸⁵

One of Haas's main arguments was that the Swiss legal framework did not effectively protect his right to privacy under Article 8 of the Convention, as prescribed by the jurisprudence of the Court.²⁸⁶ He alleged that no medical doctor would be willing to give a prescription under threat of

276. *Id.* at para. 60.

277. *Id.*

278. *Id.*

279. *Id.* at para. 61.

280. *Id.* at para. 50.

281. *Haas*, App. No. 31322/07, at para. 52. A medical doctor or a psychologist who prescribes lethal medication in violation of the legal framework can be prosecuted under Swiss law. *See id.* at para. 27 (quoting LOI FÉDÉRALE DU 3 OCTOBRE 1951 SUR LES STUPÉFIANTS ET LES SUBSTANCES PSYCHOTROPES [LSTUP] [FEDERAL LAW OF NARCOTICS AND PSYCHOTROPIC SUBSTANCES OF OCTOBER 3, 1951] June 1, 1952, RO 241, art. 86 (Switz.)).

282. *See id.* at para. 33.

283. *Id.* at para. 53.

284. *Id.* at para. 52.

285. *Id.*

286. *Id.* at para. 33 (citing *Artico v. Italy*, 3 Eur. H.R. Rep. (Ser. A), para. 33 (1980)).

criminal persecution.²⁸⁷ He argued this was clearly contrary to his Article 8 right to choose when and how to die.²⁸⁸ In the context of the *Haas* case, the applicant's argument is convincing in principle. He argued that it is essential for a State like Switzerland that decides to adopt more liberal legislation on the question of assisted suicide not only to put in place adequate legislation to prevent abuse and clandestine activities, as the Court rightly pointed out,²⁸⁹ but in practice to ensure that the individual has access to measures that facilitate the implementation of his will to die, if this decision has been taken freely and at a time when the person was fully capable of measuring the consequences of his decision.²⁹⁰ The Court, however, argued convincingly that the applicant had not proven that the invoked right existed only theoretically given the doubts raised by the methods through which the applicant attempted to obtain the lethal substance.²⁹¹

Moreover, the Court acknowledged that the threat of criminal sanctions against medical professionals was real in Switzerland.²⁹² This raises the question of whether a system of shared responsibility, for instance through the establishment of a Commission made up of several members delivering a joint opinion on the person's request, perhaps enjoying immunity against criminal prosecution, would render access to the lethal substance more effective.²⁹³

As in *Pretty*, and in relation to the complaints raised under Articles 3 and 8, the Court favored a "systemic" interpretation of the Convention rights.²⁹⁴ It considered the fundamental nature of the right to life enshrined in Article 2, and concluded that most of the States seemed to assign greater value to the protection of this right than to the right of self-determination guaranteed by Article 8, including the right to end one's own life.²⁹⁵ Unlike the *Pretty* case, however, the Court supported this conclusion with a comparative argument, emphasizing that only a few States have decriminalized assistance to suicide. Thus, the *Haas* Court did not suggest that Switzerland was legally obligated to exempt the applicant from the requirement of presenting a medical opinion in order to obtain the lethal substance. However, this does not mean that a State that has adopted such liberal legislation would necessarily be in violation of the Convention, especially

287. *Id.*

288. *Id.*

289. *See id.* at para. 57.

290. *Id.* at para. 54 (noting that the Convention should be read as a whole, including Article 2 which obligates protecting vulnerable persons).

291. *See id.* at para. 60 (finding that the letters applicant sent to physicians did not seem to encourage the recipients to respond positively to his request and therefore finding the applicant's claim that he was unable to find a physician to assist him untenable).

292. *Id.* at para. 59.

293. *Id.* at paras. 30–31 (highlighting the legal solutions adopted by Belgium and Luxembourg).

294. *See supra* Part III.B.3.

295. *Haas*, App. No. 31322/07, at para. 55.

Article 2.²⁹⁶ The States therefore continue to enjoy a considerable margin of appreciation in this field.²⁹⁷

What remains from the case of *Haas*? What are its achievements and its possible weaknesses? On the one hand, the main criticism lies in the hesitant and vague language that the Court used with respect to the question of the existence of a positive obligation to facilitate suicide in certain circumstances.²⁹⁸ In principle, paragraph 53 allows such a conclusion to be drawn given that the Court “consider[ed] it appropriate to examine the applicant’s request to have access to sodium pentobarbital without a prescription in terms of a positive obligation of the State to take measures necessary to permit a dignified suicide.”²⁹⁹ Yet, in the last paragraph of its reasoning, the Court seems to leave the question open by holding that “*even assuming that States have an obligation to adopt positive measures to facilitate a suicide in dignity*, the Swiss authorities did not violate this obligation in the case.”³⁰⁰

This Article takes the view that several positive aspects of the judgment can be identified. First, the Court made clear for the first time in *Haas* that the question of when and how an individual wants to end his life is covered by the expression of “private life” under Article 8. Second, the Court pointed out that the prohibition on access to a lethal substance without an expert opinion constitutes, in principle, an appropriate measure against abuse and clandestine activities. Third, the Court did not refrain from substantively examining the allegations raised by the applicant in great detail. In fact, the case only failed at the very last stage, namely in the examination of the proportionality of the measure; in that respect, the Court did not share the opinion of the applicant and was convinced that the right at stake had existed meaningfully and effectively. The main achievement of the case possibly lies in the fact that the Strasbourg judges were willing, after almost one decade, to come back to this very sensitive issue. This is not to be taken for granted, especially considering the criticism of excessive judicial activism that the Court is currently facing.³⁰¹

296. See *Pretty*, App. No. 2346/02, 35 Eur. H.R. Rep. 1, para. 41.

297. *Haas*, App. No. 31322/07, at paras. 55, 61.

298. See, e.g., the observations of Stijn Smet, *Haas v. Switzerland and Assisted Suicide*, STRASBOURG OBSERVERS (Jan. 27, 2011), <http://strasbourgobservers.com/2011/01/27/haas-v-switzerland-and-assisted-suicide/>. See also Frank T. Petermann, *Entscheidungsbesprechung*, 6 AKTUELLE JURISTISCHE PRAXIS 823 (2011) (Switz.). Petermann challenges, *inter alia*, the Court’s argument according to which the requirement under Swiss law for a medical prescription in order to obtain sodium pentobarbital was in the public interest. *Id.* at 829–30. He is also of the opinion that the Court’s reasoning and findings are contrary to the principle of “effectiveness.” *Id.* at 834–36.

299. *Haas*, App. No. 31322/07, at para. 53.

300. *Id.* at para. 61 (emphasis added).

301. See e.g., Luzius Wildhaber, *Rethinking the European Court of Human Rights*, in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 204–29 (Jonas Christoffersen and Mikael Rask Madsen eds., 2011); Lord Leonard Hoffmann, *The Universality of Human Rights*, 125 L. Q. REV. 416, 428–31 (2009); Michael O’Boyle, *The Future of the European Court of Human Rights*, 12 GERMAN L. J. 1862, 1862–77 (2011) (noting that “[r]eading the outpourings of denigration in the newspapers recently you can be forgiven for believing that the Court is about to be towed into the middle of the Rhine and scuppered by a coalition of unhappy State Parties . . . The Court has never, in its 50-year

In any event, the last word has yet to be spoken in this matter and other cases are currently pending in Strasbourg, which leads us to the last subchapter of this section.³⁰²

*B. Koch v. Germany*³⁰³

In one of the pending cases, a hearing on the admissibility and merits was held in Strasbourg on November 23, 2010 and declared admissible on May 31, 2011.³⁰⁴ This case concerns the German authorities' refusal to grant the applicant's wife authorization to acquire a lethal dose of medication enabling her to commit suicide.

The applicant, Ulrich Koch, is a German national, born in 1943.³⁰⁵ After falling in front of her doorstep in 2002, Koch's wife suffered from almost complete paralysis, requiring artificial ventilation and constant care from nursing staff.³⁰⁶ She wished to end her life by committing suicide.³⁰⁷ In November 2004, she made a request to the Federal Institute for Drugs and Medical Devices to grant her authorization to obtain the lethal dose of medication enabling her to commit suicide at home.³⁰⁸ In December 2004, the institute refused her request, finding that her wish to commit suicide contravened the German Narcotics Act, legislation aimed at securing the necessary medical care of the population.³⁰⁹ Koch and his wife appealed the decision in January 2005.³¹⁰ On February 12, 2005, before their appeal was decided, Koch's wife committed suicide in Switzerland, assisted by the organization *Dignitas*.³¹¹ After complaining in vain before the German tribunals, Koch appealed to the Federal Constitutional Court, which found the applicant's constitutional complaint inadmissible in November of 2008. The Federal Constitutional Court held that the applicant could not rely on a posthumous right of his wife to human dignity and that he was not entitled to lodge a complaint as her legal successor.³¹²

history, been subject to such a barrage of hostile criticism as that which occurred in the United Kingdom in February 2011.”)

302. On January 5th, 2012, the parties to the case of *Gross v. Switzerland*, App. No. 67810/10, were invited to submit their observations on the admissibility and the merits of the case. This case raises similar questions as the *Haas* case, as well as the right to respect private life in Article 8. Nevertheless, unlike in the *Haas* case, Mrs. Gross does not suffer from a mental disorder, but claims that she wants to avoid further suffering caused by her physical and mental decline due to her age (she was born in 1931). A statement of facts of the case as well as the questions submitted to the parties are available at <http://echr.coe.int/echr/fr/hudoc>.

303. App. No. 497/09, Admissibility Decision (May 31, 2011), available at <http://echr.coe.int/echr/en/hudoc>.

304. *Id.*

305. *Id.* at Section A (summarizing the circumstances of the case).

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at Section A.

311. *Id.*

312. *Id.*

In his complaint before the European Court of Human Rights, Koch argues that the refusal to grant his wife authorization to obtain the lethal dose of medication infringed on her right to respect for her private and family life under Article 8 by denying her right to a dignified death,³¹³ and that this denial infringed on his own right to respect for private and family life as he was forced to travel to Switzerland to enable his wife to commit suicide.³¹⁴ He further complains that the German courts violated his right to an effective remedy under Article 13 by not allowing him to challenge the institute's refusal to grant his wife the requested authorization.³¹⁵

This case raises the issue of victim status that was denied to the sister-in-law of Sampedro in the case of *Sanlés Sanlés v. Spain*,³¹⁶ where the Court considered the right to die in dignity as being of an “eminently personal and non-transferable nature.”³¹⁷ It will be interesting to see whether the Court changes its attitude in that respect, more than ten years later and, moreover, in respect of a closer family link between the deceased and the person bringing the claim.

V. OVERALL CONCLUSIONS

The debate on suicide is a delicate and sensitive one. The Strasbourg Court has taken a clear position in the debate regarding suicide but conditions the right to assisted suicide on the specific circumstances in each case. Throughout this analysis, it has also become clear that different aspects of the assisted suicide debate are not all recognized to the same extent.

The positive obligation of the States' authorities to prevent a person from self-inflicting harm or death in a situation of distress is solidly established in the Court's Article 2 holdings. This obligation is no longer limited to persons deprived of their liberty, but now also applies to individuals to whom the State owes a special duty, in particular to fragile persons serving in the army. This duty of States may further expand in the future and may become applicable to other circumstances of dependence and vulnerability.

The situation in which a person is willing to end her life and is capable of fully measuring the consequence of this decision but is physically incapable of carrying it out the act of suicide is much more controversial. This situation directly raises questions about the scope of a “right to die” and the Court's role in making this determination and enforcing such a right, if it exists. Like in other controversial topics where legal and moral questions collide, for instance, in questions of reproductive rights, the margin of ap-

313. *Id.* at Section I.2.

314. *Id.*

315. *Id.*

316. *See supra* Part III.A.

317. *Sanlés Sanlés v. Spain*, 2000-XI Eur. Ct. H.R. 495, 504.

preciation of States is wide and practice in the Member States of the Council of Europe varies considerably.

It was not surprising that in 2002, when asked to decide *Pretty*, the Court did not oblige the responding State to allow unpunished assistance in suicide, even if the applicant was terminally ill and unable to commit suicide by herself. It attributed more importance to the right to life than to the right of a person to assisted suicide. In my analysis of the judgment, I share the opinion of the Court according to which the acceptance of a “right to die” deriving from the right to life in Article 2 would go beyond admissible “dynamic” or “evolutive” interpretation, when specifically considering the fact that this provision obliges the States to punish the person responsible for a death that occurred under certain circumstances. It has also been submitted that, through the consequent application by the Court of a systemic interpretation of the invoked Convention rights and freedoms, this result largely influenced the Court’s examination of the applicant’s other complaints. The issue was not ripe in 2002 for the Court to oblige the respondent State to allow unpunished assistance of suicide, not even in the circumstances of *Pretty*’s compelling case.

More recently, in *Haas v. Switzerland*, in which the applicant was not suffering from a physical handicap that would prevent him from dying by his own hands and that the Court examined under a possible “positive” obligation to facilitate suicide under certain circumstances, the Court looked in depth at the allegations of the applicant and declared that the right to private life pursuant to Article 8 included the right to choose the time and the manner in which a person wanted to die. Despite the fact that the Court did not take a firm position concerning the existence of a positive obligation of the State, this declaration nevertheless opened a new chapter in the protection of human rights in Europe. The Court’s judgment can be understood as confirming the application of the principle of effectiveness of the protection of human rights to situations of assisted suicide, although the Court did not find in favor of the applicant. The Court emphasized the importance of safeguards to minimize the risk of abuse that may occur in this domain.

Finally, the development of this jurisprudence continues. The Court has already registered other applications concerning the issue of suicide, including *Koch v. Germany*. There will be future occasions for the Court to clarify its jurisprudence in the sensitive and evolving area of assisted suicide.