WRITTEN OBSERVATIONS

Submitted to the European Court of Human Rights

in the case

Karsai v. Hungary

(*Application no. 32312/23*)

Grégor Puppinck, ECLJ Director

November 2023

EUROPEAN CENTRE FOR LAW AND JUSTICE
4, Quai Koch, 67000 STRASBOURG, FRANCE – Tél : +33 3 88 24 94 40 – secretariat@eclj.org

The Court's case law on assisted suicide and euthanasia is complex and sometimes ambiguous, which is why the ECLJ considers it useful, for the proper administration of justice, to use these observations to present the state of this case law in an orderly fashion, and to offer constructive criticism. This effort at clarification is necessary in order to provide a solid foundation for the Court's future jurisprudence in this area.

These comments will address the following points in turn:

1. The Convention allows the withholding and refusal of disproportionate treatment.
2. The Court deems that the practice of suicide falls within the scope of Article 8.
3. Article 8 does not impose a procedural obligation in the absence of domestic substantive law to challenge the prohibition of assisted suicide or euthanasia.
4. In the *Mortier* case, the Court explicitly contradicted Article 2 of the Convention by tolerating active euthanasia.
    Haas extrapolation
    An abusive comparison with abortion
    A misinterpretation of article 2
    A partisan conception of human dignity
    Respect for life absorbed by respect for will
5. Article 2 of the Convention cannot be interpreted as imposing a positive obligation to legalize assisted suicide or euthanasia.
6. Article 8 of the Convention cannot be interpreted as imposing a positive obligation to legalize assisted suicide or euthanasia.
7. States may amend the Convention to add new exceptions to article 2 concerning euthanasia and assisted suicide.

1. The Convention allows the withholding and refusal of disproportionate treatment

The Convention, as interpreted by the Court, permits the withholding and refusal of disproportionate treatment, even if this has the effect of not delaying the onset of death. The proportionality of a treatment may be assessed according to the therapy envisaged (nature, degree of complexity or risk, cost, feasibility), the expected result, as well as the patient's general condition and physical and moral resources. In this evaluation, the patient's consent, if they are able to express it, and the medical team's assessment must be considered.

With regard to "refusal of treatment", which is based on the patient's wishes, the Court ruled that *"the very essence of the Convention is respect for human dignity and human freedom. It has held that in the sphere of medical assistance, even where the refusal to accept a particular treatment might lead to a fatal outcome, the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with his or her right to physical integrity."*[1]

With regard to "cessation of treatment", this is not conditional on the consent of the patient, his or her relatives or legal representatives: it is based primarily on a medical assessment of the patient's state of health.[2] Withdrawal of treatment does not fall into the logic of euthanasia or

[1] *V.C. v. Slovakia*, no. 18968/07, November 8, 2011 , § 105. See also: *Pretty v. the United Kingdom*, no. 2346/02, April 29, 2002, §§ 63 and 65; *Glass v. the United Kingdom*, no. 61827/00, March 9, 2004, §§ 82-83; *Jehovah's Witnesses of Moscow v. Russia*, no. 302/02, June 10, 2010 , § 135.
[2] *Lambert and others v. France* [GC], no. 46043/14, June 5, 2015; *Gard and others v. United Kingdom* (dec.), no. 39793/17, June 27, 2017; *Afiri and Biddarri v. France* (dec.), no. 1828/18, January 23, 2018.

assisted suicide, since death is not intentionally inflicted if the treatment withdrawn is disproportionate to the patient's state of health, and death occurs naturally. States enjoy a wide margin of discretion in this area.

The right to refuse treatment and the right to stop treatment do not therefore constitute rights to euthanasia or assisted suicide. There is a fundamental difference in the nature of these acts, even if their consequence is the same (death). Euthanasia or assisted suicide correspond to "causing death" (killing or participating in killing), whereas stopping disproportionate treatment corresponds to "letting die" naturally. The situation of a person who is dying and being kept alive artificially, and who may refuse treatment or have their treatment stopped, is not comparable to that of a person who is ill but not yet dying. The latter cannot invoke the natural death of the former to request voluntary death. As these two situations are not equivalent, they must be treated differently by the States and by the Court.

2. The Court considers that the practice of suicide falls within the scope of Article 8.

In the British context of the 2002 *Pretty v. United Kingdom* judgment, the Court held that the *"choice to avoid what she considers will be an undignified and distressing end to her life"* falls within the scope of Article 8, and rejected any obligation to allow assisted suicide or euthanasia.[3]

In the 2011 *Haas v. Switzerland* judgment,[4] the Court reasoned that the legal right to undergo assisted suicide in Switzerland constitutes a domestic substantive *right* within the meaning of the Convention. It held that *"that an individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention."*.[5] In referring to such a right, the Court quoted the terms used by the Swiss domestic courts in the case.[6] The Court was referring there to the faculty (and by extension the right) existing in Switzerland to commit suicide with assistance,[7] insofar as, in Switzerland, *"legislation and practice allow for relatively easy access to assisted suicide"*.[8] The Court did not recognize an autonomous conventional right to assisted suicide.

Moreover, the Court explicitly states that *"the instant case does not concern the freedom to die and possible immunity for a person providing assistance with a suicide. The subject of dispute in this case is whether, under Article 8 of the Convention, the State must ensure that the applicant can obtain a lethal substance, sodium pentobarbital, without a medical prescription,*

[3] *Pretty v. United Kingdom*, *op. cit.* in particular § 67.
[4] *Haas v. Switzerland*, no. 31322/07, January 20, 2011.
[5] *Ibid*, § 51.
[6] *Ibid*, § 16. In its judgment of November 3, 2006, the Federal Court stated as follows: "6.1 (...) The right to self-determination, within the meaning of Article 8 § 1 [of the Convention], includes the right of an individual to decide at what point and in what manner he or she will die, at least where he or she is capable of freely reaching a decision in that respect and of acting accordingly...".
[7] Jean-Pierre Marguenaud, "Le droit de se suicider de manière sûre, digne et indolore", *RTD Civ*., 2011 p. 311 (on the *Haas* ruling).
[8] *Haas v. Switzerland*, *op. cit*, § 57. See also: *Gross v. Switzerland*, no. 67810/10, May 14, 2013, § 67: "*Swiss law, while providing the possibility of obtaining a lethal dose of sodium pentobarbital on medical prescription*...".

by way of derogation from the legislation, in order to commit suicide painlessly and without risk of failure."[9]

This domestic right to assisted suicide clashes with the treaty obligation of States to protect life by preventing suicide. Again in 2022, the Court reiterated the principle that Article 2 *"which creates for the authorities a duty to protect vulnerable persons, even against actions by which they endanger their own lives".*[10] It is on the conditions for exercising this domestic substantive right that the Court has subsequently applied, under Article 2, a procedural obligation to protect vulnerable persons. This conventional procedural obligation is ancillary to the main substantive right, which has its source in the domestic order.

In *Haas*, the Court did not explicitly rule on the compatibility of assisted suicide with Article 2. However, assisted suicide poses a problem in this respect in that, unlike suicide, it requires the intervention of *a third party* to inflict death. It was in the Mortier case that the Court explicitly ruled on this point, but relying on *Haas* (see point 4a below).

3. Article 8 does not impose a procedural obligation, in the absence of domestic substantive law, to challenge the prohibition of assisted suicide or euthanasia.

In the 2012 *Koch v. Germany* judgment,[11] the Court went further than *Haas* by imposing a *conventional* procedural obligation in the absence of *domestic* substantive law on assisted suicide. The Court held that Germany had an obligation to provide judicial remedies enabling candidates for assisted suicide to challenge the merits of decisions to refuse assisted suicide,[12] even though euthanasia and assisted suicide are criminally prohibited under domestic law. In so ruling, the Court relied on the *Schneider v Germany* judgment of 2011,[13] in which it stated that it was possible to impose procedural obligations without first establishing the existence of the main material obligation. This reference was abusive, as in the *Koch* case, the substantive right to assisted suicide under domestic law had not yet been established: it was manifestly non-existent by the explicit will of the German legislature, unlike in the *Schneider* case, where the right invoked existed under domestic law and only the status of holder of that right remained to be established for the applicant.[14]

In the 2015 *Nicklinson and Lamb v. United Kingdom* decision, by a unanimous decision of the Chamber, the Court corrected the approach of the *Koch* judgment, holding very clearly that "*there is a fundamental problem with extending the procedural protections of Article 8 in this way.*"[15] It thus concluded that *"the Court does not consider it appropriate to extend Article 8 so as to impose on the Contracting States a procedural obligation to make available a remedy*

[9] *Haas v. Switzerland, op. cit.* at § 52.
[10] *Ibid*, § 54. This principle is reiterated in *Lings v. Denmark*, no. 15136/20, April 12, 2022, § 49.
[11] *Koch v. Germany*, nº 497/09, July 19, 2012, § 70.
[12] *Ibid*, § 71.
[13] *Schneider v. Germany*, nº 17080/07, September 15, 2011, § 100.
[14] This case concerned the impossibility for a biological (adulterous) father to have his paternity of a child already recognized by the mother's legitimate husband established in court. The Court held that a procedural right must exist without the need to first establish the substantive right to which it relates (the reality of paternity), since the procedural right aims precisely to establish this parental right, which benefits from the autonomous guarantee of the Convention. The reference in the *Koch* case to the *Schneider* judgment is therefore inappropriate.
[15] *Nicklinson and Lamb v. United Kingdom* (dec.), nºs 2478/15 and 1787/15, 23 June 2015, § 84.

requiring the courts to decide on the merits of a claim such as the one made in the present case",[16] i.e. a claim directly challenging domestic law, in the absence of an individual measure. It follows that a State which has chosen to prohibit assisted suicide or euthanasia does not have to offer individual remedies against this choice; this would exceed the requirements of article 13 of the Convention. It also follows that an applicant cannot challenge directly at the ECHR a Member State's choice to prohibit these practices, as the application would be inadmissible *rationae materiae*.

4. In *Mortier*, the Court explicitly contradicted Article 2 of the Convention by tolerating active euthanasia

In the *Mortier v. Belgium* judgment of 2022, the Court had to rule primarily on whether the legalization of euthanasia in Belgium was compatible with Article 2 of the Convention, concluding that *"the right to life* (...) *cannot be interpreted as per se prohibiting the conditional decriminalisation of euthanasia.*"[17] This is the first time that the Court has explicitly ruled on the compatibility of euthanasia with Article 2.

In so concluding, the Court extrapolated the *Haas* judgment, wrongly compared euthanasia to abortion, misinterpreted Article 2, and adopted a partisan conception of human dignity. The ruling was not unanimous, with some judges expressing profound disagreement with the judgment and pointing to a denial of the right to life.[18]

a. Haas extrapolation

In support of its decision, the Court referred to its precedents on assisted suicide, but overlooked the fact that euthanasia differs from suicide in that it involves death being inflicted *directly* by a third party.

The Court also misquoted the *Haas* judgment, stating that "*An individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life*",[19] while omitting to quote the rest of the sentence, which is nonetheless essential, namely the conditions laid down by the Court. Indeed, the *Mortier* judgment fails to recall that this (domestic) right falls within the scope of Article 8 *" provided he or she is capable of freely reaching a decision on this question and acting in consequence.*"[20] In *Mortier*, the Court surreptitiously extrapolated the *Haas* case law, giving it a conventional origin and a general scope that includes death inflicted directly by a third party (euthanasia).

b. An abusive comparison with abortion

In so concluding, the Court also drew on its case law on abortion, observing that it had held that "*an abortion could be compatible with Article 2 of the Convention (...) if there was a risk to the*

[16] *Ibid.*
[17] *Mortier v. Belgium*, no. 78017/17, October 4, 2022, § 138.
[18] *Ibid*, partly concurring and partly dissenting opinion of Judge Elósegui and partly dissenting opinion of Judge Serghides.
[19] *Ibid*, § 135.
[20] *Haas v. Switzerland, op. cit.* at § 51.

woman's physical or mental health."[21] Consequently, for the Court, it was possible to intentionally inflict death on the foetus out of respect for "*the woman's interests*". However, the *Mortier* judgment fails to recall that the Court tolerates abortion because of doubts as to the "personhood" of the unborn child within the meaning of the Convention. On the subject of abortion, the Court has never admitted or created a new exception to Article 2: it has refused to rule on the applicability of Article 2 to the unborn child, leaving this decision to the States under their margin of appreciation.

It is not correct to apply this reasoning to euthanasia, as there is no doubt as to the "personhood" of individuals who may request euthanasia. The acceptance of abortion cannot therefore be used as a precedent to justify the acceptance of euthanasia, unless we consider that an elderly, sick or bedridden person is no *longer* a person, while an unborn child is *not yet* a person.

c. *A misinterpretation of article 2*

In his dissenting opinion to the *Mortier* judgment, Judge Serghides is perfectly right to point out that "*euthanasia or any enabling legal framework would not only have no legal basis under the Convention, but would also militate against the Convention's fundamental right, the right to life*". Indeed, Article 2 of the Convention states that *"No one shall be deprived of his life intentionally"*. This is an affirmation of a fundamental principle, from which flows the *right of* every individual to have his or her life protected. The scope of this principle is general, vertical and horizontal. The right to life *"is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights"*[22] ; it protects *"every person*"[23] and strictly prohibits "*the intentional infliction of death on anyone"*. Paragraph 2, which lists the derogations to this right tolerated by the Convention, makes no mention of the request or consent of the person concerned. The absence of this derogation in the Convention is intentional, as the drafting States have always rejected the idea that the victim's consent could be a justifying pretext.

In *Mortier*, the Court rightly recalls the rule of interpretation that " *the ordinary meaning to be given to the terms in their context and in the light of the object and purpose of the provision from which they are taken.*"[24] The Court then invokes "*travaux préparatoires contain no guidance on how to interpret Article 2 of the Convention*",[25] in order to cast doubt on the fact that this right can be applied "*to relations between private individuals*". These *travaux préparatoires* are inaccessible, unlike those for the other articles of the Convention. With this interpretation, the Court opens up a loophole in this right, which Judge Serghides clearly demonstrated in his dissenting opinion.

But the *travaux préparatoires* are not the only source of information on the context in which Article 2 was drafted. The post-war context is well known.

[21] *Mortier v. Belgium, op. cit,* § 132.
[22] *Pretty v. the United Kingdom, op. cit*, § 65; *McCann and others v. the United Kingdom*, no. 18984/91, September 27, 1995, § 147; *Streletz, Kessler and Krenz v. Germany* [GC], n^{os} 34044/96, 35532/97 and 44801/98, §§ 92-94.
[23] This is confirmed by the preparatory work carried out by the 1949 Consultative Assembly, which makes it clear that these are rights possessed by the mere fact of existing: "*the Committee of Ministers has instructed us to draw up a list of rights from which human rights, as a human being, should naturally enjoy"*. Travaux préparatoires, vol. II, p. 89.
[24] *Mortier v. Belgium, op. cit,* § 128.
[25] *Ibid*, § 129.

Forced euthanasia was strongly condemned at Nuremberg.[26]
On the subject of *voluntary* euthanasia, René Cassin was one of the drafters and signatories of a declaration by the French Academy of Moral and Political Sciences, adopted on November 14, 1949, which "*formally* rejects *all methods whose purpose is to provoke the death of subjects deemed monstrous, malformed, deficient or incurable", or incurable*", considering that "*euthanasia and, in general, all methods whose effect is to provoke a 'gentle and tranquil' death in moribund patients out of compassion, must also be rejected*", otherwise the doctor would be granting himself "*a kind of sovereignty over life and death.*"[27]

Similarly, in 1950, the World Medical Association adopted a declaration "*condemning the practice of euthanasia under any circumstances*",[28] in accordance with medical deontology since Hippocrates.[29]

At the same time, associations campaigning for the legalization of euthanasia tried in vain to introduce or pass bills legalizing voluntary euthanasia. These proposals were either withdrawn before being put to the vote, as they caused such a scandal (in the UK),[30] or were rejected (in the USA).[31]

The British and American pro-euthanasia societies then took the initiative, from 1952 onwards, in asking Eleanor Roosevelt and the United Nations to recognize the right of "*incurable patients to euthanasia or merciful death.*" This request was also systematically rejected.

It is impossible to believe that the drafters of the ECHR intended to tolerate euthanasia, even if voluntary. The ban on euthanasia has been regularly reiterated by the Parliamentary Assembly of the Council of Europe (PACE). Recommendation 779 (1976) states that *"the doctor must make every effort to alleviate suffering, and that he has no right, even in cases which appear to him to be desperate, intentionally to hasten the natural course of death"*. In Recommendation 1418 (1999), the same assembly strongly affirms *" a terminally ill or dying person's wish to die never constitutes any legal claim to die at the hand of another person "* and *"cannot of itself constitute a legal justification to carry out actions intended to bring about death*". In the same vein, Resolution 1859 (2012) recalls that *"Euthanasia, in the sense of the intentional killing by act or omission of a dependent human being for his or her alleged benefit, must always be prohibited".* Here again, this prohibition applies to both involuntary and voluntary euthanasia.

The principle that *"Death may not be inflicted on anyone intentionally"* is unequivocal; it is clear, general, unconditional and impersonal: it is not subject to individual will. It simply states that any death inflicted on anyone intentionally violates the convention. It is an objective principle, not a subjective one, i.e. it does not depend on intentions. The Court's finding that euthanasia was compatible with Article 2 was based solely on the subjective "aim" of its decriminalisation of euthanasia, which in Belgium corresponds to the choice to avoid "*an*

[26] Trials of the War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg October 1946-April 1949, Volume V, Washington, DC: Government Printing Office, 1950.
[27] Revue des Travaux de l'Académie des Sciences morales et politiques, procès-verbaux, 1949/2, p. 258.
[28] P. Moran, "Report on the fourth General Assembly of the World Medical Association". *J Med Assoc Eire*. 1950 Dec;27(162):107-10. See also "PROFESSIONAL freedom stressed by World Medical Association; euthanasia condemned". *Can Hosp*. 1950 June;27(6):76.
[29] V^{e} century B.C.; extract from the oath: "*I will not give poison to anyone, if asked, nor will I initiate such a suggestion*" (Littré translation).
[30] House of Lords, debates, November 28, 1950, c 559.
[31] Jean Graven, "Le Procès De L'euthanasie Les données et la solution d'un problème "insoluble"", *Revue pénale Suisse*, Vol. 80, Nos. 2 and 3, 1964, p. 132.

undignified and distressing end to life."[32] Indeed, it was this objective, rather than subjective, nature of the right to life that justified the ban on suicide in Europe.

In all legal rigor, it is impossible to support the majority's assertion in *Mortier* that "*the right to life […] cannot be interpreted as per se prohibiting the conditional decriminalisation of euthanasia.*"[33] On the contrary, it can and should be interpreted as prohibiting euthanasia.

Even the adoption of a subjective conception of dignity does not render the protection of life subjective. The protection of the quality of life affirmed by the Court in the context of Article 8 does not remove the prohibition on the intentional infliction of death laid down in Article 2. In other words, Article 8 does not absorb Article 2. The two provisions must offer guarantees that are compatible with each other.

d. A partisan conception of human dignity

In concluding that euthanasia was conventional in the *Mortier* judgment and failing to rely on the letter of the Convention, the Court again relied on the "essence" of the Convention, stating that " *the decriminalisation of euthanasia was intended to give individuals a free choice to avoid what in their view might be an undignified and distressing end to life. It must be said that human dignity and human freedom constitute the very essence of the Convention*."[34]

In so ruling, the Court adopted the partisan conception of dignity espoused, in particular, by the associations "*pour le droit de mourir dans la dignité*" ("for the right to die with dignity"). This is a fundamental philosophical choice with far-reaching consequences for the Court's jurisprudence. Indeed, one's idea of human dignity, and therefore of Man, determines the content of one's rights and freedoms.

This choice, made by the Court, is questionable because there are two competing conceptions of human dignity: one is individual, the other universal. Since *Pretty*, the Court has endorsed the individual conception, which is subjective and relative. According to this conception, dignity varies according to "*which conflict with strongly held ideas of self and personal identity",*[35] from which it follows that some people might feel they are leading "an undignified end of life". This concept of dignity is controversial and far from universally accepted. It has replaced the universal conception, which is objective and absolute. According to the universal conception, every person possesses the same human dignity, simply by virtue of being human. This shared dignity implies an individual duty not to treat one's own body with indignity, notably by selling, mutilating, prostituting or killing it. The European peoples who prohibit euthanasia do so on the basis of the universal conception of dignity, from which it follows that dying by euthanasia is not a death worthy of a human being.

It is from this universal conception of human dignity that human rights and their universality derive. The Universal Declaration of Human Rights bases the origin of human rights on "*inherent dignity and of the equal and inalienable rights of all members of the human family",* i.e. on the objective and absolute dignity of human nature. Inherent dignity is not subjective, as

[32] *Mortier v. Belgium, op. cit,* § 137.
[33] *Ibid,* § 138.
[34] *Ibid,* § 137.
[35] *Pretty v. the United Kingdom, op. cit.* § 65; *Koch v. Germany, op. cit.* § 51.

the report associated with PACE Recommendation 1418 (1999) reminds us.[36] This dignity is independent of a person's sex, race or state of health: no one can be unworthy.

Conversely, the right to voluntary death is based on a subjective and relative conception of dignity, according to which each person is the judge of his or her own dignity and may therefore consider death preferable to life. Respect for dignity then consists in respect for the individual's will, and this human dignity would be all the more honoured if the individual were capable, through his will, of overcoming his physical or mental decline by deciding to die. Dignity would ultimately be preserved by voluntary death. Nietzsche, in this sense, declared in *Twilight of the Idols* that "*the right to life, should entail, on the part of Society, profound contempt*" because it supports the "*obstinacy*" of the sick "*to vegetate cowardly" whereas "freely chosen death*" would allow one to "*die proudly when it is no longer possible to live proudly*". By replacing inherent dignity with a reflexive dignity measured by individual feelings, the Court radically alters the ontological basis of the Convention, transforming it from universal to individual and relative.

e. <u>Respect for life absorbed by respect for will</u>

When the Court acknowledges "*the risks of abuse inherent in a system that facilitates access to assisted suicide should not be underestimated*",[37] it is not so much to protect people's lives as to respect their wishes. To this end, the European Court stipulates that States which authorize assisted suicide must "*to establish a procedure capable of ensuring that a decision to end one's life does indeed correspond to the free will of the individual concerned*" in order to prevent him or her "*to prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved*."[38] Thus, according to the Court, respect for the right to life is reduced to respect for the free will of the individual, which is both the source of the right to suicide and its condition. The objectivity of respect for the right to life is thus absorbed into the subjectivity of the individual will.

An inconsistency then emerges: why should voluntary death be reserved for the sick, when the basis of the right to voluntary death is not so much illness as self-determination? Why is it necessary to be ill in order to die voluntarily, when the individual has the firm will to do so? What's more, why reserve euthanasia for the sick and refuse it to healthy people who have full capacity for discernment and autonomy? In a depressed person, aren't suicidal thoughts more a symptom of the illness than an expression of individual autonomy? Thus, basing euthanasia on willpower and reflective dignity necessarily leads to a broadening of the grounds for access to this practice, beyond cases of serious pathology, as has been observed in Belgium and the Netherlands, where euthanasia for "fatigue of living" of isolated elderly people is multiplying.

---

[36] Report on "Protecting of the Human Rights and Dignity of the Terminally Ill and the Dying", Doc. 8421: *"3. Dignity is bestowed equally upon all human beings, regardless of age, race, sex, particularities or abilities, of conditions or situations, which secures the equality and universality of human rights. Dignity is a consequence of being human. Thus a condition of being can by no means afford a human being its dignity nor can it ever deprive him or her of it.*
4. Dignity is inherent in the existence of a human being. If human beings possessed it due to particularities, abilities or conditions, dignity would neither be equally nor universally bestowed upon all human beings. Thus a human being possesses dignity throughout the course of life. Pain, suffering or weakness do not deprive a human being of his or her dignity."

[37] *Haas v. Switzerland, op. cit*, § 58. In the *R. v. United Kingdom* decision of July 4, 1983, the former Commission had already indicated that the State may "*take measures to protect the lives of citizens from criminal conduct, in particular those who are particularly vulnerable because of their age or infirmity*" (§ 13).

[38] *Haas v. Switzerland, op. cit,* §§ 58 and 54.

5. Article 2 of the Convention cannot be interpreted as imposing a positive obligation to legalize assisted suicide or euthanasia

This impossibility has been explicitly affirmed by the Court on several occasions:

In *Pretty*, the Court made it clear that "*Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.*"[39] The Court concluded that "*whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention.*"[40]
In the *Mortier* judgment, the Court recalls that "*the Court has found that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2.*"[41]
This impossibility is obvious, as noted in the *Pretty* judgment, in that Article 2 guarantees the right to life.

6. Article 8 of the Convention cannot be interpreted as imposing a positive obligation to legalize assisted suicide or euthanasia

To date, the Court has held that Swiss and Belgian legislation permitting assisted suicide and euthanasia fall within the scope of Article 8 and are not incompatible with Article 2, provided that they protect the lives of vulnerable persons.

The Court has not created a conventional right to assisted suicide or euthanasia. Indeed, in the *Lings v. Denmark* judgment of 2022, the Court recalled that "*There is no support in the Court's case-law, however, for concluding that a right to assisted suicide exists under the Convention.*" (§52)[42]

Tolerance of such practices under Article 8 does not, however, make it possible to assert the existence of a conventional right to voluntary death, since such an assertion would run counter to the letter of Article 2 and constitute an excessive interpretation of Article 8.

Article 8 was originally designed to protect private and family life, the home and correspondence. During the preparatory work, it formed part of a draft article dealing with "family freedoms" and grouping together the current articles 8, 12 (on marriage) and 2 of the 1er protocol (on the educational rights of parents). The Court considerably extended the boundaries of private and family life, deeming it a "*broad notion, not susceptible of an exhaustive definition.*"[43] This prompted Judge Küris to write that Article 8 should now be spelled "Article ∞",[44] as its scope has become infinite.

In practice, the inclusion of a practice within the scope of private or family life (Article 8) has the effect of obliging States to justify their legislation prohibiting this practice, provided that

[39] *Pretty v. United Kingdom, op. cit.*, § 39.
[40] *Ibid*, § 40.
[41] *Mortier v. Belgium, op. cit*, § 119.
[42] *Lings v. Denmark*, no. 15136/20, April 12, 2022, § 52.
[43] *Couderc and Hachette Filipacchi Associés v. France*, no. 40454/07, November 10, 2015, § 83.
[44] *Erményi v. Hungary*, no. 22254/14, November 22, 2016, Dissenting Opinion of Judge Küris.

the applicant has been the subject of an individual measure. This method enables the Court to create new rights, even though in principle it cannot derive from the Convention *"derive from these instruments a right that was not included therein at the outset."*[45]

Thus, the consequences of the decision to bring assisted suicide and euthanasia within the scope of Article 8 (*Pretty* and *Haas*) are far-reaching. However, because euthanasia and assisted suicide involve the intervention of a third party, and call into question the rights and interests of third parties, these practices cannot fall exclusively within the scope of Article 8.

What's more, because euthanasia and assisted suicide consist precisely in the intentional infliction of death on a person, the assertion of a right to resort to these practices is in direct conflict with Article 2.

However, as the Court has emphasized, the Convention must be read as a whole and interpreted consistently. In *Pretty*, the Court emphasized that *"While the Court must take a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection."*[46] In *Haas,* the Court also recalled that the Convention must be read as a whole.[47]

Thus, even if there were a broad European consensus in favour of euthanasia or assisted suicide, the Court could not deduce from the Convention a *treaty right* to these practices, as such rights would be contrary to the letter of the Convention.

As a result, recognition of a conventional right to euthanasia or assisted suicide would require not only an extensive interpretation of Article 8, but also a modification of Article 2.

7. States may amend the Convention to add new exceptions to article 2 concerning euthanasia and assisted suicide

Assuming that States are broadly in favour of euthanasia and assisted suicide, it would then be up to them to amend the Convention, if they so wished, to add new exceptions to Article 2, following the example of Protocol No. 6 of 1983, which amended Article 2 of the Convention by providing for the abolition of the death penalty. It was not the Court that imposed such an abolition of the death penalty, but the governments of the member states.

The Court cannot "update" the Convention against its letter.

[45] *Johnston and others v. Ireland*, no. 9697/82, December 18, 1986, § 53 and *Emonet and others v. Switzerland*, no. 39051/03, December 13, 2007, § 66.
[46] *Pretty v. United Kingdom, op. cit.*, § 54.
[47] *Haas v. Switzerland, op. cit,* § 54.