-TRANSLATION FROM THE ORIGINAL IN FRENCH-

OBSERVATIONS RELATING TO THIRD PARTY INTERVENTION

submitted to the Second Section of the
European Court of Human Rights

in the case of

Alda Gross v. Switzerland

Application No. 67810/10

By the *European Centre for Law and Justice*

Strasbourg, April 25, 2012,

by Grégor Puppinck, Director of the ECLJ, with the participation of Miss Andreea Popescu and Mrs. Claire de la Hougue, attorneys.

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I. PRESENTATION OF FACTS AND QUESTIONS TO PARTIES

- Prepared by the Registry of the Court -

SECOND SECTION

Application No. 67810/10
Alda GROSS
versus Switzerland
Introduced November 10, 2010

STATEMENT OF FACTS

IN FACT

The applicant, Mrs. Alda Gross, is a Swiss national, born in 1931 and residing in Greifensee. She is represented in court by Mr. F. Th. Petermann, an attorney in St. Gallen.

A. The circumstances of the case

The facts of the case, as represented by the applicant, are summarized as follows.

The applicant has long expressed a desire to end her life. She has explained that she is becoming more and more fragile, and no longer sees the point of continuing to suffer the decline of her physical and mental faculties.

In 2005, she attempted to commit suicide and as a result was hospitalized and received psychiatric care for six weeks.

Despite the psychiatric treatment, her desire to die remained. She tried in vain to obtain a dose of sodium pentobarbital from the Organization of Suicide Assistance, "Exit." The applicant further alleges that she has been unable to find a doctor that would prescribe her a dose of this substance that would likely allow her to commit suicide.

On December 16, 2008, she wrote the Director of Health of the district of Zürich (below: "Letter") and requested that she be given 15 grams of sodium pentobarbital in order that she might commit suicide.

On April 29, 2009, after her request was denied by the Director, the applicant appealed the Director's decision and brought her case to the Administrative Court of the District of Zürich.

In a decision given on November 22, 2009, the court rejected the applicant's appeal on the grounds that the restrictions placed on the distribution of sodium pentobarbital could not be circumvented without a medical examination of all the relevant facts and a doctor's prescription.

The applicant appealed the lower court's decision in federal court. She reiterated her request for the issuance of 15 grams of sodium pentobarbital, possibly through a pharmacy. She also requested that it be noted that the issuance of a lethal dose of sodium pentobarbital does not constitute a violation of the duties of medical care when the dose is issued to a person who is capable of discernment and who does not suffer from mental or somatic illness.

Invoking explicitly, or in substance, Articles 2, 3 and 8 of the Convention, she alleged that the decision of the Tribunal authorities took away her right to decide the manner and time of her death. She further contended that the State should create the conditions necessary for her to exercise the right in a practical and effective manner.

In an April 12, 2010 decision, sent to the applicant on May 10, 2010, the Federal Court dismissed the applicant's appeal. The court determined that the State does not have an (positive) obligation to guarantee individuals access to a dangerous substance in order that they may have a certain and painless method of death. The court further contended that the requirement of a medical prescription not only served to prevent abuse, but also the legitimate purpose of protecting anyone from hasty decision-making. The federal court was also of the opinion that the restriction of access to sodium pentobarbital served to protect the health and welfare of the public. This decision also made it clear that the applicant did not suffer from a fatal disease, but wished to die because of her advanced age and growing fragility. She does not see the sense in continuing to suffer a decline in her physical and mental faculties.

The applicant subsequently contacted several other authorities in order to obtain a permit to acquire a firearm. These attempts have been unsuccessful.

B. The law and relevant internal practices

The relevant provisions of the Swiss penal code are as follows:

"Article 114: Homicide at the request of the victim

Any person who for commendable motives, and in particular out of compassion for the victim, causes death of a person at that person's own genuine and insistent request shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

Article 115: Inciting and assisting suicide

Any person who for selfish motives incites or assists another to commit or attempt to commit suicide shall, if that other person thereafter commits or attempts to commit suicide, be liable to a custodial sentence not exceeding five years or to a monetary penalty."

In a November 3, 2006 decision, the Federal Court rendered a decision regarding the question of assisted suicide (Judgment of the Federal Court (ATF) 133 I 58). First, the court found that, according to applicable law, the sodium pentobarbital could be obtained only by medical prescription, and that the claimant had not obtained such a prescription. This decision was based on *Hass v. Switzerland*, No. 31322/07 (January 20, 2011), in which the Court determined that there was no violation of Article 8. The discussion relevant to this case is in paragraph 16 of the Court's decision. See also supra, paragraphs 20-31 of the *Haas* decision for other comparisons of internal, international and comparative law and practices.

GRIEVANCE

1. Relying on Article 8 of the Convention, the applicant alleges that the Swiss authorities refused her access to a dose of sodium pentobarbital sufficient to commit suicide and have deprived her of her right to decide the time and manner of her death. Therefore, this right exists only as a theoretical and abstract right.

2. For the above reasons, the applicant claims to be a victim of a violation of Article 13, as well as Article 8 of the Convention.

3. The applicant also believes that her right to life, within the meaning of Article 2 of the Convention, has been violated, and alleges that the State is not obligated to protect the life of a person, who in an informed manner, desires to give up their life.

4. According to the applicant, denial of access to the sodium pentobarbital will cause her to endure a decline in her physical and mental faculties, which would be degrading treatment. Therefore, this denial is a violation of Article 3 of the Convention.

5. The applicant also alleges that Articles 6 and 13 of the Convention have been violated on the grounds that the Swiss courts did not sufficiently take into consideration the applicant's arguments developed and presented in support of her case.

QUESTIONS TO THE PARTIES (QUESTIONS PRESENTED)

1. Is the refusal of the Swiss authorities to provide the applicant with a lethal dose of sodium pentobarbital in order to end her life an interference with the right to privacy within the meaning of Article 8 of the Convention? If so, is the interference in the exercise of this right provided for by law with the legitimate goal necessary in a democratic society within the meaning of Article 8 § 2?

2. According to the circumstances of this case, has Switzerland violated a positive duty to facilitate the suicide of the applicant?

II. WIRTTEN OBSERVATIONS OF THE ECLJ

This case raises a question similar to the question raised in *Haas v. Switzerland* on the right to assisted suicide, the decision of which decision was rendered on January 20, 2011.

1. Reminder of the solution set out in the case of *Hass v. Switzerland*

1. Let us briefly recall the principles established in this case. As explained by the Registry of the Court, "*this case raised the issue of whether, by virtue of the right to respect for private life, the State should have ensured that a sick man wishing to commit suicide could obtain a lethal substance without a prescription, by way of derogation from the law, so as to be able to end his life without pain and with no risk of failure*." The Court unanimously replied in the negative. Although admitting a sort of right to suicide, the Court denied the existence of a right to assisted suicide stemming from the European Convention and guaranteed by the State.

2. In *Haas*, the applicant suffered from a serious psychic disorder and he wanted to commit suicide with a lethal substance which, according to Swiss law, was only available by medical prescription. Because the applicant did not qualify under this law, he vainly undertook to obtain special consideration in order to get the substance without a prescription. He complained that the impossibility of obtaining the substance violated his right to privacy, guaranteed by Article 8 of the European Convention on Human Rights. According to the applicant, the State should have provided him with the drugs that would allow him to commit suicide. In that case, the applicant was not suffering from a fatal disease and the State did not prevent him from committing suicide by his own means.

3. To answer the question, the Court first recalled the broad scope of the concept of "private life" which, enlarged through successive interpretations, included the right to autonomy and personal development. Thus, in the case of *Pretty v. United-Kingdom* (2002), the Court ruled that the decision of the applicant to avoid what would be, in her eyes, an undignified and distressing end to her life was part of the "private sphere" covered by the scope of Article 8 of the Convention.
Applying the case law found in *Pretty*, using the words of the Swiss Federal Tribunal, and stretching the definitions of "choice" and "right," the Court admitted *"that the right of an individual to decide how and when to end his life, provided that said individual was in a position to make up his own mind in that respect and to take the appropriate action, was one aspect of the right to respect for private life"* under Article 8 of the Convention (§ 51). The Court thus recognized, under certain conditions, a sort of right to self-determination concerning one's own death; in other words, the "right to suicide." The existence of this right is subject to two conditions; one relates to the free will (discernment) of the person concerned, the other relates to their *ability to act accordingly*. The Court did not define the requirements for the last condition very clearly, and its scope goes beyond a person committing suicide on their own, and does not preclude "suicide" from being performed by a third party. A person who, upon reflection, decides to continue with a request to euthanasia could be regarded as exercising his or her right to determine how and when his or her life should end, as long as the decision is actually based on free will.

4. The Court also observed that the Convention should be read as a whole, thus it is necessary to consider Article 2 of the Convention, which protects the right to life. The Court noted that most member States place more weight on the protection of an individual's life

than on the right to end one's life (§55), and concluded that the States have a broad margin of appreciation in that respect. In any case, respect for the right to life requires national authorities to prevent an individual from ending their own life if such a decision is not made freely and with full knowledge of the consequences (§54).

5. The Court weighed the interest of the applicant in being able to commit suicide in a reliable and painless manner against the interests of the authorities. The Court observed that the requirement of a prescription serves the legitimate purposes of protecting individuals from making hasty decisions and preventing abuse of the substance (§56), especially necessary in a country such as Switzerland, which readily allows assisted suicide. The Court noted that the risk of abuse inherent in a system that facilitates access to assisted suicide cannot be underestimated (§58). The Court concluded that restriction of access to this deadly substance serves to protect the health and safety of the public, and to prevent crime (§58).

2. The *Haas* decision in view of the objectivity of Article 2 and the subjectivity of Article 8

6. Based on the standards set in the *Haas* case, the Court could easily decide *Alda Gross v. Switzerland* one way or the other.
As has been stated, the Court in *Haas* indicated that a right to suicide may exist under Article 8. Without reaching a decision, due to the lack of European consensus on the existence of a positive obligation of the State to allow assisted suicide, the Court stated that if the State made the choice to allow the assisted suicide, then the positive obligation of Article 2 would require that a "procedure be put in place to allow an individual to freely decide to end his or her life," (§ 58) while at the same time ensuring that a decision to end one's life could not be forced or made without full knowledge of the facts (§ 54). Article 2 would *merely* require that a verification process exist to prove the subjective will, that is to say the autonomy, of the candidate to suicide. Only because the margin of appreciation exists can States choose to further protect life when the right to suicide exists, by penalizing assisted suicide, or by imposing conditions of "objectivity" related to the health status of the candidate.

7. It should be emphasized that according to the *Hass* decision, the standard for acceptable suicide, and as a result, assisted suicide, is not based on the health status or suffering of the candidate for suicide, but rather is exclusively determined by the candidate's free will—on what the Court had deemed to be autonomy. In doing so, the *Hass* decision has subjected the objective standard of Article 2 to the subjective standard of Article 8. In fact, according to the logic of this decision, the obligation of the State to guarantee and to respect the right to life is fulfilled by respect—not of the life—but of the autonomy of the candidate to suicide. In fact, the objectivity of Article 2 is absorbed and disappears into the subjectivity of Article 8. After the *Hass* decision, it can no longer be said that the right to life is the first of human rights—that it "constitutes an inalienable attribute of the human person and that it form the supreme value in the scale of human rights"[1] and that it protects "any person."[2]

[1] *Pretty v. RU*, Application No. 2346/02, judgment of 29 April 2002, ¶ 65; *McCann and others v. RU*, judgment of 27 September 1995, ¶ 147; *Streletz, Kessler and Krenz v. Germany*, [GC], Application Nos. 34044/96, 35532/97 and 44801/98, ¶¶ 92-94.

3. The European Convention must continue to rise above the conflict between individual autonomy and social laws

8. This reversal in the hierarchy of values between life and liberty is certainly representative of a trend in Western society which promotes individual autonomy over any other objective consideration. This conception of individual autonomy, seen as a liberation of the individual from standards of society that are perceived as heteronomous, poses a danger to social unity, as well as to the consistency and effectiveness of the law, including the law pertaining to human rights. It is not certain that reorganizing the law and the understanding of human rights around individual autonomy is beneficial to the protection of human rights. "Indeed, it is difficult to reconcile personal autonomy with the sovereignty of States, which is recognized domestically and internationally, while understanding that the current definition of sovereignty is identical to the definition of personal autonomy, *in the strictest sense*. But it is even more difficult to reconcile personal autonomy with the principle of heteronomy, that structure by which all positive law functions." [3] In fact, we often tend to think of positive law as permeated by a heteronomous structure, the embodiment of a sovereign State's decision. This positivist conception cannot support the recognition of personal autonomy without opposing, and causing the instability of, any legal order by which the State has complete power to protect irreducible human freedom. In order to dismiss such an opposition, an understanding of the law, the State, and autonomy, is required to restore their original meaning, and thus allow them to exist in harmony rather than opposition. Now, this understanding is fundamentally inscribed in the thoughts animating and supporting the European Convention, and is based, not on fruitless opposition to the absolute power of the State (sovereignty) in support of the power of the individual (autonomy), but on a set of values that are as objective and universal as possible, which arise from universal human nature; these values rise above both society and the individual, and may thus regulate the relationship between the two without opposition to either.

9. It is the chief interest of systems for the protection of human rights, which is well founded, to moderate the power of the State and make possible the integration of personal autonomy into the legal system while distinguishing it from human dignity which is (proven?). The European Convention on Human Rights, adopted in 1950, is an expression of the modern concept of man and the rights of man, as perceived at the end of the Second World War. The source of the rights guaranteed by the Convention are not founded in the affirmation of the subjective will of each individual, nor in "pure law" stemming from a national sovereignty, but rather in a certain timeless idea of man and his value. The effort of writing the declarations of human rights has been to establish these values and so reduce the absolute power of the State and its ideology; it is also appropriate, in modern culture, to preserve these values from the absolute power of the individual.

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[2] This is confirmed by the preparatory work of the Consultative Assembly of 1949, which clearly demonstrates that these are rights are the sole reason for its existence: "*the Committee of Ministers has entrusted us to establish a list of rights including the rights, a human being, should naturally enjoy*" Preparatory Works, Vol. II, p. 89.

[3] Aymeric d'Alton*, The notion of personal autonomy in European law with a human rights approach to philosophy of law*, Centre for Philosophy of Law, University Montesquieu Bordeaux IV, Revue de la B.P.C., I/2009.

4. A "right to suicide" is contrary to the policy of the European Convention

10. Currently, the creation of a "right to suicide" based on Article 8 has broken this balance and has integrated personal autonomy into the legal system. By reducing the positive obligations that arise from Article 2 and giving respect only to Article 8, personal autonomy is allowed to dominate the legal system and, within the legal system, dominate the values it contains and its mission to protect life. This is inconsistent with the jurisprudence of the Court. Indeed, the Court stated in its decision in *Pretty v. United Kingdom* 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."[4] Thus, it is not surprising that the recognition of a "right to suicide" calls into question the consistency of the Convention and the predictability of State obligations. Does the State still have an obligation to take positive action to prevent suicide; to revive and bring health care to people injured after a suicide attempt? More generally, how can the State guarantee the quality of control to the candidate? Normally, in all acts of civil life, the quality will be presumed, except in exceptional cases of objective impediments related to a disability previously established. Can we say, for example, as regards the right to marry, that the State has an obligation to establish a procedure that ensures a decision to marry corresponds to the free will of the person. The simple expression of consent is sufficient. More generally, how can the State guarantee the free will of the candidate? Normally, in all acts of civil life, free will is to be presumed, with the exception of cases where there is an objective impediment from a previously established incapacity.

11. The tendency to "inflate" Article 8, including the expansion of the scope of application, has not been done in a comparable manner to any other provision of the Convention, and is undoubtedly a manifestation of the increasing dominance of individual autonomy, particularly in areas such as public order, morality and health. This expansion of the scope of Article 8 into new areas would not pose a major difficulty if these areas are effectively exercised within the framework of privacy, have no social consequence, and do not involve a form of collaboration with the State. However, the situation is different when it is no longer a question of "independent choices" (lifestyle, suicide, etc.) under the scope of individual autonomy, but instead arises from "rights" of individual autonomy, such as an alleged right to suicide. This overlooks the fact that individual autonomy is the source of individual freedoms, not rights. More specifically, individual autonomy is the set of capacities by which each person determines how to use his or her faculties and abilities, i.e. freedom of action; it is the matrix of the judgments and actions of the individual, not a matrix of rights for which society is liable.

5. The improper change from *choice* to *right* to suicide

12. In changing (as the Court has done in its decision in *Haas* in paragraphs 50 and 51) the concept of "choice" to that of a "right" to suicide, the Court has transformed a freedom of the individual into a social norm. Liberalism of individual freedom to commit suicide itself becomes the norm. In so doing, the private sphere protected by Article 8 is not only an area of

[4] *Pretty v. RU*, Application No. 2346/02, judgment of 29 April 2002, ¶ 39.

individual freedom from autonomous state power, but a source in itself of rights enforceable against the State.

In *Haas*, and with regard to Article 8, the Court referred to *Pretty v. The United Kingdom*,[5] recalling that it had considered "the choice of the applicant to avoid what would, in her view, constitute an undignified and distressing death falls within the scope of Article 8 of the Convention" (¶ 50). In an abusive fashion, the *Haas* decision inferred the existence of a "right of an individual to decide how and at what time his life should end (…)."[6] **This shift of "choice" to "right" is a fundamental error that needs to be corrected.** The most that can be considered is that the desire to die, thoughts of suicide, falls within the scope of private life.

6. Suicide exceeds the scope of private life

13. Suicide is an option, but even as an option—or freedom—suicide exceeds the scope of privacy for at least two reasons.

- On the one hand, suicide affects life which is not only a private good, but is also a public good: each person is a part of society. Human life is both a "common good" of society and a "private good" of the one who enjoys it, this explains why society had not only the negative obligation to refrain from infringing (as with any private good), but it also had the positive obligation to protect and promote (as with any common good). This dual nature of private property and common human life also explains why pregnancy does not fall exclusively within the privacy of the mother,[7] and why life is normally protected by criminal law in preference to civil law.
- On the other hand—and this is crucial—suicide can harm society and require its action, for example to assist those committing suicide, to bear the debts of those who commit suicide, to provide for the families, educate the children, etc. Society is directly affected by suicide, which is not necessarily the case for other individual practices recognized by the Court as falling within the scope of autonomy. On this point, the many and strong criticisms against the decision of *K.A. and A.D. v. Belgium*, that recognized a right to sadomasochism[8] under Article 8, should be kept in mind.

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[5] Application No. 2346/02, ¶ 67, CEDH 2002-III.

[6] "*In light of this jurisprudence, the Court considers that the right of an individual to decide how and when life should end, provided that he is able to determine of his own free will and act accordingly, is one aspect of the right to respect for private life under Article 8 of the Convention*" *Haas v. Switzerland*, Application No. 31322/07 judgment of 20 January 2011, (¶ 51) (ECLJ translation).

[7] *Bruggemann and Scheuten v. Germany*, Application No. 6959/75, Report of the former Commission on 12 July 1977, p. 138, ¶¶ 59, 60, and 61; *Boso v. Italy*, Application No. 50490/99, judgment of 5 September 2002.

[8] *See* ECHR judgment, 1st Section, 17 February 2005, in the case of *KA and AD v. Belgium*, Application Nos. 42758/98, 45558/99, establishing a right to "*personal autonomy . . . including the right to have sexual intercourse (i.e.) to dispose of his body . . . to engage in activities of the kind perceived as physically or morally harmful or dangerous to his person*" (ECLJ translation).

7. The "right to suicide" or the "right to assisted suicide"

14. It should be noted that the recognition of a right to suicide leads to the establishment of a "right to assisted suicide," if we do not want the right to suicide to remain theoretical. In effect, the right to assisted suicide is a right no different than the right to suicide, it is only an extension by the recognition of a positive obligation of the State to facilitate the exercise of the right to suicide, framed in view of the other rights and interests involved.

15. It is possible to consider in respect to the Convention, as the Court has done in *Pretty*, that everyone has the *power* to commit suicide. It is also possible to say, respecting the balance of the Convention, that the desire or will to commit suicide falls within the scope of private life, and that the positive obligation of the State to prevent this suicide is conditioned and limited, as is any positive obligation, under the circumstances, especially as the individual is not under the care and custody of the State. However, the Convention cannot by interpreted in a way that states a right to suicide, because every right involves more than the liberty of its owner: a right establishes a relationship; it is a debt enforceable against society.

8. A "right to assisted suicide" would be a violation of Article 2

16. The recognition of a right to assisted suicide would not only undermine the coherence of the Convention, but would introduce a praetorian exception to Article 2, that is to say a structural breach. The right to assisted suicide, by definition, requires assistance, or the close collaboration of the public power, in other words it would be a violation of State obligations under Article 2.

17. It is necessary here to make a note of the parallel between the logic of the right to suicide and that of access to abortion. First of all, it much be emphasized that although the Court did in fact address abortion and suicide under the scope of privacy, it has clearly stated, in the case of *A, B and C v. Ireland*, that it cannot infer a right to abortion under Article 8. The same observation should be imposed with respect to suicide. In order not to obstruct the liberalization of abortion, the Court has disabled the scope of Article 2 from applying to the unborn person, and stated that once a State decides to allow abortion, the legal framework established for this purpose must be consistent and "*allow[] the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention*"[9]

18. It may be tempting to apply to assisted suicide the reasoning employed by the Court on the legalization of abortion, as the parallel seems to prevail between these two practices. It seems that it would suffice to say that if a State decides to allow assisted suicide, the legal framework established to this effect must "*allow[] the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention*."[10] In addition, one might add that the *Haas* judgment has already determined

[9] *A., B. and C. v. Ireland*, Application No. 25579/05, [GC], judgment of 16 December 2010, ¶ 249 ; *R.R. v. Poland*, Application No. 27617/04, judgment of 26 May 2011,¶ 187.
[10] *A., B. and C. v. Ireland*, Application No. 25579/05, [GC], judgment of 16 December 2010, ¶ 249 ; *R.R. v. Poland*, Application No. 27617/04, judgment of 26 May 2011,¶ 187.

these different legitimate interests to be taken into account, by stating that the State should "prevent abuse," that is to say, concretely, check the quality of the consent of the candidate to suicide. The establishment of a right to suicide would thus be completely liberal, even more than that of abortion, as compliance with Article 2 would be provided simply by compliance with Article 8. The autonomy of the candidate appears to be the both the source of the right to suicide as well as its condition. This is not the case in abortion, which is subject to conditions other than the consent of the mother.

19. However, there is another insurmountable obstacle in the application of this reasoning: it is implies that Article 2 has been "deactivated" for the person who has already been born. So has it been possible for the Court with regard to prenatal life, by saying that it is not called upon to determine when life begins, that is, by raising the determination of the scope of the application of Article 2 in the national margin of appreciation,[11] it is difficult to see how the Court could avoid the person already being born falling from within the scope of Article 2. In fact, Article 2, both in its positive scope (to protect life) and in the negative (to not kill), applies to the person who is born.

9. The essential difference between the negative and positive obligations to respect and protect life

20. At this stage of reasoning, one should bear in mind the difference in nature between the scope of positive and the scope of negative obligations under the Convention. Due to their nature—not a bad thing—the negative obligations always oblige and under all circumstances (*semper sed non ad semper*). On the other hand, the positive obligations—which are designed to achieve good—always oblige, but not in all circumstances (*semper sed non ad semper*), because they are subject to the assessment of the conditions of time, place, and other such conditions. Only positive obligations can be modulated, as appropriate, in their execution. With regard to the preservation of life, the negative obligation is to not kill, while the positive obligation is to care for life.[12] In the case of *Osman v. United Kingdom*, the European Court of Human Rights stated that: "*[t]he Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life*" (Application Nos. 87/1997/871/1083, ¶ 115.

a. The positive obligation to protect life is relative

21. Article 2 of the Convention imposes upon authorities a positive obligation to protect vulnerable persons. Even against acts by which they threaten their own lives.[13] In the *Haas*

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[11] *Vo v. France,* Application No. 53924/00, [GC], judgment of 8 July 2004, ¶ 82.
[12] It is simply that of the structure of synderesis, that is to say, the essential difference between the two general precepts, "avoid evil" and "do good."
[13] *Keenan v. United Kingdom*, Application No. 27229/95, ¶ 91, CEDH 2001-III (§ 54).

case, the Court reduced this positive obligation to only to cases where suicide would not be decided freely and knowingly. It does not appear, in the current state of the law, that one can interpret Article 2 as imposing on the State the general positive obligation to prevent suicide in society: this would not be realistic. The question is presented in a different manner if the candidate for the suicide is placed under the supervision or under the authority of the public power, as such is the case of persons in custody, detained persons,[14] or those in the military.[15] It is in these conditions that Article 2 can be seen as imposing a positive obligation and a special vigilance at the expense of the State.

b. The negative obligation to respect life is absolute

22. However, the fact that a positive obligation to protect live is relative in nature does not in effect relativize the negative obligation according to which "*no one shall be deprived of his life intentionally*." This negative obligation not to intentionally inflict death on anyone always obliges under all circumstances: it is absolute in nature. The State may not impose, or allow to be imposed, death on anyone intentionally. But, recognizing a right to assisted suicide, that is to say a positive obligation on the State to facilitate the right to suicide, in effect directly involves the State and the third party in the deliberate killing of a person.
This difference between positive and negative obligations allows a discernment of the distinction between a refusal of treatment and the issuance of a lethal substance. There is a big difference between a refusal to treat and granting the demand of a lethal substance: refusal to treat involves only the positive obligations of the State, while the request of a lethal substance brings in to play the negative obligations of the State.

23. In *Haas*, the Court only addressed Article 2 in terms of the positive obligations of the State, but failed to address it in terms of its negative obligations. However, these negative obligations remain, and the Court cannot ignore them in the examination of the present case. Just as the relativity of the positive obligations allows this aspect of Article 2 to be "deactivated," the absolute character of negative obligations does not allow a deactivation. The prohibition on the State from intentionally inflicting death cannot be put in brackets, we cannot extract the consenting adult from its scope of application (as is done to the fetus).

24. This being the case, it should be noted that in the assessment by the State of the various legitimate interests, a fundamental right, such as the right to life and health, cannot be subordinated to or placed on equal footing with a right that is not guaranteed by the Convention.[16] There is therefore no equivalence, nor balancing, possible between the obligation of the State to respect life and the so-called "right to suicide." The obligation of the State not to inflict death intentionally cannot be put in a balance, outside of the exceptions expressly provided for in paragraph 2. We cannot apply the principle of proportionate reason to a negative obligation, because an act which it wrong in itself and of itself cannot be made

[14] *Tanribilir v. Turkey*, judgment of 16 November 2000; *Keenan v. United Kingdom*, judgment of 3 April 2001; *Akdogdu v. Turkey*, judgment of 18 October 2005.
[15] *Kilinç v. Turkey*, judgment of 7 June 2005.
[16] *Chassagnou and others v. France*, [GC], Application Nos. 25088/94, 2833/95, 2844/95, judgment of 29 April 1999. ¶ 113: "*where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect 'rights and freedoms' not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right*."

good by its circumstances or its purpose. The principle of proportionate reason is applicable only to a positive obligation.

Contrary to Articles 8 and 11 of the Convention, Articles 2 and 3 do not contain a second paragraph which waives the obligation in the first paragraph. Article 15 paragraph 2 of the Convention clearly indicates that no derogation from Article 2 shall be permitted.

10. The consistent condemnation of assisted suicide or euthanasia

25. The absolute nature of the prohibition of homicide is largely consensual. In fact, the consensus in Europe and the world is in favor of a ban on euthanasia and assisted suicide, not the reverse. In this respect, medical ethics does not distinguish between assisted suicide and euthanasia; the difference is very theoretical as consent is also required for euthanasia.

26. Assisted suicide and euthanasia have been consistently condemned by medical professionals since the Hippocratic Oath (460-370 av. J.-C), and by all major religions. Euthanasia is included in the list of crimes against humanity committed by the Nazi conspiracy.[17] Since WWII, euthanasia has constantly been condemned.[18] The Council of Europe unequivocally and consistently condemns assisted suicide and euthanasia. Such is the case with Resolutions 613 and 779 of the recommendation of the Parliamentary Assembly on the rights of the sick and dying, adopted on 29 January 1976. Recommendation 779 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*" (¶ 7).

Similarly, Recommendation 1418 (1999) on the protection of human rights and the dignity of the terminally ill and dying, adopted 25 June 1999, maintains very clearly that there is "*an absolute prohibition against intentionally taking the life of the terminally ill or dying*."[19]

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[17] See in particular *USA v. POHL and others*, judgment of 13 January 1947, Trials of the War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg October–April 1949, Volume V, Washington, DC: Government Printing Office, 1950.

[18] Thus, *l'Académie des sciences morales et politiques* in Paris adopted, on 14 November 1949, the following statement: "*The Academy of Moral and Political Sciences: Strongly rejects any methods for purposely causing the death of the subject considered as monstrous, malformed, deficient or incurable because, among other reasons, any medical or social doctrine that does not systematically meet the principles of life inevitably lead, as demonstrated by recent experience, to criminal abuses. Considers euthanasia and, in general, all methods that have the effect of provoking by compassion for a dying person, a 'gentle and quite' death must also be removed . . . . This is categorical opinion . . . is based on the fact that . . . such methods would lead to granting the physician a kind of sovereignty over life and death*," M. TORRELLI in *Le Médecin et les droits de l'homme*, Paris, Berger-Levrault, 1983, pp. 235 s. (ECLJ translation).

[19] The Assembly recommends that the Committee of Ministers, in paragraph 9 "*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."

More recently, the Assembly, in its Resolution 1859 (2012) and Recommendation 1993 (2012), "Protecting human rights and dignity by taking into account previously expressed wishes of patients," reaffirms the principle 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**" (¶ 5).

27. Euthanasia and assisted suicide are, not rights, but *stricto sensu*, violations of the right to life, unless it is abusively considered that individual autonomy takes precedence over the right to life, is a form of metajuridical value which dominates the Convention. Such a statement would jeopardize the Convention and cause it to lose its clarity and consistency. More profoundly, the whole effort to objectivize human rights would be destroyed by their domination and redefinition by individual subjectivity.

28. More simply, it is difficult to conceive hoe the Court could establish in law or in practice a freedom repressed in the majority of Member States. The European States are still far from accepting the idea that the consent of the victim may absolve of its responsibility the author of a voluntary homicide.

11. Recent cases also arguing against euthanasia

29. Finally, in fact, the experience of countries that have legalized euthanasia or assisted suicide shows, with the benefit of hindsight, that the assessment of the candidate's will is, to say the least, questionable. In fact, "assisted suicide" is increasingly open to youth, minors, and persons with a psychological disease. In opening Pandora's Box with the right to suicide, is the Court able to determine the criteria to make suicide or euthanasia acceptable, such as the age or health of the candidate? In addition, the assessment and verification of the willingness of the candidate will pose insoluble difficulties and permit numerous abuses.
In Switzerland, the practices of the associations *Dignitas* and *Exit* have been the subject of many investigations. The practice of prohibitive tariffs and the organization of truly lucrative death tourism are shocking. Used in place of a lethal potion, which is deemed too costly, is a plastic bag filled with argon gas in order to cause death by asphyxiation, the auction of the personal effects of those who commit suicide, the dumping of illegal urns into Lake Zurich, the use of hotel rooms or parking garages as a place of implementation for suicides, the organization of the suicide of people who are not suffering from serious illness and/or victims of a diagnostic error, are all part of the many alleged facts–especially through the testimony of relatives of those who commit suicide and employees of the associations.[20] Excesses and abuses related to assisted suicide were reported in the Netherlands, in particular by the Committee of Human Rights.[21]

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[20] *Réflexions sur la tentation de créer un droit à choisir sa mort*, www.plusdignelavie.com.
[21] Concluding observations of the Human Rights of UN reports from the Netherlands, 13-31 July 2009 in Geneva http://www.aidh.org/ONU_GE/Comite_DH/96Sess.htm: "*Among other topics of concern, the Committee mentions the high rate of euthanasia and assisted suicide, noting that the law allowed a doctor to authorize ending the life of a patient without resorting with the opinion of a judge or magistrate which would ensure that this decision is not subject to influence or misinterpretation of the patient's wishes. He notes that although a second opinion is required, it may be obtained through a telephone hotline. The Committee recommends that the Netherlands take into account the comments already made about it and invited to revise their legislation to align with the Covenant rights to life.*"

30. Since the legalization of euthanasia in Belgium in 2002, except in the case of Luxemburg in 2009, European countries have chosen to reject euthanasia by regulating treatment stops along with the waiver of palliative care and by developing advanced directives (France in 2005, Germany and Italy in 2009 and 2011, Sweden in 2010 and 2011, Spain in 2011). Germany, Spain, France, Italy, Sweden have opted to authorize treatment stops and waiver of palliative care.

31. The damage caused by assisted suicide to human rights and freedoms is not the only result of these many cases of abuse. Respect for human rights requires more than "preventing abuse." To hide behind the invocation of the "prevention of abuses" is a *minimum* position, a position of compromise between the power of the State and the individual. This position sacrifices the fundamental principle of protecting human life and the prohibition of homicide. The Parliamentary Assembly had the courage and foresight to recognize the principle of the prohibition of euthanasia and assisted suicide by describing how the protection of human rights and the dignity of the person which is sought may take into account wishes previously expressed by patients, without compromising the fundamental principle of respect for life. It also gave an example.

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List of annexes to the observations of the ECLJ in Gross v. Switzerland:

1. *Légiférer en faveur de l'aide active à mourir ?*, Collectif Plus digne la vie, janvier 2011, www.plusdignelavie.com;
2. *Le suicide assisté en Suisse* dans le document *Légiférer en faveur de l'aide active à mourir ?, pages 65 et les suivantes ;*
3. *Le suicide assisté en Suisse,* Ségolène du Closel, 10 juillet 2011, http://www.alliancevita.org/;
4. *Approches de la fin de vie et de l'euthanasie en Europe*, Collectif Plus digne la vie, janvier 2011, www.plusdignelavie.com;
5. *Articles sur l'assistance au suicide et l'euthanasie en Europe,* plusieurs auteurs, janvier-février 2012 ;
6. *Problèmes de l'assistance médicale au suicide Prise de position de la Commission Centrale d'Ethique de l'Académie Suisse des Sciences Médicales,* 20 janvier 2012 ;
7. *Argumentaire sur la proposition de loi sénatoriale n° 321 de M. Jean-Pierre Godefroy enregistrée à la Présidence du Sénat le 31 janvier 2012 prolongeant la proposition n° 21 du candidat François Hollande,* Groupe d'éthique, droit et santé, Collectif plus digne la vie, www.plusdignelavie.com;
8. *21 Propositions pour une fin de vie digne*, Collectif Plus digne la vie, www.plusdignelavie.com;
9. *Quelques textes internationaux et nationaux relatifs à la fin de vie*, Collectif Plus digne la vie, www.plusdignelavie.com;
10. *Faudrait-il légaliser l'euthanasie à titre exceptionnel ?,* Alliance Vita, http://www.alliancevita.org/;
11. *Euthanasie ? Faut pas pousser…,* Alliance Vita, http://www.alliancevita.org/;