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The Right to Active Euthanasia
in the Light of the
European Convention on Human Rights

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STATUTORY DECLARATION

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ABBREVIATIONS

Art.	article/s
CoE	Council of Europe
ECHR	European Convention on Human Rights 1953
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU-Charter	Charter of Fundamental Rights of the European Union
EuGRZ	Europäische Grundrechte-Zeitschrift (Journal)
HRC	Human Rights Committee of the United Nations
ICLQ	International and Comparative Law Quarterly
e. g.	for example
JURA	Juristische Ausbildung (Journal)
JRP	Journal für Rechtspolitik (Journal)
JZ	Juristen Zeitung (Journal)
TEU	Treaty on European Union
UN	United Nations
UK	United Kingdom of Great Britain and Northern Ireland
VCLT	Vienna Convention on the Law of Treaties 1969
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Journal)

EXECUTIVE SUMMARY

The thesis analyses the research question, whether a 'right to active euthanasia' emerges under the provisions of Art. 2, Art. 3 or Art. 8 of the European Convention on Human Rights adopted by the Council of Europe. It shall focus on the question, whether the possible right entails primarily a negative obligation for the Member States to cease criminalisation and to enact legalisation of active euthanasia. The research question shall be answered by using primarily the method of legal interpretation according to the rules of Public International Law as the Convention being a multilateral treaty. The materials are obtained by library research.

The subject of examination 'voluntary active euthanasia' shall be defined and distinguished from other forms of termination of life in the 1st chapter.

The 2nd chapter contains the analyses of the right to life according Art. 2 of the Convention as a possible legal basis for the right to active euthanasia to emerge. The chapter deals with four specific legal problems.

The first and second legal questions refer to the positive obligations of the Member States' to establish and maintain an adequate legal framework to ensure protection against offences occasioning deprivation of life' and 'to prevent risks to which individuals submit themselves voluntarily'. As a consequence, these obligations do not oblige States to sanction active euthanasia by law and do not prevent the emergence of the right in question.

The third legal question shall demonstrate that private individuals are not prevented from participate in active euthanasia since there is no obligation under Art. 2 of the Convention in the sense of a 'unmittelbare Drittwirkung'.

The fourth legal problem deals with a possible negative obligation for the Member States to cease sanctioning active euthanasia. For this purpose, the scope of protection of Art. 2 of the Convention shall be analysed by means of legal interpretation. The main arguments refer to the right to life as being unconcerned with the quality of living and safeguarding the sole physical existence of individuals without considering the individual's choices about life. As a result, the scope of protection does not apply to requests to end one's life. Thus, Art. 2 of the

Convention does not entail such negative obligation. The provision guarantees no right to active euthanasia.

In addition, the chapter shall discuss the legitimacy of the method of the 'dynamic and evolutive interpretation' of the European Court of Human Rights.

The 3rd chapter refers to the clause of prohibition of torture and other forms of maltreatment in Art. 3 of the Convention. The examination includes three legal problems.

First, the absolute character of the provision shall be established. As a consequence, there is no possibility to justify interferences, not even for the purpose of preserving life.

The second question examines the positive obligation 'to establish and maintain an adequate legal framework to ensure protection against offences occasioning bodily or mental harm'. This obligation does not oblige States to criminalise active euthanasia and do not prevent the emergence of the right in question.

The third legal problem concerns the negative obligation of the Member States to protect individuals from maltreatment in the sense of the provision. The interpretation concludes that the refusal to cease criminal sanctioning of active euthanasia does not constitute a 'degrading treatment' in the sense of Art. 3 of the Convention. The main arguments relate to the necessity of a certain degree of severity of the maltreatment and to the insufficient responsibility of the States in concerned case. Thus, no negative obligation emerges to cease criminalisation of active euthanasia. Therefore, Art. 3 of the Convention provides no right to active euthanasia.

The 4th chapter examines three legal problems within Art. 8 of the Convention. The first legal question is whether the negative obligation to refrain from unjustified interferences with the right to private life requests the Member State to cease legal sanctions of active euthanasia. For this purpose, the scope of protection shall be determined by methods of interpretation. As a result, the right involves the quality of living and the choices about life and death made by individuals as an expression of self-determination. Thus, Art. 8 (1) of the Convention applies in this context. The laws of criminalising active euthanasia intervene with the provision. However, the interference is justified according Art. 8 (2) of the Convention. The 'test of proportionality' strikes a balance between the right to life and to self-determination proving both interests to be equal. Due to the wide 'margin of appreciation' of the Member States in the field in question, the decision to criminalise or legalise active euthanasia remains with

each State. In conclusion, Art. 8 of the Convention contains no negative obligation in this regard and safeguards no right to active euthanasia.

The second and third legal problems relate to the determination of the requirement 'in accordance with the law' of Art. 8 (2) of the Convention.

In the 5th chapter the conclusions of the analysis shall be recaptured. The assessment of the results shall discuss the core problem of the negation of the right to active euthanasia: the mixing of judicial decisions with political considerations.

The purpose of the thesis is to contribute to the existing literature a contemporary study of the controversial topic of active euthanasia referring to its emergence as a human right under the European Convention on Human Rights. The right in question is analysed in the context of primary negative obligations of the Member States of the Council of Europe. The examination is undertaken from the perspective of International Human Rights Law considering also the fields of Public International Law, the Law of the European Union and the domestic laws of the Member States. The discussion within the thesis shall raise awareness to the necessity of change in regulating the subject of 'active euthanasia'.

INTRODUCTION

Euthanasia has been a matter of dispute for many generations. Its concept has changed over the ages, from the Ancient Greek ideal of death mentioned in literature over the killing programmes during the Regime of National Socialism to the present movement highlighting the self-determination of a person. The change of the concept of euthanasia is especially influenced by evolving moral values in society and the progress in medical science.¹ The dynamic of its controversy flows from the difficulty in balancing two human rights values – the right to life and the right to self-determination, which oppose each other in the field of euthanasia. The debate is heated by different cultural, moral, religious and legal views on the subject and the argumentation contains a high degree of emotional involvement.²

The controversy on the subject of active euthanasia shall be the topic of this thesis. It shall be analysed from the legal perspective on International Human Rights Law regarding a regional legal instrument – the European Convention for the Protection of Human Rights and Fundamental Freedoms³ (ECHR) of the Council of Europe (CoE). The research question concerns the legal issue, whether the ECHR guarantees a ‘right to active euthanasia’. It shall be focused on the question, whether such a possible right contains a negative obligation of the Member States of the CoE to cease criminalisation or prohibition in any other way of active euthanasia. It also shall be taken into consideration, for instance, whether a possible right includes the positive obligation to administer lethal medication on demand.

The possibility of the existence of a ‘right to active euthanasia’ under the ECHR arises from the Convention’s objective. Its Preamble refers to the aim of the CoE to achieve greater unity between the Member States through maintenance and further realisation of the rights enshrined in the ECHR. From this provision derives the competence of the European Court of Human Rights (ECtHR) to evolve the Convention’s guarantees.⁴ In accordance with the

¹ *Baumgarten*, Right to die? Rechtliche Probleme um Sterben und Tod² (2000), pp. 132-143.

² *Lester/Pannick/Herberg*, Human Rights Law and Practice³ (2009), p. 163.

³ CoE, Convention for the Protection of Human Rights and Fundamental Freedoms (1950), ETS no. 005.

⁴ CoE, Resolution (99) 50 of the Committee of Ministers of the Council of Europe, Präambel; *Hilpold* in: Pabel/Schmahl (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention (2017), Vol. 1, Präambel, p. 14; *Fitzmaurice* in: Shelton, International Human Rights Law (2013), p. 755; *Heißl* in: Heißl, Handbuch Menschenrechte (2009), p. 46; *Harris/O’Boyle/Warbrick*, Law of the European Convention on Human

evolutive and dynamic interpretation by the ECtHR, the objective of the Convention is not to guarantee a minimal protection, but a comprehensive and contemporary one.⁵ Thus, the Convention is a 'living instrument' and its standards are not to be regarded as static, but should rather reflect on current conditions and social changes.⁶ A contemporary examination of the subject on active euthanasia may be considered as being required due to the dynamic of the debates in Parliaments and the lack of consensus among the Member States as well as due to the socio-political changes in the societies of Europe.⁷

The motivation for the research relating to active euthanasia stems from the fascination of the controversy on the subject and its connection to the basic human right – the human dignity. The motivation to undertake the research in the context of the ECHR lies in the circumstance that the ECtHR's Human Rights protection system is one of the most effective ones in International Human Rights Law.⁸ Thus, it seems promising to discuss a controversial topic as the 'right to active euthanasia' in its context.

Active euthanasia belongs together with the subjects of suicide, assisted suicide and passive euthanasia to the concept of the 'right to die'. Due to the limited capacity of the thesis, the other aspects of this concept shall not be analysed, though. They shall be taken into consideration only when relevant for the focal topic of active euthanasia. The same applies to the Protocols of the Convention. The analysis of a possible legal basis for the right in question shall focus only on the provisions of Art. 2, Art. 3 and Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Rights³ (2014), p. 8 f; *Grabenwarter* in: Gamper/Verschraegen (Edit.), *Rechtsvergleichung als juristische Auslegungsmethode* (2013), pp. 104-105.

⁵ ECtHR (GC), 23.03.1995, no. 15318/89 (*Loizidou v. Turkey*), para. 71; *Schabas*, *European Convention on Human Rights* (2015), p. 49; *Grewe*, *Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des Europäischen Gerichtshofs für Menschenrechte*, *ZaöRV* 2001/61, p. 459 (467).

⁶ ECtHR, 25.04.1978, no. 5856/72 (*Tyrer v. the UK*), para. 31; ECtHR, 13.06.1979, no. 6833/74 (*Marckx v. Belgium*), para. 41; ECtHR, 09.10.1979, no. 6289/73 (*Airey v. Ireland*), para. 24; ECtHR, 13.05.1980, no. 6694/74 (*Artico v. Italy*), para. 33; ECtHR, 17.10.1986, no. 9532/81 (*Rees v. the UK*), para. 47; ECtHR (GC), 11.07.2002, no. 28957/95 (*Goodwin v. the UK*), para. 75; ECtHR (GC), 10.02.2009, no. 14939/03 (*Zolotukhin v. Russia*), para. 80; ECtHR (GC), 07.07.2011, no. 23459/03 (*Bayatyan v. Armenia*), para.102.

⁷ For example: in Portugal in 2018, see <https://www.parlamento.pt/Paginas/2018/maio/MorteAssistida.aspx>; in France in 2017, see <http://www.assemblee-nationale.fr/15/propositions/pion0517.asp>; in Austria in 2016, see https://www.parlament.gv.at/PAKT/PR/JAHR_2016/PK0780/; in Germany in 2014/2015, see <https://www.bundestag.de/dokumente/textarchiv/sterbehilfe-529962> (22.05.2019).

⁸ *Kerschbaumer* in: Heißl (Edit.), *Handbuch Menschenrechte* (2009), pp. 617-618.

THE RIGHT TO ACTIVE EUTHANASIA

The ECHR contains no explicit right to active euthanasia. The analysis of the contemplable provisions shall determine, whether one of them guarantee the right in question. The preconditions are the determination of the concept of 'voluntary active euthanasia' and its distinction from other forms to end life. Precise terminology enables to identify the conducts of voluntary active euthanasia, which could fall within the scope of protection of the right in question. Additionally, it allows to define the concrete obligations of the Member States.

1 TERMINOLOGY

Issues related to the end of life refer to a specific terminology. In the international ethical debate, the English term 'euthanasia' is usually to be found. The word's origin derives from the Greek language and includes the meaning of a 'good death' in the sense of an easy and painless death.⁹ Since the Convention provides no definition of this word, it shall be examined how 'euthanasia' is to be understood in regard to the Convention.

Among the Member States as Contracting Parties to the Convention, the term 'euthanasia' has no established or common meaning.¹⁰ For instance, the term 'eutanásia' is generally used in Portugal. In Germany, the term 'Sterbehilfe' ('assisted dying') is in use instead of 'Euthanasie'. The reason lies in the fact that the last-mentioned expression bears historical connotations in the context of the euthanasia programmes e. g. 'T4' and the 'special treatment campaign 14f13' during the Regime of the National Socialism.¹¹

⁹ *Brown/Stevenson/Trumble*, Shorter Oxford English Dictionary on Historical Principles⁶ (2007), Vol. 1, p. 862; Parliamentary Assembly of the Council of Europe, Report on Euthanasia of the Social, Health and Family Affairs Committee, Rapporteur Marty, Doc. 9898, 10.09.2003, p. 4.

¹⁰ Steering Committee on Bioethics, Council of Europe, 20.01.2003, Replies to the questionnaire for member states relating to euthanasia, CDBI/INF (2003) 8, pp. 3 ff; *Reid*, A Practitioner's Guide to the European Convention on Human Rights⁵ (2015), p. 535.

¹¹ The programme "T4" intended the killings of persons with physical or mental disabilities within the society in the Third Reich and occupied territories since 1939 till 1945. The campaign "14f13" concerned the killings of sick or old prisoners in concentration camps, who were considered to no longer been able to work. The killings took place from 1941 till 1944. See also *Baumgarten*, Right to die? Rechtliche Probleme um Sterben und Tod² (2000), p. 141; Steering Committee on Bioethics, Council of Europe, 20.01.2003, Replies to the questionnaire for member states relating to euthanasia, CDBI/INF (2003) 8, p. 7.

The ECtHR's case-law provides no definition of 'euthanasia'. However, the Court applies diverse concepts related to the 'right to die' by using autonomous terminology. The Court's case-law also refers to soft-law of other Organs of the CoE.¹² These sources of law shall be primarily considered to define the terms in question.

1.1 Concepts of 'voluntary', 'non-voluntary' and 'involuntary' euthanasia in the meaning of the ECHR

The Court distinguishes between 'voluntary euthanasia', meaning the intentional consensual killing, and 'non-voluntary euthanasia', describing the termination of life without an explicit request of the terminally-ill.¹³ The last one includes cases in which e. g. the patient's consent is unobtainable because the patient is unconscious. 'Involuntary active euthanasia' refers to an act conducted against the patient's wish.¹⁴ The thesis focuses on 'voluntary euthanasia'.

1.2 Concept of 'voluntary active euthanasia' in the meaning of the ECHR

The ECtHR does not mention explicitly the concept of 'voluntary active euthanasia'. Instead, the Court speaks simply of 'euthanasia'.¹⁵ The term can be found in cases concerning the end of life of terminally-ill persons by the act of a third person, e. g. a relative or doctor. The facts of these cases go with the definitions of active euthanasia in soft law of the Organs of the CoE, which use a more precise terminology. Accordingly, 'voluntary active euthanasia' means "to terminate the life of the terminally-ill patients, who undergo constant, unbearable pain and suffering without hope of any improvement in their condition at his or her persistent, voluntary and well-considered request"¹⁶ by a third person. Based on this definition and the

¹² ECtHR (GC), 05.06.2015, no. 46043/14 (*Lambert and Others v. France*), para. 60; Parliamentary Assembly of the Council of Europe, Opinion on Euthanasia of the Committee on Legal Affairs and Human Rights, Rapporteur McNamara, Doc. 9923, 23.09.2003, p. 2.

¹³ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 5, 27.

¹⁴ Parliamentary Assembly of the Council of Europe, Report on Euthanasia of the Social, Health and Family Affairs Committee, Rapporteur Marty, Doc. 9898, 10.09.2003, p. 4.

¹⁵ For example: ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 27; ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 31; ECtHR, 14.05.2013, no. 67810/10 (*Gross v. Switzerland*), paras. 35-36; ECtHR, 19.07.2012, no. 497/09 (*Koch v. Germany*), para. 57.

¹⁶ Parliamentary Assembly of the Council of Europe, Report on Euthanasia of the Social, Health and Family Affairs Committee, Rapporteur Marty, Doc. 9898, 10.09.2003, pp. 1, 2.

Court's case-law 'voluntary active euthanasia' can be understood in the meaning of the Convention as a deliberate act of violence or administration of lethal medication leading directly to the end of a terminally-ill person's life according to his or her explicit wish, committed by a third person.¹⁷ These conducts correspond to the possible negative obligation of the Member States not to criminalise active euthanasia. It also relates to a possible positive obligation to administer lethal medication on demand (in contrast to provide such medication for the own use by the patient). The thesis focuses on this concept. For reasons of simplification, the term 'active euthanasia' shall be used, presuming being voluntary.

1.3 Concept of 'passive euthanasia' in the meaning of the ECHR

The ECtHR does not name explicitly the concept of 'passive euthanasia'. However, this expression is mentioned by the Human Rights Clinic in the Court's judgment.¹⁸ The case is related to the withdrawal of life-sustaining treatment. The Court itself held that 'euthanasia' differentiates from therapeutic abstention or withdrawal of life-sustaining treatment.¹⁹ According to soft law of the Parliamentary Assembly, these aspects are part of 'passive euthanasia', meaning the "withholding or withdrawal of life sustaining treatment [...] with the intention of ending"²⁰ the life of the patient. In the sense of the Convention, the concept of 'passive euthanasia' can be understood as hastening the death of a patient by altering life-sustaining measures on account of an explicit or at least putative consent of the patient.²¹ It includes the notion of 'letting die', contrary to the notion of active euthanasia of 'taking life'.

¹⁷ *Lagodny* in: Pabel/Schmahl (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 1, Art. 2, p. 20.

¹⁸ ECtHR (GC), 05.06.2015, no. 46043/14 (*Lambert and Others v. France*), paras. 77-79, 135.

¹⁹ ECtHR (GC), 05.06.2015, no. 46043/14 (*Lambert and Others v. France*), paras. 78 f, 141; ECtHR, *Guide on Art. 2 of the Convention – Right to life* (2018), p. 16.

²⁰ Parliamentary Assembly of the Council of Europe, *Report on Euthanasia of the Social, Health and Family Affairs Committee*, Rapporteur Marty, Doc. 9898, 10.09.2003, p. 1.

²¹ *Lagodny* in: Pabel/Schmahl (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 1, Art. 2, p. 19.

1.4 Concept of 'assisted suicide' in the meaning of the ECHR

The ECtHR differentiates between the expression 'euthanasia' and 'assisted suicide' or 'physician-assisted suicide'.²² The Court connects 'assisted suicide' with situations, when a person commits suicide with assistance of a non-medical practitioner, e. g. relative or an assisted-suicide organisation.²³ According to soft-law of the CoE Organs, the term 'physician-assisted suicide' refers to a situation, when doctors or other members of medical staff "help a patient to take his or her own life"²⁴. Thus, 'assisted suicide' in the sense of the Convention means aiding and abetting a person to commit suicide without undertaking the final act of ending the patient's life.²⁵ This constitutes the difference to active euthanasia, where the final act is performed by a third party and not by the terminally-ill himself or herself. The concept of 'assisted suicide' relates to a possible obligation of the States to provide lethal medication for the own use by the patient but does not include its administration by a third person.

After clarifying the terminology related to the research question, the provisions of the Convention shall be examined as followed. Art. 2, 3 and 8 ECHR provide possible legal bases for a right to active euthanasia.

²² ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 27; ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 31; ECtHR, 14.05.2013, no. 67810/10 (*Gross v. Switzerland*), para. 36.

²³ ECtHR, 19.07.2012, no. 497/09 (*Koch v. Germany*), para. 8.

²⁴ Parliamentary Assembly of the Council of Europe, Opinion on Euthanasia of the Committee on Legal Affairs and Human Rights, Rapporteur McNamara, Doc. 9923, 23.09.2003, p. 1; See also: Parliamentary Assembly of the Council of Europe, Report on Euthanasia of the Social, Health and Family Affairs Committee, Rapporteur Marty, Doc. 9898, 10.09.2003, p. 1.

²⁵ *Lagodny* in: Pabel/Schmahl (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention (2017), Vol. 1, Art. 2, p. 20.

2 RIGHT TO LIFE (ART. 2)

Art. 2 ECHR enshrines the 'right to life'. By safeguarding the existence of human beings, it constitutes the precondition to enjoy and exercise any other rights and freedoms. For this reason, the provision is one of the most fundamental guarantees of the Convention.²⁶ Together with Art. 3 and Art. 8 ECHR, the provision guarantees the basic and fundamental value – the human dignity.²⁷ The provision's importance is reflected in Art. 15 ECHR. A derogation from Art. 2 ECHR is not permitted in peace time.²⁸ In time of war or other public emergency, a derogation is only permitted in regard to lawful acts of war.²⁹

The general principle of the 'right to life' is established by the first sentence of Art. 2 (1) ECHR. However, the principle is not an absolute one.³⁰ The second sentence of Art. 2 (1) ECHR permits an exception regarding the death penalty. Today, it is of minor relevance since the death penalty has been abolished by the majority of the Member States³¹ through ratifying the 6th and 13th Protocols³². Art. 2 (2) lit. a – c ECHR contain three further exceptions

²⁶ ECtHR (GC), 27.09.1995, no. 18984/91 and other (*McCann and Others v. the UK*), paras. 146-147; ECtHR (GC), 22.03.2001, nos. 34044/96, 35532/97 and 44801/98 (*Streletz, Kessler and Krenz v. Germany*), paras. 92-94; *Tomuschat* in: *Tomuschat/Lagrange/Oeter* (Edit.), *The Right to Life* (2010), p. 3; *Harris/O'Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), p. 203; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 152; *Gerards* in: *Van Dijk/Van Hoof/Van Rijn/Zwaak* (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 353.

²⁷ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 49-52, 65; *Lester/Pannick/Herberg*, *Human Rights Law and Practice*³ (2009), p. 138; *Schabas*, *European Convention on Human Rights* (2015), p. 122; *Schübel-Pfister* in: *Karpenstein/Mayer* (Edit.), *EMRK*² (2015), p. 62; *Hilgendorf* in: *Joerden/Szwarc* (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 182.

²⁸ ECtHR, 17.12.2009, no. 4762/05 (*Mikayil Mammadov v. Azerbaijan*), para. 98.

²⁹ *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 152; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 164; *Schübel-Pfister* in: *Karpenstein/Mayer* (Edit.), *EMRK*² (2015), p. 63; *Alleweldt*, in: *Dörr/Grote/Marauhn* (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol.1, p. 495; *Amos*, *Human Rights Law*² (2014), p. 181; *Meyer-Ladewig/Huber*, in: *Meyer-Ladewig/Nettesheim/von Raumer* (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 64.

³⁰ *Amos*, *Human Rights Law*² (2014), p. 181; *Schabas*, *European Convention on Human Rights* (2015), p. 118; *Gerards* in: *Van Dijk/Van Hoof/Van Rijn/Zwaak* (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 355; *Starmer*, *Blackstone's Human Rights Digest* (2001), p. 187.

³¹ Only the Russian Federation has not ratified both Protocols and Armenia as well as Azerbaijan have not ratified the 13th Protocol, yet;

https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114/signatures?p_auth=tjXZYeNI;

https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=tjXZYeNI

(22.05.2019); *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 153.

³² CoE, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (1985), ETS No. 114; CoE, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (2003), ETS No. 187.

addressing the use of force and referring to the intended and unintended deprivation of life.³³ These exceptions are listed exhaustively.³⁴

2.1 Classification of the right and its obligations

The right to life is to be classified as a 'classic right'.³⁵ As such it is based on the 'principle of separation between state and society'.³⁶ Thus, it includes the primary negative obligation of States to refrain from deprivation of life. This obligation corresponds to the first sentence of Art. 2 (1) ECHR. Additionally, the provision contains positive obligations, which require States to take active measures for the protection of the right to life.³⁷ The Convention's obligations refer to the Member States according to Art. 1 ECHR, including the legislative, executive and judicative power of the State.³⁸

2.1.1 Positive obligation to establish and maintain an adequate legal and administrative framework for the protection against offences

The first legal problem refers to the positive obligation to establish and maintain an adequate legal and administrative framework for the effective protection against offences regarding the

³³ *Bigler* in: Gonin/Bigler (Edit.), *Convention européenne des droits de l'homme, Commentaire des articles 1 à 18 CEDH* (2018), pp. 41, 45 ff; *Harris/O'Boyle/Warbrick, Law of the European Convention on Human Rights*³ (2014), p. 203; *Lester/Pannick/Herberg, Human Rights Law and Practice*³ (2009), p. 139; *Meyer-Ladewig/Huber*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 64; *Alleweldt* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, pp. 494-495.

³⁴ *Gerards* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 355; *Lester/Pannick/Herberg, Human Rights Law and Practice*³ (2009), p. 139.

³⁵ *Schweizer* in: Merten/Papier (Edit.), *Handbuch der Grundrechte in Deutschland und Europa, Vol. Band VI/1 Europäische Grundrechte I* (2010), p. 111.

³⁶ *Hengstschläger/Leeb, Grundrechte*² (2013), p. 22; *Meyer-Ladewig/Huber*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 69; *Amos, Human Rights Law*² (2014), p. 181; *Lester/Pannick/Herberg, Human Rights Law and Practice*³ (2009), p. 139.

³⁷ ECtHR, 09.06.1998, no. 23413/94 (*L. C. B. v. the UK*), para. 36; ECtHR, 09.06.2009, no. 33401/02 (*Opuz v. Turkey*), para. 25; *Mowbray, Cases, Materials, and Commentary on the European Convention on Human Rights*³ (2012), p. 119; *Alleweldt* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 505; *Jacobs/White/Ovey, The European Convention on Human Rights*⁷ (2017), p. 161; *Berger, Jurisprudence de la Cour Européenne des Droits de l'Homme*⁹ (2004), p. 10; *Bantekas/Oette, International Human Rights Law and Practice* (2013), p. 321; *Stone, Textbook on Civil & Human Rights*¹⁰ (2014), p. 27.

³⁸ ECtHR (GC), 22.03.2001, nos. 34044/96, 35532/97 and 44801/98 (*Streletz, Kessler and Krenz v. Germany*), para. 86; ECtHR, 17.01.2002, no. 32967/96 (*Calvelli and Ciglio v. Italy*), para. 49; *Gollwitzer, Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 159; *Gerards* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 355.

deprivation of life.³⁹ It shall be analysed, whether this duty requires mandatorily the Member States to declare acts of active euthanasia as criminal offences. As mentioned above, acts of active euthanasia consist of the deliberate final act of termination of life committed by a third party at the request of the terminally-ill person. If the positive obligation of Art. 2 (1) ECHR would be that extensive requiring these acts to be criminalised, there could not emerge any right to active euthanasia under this provision.

The ECtHR has not answered this question in its case-law.⁴⁰ The Commission of Human Rights (EComHR) answered it in the context of passive euthanasia. It stated that Art. 2 ECHR does not require the States to criminalise acts related to passive euthanasia.⁴¹ However, this implication cannot be extended to active euthanasia due to the different notions and conducts of both concepts. Among the scholars there exists the legal view that Art. 2 ECHR does not oblige the States to sanction acts of active euthanasia under national Criminal Law.⁴² In assessing this legal question, there are following arguments to be taken into consideration.

First, the Convention does not contain any substantive regulations regarding the content or scope of the positive obligation in question, except for the necessity to prohibit intended and unintended deprivations of life. However, these conducts refer to involuntary killings. Active euthanasia includes voluntary termination of life. Thus, both conducts have to be assessed in different ways.⁴³ These differences negate an obligation to criminalise active euthanasia.

Second, the Member States enjoy a certain 'margin of appreciation'/'marge d'appréciation'.⁴⁴ The doctrine was established by the ECtHR. It waits its enforcement through the contractual modifying 15th Protocol.⁴⁵ The margin of appreciation is based on the 'principle of State

³⁹ ECtHR (GC), 30.11.2004, no. 14967/89 (*Öneryildiz v. Turkey*), para. 89; *Gerards* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 353; *Schabas*, *European Convention on Human Rights* (2015), p. 126; *Jacobs/White/Ovey*, *The European Convention on Human Rights*⁷ (2017), p. 161; *Bantekas/Oette*, *International Human Rights Law and Practice* (2013), p. 321.

⁴⁰ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 41; *Gerards* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 357; *Reid*, *A Practitioner's Guide to the European Convention on Human Rights*⁵ (2015), p. 537.

⁴¹ EComHR, 10.02.1993, no. 20527/92 (*Widmer v. Switzerland*).

⁴² *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), pp. 167, 175; *Kneihls*, *Sterbehilfe durch EMRK nicht geboten / Der Fall Pretty*, *EuGRZ* 2002, p. 242 (243).

⁴³ *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), pp. 158-159.

⁴⁴ *Schweizer* in: Merten/Papier (Edit.), *Handbuch der Grundrechte in Deutschland und Europa*, Vol. Band VI/1 *Europäische Grundrechte I* (2010), pp. 96-97.

⁴⁵ ECtHR, 07.12.1976, no. 5493/72 (*Handyside v. the UK*), paras. 48-49; ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 70; ECtHR, 24.07.2003, no. 40016/98 (*Karner v. Austria*), para. 40; ECtHR, 21.09.2017, no. 53661/15 (*Severe v. Austria*), para. 96; CoE, Protocol No. 15 amending the Convention for the Protection of

Sovereignty' according to Public International Law and on the 'principle of subsidiarity' according to the ECtHR's case-law.⁴⁶ There exists no legal definition of the 'margin of appreciation'. However, it is established by the Court that it provides States with discretion regarding the implementation and application of the Convention's provisions. This refers especially to their restriction.⁴⁷ The extent of the margin of appreciation depends on circumstances in each case. In terms of "addressing complex scientific, legal and ethical issues concerning in particular the beginning or the end of life"⁴⁸, the Member States enjoy a wide margin of appreciation. The same applies, if there exists no European consensus among the Member States.⁴⁹ Currently, only 3 of 47 Contracting Parties to the Convention permit legally acts of active euthanasia.⁵⁰ So, the ECtHR grants the national authorities a wide margin of appreciation in respect to active euthanasia.⁵¹ Thus, it is the decision of each State, whether to criminalise or to legalise such acts. These observations support the legal view, that Art. 2 ECHR does not oblige the national authorities to criminalise acts of active euthanasia.⁵²

Therefore, the duty to establish and maintain an adequate legal and administrative framework for the protection of life under Art. 2 (1) ECHR does not require the criminalisation of acts of active euthanasia. Thus, the positive obligation in question does not prevent the right to active euthanasia to emerge under Art. 2 (1) ECHR.

Human Rights and Fundamental Freedoms, CETS No. 213, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=rQsUXNk1 (22.05.2019).

⁴⁶ ECtHR, 07.12.1976, no. 5493/72 (*Handyside v. the UK*), para. 48; ECtHR, 15.07.1982, no. 8130/78 (*Eckle v. Germany*), para. 61; ECtHR (GC), 16.09.1996, no. 21893/93 (*Akdivar and Others v. Turkey*), para. 65; ECtHR, 10.05.2001, no. 29392/95 (*Z. and Others v. the UK*), para. 103; ECtHR (GC), 15.03.2012, no. 39692/09, 40713/09, 41008/09 (*Austin and Others v. the UK*), para. 61; *Hilpold* in: Pabel/Schmahl (Edit.), *IntKommEMRK, Präambel*, p. 24; *Haratsch/Koenig/Pechstein*, *Europarecht*¹¹ (2018), pp. 21-22; *Peters/König* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 2, pp. 1449-1450.

⁴⁷ ECtHR, 26.10.2017, no. 28475/12 (*Ratzenböck and Seydl v. Austria*), para. 32; *Hilpold* in: Pabel/Schmahl (Edit.), *IntKommEMRK, Präambel*, pp. 25-26; *Hutchinson*, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, *ICLQ* Vol. 48/3 (1999), p. 638 (640); *Breuer* in: Grabenwarter (Edit.), *Enzyklopädie Europarecht* (2014), Vol. 2, p. 329.

⁴⁸ ECtHR (GC), 05.06.2015, no. 46043/14 (*Lambert and Others v. France*), para. 11.

⁴⁹ *Hilgendorf* in: Joerden/Szwarc (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 176.

⁵⁰ Steering Committee on Bioethics, Council of Europe, 20.01.2003, Replies to the questionnaire for member states relating to euthanasia, CDBI/INF (2003) 8, pp. 16 ff.

⁵¹ *Schübel-Pfister* in: Karpenstein/Mayer (Edit.), *EMRK*² (2015), p. 63; *Reid*, *A Practitioner's Guide to the European Convention on Human Rights*⁵ (2015), p. 537.

⁵² *Lester/Pannick/Herberg*, *Human Rights Law and Practice*³ (2009), p. 164; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), pp. 167, 175; *Kneihls*, *Sterbehilfe durch EMRK nicht geboten / Der Fall Pretty*, *EuGRZ* 2002, p. 242 (243); *Starmer*, *Blackstone's Human Rights Digest* (2001), p. 187.

2.1.2 Positive obligation to prevent risks to life to which individuals submit themselves voluntarily

The second legal problem in the context of Art. 2 ECHR refers to another positive obligation of the Member States. Art. 2 (1) ECHR comprises the obligation to regulate and prevent risks to which individuals submit themselves voluntarily.⁵³ This corresponds to attempts to end one's life. The prevention means other measures than criminalisation by law. If this obligation would oblige the national authorities to prevent the acts in question by any means, the right to active euthanasia could not emerge under Art. 2 ECHR.

The ECtHR dealt with the scope of this obligation in diverse cases. The condition for the obligation to arise is that the national "authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the acts of a third party (or, in particular circumstances, from self-harm)"⁵⁴. The obligation arises, if a person is affected by a certain situation, for example, being in custody or conducting self-immolation as a protest or in the case of concrete danger of suicide due to mental illness.⁵⁵ These situations have in common that they bear an element of unfreedom or of doubts about the full understanding of what is involved for the person concerned. These elements influence the decision and make it become unfree and irresponsible. Thus, in such situations the positive obligation requests the national authorities to prevent acts constituting a risk to the own life.⁵⁶ However, such an obligation does not arise, if the decision about death is taken freely and under full comprehension of what is involved.⁵⁷ The scholars share the view of the Court.⁵⁸ This entails other positive obligations, though. States have to establish a procedure which is

⁵³ ECtHR, 03.04.2001, no. 27229/95 (Keenan v. the UK), para. 90; ECtHR, 01.03.2005, no. 69869/01 (Bone v. France); ECtHR, 17.01.2013, no. 52013/08 (Mosendz v. Ukraine), para. 80.

⁵⁴ ECtHR, 16.11.2000, no. 21422/93 (Tanribilir v. Turkey), para. 70; ECtHR, 15.01.2009, no. 46598/06 (Tomašić and Others v. Croatia), para. 51; ECtHR, 17.12.2009, no. 4762/05 (Mikayil Mammadov v. Azerbaijan), para. 100; Jacobs/ White/Ovey, *The European Convention on Human Rights*⁷ (2017), p. 163; Meyer-Ladewig/Huber, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 70.

⁵⁵ ECtHR, 03.04.2001, no. 27229/95 (Keenan v. the UK), para. 90; ECtHR, 17.12.2009, no. 4762/05 (Mikayil Mammadov v. Azerbaijan); Jacobs/White/Ovey, *The European Convention on Human Rights*⁷ (2017), pp. 163-164; Meyer-Ladewig/Huber, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 70; Hengstschläger/Leeb, *Grundrechte*² (2013), p. 68.

⁵⁶ Jacobs/ White/Ovey, *The European Convention on Human Rights*⁷ (2017), p. 164.

⁵⁷ ECtHR, 20.01.2011, no. 31322/07 (Haas v. Switzerland), para. 54; *Schabas*, *European Convention on Human Rights* (2015), p. 132; Meyer-Ladewig/Huber, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 70.

⁵⁸ Hengstschläger/Leeb, *Grundrechte*² (2013), p. 68.

adequate to ensure that the decision derives from a free wish of a responsible person to die e. g. through a full psychiatric examination.⁵⁹ The argument for the opinion taken by the Court and the Scholars lies in practical reasons. The obligation to prevent every attempt to end the own life by a person would create a disproportionate or even impossible burden on States considering the “difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources”⁶⁰.

Therefore, the obligation of Art. 2 (1) ECHR to regulate and prevent risks to life to which individuals submit themselves voluntarily does not oblige the Member States to prevent such conducts, if they are based on a free decision taken under full understanding of what is involved for the person concerned. Thus, the positive obligation does not prevent the right to active euthanasia to emerge under Art. 2 ECHR.

2.1.3 No obligation for individuals in the sense of ‘unmittelbare Drittwirkung’

The previous obligations referred to the Member States according to Art. 1 ECHR.⁶¹ The third legal problem to be examined is whether the obligations under Art. 2 (1) ECHR entail an obligation to protect the right to life by individuals in the sense of the ‘unmittelbare Drittwirkung’. The concept means a ‘direct third party effect’. The private individual becomes the obliged party of fundamental rights and shall ensure the right in question towards other private individuals.⁶² This becomes relevant in the case of active euthanasia because the final act of termination of life of a person is undertaken by another person.

The ‘direct third party effect’ is an exception. As such, it applies only on a legal basis. The case-law of the ECtHR does not provide any indications for the existence of an obligation for

⁵⁹ *Schabas*, European Convention on Human Rights (2015), p. 133.

⁶⁰ ECtHR, 17.12.2009, no. 4762/05 (*Mikayil Mammadov v. Azerbaijan*), para. 99.

⁶¹ ECtHR (GC), 22.03.2001, nos. 34044/96, 35532/97 and 44801/98 (*Streletz, Kessler and Krenz v. Germany*), para. 86; ECtHR, 17.01.2002, no. 32967/96 (*Calvelli and Ciglio v. Italy*), para. 49; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 159; *Schilling*, *Internationaler Menschenrechtsschutz*³ (2016), p. 65; *Gerards* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 355; *Meyer-Ladewig/Huber*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 69.

⁶² *Hengstschläger/Leeb*, *Grundrechte*² (2013), p. 61.

individuals in the meaning of the ‘unmittelbare Drittwirkung’ nor does any other legal sources.⁶³ As a consequence, private individuals are not prevented to participate in active euthanasia since there is no obligation under Art. 2 of the Convention in the sense of a ‘unmittelbare Drittwirkung’.

2.1.4 Interim result

In conclusion, the existing obligations do not prevent the emergence of a right to active euthanasia under Art. 2 ECHR. It shall be reminded that it relates to voluntary active euthanasia based on a free decision under full comprehension of what is involved.

The fourth legal problem is, whether there exists a negative obligation for the Member States to cease criminalisation of active euthanasia under Art. 2 ECHR. If the provision would include such an obligation, a positive obligation to administer lethal medication on demand could arise beyond it. Therefore, the scope of protection of Art. 2. ECHR shall be analysed whether it includes the right to terminate the own life by active euthanasia.

2.2 Scope of protection

The beneficiary of Art. 2 ECHR is ‘everyone’/‘toute personne’ according to the wording of the provision.⁶⁴ In conjunction with Art. 1 ECHR the right to life entitles every person within the jurisdiction of the Member States.

The legal interest to be protected by Art. 2 ECHR is ‘life’/‘la vie’.⁶⁵ It comprises the existing life regardless of age, sex or other characteristics.⁶⁶ The protection of life begins with birth. Under

⁶³ *Schübel-Pfister* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 69.

⁶⁴ *Schabas*, European Convention on Human Rights (2015), p. 124; *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 152.

⁶⁵ *Schilling*, Internationaler Menschenrechtsschutz³ (2016), p. 56.

⁶⁶ *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 165; *Uerpmann-Witzack* in: Ehlers (Edit.), European Fundamental Rights and Freedoms (2007), p. 86; *Schübel-Pfister* in: Karpenstein/ Mayer (Edit.), EMRK² (2015), p. 64; *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 153.

certain circumstances the unborn life ('nasciturus') is also protected. While previously death referred to cardiac death, in the present it refers to brain death.⁶⁷

It is commonly acknowledged that the right to life guarantees a 'right to live one's life' as a positive aspect. However, it is up for debate, whether there exists a counterpart of a negative aspect in the sense of 'not to live one's life' or 'to end one's life' or 'to die'. Therefore, it is necessary to define the indeterminate legal term of 'life'/'la vie'. Since there is no legal definition in the meaning of the ECHR, the determination shall be achieved by methods of interpretation.

The Convention does not contain any rules in respect to the interpretation of its provisions. Only Art. 17 ECHR refers to the interpretation.⁶⁸ It prohibits to interpret the rights of the Convention in a manner which would lead to abuse of those rights.

The ECHR is a multilateral treaty of Public International Law.⁶⁹ Under consideration of the International Treaty Law, the ECHR shall be interpreted according to Art. 31 – 33 of the Vienna Convention on the Law of Treaties⁷⁰ (VCLT).⁷¹ The provisions of Art. 31 and Art. 33 VCLT relate to the literal, systematic and teleological interpretation. The Art. 32 VCLT refers to the historical interpretation as supplementary means of the interpretation methods.⁷²

⁶⁷ *Alleweldt* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 505; *Schübel-Pfister* in: Karpenstein/Mayer (Edit.), *EMRK*² (2015), p. 63; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 157; *Amos*, *Human Rights Law*² (2014), p. 183; *Uerpman-Witzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴ (2014), p. 118; *Alleweldt* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 502; *Uerpman-Witzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 86; *Lagodny* in: Pabel/Schmahl (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 2, Art. 2, p. 18.

⁶⁸ *Schabas*, *European Convention on Human Rights* (2015), p. 33; *Schilling*, *Internationaler Menschenrechtsschutz*³ (2016), p. 18.

⁶⁹ *Frowein* in: Frowein/Peukert (Edit.), *EMRK-Kommentar*³ (2009), p. 3; *Mayer* in: Karpenstein/Mayer (Edit.), *EMRK*² (2015), p. 6; *Meyer-Ladewig/Nettesheim* in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), pp. 29-30.

⁷⁰ UN, *Vienna Convention on the Law of Treaties* (1969), no. 18232, *Treaty Series*, Vol. 1155, p. 331.

⁷¹ ECtHR, 21.02.1975, no. 4451/70 (*Golder v. the UK*), para. 29, ECtHR (GC), 12.12.2001, no. 52207/99 (*Banković and Others v. Belgium and Others*), paras. 55-58; ECtHR (GC), 29.01.2008, no. 13229/03 (*Saadi v. the UK*), paras. 61 f; *Fitzmaurice* in: Shelton (Edit.), *The Oxford Handbook of International Human Rights Law* (2013), p. 741.

⁷² *Heintschel von Heinegg* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), p. 479; *Wildhaber/Breitenmoser* in: (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 2, p. 15; *Fitzmaurice* in: Evans (Edit.), *International Law*⁴ (2014), pp. 179, 181; *Mayer* in: Karpenstein/Mayer (Edit.), *EMRK*² (2015), p. 6.

2.2.1 Literal interpretation

Art. 33 (1) VCLT notes that the literal interpretation refers to the authentic languages of the international treaty.⁷³ In the ECHR, the English and French texts are both equally authentic.⁷⁴ The English term 'life' and the French expression 'la vie' indicate having the same meaning. This assumption is confirmed by Art. 33 (3) VCLT stating that each authentic text is presumed to convey the same sense.

The wording of both text versions of Art. 2 ECHR requires explicitly the protection of human life by law.⁷⁵ Thus, the right to life cannot be interpreted literally as safeguarding an entirely opposite right meaning the 'right to die' without distorting the language.⁷⁶ However, the wording referring to the 'protection of the right to life' cannot be interpreted as an 'obligation to live' enacted by the State. The right cannot be understood as an obligation to enjoy the entitlement under Art. 2 ECHR against the explicit will of the rightholder.⁷⁷ Therefore, the literal interpretation is not definitive and leaves room for further interpretation in regard to the existence of a negative aspect of the right to life according Art. 2 ECHR.

2.2.2 Historical interpretation

Art. 32 VCLT refers to the historical interpretation of an international treaty as supplementary means.⁷⁸ Thereby, the ECtHR underlines the connection between the literal and historical interpretation.⁷⁹ The historical interpretation shall examine the drafting of the Convention and the intention of the contracting parties. The examination may involve different legal sources,

⁷³ *Heintschel von Heinegg* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), p. 479.

⁷⁴ *Schilling*, *Internationaler Menschenrechtsschutz*³ (2016), p. 17-18.

⁷⁵ EComHR, 04.10.1989, no. 13371/87 (*Adler v. Germany*); *Hengstschläger/Leeb*, *Grundrechte*² (2013), p. 65; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 166.

⁷⁶ *Jayawickrama*, *The Judicial Application of Human Rights Law*² (2017), p. 220; *Gerards* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 356; *Lester/Pannick/Herberg*, *Human Rights Law and Practice*³ (2009), p. 164; *Lester/Pannick/Herberg*, *Human Rights Law and Practice*³ (2009), p. 163; *Meyer-Ladewig/Huber*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 65; *Stone*, *Textbook on Civil & Human Rights*¹⁰ (2014), p. 29.

⁷⁷ *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 153.

⁷⁸ *Fitzmaurice* in: Evans (Edit.), *International Law*⁴ (2014), p. 181; *Heintschel von Heinegg* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), p. 479.

⁷⁹ ECtHR (GC), 12.12.2001, no. 52207/09 (*Banković and Others v. Belgium and Others*), paras. 58, 65.

e. g. the Travaux Préparatoires.⁸⁰ These legally non-binding documents had been produced during the drafting of the ECHR. However, they are non-existent in respect to Art. 2 ECHR.⁸¹

The drafting of the Convention was influenced by the spirit of the post-war period. Aiming to create an effective human rights protection system in Europe after the horrors of the Second World War, the ECHR was meant to enforce certain rights of the Universal Declaration of Human Rights⁸² (UDHR). The opening of the Convention was in 1950. Three years later, the treaty came into force. Thus, its contents are influenced by notions and ideas of the late 1940s.⁸³ However, the understanding of the right to life in those days involves notions grown over ages.⁸⁴ Religious views still played an important role in the 1940s. In Europe, the Christian doctrine about the non-disposability of life was predominant, which derived from the Middle Ages. The ECtHR does not explicitly name this concept but refers to its meaning in the case-law.⁸⁵ Suicide and acts of active euthanasia constitute mortal sins according to the Christian teaching.⁸⁶

The atrocities under the Regime of National Socialism in the 1930s and 40s also influenced the understanding of the right to life especially in the context of active euthanasia. The National Socialists took up the theory of Social Darwinism of the 19th century, referring to the natural selection to humans.⁸⁷ They implemented it according to their ideology of 'race hygiene'. Their

⁸⁰ *Heintschel von Heinegg* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), p. 479; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 32; *Fitzmaurice* in: Shelton (Edit.), *The Oxford Handbook of International Human Rights Law* (2013), p. 745; *Fitzmaurice* in: Evans (Edit.), *International Law*⁴ (2014), p. 181; *Schabas*, *European Convention on Human Rights* (2015), p. 34.

⁸¹ Travaux Préparatoires to the Convention, https://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf (12.04.2019).

⁸² UN, Universal Declaration of Human Rights (1948), Res. 217 A (III) of the UN-General Assembly.

⁸³ *Meyer-Ladewig/Nettesheim* in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), pp. 23-24.

⁸⁴ *Alleweldt* in: Dörr/Grote/Maruhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 494; *Schübel-Pfister* in: Karpenstein/Mayer (Edit.), *EMRK*² (2015), p. 63; *Uerpman-Wittzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 87; *Uerpman-Wittzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴ (2014), p. 119.

⁸⁵ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 39: "Article 2 cannot [...] create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life".

⁸⁶ *Hilgendorf* in: Joerden/Szwarc (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 177; *Baumgarten*, *Right to die? Rechtliche Probleme um Sterben und Tod*² (2000), pp. 132-133, 135.

⁸⁷ *Maehle* in: in: Frewer/Neumann (Edit.), *Medizingeschichte und Medizinethik, Kontroversen und Begründungsansätze 1900 – 1950* (2001), pp. 51 ff; *Schipperges* in: Eser (Edit.), *Suizid und Euthanasie, 1976*, p. 19; *Baumgarten*, *Right to die? Rechtliche Probleme um Sterben und Tod*² (2000), p. 139-140; *Bergdolt*, *Das Gewissen der Medizin, Ärztliche Moral von der Antike bis heute* (2004), pp. 25, 34-35, 39-40.

notion of life contained the 'life worth living' and the 'unworthy to live'.⁸⁸ The last mentioned group referred to old and ill persons who were unfit to work, among others. These persons became the victims of killing programmes, which were labelled with the misleading term of 'euthanasia'. Those incidents became public in Europe through the so-called 'Nuremberg Doctors' trial' in 1946/47. Acts of involuntary active euthanasia were one of different horrid crimes in the field of medicine.⁸⁹

These historical events and ideas allow the assumption, that the contracting parties would had been aware of the risks of abuse connected to a right to active euthanasia. In the context of the non-disposability of life, a comprehensive protection of life was codified into the general principle of the right to life according to the first sentence of Art. 2 (1) ECHR. As such, the provision contains the 'principle of the sanctity of life of human beings'.⁹⁰ The inclusion of a right to active euthanasia according to the intention of the contracting parties seems unlikely. These assumptions are supported by the fact that the movement highlighting the self-determination in terms of euthanasia obtained acceptance in the later decades after the draft of the ECHR has been already accomplished. In conclusion, the historical interpretation tends to negate the existence of the negative aspect in Art. 2 ECHR and of the right in question. In conjunction with the literal interpretation, though, it requires further interpretation.

2.2.3 Systematic interpretation

Art. 31 (2) and (3) VCLT allows the systematic interpretation of the undetermined legal term under consideration of the rest of the provision concerned, of the whole treaty and of other legal sources of International Law.⁹¹

⁸⁸ *Frewer* in: *Frewer/Neumann* (Edit.), *Medizingeschichte und Medizinethik, Kontroversen und Begründungsansätze 1900 – 1950* (2001), p. 152.

⁸⁹ *Weindling* in: *Frewer/Neumann* (Edit.), *Medizingeschichte und Medizinethik, Kontroversen und Begründungsansätze 1900 – 1950* (2001), p. 157.

⁹⁰ *Amos*, *Human Rights Law*² (2014), p. 181.

⁹¹ *Schabas*, *European Convention on Human Rights* (2015), p. 40; *Heintschel von Heinegg* in: *Ipsen* (Edit.), *Völkerrecht*⁷ (2018), p. 475.

2.2.3.1 Consideration of the whole provision of Art. 2 ECHR

The general principle of the right to life in the first sentence of Art. 2 (1) ECHR corresponds with its exceptions in the second sentence of Art. 2 (1) and in Art. 2 (2) ECHR. These exceptions are listed exhaustively (see above). The acts of active euthanasia do not fall within any of these exceptions. This circumstance speaks against the emergence of the right in question.

2.2.3.2 Consideration of other provisions of the ECHR

Art. 2 ECHR shall also be compared with other provisions of the Convention. Art. 2 ECHR in conjunction with Art. 3 and Art. 8 ECHR guarantee the human dignity.⁹² In cases related to euthanasia, the persons concerned expressed their wish to be able to die with dignity and so spare themselves from pain and suffering due to their terminal illness. The reference to the human dignity in this context is understandable, but not undisputed. On the one hand, the right to life should include any aspect that makes life dignified. Such aspects, which entail the end of existence of a human being, however, are supposed to be excluded. The reason for this view is that acts resulting in death efface the right to life itself and, thus, are inconsistent with it.⁹³ On the other hand, the inclusion of aspects which are considered by the person concerned as making his or her life dignified and lead to the end of his or her life constitute only an option for the terminally-ill person, not an obligation. It does not encroach the right to life of the vulnerable group of terminally-ill persons because every human being regardless of age, health status or other characteristics is granted such a right.⁹⁴ But if a person wishes no longer to participate in it, the refusal of the possibility of active euthanasia supervised by public authorities for persons mostly who are physically not able to commit suicide themselves may lead to acts of active euthanasia which are done secretly.⁹⁵ Securing the free will of the person concerned and preventing the misuse of acts of euthanasia becomes more difficult under such

⁹² ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 49-52, 65; *Lester/Pannick/Herberg*, *Human Rights Law and Practice*³ (2009), p. 138; *Schabas*, *European Convention on Human Rights* (2015), p. 122; *Schübel-Pfister* in: *Karpenstein/Mayer* (Edit.), *EMRK*² (2015), p. 62.

⁹³ *Jayawickrama*, *The Judicial Application of Human Rights Law*² (2017), p. 222.

⁹⁴ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 8.

⁹⁵ ECtHR, 26.10.2000, no. 48335/99 (*Sanles Sanles v. Spain*); CoE, Parliamentary Assembly of the Council of Europe, Report on Euthanasia of the Social, Health and Family Affairs Committee, Rapporteur Marty, Doc. 9898, 10.09.2003, pp. 4, 13; CoE, Parliamentary Assembly of the Council of Europe, Opinion on Euthanasia of the Committee on Legal Affairs and Human Rights, Rapporteur McNamara, Doc. 9923, 23.09.2003, p. 4.

circumstances. Thus, the argument of the human dignity constitutes a motivation for the request of granting a right to active euthanasia, which should be read into the notion of 'life'.⁹⁶ It advocates for the negative aspect within Art. 2 ECHR.

Furthermore, Art. 2 ECHR shall be compared with other provisions of the Convention safeguarding rights which can also be classified as 'classic rights'. These are, for instance, the Freedom of Expression in Art. 10 ECHR or the Freedom of Association in Art. 11 ECHR. These rights contain a positive as well as a negative aspect.⁹⁷ The ECtHR notes that the notion of these rights "implies some measure of choice as to its exercise"⁹⁸. Compared to the right to life, the Court states that Art. 2 ECHR is expressed in different terms, because it does not relate to decisions regarding the choices of what someone chooses to do with one's life.⁹⁹ However, this argument leaves room for doubts. The decision to end one's life at a time of one's choice and by means of one's choice de facto constitutes a measure of choice regarding the exercise of the right concerned. It constitutes the choice not to exercise the right to life any longer. Additionally, the nature of the question regarding the existence or non-existence of a negative aspect is a structural one. It would amount to a breach of the structure of human rights classifications to include the right to life into the 'group of classic rights' and then exclude it from the typical structural shape of these rights while confirming this structural shape towards other classic rights as Art. 10, 11 ECHR. Thus, the comparison with other relevant provisions of the Convention advocates for the involvement of a negative aspect in Art. 2 ECHR.

2.2.3.3 Principles of Public International Law influencing the consideration of other legal instruments of International Human Rights Law

The systematic approach of interpretation enables also the inclusion of other legal sources of International Law in the sense of Art. 31 (3) lit. c VCLT for the determination of the scope of

⁹⁶ Rodley in: Moeckli/Shah/Sivakumaran (Edit.), *International Human Rights Law*³ (2014), p. 176.

⁹⁷ Hengstschläger/Leeb, *Grundrechte*² (2013), p. 22.

⁹⁸ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 39, see also ECtHR, 13.08.1981, nos. 7601/76, 7806/77 (*Young, James and Webster v. the UK*), para. 52; ECtHR, 30.06.1993, no. 16130/90 (*Sigurður A. Sigurjónsson v. Iceland*), para. 35.

⁹⁹ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 39; *Martin/Podríguez-Pinzón/Brown*, *Human Rights of Older People* (2015), p. 161.

protection.¹⁰⁰ It includes especially the legal sources according to Art. 38 of the Statute of the International Court of Justice¹⁰¹ (ICJ-Statute).¹⁰² These are international conventions and custom, general principles of International Law and as subsidiary means, judicial decisions and teachings. The list is non-exhaustive because of the declarative character of the provision.¹⁰³ The consideration of soft-law is also legitimate.

The consideration for the purpose of interpretation is not without difficulties, though. It must observe the principles of International Law. This refers specially to the 'principle of State Sovereignty' bearing the 'principle of consensus'.¹⁰⁴ According to these principles, the State is a subject of International Law who is only bound by an obligation if the State concerned has submitted its consent to the obligation in question.¹⁰⁵ Therefore, the principles of Public International Law influence the method of systematic interpretation. It may not be approached in a manner of reading obligations agreed on in one treaty into these of another treaty. Further difficulties arise in regard to the consideration of several legal instruments when e. g. there are different contracting parties to the treaty or when the treaty is a legally non-binding. The consideration of different legal sources of International Law is generally possible, though, because declarations submitted by a State to promote certain guarantees indicate the State's intent not to conduct in a way which is contrary to these declarations. As a consequence, any systematic interpretation must be conducted in a cautious and non-excessive manner for not intervening with the principles of Public International Law.¹⁰⁶

In the following, Art. 2 ECHR shall be interpreted as being part of the international human rights protection system.¹⁰⁷

¹⁰⁰ ECtHR, 23.09.1994, no. 15890/89 (*Jersild v. Denmark*), para. 31; *Fitzmaurice* in: Shelton (Edit.), *The Oxford Handbook of International Human Rights Law* (2013), p. 749.

¹⁰¹ UN, Statute of the International Court of Justice (1945).

¹⁰² *Dörr* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), p. 560; *Vitzthum* in: *Vitzthum/Proelß* (Edit.), *Völkerrecht*⁷ (2016), pp.42-43; *Schilling*, *Internationaler Menschenrechtsschutz*³ (2016), pp. 20-21.

¹⁰³ *Schabas*, *European Convention on Human Rights* (2015), p. 44.

¹⁰⁴ *Herdegen*, *Völkerrecht*¹⁷ (2018), p. 57; *Epping* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), p. 205.

¹⁰⁵ *Stein/von Buttlar/Kotzur*, *Völkerrecht*¹⁴ (2017), pp. 4-5; *Vitzthum* in: *Vitzthum/Proelß* (Edit.), *Völkerrecht*⁷ (2016), p. 45; *Herdegen*, *Völkerrecht*¹⁷ (2018), pp. 31-32;

¹⁰⁶ *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), pp. 37-38.

¹⁰⁷ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 54; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 153; *Mayer* in: *Karpenstein/Mayer* (Edit.), *EMRK*² (2015), p. 13; *Schabas*, *European Convention on Human Rights* (2015), p. 47.

2.2.3.4 Consideration of other legal instruments of International Human Rights

Law

Besides the provision of Art. 2 ECHR, the right to life is enshrined in Art. 3 UDHR. The Declaration was adopted in 1948 and is influenced by the atrocities during the Second World War.¹⁰⁸ The guarantee of the right to life in Art. 3 UDHR, for instance, intends to protect individuals from such tort.¹⁰⁹ The foundation of the UDHR is the 'principle of human dignity'.¹¹⁰ The ECHR is based on the model of the UDHR promoting its safeguards on European level. In this context, the Art. 3 UDHR is the ancestor of Art. 2 ECHR.¹¹¹ All Member States of the ECHR are also contracting parties of the UDHR.¹¹² Due to this strong bond between both legal instruments, the Declaration shall be considered for the purpose of interpreting the term 'life' in Art. 2 ECHR. In despite of a legally non-binding character, the UDHR's function as means of interpretation for other legal documents in the field of International Human Rights Law is commonly accepted because of its major impact for the promotion of contemporary human rights protection.¹¹³

As mentioned, the purpose of Art. 3 UDHR is to ensure the right to life in the context of the severe interferences with this right during the Second World War. It is doubtful that in this specific context the right to life under Art. 3 UDHR included a negative aspect that would be the right to end one's life. There are no indications referring to active euthanasia as a guarantee of Art. 3 UDHR. Thus, no such conclusion may be drawn from it for Art. 2 ECHR.

¹⁰⁸ *Alleweldt* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 494.

¹⁰⁹ *Tomuschat* in: Tomuschat/Lagrange/Oeter (Edit.), *The Right to Life* (2010), p. 4.

¹¹⁰ *Brown*, *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (2016), p. 14.

¹¹¹ Preamble of the ECHR; *Steiner/Alston/Goodman*, *International Human Rights in Context*³ (2008), pp. 133, 137; *Hilpold* in: Pabel/Schmahl (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 1, Präambel, pp. 9-10; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 537; *Schilling*, *Internationaler Menschenrechtsschutz*³ (2016), p. 6; *Schabas*, *European Convention on Human Rights* (2015), p. 118.

¹¹² *Schilling*, *Internationaler Menschenrechtsschutz*³ (2016), p. 32.

¹¹³ *Nettesheim* in: Merten/Papier (Edit.), *Handbuch der Grundrechte in Deutschland und Europa*, Vol. VI/2 Europäische Grundrechte II – Universelle Menschenrechte (2009), pp. 198-199, 203; *Schilling*, *Internationaler Menschenrechtsschutz*³ (2016), p. 4.

The International Covenant on Civil and Political Rights¹¹⁴ (ICCPR) is a legally binding international treaty.¹¹⁵ All the Member States of the ECHR are also States Parties to the ICCPR. They submitted binding declarations of intent to promote the right to life to an extent according to their reservations and declarations. Therefore, the States are generally bound not to act in a harmful way in respect to the right to life.

The general principle of the first sentence of Art. 2 (1) ECHR correspond to the first and second sentences of Art. 6 (1) ICCPR enshrining the right to life.¹¹⁶ Art. 6 (1) ICCPR guarantees not only the mere existence of a human being, but also a treatment with dignity.¹¹⁷ The provision does not contain any obligation to preserve the life of a person against the explicit wish.¹¹⁸ In the case of euthanasia, there is a notable change taking place. In the past, the UN Human Rights Committee (HRC) has been rather reluctant on the subject.¹¹⁹ However, the HRC released the ‘General Comment No. 36’ in 2018.¹²⁰ It is a quasi-judicial statement on how the HRC interprets the ICCPR’s guarantees. As such it is part of soft-law. The HRC stated in it that Art. 6 ICCPR contributes to the importance of personal autonomy in terms of human dignity. Thus, the right to life is compatible with acts of termination of life. The requirement for it is that States “must ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and, unambiguous decision of their patients”¹²¹. These precautions shall prevent the terminally-ill persons from abuse and pressure. However, it shall be remarked that the HRC has no authority to create obligations within the ICCPR. In conclusion, the right to life according to Art. 2 ECHR cannot be interpreted to the same extent. But the statement of the HRC demonstrates the possibility of a new understanding of ‘life’ and its scope of protection. Hence it could be an impulse to rethink the concept of ‘life’, which once might be shared by the ECtHR.

¹¹⁴ UN, International Covenant on Civil and Political Rights (1966), UNTS 171, Res. 2200A (XXI).

¹¹⁵ *Joseph/Castan*, International Covenant on Civil and Political Rights³ (2013), p. 8.

¹¹⁶ ECtHR (GC), 22.03.2001, no. 37201/97 (*K.-H. W. v. Germany*), para. 96; ECtHR (GC), 22.03.2001, nos. 34044/96, 35532/97 and 44801/98 (*Streletz, Kessler and Krenz v. Germany*), para. 94.

¹¹⁷ *Jayawickrama*, *The Judicial Application of Human Rights Law*² (2017), pp. 220, 226.

¹¹⁸ *Nowak*, *U.N. Covenant on Civil and Political Rights*² (2005), p. 155.

¹¹⁹ *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 153; *Joseph/Castan*, International Covenant on Civil and Political Rights³ (2013), pp. 212-213.

¹²⁰ UN, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf (22.05.2019).

¹²¹ UN, General comment No. 36 (2018), CCPR/C/GC/36, p. 2 para. 9.

Another legal human rights instrument for the region of Europe is the Charter of Fundamental Rights¹²² (EU-Charter) of the European Union (EU).¹²³ It is a legally binding international treaty according to Art. 6 (1) of the Treaty on European Union¹²⁴ (TEU). Not all Member States of the ECHR are Member States of the EU-Charter. Therefore, the interpretation needs to be conducted in a cautious and non-excessive manner (see above). The consideration of the EU-Charter is possible, though, because there is a strong link between the both legal documents. The relationship between the ECHR and the EU-Charter is regulated by Art. 52, 53 EU-Charter which correspond to Art. 53 ECHR. The Art. 52 (3) EU-Charter bears a clause of 'minimal protection' in relation to the ECHR.¹²⁵ In general terms, Art. 2 EU-Charter and Art. 2 ECHR "have the same meaning and the same scope, in accordance with"¹²⁶ Art. 52 (3) EU-Charter.¹²⁷ However, it is possible that the EU-Charter may provide a wider scope of protection.¹²⁸ In respect to the guarantee of the right to life in Art. 2 EU-Charter, there exists no jurisprudence of the Court of Justice or the General Court of the EU.¹²⁹ The interpretation is oriented thus towards the jurisprudence of the ECtHR.¹³⁰ In the field of active euthanasia, the subject became a matter of dispute among the scholars. One first opinion favours the inclusion into the scope of protection of Art. 2 EU-Charter. The second view negates such conclusion. The second view is the prevailing opinion which is based on the arguments of the risk of abuse of active euthanasia and the difficulties to provide safety procedures to ensure a free decision-making process.¹³¹ Under consideration of these judicial teachings and the judicial decisions of the ECtHR according to Art. 38 ICJ-Statute, the scope of protection of Art. 2 EU-Charter

¹²² EU, Charter of Fundamental Rights of the European Union (2000), 2000/C 364/01.

¹²³ *Grabenwarter* in: Gamper/Verschraegen (Edit.), *Rechtsvergleichung als juristische Auslegungsmethode* (2013), p. 101.

¹²⁴ EU, Treaty on European Union (2007).

¹²⁵ *Cariat* in: Picod/Van Drooghenbroeck/Rizcallah (Edit.), *Charte des droits fondamentaux de l'Union européenne* (2018), p. 1150; *Wolffgang* in: Lenz/Borchardt (Edit.), *EU-Verträge Kommentar*⁶ (2012), p. 3350.

¹²⁶ EU, Explanation relating to the Charter of Fundamental Rights (2007), C 303/33, pp. 1, 16.

¹²⁷ *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 165; *Folz* in: Vedder/Heintschel von Heinegg (Edit.), *Europäischen Unionsrecht*² (2018), p. 1319; *Höfling/Kempny* in: Stern/Sachs (Edit.), *Europäische Grundrechte-Charta* (2016), p. 148.

¹²⁸ *Jarass*, *Charta der Grundrechte der Europäischen Union*³ (2016), p. 511; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 27.

¹²⁹ *Folz* in: Vedder/Heintschel von Heinegg (Edit.), *Europäischen Unionsrecht*² (2018), p. 1319; *Höfling/Kempny* in: Stern/Sachs (Edit.), *Europäische Grundrechte-Charta* (2016), p. 149.

¹³⁰ *Wolffgang* in: Lenz/Borchardt (Edit.), *EU-Verträge Kommentar*⁶ (2012), p. 3187; *Höfling/Kempny* in: Stern/Sachs (Edit.), *Europäische Grundrechte-Charta* (2016), pp. 149-150.

¹³¹ *Höfling/Kempny* in: Stern/Sachs (Edit.), *Europäische Grundrechte-Charta* (2016), p. 159.

safeguards the physical existence of a person.¹³² This excludes any possibility to influence life through personal decisions in the sense of self-determination. In conclusion, Art. 2 EU-Charter does not guarantee any right to active euthanasia. The consideration of this provision leads to the interpretation of the term 'life' in Art. 2 ECHR as referring to the sole physical existence being unconcerned with the decision to terminate life.

2.2.3.5 Consideration of national legal frameworks of the Member States in conjunction with soft-law of the Organs of the Council of Europe

The method of the systematic interpretation also considers the commonalities and differences in the national legal frameworks of the Member States of the CoE.¹³³ Thereby, the meaning of 'life' shall not to be adopted from national law, but rather be established by an 'autonomous interpretation'.¹³⁴ The evaluative legal comparison of the commonalities and differences in the national legal frameworks shall be combined with soft-law of the CoE Organs according to the practice of the ECtHR.¹³⁵

A comparison of the national legal frameworks of the Member States demonstrates that a right to active euthanasia is granted in 3 of 47 States.¹³⁶ The Netherlands introduced this form of euthanasia to their legal system in 2002. Belgium declared acts of active euthanasia as lawful in 2002 for adults and in 2014 for minors. And since 2009, Luxembourg allows active euthanasia by law.¹³⁷ In Switzerland, the legal situation does not contain specific laws

¹³² ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 42; *Wolfgang* in: Lenz/Borchardt (Edit.), *EU-Verträge Kommentar*⁶ (2012), p. 3187.

¹³³ *Fitzmaurice* in: Shelton (Edit.), *The Oxford Handbook of International Human Rights Law* (2013), p. 769; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), pp. 34-35.

¹³⁴ ECtHR, 28.06.1978, no. 6232/73 (*König v. Germany*), para. 89; ECtHR (GC), 07.07.2011, no. 23459/03 (*Bayatyan v. Armenia*), paras. 98 ff; *Cremer*, in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, pp. 171-174; *Schilling*, *Internationaler Menschenrechtsschutz*³ (2016), p. 21; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 35.

¹³⁵ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 24, 40; ECtHR (GC), 05.06.2015, no. 46043/14 (*Lambert and Others v. France*), paras. 59-76.

¹³⁶ ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 55; *Feldmann* in: Taupitz/Raspe/Oehlrich (Edit.), *Medizin – Recht – Wirtschaft* (2009), Vol. 7, p. 395; *Schübel-Pfister* in: Karpenstein/Mayer (Edit.), *EMRK*² (2015), pp. 67-68; *Zwaak/Haeck/Burbano Herrera* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 100; *Hilgendorf* in: Joerden/Szwarc (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 176.

¹³⁷ Netherlands' law 'Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding' (2002); Belgium's law 'Wet betreffende de euthanasie/Loi relative à l'euthanasie' (2002); Luxembourg's law 'Loi sur l'euthanasie et

regarding active euthanasia. But the Swiss criminal regulations provide impunity, if the deprivation of life is committed on grounds of compassion.¹³⁸ As mentioned above, the debates on this subject have been taking place in the Parliaments of the Member States for years with the result that active euthanasia is still prohibited in the majority of the States.¹³⁹ There is no European consensus among the Member States in respect to guarantee a right to active euthanasia due to different religious and cultural differences.¹⁴⁰ According to the jurisprudence of the ECtHR, the Member States enjoy a wide margin of appreciation in regard to active euthanasia (see above). Therefore, the States may decide whether or not they ensure the right in question. The provision of Art. 2 ECHR, thus, shall not be interpreted in a way which would interfere with the doctrine of the margin of appreciation. A negative aspect of the Right of Life cannot derive from this interpretation. It shall be remarked that the legal situation looks different in terms of passive euthanasia. The majority of the Member States allow the withdrawal of life-sustaining treatment under certain conditions.¹⁴¹

The soft-law of the Organs of the CoE draws a similar picture. In 1999, the Parliamentary Assembly held up “the prohibition against intentionally taking the life of terminally ill or dying persons”¹⁴² referring to acts of active euthanasia.¹⁴³ In conjunction with the jurisprudence of the ECtHR, this demonstrates that the right to life in Art. 2 ECHR does not involve a negative aspect in the sense of a right to die.¹⁴⁴ An opinion of advocacy for the compatibility of active euthanasia with the Convention was rather rare.¹⁴⁵ And it shall be noted that compatibility does not automatically mean an entitlement in the sense of a right. The disaffirmance of active

l'assistance au suicide (2009); see also *Höfling/Kempny* in: Stern/Sachs (Edit.), *Europäische Grundrechte-Charta* (2016), p. 159.

¹³⁸ ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 55; CoE, Parliamentary Assembly of the Council of Europe, Report on Euthanasia of the Social, Health and Family Affairs Committee, Rapporteur Marty, Doc. 9898, 10.09.2003, pp. 7-11.

¹³⁹ ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 55.

¹⁴⁰ *Lester/Pannick/Herberg*, *Human Rights Law and Practice*³ (2009), p. 163; *Hilgendorf* in: Joerden/Szwarc (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 175.

¹⁴¹ ECtHR (GC), 05.06.2015, no. 46043/14 (*Lambert and Others v. France*), para. 72; *Hilgendorf* in: Joerden/Szwarc (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 176.

¹⁴² CoE, Recommendation 1418 (1999) of the Parliamentary Assembly, Protection of the human rights and dignity of the terminally ill and the dying, para. 9 lit. c.

¹⁴³ *Mowbray*, *Cases, Materials, and Commentary on the European Convention on Human Rights*³ (2012), p. 119.

¹⁴⁴ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 40.

¹⁴⁵ CoE, Parliamentary Assembly of the Council of Europe, Report on Euthanasia of the Social, Health and Family Affairs Committee, Rapporteur Marty, Doc. 9898, 10.09.2003.

euthanasia was maintained by the Parliamentary Assembly until today.¹⁴⁶ The main arguments for the reluctant opinion are the risks of increase of the performance of these acts and the risks of misuse. First, according to the Committee on Legal Affairs and Human Rights, the evidence seems to be found, for instance, in the data from the Netherlands. One year after legalisation of active euthanasia, the “Dutch situation demonstrates that legalizing euthanasia [...], far from introducing greater controls, simply introduces more euthanasia”¹⁴⁷. However, it shall be considered that the Netherlands is one of the first countries in Europe legalising these acts. It did not only make active euthanasia available to its own subjects but also to other nationals who travelled to the country for that reason. Therefore, the increase referred to by the Committee shall be regarded with caution. Besides, if active euthanasia is conducted according to the regulations of law, an increased demand cannot be seen as a negative fact as long as it corresponds to a free decision taken in full comprehension of what is involved. Secondly, the risk of abuse is an important reason for prohibiting euthanasia and it must be taken seriously.¹⁴⁸ However, the total prohibition cannot be the answer because acts of active euthanasia are practised secretly in despite of any prohibitions.¹⁴⁹ As mentioned above, without the supervision of national authorities, securing the free will of the person concerned and preventing the misuse of acts of euthanasia becomes more difficult. An alternative could be the allowance of active euthanasia including the establishment of a procedure which secures the decisions of terminally-ill persons in the field of active euthanasia.¹⁵⁰ Compared to passive euthanasia, the legal sources of the CoE state a continued pursuit to strengthen the self-determination and autonomy of the patients due to protect the dignity of humans.¹⁵¹ The main argument for the acknowledgment of passive euthanasia derives from

¹⁴⁶ CoE, Parliamentary Assembly of the Council of Europe, Opinion on Euthanasia of the Committee on Legal Affairs and Human Rights, Rapporteur McNamara, Doc. 9923, 23.09.2003; CoE, Resolution 1859 (2012) of the Parliamentary Assembly, Protecting human rights and dignity by taking into account previously expressed wishes of patients.

¹⁴⁷ CoE, Parliamentary Assembly of the Council of Europe, Opinion on Euthanasia of the Committee on Legal Affairs and Human Rights, Rapporteur McNamara, Doc. 9923, 23.09.2003, p. 7.

¹⁴⁸ *Uerpman-Wittzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 87; *Uerpman-Wittzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴ (2014), p. 119.

¹⁴⁹ ECtHR, 26.10.2000, no. 48335/99 (*Sanles Sanles v. Spain*); CoE, Parliamentary Assembly of the Council of Europe, Report on Euthanasia of the Social, Health and Family Affairs Committee, Rapporteur Marty, Doc. 9898, 10.09.2003, pp. 4, 13; CoE, Parliamentary Assembly of the Council of Europe, Opinion on Euthanasia of the Committee on Legal Affairs and Human Rights, Rapporteur McNamara, Doc. 9923, 23.09.2003, p. 4.

¹⁵⁰ *Schabas*, *European Convention on Human Rights* (2015), p. 133.

¹⁵¹ CoE, Recommendation 779 (1976) of the Parliamentary Assembly, Rights of the sick and dying; CoE, Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (1999), ETS No.164; CoE, Recommendation 1418 (1999) of the Parliamentary Assembly,

the circumstance that the use of intense medication can result in a medical treatment, which is contradictory to the human dignity.¹⁵²

The analysis of the soft-law of the CoE Organs illustrates a linkage to the case-law of the ECtHR. The Court takes soft-law into account in its judgements and the CoE Organs refer to the argumentation in the Court's decisions.¹⁵³ This allows the conclusion that soft-law of the CoE does not provide any scope of protection beyond the one ensured by the case-law of the ECtHR. If the case-law does not guarantee a negative aspect in terms of Art. 2 ECHR, then soft-law also does not safeguard any negative aspect of the right to life.

2.2.3.6 Interim result regarding the systematic interpretation

While in the field of passive euthanasia arguments concerning the self-determination of patients and the individual assessment of a dignified end of life are recognised, these arguments are not acknowledged in terms of active euthanasia. The prevailing arguments of the systematic interpretation deny the existence of a negative aspect within the right to life.¹⁵⁴ Thus, the systematic interpretation negates the emergence of a right to active euthanasia under Art. 2 ECHR. However, it gives impulses towards a possible new understanding of the right to life – including 'life' being more than just existence and embracing the realisation of human dignity through personal autonomy.

Protection of the human rights and dignity of the terminally ill and the dying; CoE, Parliamentary Assembly of the Council of Europe, Opinion on Euthanasia of the Committee on Legal Affairs and Human Rights, Rapporteur McNamara, Doc. 9923, 23.09.2003; CoE, Resolution 1859 (2012) of the Parliamentary Assembly, Protecting human rights and dignity by taking into account previously expressed wishes of patients; CoE, Recommendation 1993 (2012) of the Parliamentary Assembly, Protecting human rights and dignity by taking into account previously expressed wishes of patients.

¹⁵² CoE, Recommendation 1418 (1999) of the Parliamentary Assembly, Protection of the human rights and dignity of the terminally ill and the dying, p. 2.

¹⁵³ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 24, 40; ECtHR (GC), 05.06.2015, no. 46043/14 (*Lambert and Others v. France*), paras. 59-76; CoE, Parliamentary Assembly of the Council of Europe, Report on Euthanasia of the Social, Health and Family Affairs Committee, Rapporteur Marty, Doc. 9898, 10.09.2003; CoE, Parliamentary Assembly of the Council of Europe, Opinion on Euthanasia of the Committee on Legal Affairs and Human Rights, Rapporteur McNamara, Doc. 9923, 23.09.2003.

¹⁵⁴ *Uerpmann-Wittzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴ (2014), p. 119; *Berger*, *Jurisprudence de la Cour Européenne des Droits de l'Homme*⁹ (2004), p. 10; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 166; *Schübel-Pfister* in: Karpenstein/Mayer (Edit.), *EMRK*² (2015), p. 67; *Amos*, *Human Rights Law*² (2014), p. 182; *Jayawickrama*, *The Judicial Application of Human Rights Law*² (2017), p. 222.

2.2.4 Teleological interpretation, incl. dynamic and evolutive interpretation

Art. 31 (1) VCLT includes the interpretation of a treaty in the light of its object and purpose.¹⁵⁵ As mentioned above, the Convention's object and purpose is not to guarantee a minimal protection, but a comprehensive and contemporary one, making its safeguards effective and practical.¹⁵⁶ Within the teleological interpretation, the ECtHR applies the 'dynamic and evolutive interpretation'. It is a special method of the teleological interpretation aiming to develop the existing guarantees of the Convention.¹⁵⁷

The dynamic and evolutive interpretation is not undisputed as it amounts to judicial law-making by the ECtHR. Law-making might extend existing obligations under the Convention. Thus, the legal question arises, whether the competence to law-making lies only with the Member States as subjects of Public International Law or also with the ECtHR.

The foundation of the ECtHR was an innovation in the field of International Human Rights Law. Thus, there were no empirical values to be considered in respect to possible conflicts between judicial law-making and the principles of International Law.¹⁵⁸ At first, each Member State acknowledged the jurisdiction of the ECtHR through facultative declarations.¹⁵⁹ Later, the content of these recognitions was incorporated into the 11th Protocol¹⁶⁰ of the ECHR.¹⁶¹ By ratifying the Convention itself, the Member States also submitted their consents to the Convention's obligations. From the beginning, the ECHR was meant to be a "law-making

¹⁵⁵ *Fitzmaurice* in: Shelton (Edit.), *The Oxford Handbook of International Human Rights Law* (2013), p. 745; *Heintschel von Heinegg* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), pp. 475-478; *Fitzmaurice* in: Evans (Edit.), *International Law*⁴ (2014), pp. 179, 182.

¹⁵⁶ ECtHR (GC), 23.03.1995, no. 15318/89 (*Loizidou v. Turkey*), para. 71; ECtHR (GC), 27.09.1995, no.18984/91 and other (*McCann and Others v. the UK*), paras. 146-147; ECtHR, 17.12.2009, no. 4762/05 (*Mikayil Mammadov v. Azerbaijan*) para. 98; *Schabas*, *European Convention on Human Rights* (2015), p. 49; *Grewe*, *Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des Europäischen Gerichtshofs für Menschenrechte*, *ZaöRV* 2001/61, p. 459 (467); *Lester/Pannick/Herberg*, *Human Rights Law and Practice*³ (2009), p. 138.

¹⁵⁷ *Grabenwarter* in: Gamper/Verschraegen (Edit.), *Rechtsvergleichung als juristische Auslegungsmethode* (2013), pp. 104-105; *Heißl* in: Heißl (Hrsg.), *Handbuch Menschenrechte* (2009), p. 46; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), pp. 38-39; *Harris/O'Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), pp. 8-9.

¹⁵⁸ *Frowein* in: *Frowein/Peukert* (Edit.), *EMRK-Kommentar*³ (2009), pp. 7-8.

¹⁵⁹ *Schilling*, *Internationaler Menschenrechtsschutz*³ (2016), p. 8.

¹⁶⁰ CoE, *Protocoll No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby* (1994), ETS No. 155.

¹⁶¹ *De Schutter*, *International Human Rights Law* (2010), pp. 901 f; *Haratsch/Koenig/Pechstein*, *Europarecht*¹¹ (2018), pp. 20-21.

treaty”¹⁶², including the further development of its substantive and procedural safeguards. Here, the Member States still have the possibility to influence them to a certain extent.¹⁶³ The States have the opportunity to amend or modify the guarantees of the Convention through signing of its Protocols. In addition, they may influence the contents of the guarantees through ‘subsequent practise’ in the sense of Art. 31 (2) lit. b VCLT.¹⁶⁴ The ECtHR takes the State’s practise into consideration by referring to the existence or non- existence of a consensus among the Member States in the judgements.¹⁶⁵ Thus, the method of dynamic and evolutive interpretation of the ECtHR complies with the rules of International Law.

The ECtHR finds the legal basis for the competence to undertake the dynamic and evolutive interpretation in the Convention itself.¹⁶⁶ First, the competence derives from the Preamble. It states the purpose of the ECHR to maintain and further realise the guarantees of human rights for the sake of achieving greater unity between the members of the CoE. This requires the development of the human rights protection system.¹⁶⁷ Second, the legal basis derives from Art. 19, 46 ECHR. To achieve an effective protection of human rights, Art. 19 ECHR assigns the ECtHR to ensure the observance of the Convention’s obligations. Art. 46 ECHR obliges the Contracting Parties to adhere the judgments of the ECtHR. The synergy of these provisions aims to ensure a high standard of human rights protection.¹⁶⁸ Third, the application of the dynamic and evolutive interpretation complies with the principle of effectiveness.¹⁶⁹ The Convention’s objective is to guarantee a comprehensive and contemporary protection.¹⁷⁰ Its standards are not to be applied as being static, but rather being reflective in regard to present-

¹⁶² *Mayer* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 13.

¹⁶³ *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), pp. 34-35, 39-40.

¹⁶⁴ *Grewe*, Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des Europäischen Gerichtshofs für Menschenrechte, ZaöRV 2001/61, p. 459 (466).

¹⁶⁵ ECtHR (GC), 11.07.2002, no. 28957/95 (*Goodwin v. the UK*), paras. 84-85; *Frowein* in: Frowein/Peukert (Edit.), EMRK-Kommentar³ (2009), pp. 5-6.

¹⁶⁶ *Harris/O’Boyle/Warbrick*, Law of the European Convention on Human Rights³ (2014), p. 8 f; *Grabenwarter* in: Gamper/Verschraegen (Edit.), Rechtsvergleichung als juristische Auslegungsmethode (2013), pp. 104 f.

¹⁶⁷ *Grewe*, Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des Europäischen Gerichtshofs für Menschenrechte, ZaöRV 2001/61, p. 459 (466).

¹⁶⁸ *Kerschbaumer* in: Heißl (Hrsg.), Handbuch Menschenrechte (2009), pp. 617-618; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), pp. 38-39.

¹⁶⁹ *Ehlers* in: Ehlers (Edit.), Europäische Grundrechte und Grundfreiheiten⁴ (2014), pp. 48-49; *Schabas*, European Convention on Human Rights (2015), p. 49.

¹⁷⁰ ECtHR (GC), 23.03.1995, no. 15318/89 (*Loizidou v. Turkey*), para. 71; *Schabas*, European Convention on Human Rights (2015), p. 49; *Grewe*, Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des Europäischen Gerichtshofs für Menschenrechte, ZaöRV 2001/61, p. 459 (467).

day conditions.¹⁷¹ This requires an interpretation in an effective and practical rather than illusory or theoretical manner.¹⁷² Referring to this, the ECtHR understands the Convention to be a “living instrument”¹⁷³, constantly adjusting to social and economic changes of the present. In conclusion, the Convention itself provides the competence of the ECtHR to undertake the method of dynamic and evolutive interpretation.

The ECtHR does not differentiate between the terms ‘dynamic’ and ‘evolutive’ according to the case-law.¹⁷⁴ A distinction would not be useful, since both terms refer to the dynamic character of the Convention’s interpretation and the evolution of the standard of human rights protection.¹⁷⁵ Thus, the terms ‘dynamic’ and ‘evolutive’ contain no substantive differences and can be understood as synonyms.¹⁷⁶

In the following, the indeterminate legal term of ‘life’/‘la vie’ shall be examined by applying the dynamic and evolutive interpretation. The interpretation shall be conducted in a cautious and non-excessive manner to pay respect to the rules of International Law (see above).¹⁷⁷ The interpretation shall consider the development in the jurisprudence of the ECtHR¹⁷⁸ regarding Art. 2 ECHR, the development in the soft-law of the other Organs of the CoE¹⁷⁹ and the change of moral values in societies of the Member States¹⁸⁰.

¹⁷¹ ECtHR 25.04.1978, no. 5856/72 (*Tyrer v. the UK*), para. 31; ECtHR, 13.06.1979, no. 6833/74 (*Marckx v. Belgium*), para. 41; ECtHR, 09.10.1979, no. 6289/73 (*Airey v. Ireland*), para. 26; ECtHR, 17.10.1986, no. 9532/81 (*Rees v. the UK*), para. 47; ECtHR (GC), 11.07.2002, no. 28957/95 (*Goodwin v. the UK*), para. 75; ECtHR (GC), 10.02.2009, no. 14939/03 (*Zolotukhin v. Russia*), para. 80; ECtHR (GC), 07.07.2011, no. 23459/03 (*Bayatyan v. Armenia*), para.102; *Fitzmaurice* in: Evans (Edit.), *International Law*⁴ (2014), p. 183.

¹⁷² ECtHR (GC), 12.07.2001, no. 44759/98 (*Ferrazzini v. Italy*), para. 26; *Harris/O’Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), p. 384; *Jacobs/White/Ovey*, *European Convention on Human Rights*⁷ (2017), p. 555.

¹⁷³ ECtHR 25.04.1978, no. 5856/72 (*Tyrer v. the UK*), para. 31; ECtHR, 13.06.1979, no. 6833/74 (*Marckx v. Belgium*), para. 41; ECtHR, 09.10.1979, no. 6289/73 (*Airey v. Ireland*), para. 26; ECtHR, 17.10.1986, no. 9532/81 (*Rees v. the UK*), para. 47; ECtHR (GC), 11.07.2002, no. 28957/95 (*Goodwin v. the UK*), para. 75; *Frowein* in: *Frowein/Peukert* (Edit.), *EMRK-Kommentar*³ (2009), p. 5; *Schilling*, *Internationaler Menschenrechtsschutz*³ (2016), pp. 21-22.

¹⁷⁴ ECtHR (GC), 28.05.2002, no. 46295/99 (*Stafford v. the UK*), para. 68; ECtHR (GC), 11.07.2002, no. 28957/95 (*Goodwin v. the UK*), para. 74; ECtHR (GC), 12.11.2008, no. 34503/97 (*Demir and Baykara v. Turkey*), para. 153.

¹⁷⁵ *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), pp. 38-39.

¹⁷⁶ *Peters*, *Praxis Internationaler Organisationen – Vertragswandel und völkerrechtlicher Ordnungsrahmen* (2016), pp. 42, 44; *Fitzmaurice* in: Evans (Edit.), *International Law*⁴ (2014), p. 183.

¹⁷⁷ *Frowein* in: *Frowein/Peukert* (Edit.), *EMRK-Kommentar*³ (2009), p. 7.

¹⁷⁸ ECtHR (GC), 05.06.2015, no. 46043/14 (*Lambert and Others v. France*), paras. 136 ff.

¹⁷⁹ ECtHR (GC), 05.06.2015, no. 46043/14 (*Lambert and Others v. France*), paras. 60 ff, 69, 70 ff.

¹⁸⁰ *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), pp. 39-40.

2.2.4.1 Development in the jurisprudence of the ECtHR

End-of-life issues have been judged in several cases before the ECtHR.¹⁸¹ The development in the jurisprudence shall be analysed to conclude any trends indicating a change related to the understanding of 'life' and a possible Right of active euthanasia according to Art. 2 ECHR.

One of the first cases before the ECtHR which related to the end of life was the case of 'Sanles Sanles'¹⁸². It concerned an act of active euthanasia at the request of the applicant's brother-in-law, who was physically not able to commit suicide. The legal question of the case was whether Art. 2 ECHR guarantees a right to "a dignified death or a dignified life"¹⁸³. It concerned the recognition of a negative aspect of the right to life. However, the ECtHR did not deal with the substantive matter due to the inadmissibility of the complaint.

One of the most important judgements released by the ECtHR on the subject was in the case of 'Pretty'.¹⁸⁴ It also dealt with an active euthanasia at the request of the applicant, who was physically not able to commit suicide. Her capacity to take decisions was unimpaired. Her wish to die was motivated by sparing herself suffering and indignity in the end of her life. Here, the ECtHR considered the question whether Art. 2 ECHR includes a negative aspect. The Court held, that the right to life "is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life"¹⁸⁵. According to the Court, the right to life does not include a right to self-determination entitling a person to choose between life or death.¹⁸⁶

¹⁸¹ ECtHR, 26.10.2000, no. 48335/99 (Sanles Sanles v. Spain); ECtHR, 29.04.2002, no. 2346/02 (Pretty v. the UK); ECtHR, 22.12.2008, nos. 55185/08 and Others (Ada Rossi and Others v. Italy); ECtHR, 20.01.2011, no. 31322/07 (Haas v. Switzerland); ECtHR, 19.07.2012, no. 497/09 (Koch v. Germany); ECtHR, 14.05.2013, no. 67810/10 (Gross v. Switzerland); ECtHR (GC), 05.06.2015, no. 46043/14 (Lambert and Others v. France); ECtHR, 23.06.2015, nos. 2478/15, 1787/15 (Nicklinson and Lamb v. the UK); ECtHR, 27.06.2017, no. 39793/17 (Gard and Others v. the UK); ECtHR, 23.01.2018, no. 1828/18 (Afiri and Biddarri v. France).

¹⁸² ECtHR, 26.10.2000, no. 48335/99 (Sanles Sanles v. Spain).

¹⁸³ ECtHR, 26.10.2000, no. 48335/99 (Sanles Sanles v. Spain).

¹⁸⁴ ECtHR, 29.04.2002, no. 2346/02 (Pretty v. the UK).

¹⁸⁵ ECtHR, 29.04.2002, no. 2346/02 (Pretty v. the UK), para. 39; see also *Gerards* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 356; *Lester/Pannick/Herberg*, *Human Rights Law and Practice*³ (2009), p. 164.

¹⁸⁶ ECtHR, 29.04.2002, no. 2346/02 (Pretty v. the UK), para. 39; see also *Lester/Pannick/Herberg*, *Human Rights Law and Practice*³ (2009), p. 164; *Jayawickrama*, *The Judicial Application of Human Rights Law*² (2017), p. 222; *Gerards* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 356; *Meyer-Ladewig/Huber*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 65.

In conclusion, the term 'life' means the sole physical existence.¹⁸⁷ Circumstances, under which a person might regard life as dignified or undignified, are not incorporated into the meaning of 'life'. Therefore, regardless of the quality of living, Art. 2 ECHR does not provide a right to decide to terminate one's life. In the merits, the Court held that there is no negative aspect involved in Art. 2 ECHR. Additionally, the Court referred to Art. 8 ECHR as to being concerned with the quality of living and constituting a possible legal basis for a right to die.

The case of 'Ada Rossi and Others'¹⁸⁸ was connected to passive euthanasia and legal questions regarding the discontinuation of nutrition. However, the complaint was inadmissible and brought no insights regarding the examined question.

The ECtHR dealt in the case of 'Haas'¹⁸⁹ with assisted suicide referring to the request to make lethal medication available for the use by the patient. The applicant considered his life to be no longer dignified due to his illness, from which he suffered for more than two decades. Although the judgment focused on Art. 8 ECHR, the Court made also important remarks on Art. 2 ECHR. The Court did not refer to the argument anymore, that the right to life would not allow any choices on the termination of life. Instead, the Court held, that the State's obligation to protect life do not require the prevention of a person from taking his or her life only, if the person took the decision freely and with full comprehension of what is involved.¹⁹⁰ In these situations, the obligation requires the "States to establish a procedure capable of ensuring that a decision to end one's life does indeed correspond to the free will [...] the requirement for a medical prescription, issued on the basis of a full psychiatric assessment, is a means enabling this obligation to be met"¹⁹¹. Thus, choices regarding the end of life may concern the right to life under Art. 2 ECHR, if they are taken freely and with full comprehension of what is involved. The involvement of a negative aspect in the context of Art. 2 ECHR, though, has not been mentioned by the Court.

¹⁸⁷ *Hilgendorf* in: Joerden/Szwarc (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 181.

¹⁸⁸ ECtHR, 22.12.2008, nos. 55185/08 and other (*Ada Rossi and Others v. Italy*).

¹⁸⁹ ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*).

¹⁹⁰ ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 54.

¹⁹¹ ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 58.

The cases 'Koch'¹⁹² and 'Gross'¹⁹³ also referred to assisted suicide and the State's refusal to provide lethal medication for the use by the patient. The judgments corresponded to Art. 8 ECHR. However, they provide no insights in regard to Art. 2 ECHR. The same result applies to the case of 'Nicklinson and Lamb'¹⁹⁴, which concerned active euthanasia and assisted suicide.

In the case of 'Lambert and Others'¹⁹⁵ the ECtHR dealt with the discontinuation of artificial nutrition and hydration of the unconscious relative of the applicants. It constituted an act of non-voluntary passive euthanasia. The Court held that the withdrawal of life-sustaining treatment was compatible with the positive obligation of States under Art. 2 ECHR. In this regard, the Court found that the positive obligation to protect life is fulfilled when the State respects the patient's autonomy and adjusts its protective measures to the will of the patient. It demonstrates the interplay between the Art. 2 ECHR and Art. 8 ECHR.¹⁹⁶ The value of the personal autonomy of Art. 8 ECHR radiates the scope of protection of Art. 2 ECHR. The Court emphasised the significance of the wishes of the patient in the decision-making process and the existence of a consensus on it.¹⁹⁷ This has been confirmed by the Court in the judgements of the cases 'Gard'¹⁹⁸ and 'Afiri and Biddarri'¹⁹⁹, also concerning passive euthanasia. This leads to the conclusion that the term 'life' in the meaning of Art. 2 ECHR is concerned with choices of a person what to do with his or her life and that these decisions are to be respected by the State to a certain extent. The Court also pointed out the difference between passive and active euthanasia.²⁰⁰ Thus, the conclusion worked out in the case of passive euthanasia cannot be transferred directly to the case of active euthanasia in any circumstances. Besides, the mentioned cases did not make any concrete reference to a negative aspect of Art. 2 ECHR.

The examination of the Court's jurisprudence demonstrates a trend of change regarding the term 'life' in the sense of Art. 2 ECHR. In the beginning of the case-law, the right to life was

¹⁹² ECtHR, 19.07.2012, no. 497/09 (Koch v. Germany).

¹⁹³ ECtHR, 14.05.2013, no. 67810/10 (Gross v. Switzerland); ECtHR (GC), 30.09.2014, no. 67810/10 (Gross v. Switzerland).

¹⁹⁴ ECtHR, 23.06.2015, nos. 2478/15, 1787/15 (Nicklinson and Lamb v. the UK).

¹⁹⁵ ECtHR (GC), 05.06.2015, no. 46043/14 (Lambert and Others v. France).

¹⁹⁶ ECtHR (GC), 05.06.2015, no. 46043/14 (Lambert and Others v. France), para. 142; see also *Jacobs/White/Ovey*, *The European Convention on Human Rights*⁷ (2017), pp. 181-182

¹⁹⁷ ECtHR (GC), 05.06.2015, no. 46043/14 (Lambert and Others v. France), paras. 147, 178.

¹⁹⁸ ECtHR, 27.06.2017, no. 39793/17 (Gard and Others v. the UK), para. 83.

¹⁹⁹ ECtHR, 23.01.2018, no. 1828/18 (Afiri and Biddarri v. France), para. 28.

²⁰⁰ ECtHR (GC), 05.06.2015, no. 46043/14 (Lambert and Others v. France), para. 141.

not meant to be related to the concept of self-determination over one's life and the choices of an individual about what to do with one's life.²⁰¹ This comprehension has changed to a certain extent towards the understanding of 'life' as paying respect to the patient's autonomy over his or her life to a certain extent. The consideration of the decisions of patients is a crucial part of the concept of self-determination over one's life.²⁰² However, this aspect of self-determination is solely granted in terms of passive euthanasia. In the field of active euthanasia, the cases indicate no acknowledgment of self-determination regarding the decision to end one's life. Here, the right to life may not be renounced with the consequence that the national authorities are allowed to disregard the wish regarding the termination of life and to prohibit acts of active euthanasia.²⁰³

The Court's case-law also establishes the right to life as not to be concerned with the quality of living regarding both forms of euthanasia. Accordingly, the meaning of 'life' would refer to the sole physical existence of human beings.²⁰⁴ Aspects of life which an individual considered to be dignified or not would not be taken into consideration. Thus, the arguments regarding human dignity (see above) would not be taken into account. The right in Art. 2 ECHR appeared to refer to 'quantity of living'. The ECtHR held that Art. 8 ECHR is concerned with the question regarding the quality of living. Therefore, this provision should be applied in cases related to end-of-life issues.

It remains to be seen, if the development will be continued in the pending case of 'Mortier'²⁰⁵ referring to active euthanasia in the context of Art. 2 and Art. 8 ECHR. To date, there is no acknowledgement of the existence of a negative aspect of Art. 2 ECHR.²⁰⁶ In conclusion, no right to active euthanasia derives from the Court's case-law.

²⁰¹ *Jacobs/White/Ovey*, *The European Convention on Human Rights*⁷ (2017), p. 180; *Meyer-Ladewig/Huber*, in: *Meyer-Ladewig/Nettesheim/von Raumer* (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 65.

²⁰² *Amos*, *Human Rights Law*² (2014), p. 184.

²⁰³ *Uerpmann-Wittzack* in: *Ehlers* (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 87; *Uerpmann-Wittzack* in: *Ehlers* (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴ (2014), p. 119.

²⁰⁴ *Hilgendorf* in: *Joerden/Szwarc* (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 181.

²⁰⁵ ECtHR, no. 78017/17 (*Mortier v. Belgium*).

²⁰⁶ *Rodley* in: *Moeckli/Shah/Sivakumaran* (Edit.), *International Human Rights Law*³ (2014), p. 176.

2.2.4.2 Development in soft-law of the Organs of the Council of Europe

The development in soft-law of the other Organs of the CoE could indicate trends toward a change related to the understanding of 'life' and a possible right of active euthanasia under Art. 2 ECHR.²⁰⁷ However, the previous examination of soft-law of the Organs of the CoE indicates that soft-law referring to active euthanasia does not provide any scope of protection beyond the one ensured by the case-law of the ECtHR. The previous examination of the Court's case-law demonstrates that Art. 2 ECHR does not involve any negative aspect. Thus, the soft-law also does not safeguard any negative aspect of the right to life.

2.2.4.3 Change of moral values in societies of the Member States

The meaning of indeterminate legal terms may change over the time and the scope of protection may develop due to changing ideas of society.²⁰⁸ The dynamic and evolutive interpretation allows their determination in the light of contemporary conditions.²⁰⁹ The change of moral values regarding the understanding of 'life' and active euthanasia shall be taken into account to establish the meaning of the term 'life' according to Art. 2 ECHR.²¹⁰

The Convention is influenced by the ideas of the late 1940s (see above). However, the influencing aspects have changed during the decades. One important impact was the so-called 'euthanasia programmes' under the National Socialism and the 'Nuremberg Doctors' trial' in 1946/47. In the moment of the Convention's draft, these atrocities had occurred very recently. Today, these events are not forgotten. But there is a distance between the past and present. In the National Socialism the State's right to active euthanasia was abused by the State itself. Today, the risk of abuse of such a right is considered to derive rather from private individuals and organisations. These risks could be tackled by the State through legal regulation and supervision. Besides, during the second half of the 20th century, religious values became less

²⁰⁷ ECtHR (GC), 05.06.2015, no. 46043/14 (*Lambert and Others v. France*), paras. 60 ff, 69, 70 ff.

²⁰⁸ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 61, 76; *Meyer-Ladewig/Nettesheim*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), EMRK, Europäische Menschenrechtskonvention⁴ (2017), p. 320.

²⁰⁹ ECtHR (GC), 23.03.1995, no. 15318/89 (*Loizidou v. Turkey*), para. 71; *Heißl* in: Heißl (Edit.), *Handbuch Menschenrechte* (2009), p. 46; *Meyer-Ladewig/Nettesheim*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), EMRK, Europäische Menschenrechtskonvention⁴ (2017), p. 36.

²¹⁰ *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), pp. 39-40.

important for the majority of European societies. The modern secular State is meant to be neutral to ensure non-discrimination by not favouring a certain religious teaching.²¹¹

In addition, new aspects appeared in the decades after the draft of the Convention. One of them is the progress in science of biomedicine and technology. The modern scientific achievements have allowed mankind to influence the beginning of life through e. g. in-vitro fertilisation or cloning. It became also possible to prolong life through life-sustaining treatments or to terminate it through the administration of medication. In this context, the meaning of 'life' has changed. It is no longer seen as being non-disposable to humans, but as influenceable to a certain extent by decisions of individuals.²¹²

Another aspect is the change in awareness of societies of the Member States. The 1940s were still predominated by moral and social rules of great generality and by the sense of conformance. Today, the European societies are characterized by pluralism, multi-culture and individualism. Self-determination and individual fulfilment are considered as essential values. For the majority of European societies, 'life' and 'quality of living' are inseparable nowadays.²¹³ To achieve a high quality of living is one of the most important aims in life. Thus, it is no coincidence that the wish to terminate one's life appears in the cases connected with the loss of the quality of living according to the persons concerned. In the modern achievement-oriented society, a person is in charge of its own life. This corresponds to the acceptance of suicide and euthanasia.²¹⁴ A right to active euthanasia would provide the possibility of a self-determined decision about the end of one's own life. This corresponds also to the change of the notion of 'death'. In earlier ages the dying process has been regarded as unavoidable and, thus, a preparation of death. Currently, a sudden death without a long dying process is considered as being a 'good death'.²¹⁵ If the natural process of terminal illness is prognosed to be long and painful, the medical progress can provide relief in this regard. The movement highlighting the self-determination in terms of euthanasia demands that the achievements in science and medicine shall become available to everyone without laws limiting the decision about the end of life. In the last decades the movement obtained great acceptance in Europe.

²¹¹ *Baumgarten*, Right to die? Rechtliche Probleme um Sterben und Tod² (2000), p. 143-145.

²¹² *Baumgarten*, Right to die? Rechtliche Probleme um Sterben und Tod² (2000), p. 143.

²¹³ *Baumgarten*, Right to die? Rechtliche Probleme um Sterben und Tod² (2000), p. 143-145.

²¹⁴ CoE, Parliamentary Assembly of the Council of Europe, Report on Euthanasia of the Social, Health and Family Affairs Committee, Rapporteur Marty, Doc. 9898, 10.09.2003, p. 12.

²¹⁵ *Baumgarten*, Right to die? Rechtliche Probleme um Sterben und Tod² (2000), p. 133.

In conclusion, a change of moral values regarding the understanding of 'life' and active euthanasia in the societies of the Member States can be observed. It seems to exist a discrepancy between the socio-political claim of the public to a right to active euthanasia and the prohibiting laws in the Member States. This discrepancy results e. g. in the so-called 'tourism' to Member States which allow legally active euthanasia and in the secret practise of such acts in spite of any prohibitions.²¹⁶ The changed moral values in the European societies may provide an alternative understanding of the matter of dispute. However, a change in society cannot create any new legal obligation on the Member States due to the principles of International Law (see above). Thus, it cannot lead to the establishment of a negative aspect in respect to the right to life under Art. 2 ECHR.

2.2.5 Interim result regarding the dynamic and evolutive interpretation

The analysis of the development in case-law and soft-law of the Organs of the CoE demonstrates a trend in respect to the comprehension of 'life'. In terms of passive euthanasia, 'life' includes the notion of self-determination under consideration of the patient's autonomy. Thus, the right to life cannot be understood as an obligation to continue to live under the involvement of all possible medical means.²¹⁷ In terms of active euthanasia, 'life' does not take aspects of self-determination into account. Besides, the provision of Art. 2 ECHR is not concerned with the quality of living. It refers to Art. 8 ECHR. Therefore, case-law of the Court and soft-law of the Organs of the CoE negate a negative aspect of the right to life. The constituting change of the moral values in the societies of the Member States does not lead to the establishment of a negative aspect within Art. 2 ECHR, but it demonstrates a statement advocating for a right to active euthanasia.

²¹⁶ ECtHR, 26.10.2000, no. 48335/99 (*Sanles Sanles v. Spain*); ECtHR, 19.07.2012, no. 497/09 (*Koch v. Germany*), paras. 8 ff; CoE, Parliamentary Assembly of the Council of Europe, Report on Euthanasia of the Social, Health and Family Affairs Committee, Rapporteur Marty, Doc. 9898, 10.09.2003, pp. 4, 13; CoE, Parliamentary Assembly of the Council of Europe, Opinion on Euthanasia of the Committee on Legal Affairs and Human Rights, Rapporteur McNamara, Doc. 9923, 23.09.2003, p. 4; *Hilgendorf* in: Joerden/Szwarc (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 176.

²¹⁷ ECtHR, 29.04.2002, No. 2346/02 (*Pretty v. the UK*), paras. 64-67; *Lagodny* in: Pabel/Schmahl (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 1, Art. 2, p. 20; *Rodley* in: Moeckli/Shah/Sivakumaran (Edit.), *International Human Rights Law*³ (2014), p. 176; *Opsahl* in: Macdonald/Matscher/Petzold (Edit.), *The European System for the Protection of Human Rights* (1993), p. 221; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 153.

2.3 Result

The interpretation of the indeterminate legal term of 'life'/'la vie' allows the following conclusions. The term in question refers to the sole 'physical existence' of a person being unconcerned with the quality of life. It can be described as the 'quantity of lifetime'. Individuals are entitled to a certain degree of autonomy to decide about the option of prolongation of life. Its refusal leads to the withdrawal or withhold of life-sustaining treatments and causes natural death. However, the autonomy does not include the legal possibility to decide about the shortening of life caused by the act of a third person. Bearing in mind this comprehension of 'life', the prevailing arguments gained from the interpretation methods negate the involvement of the negative aspect in Art. 2 ECHR in terms of active euthanasia. Thus, no 'negative right' to end one's life or to die can be established under Art. 2 ECHR.²¹⁸ Therefore, the right to life does not provide a right to active euthanasia under the Convention.²¹⁹

In conclusion, Art. 2 ECHR does not oblige the Member States to guarantee a right to active euthanasia. Thus, there is no negative duty for the Contracting Parties to cease criminalisation of acts of active euthanasia under Art. 2 ECHR. Since the legalisation of this form of life termination is not provided, there cannot arise any further positive obligation to permit administration of lethal medication on demand.

However, the provision does not oblige the States to criminalize or prohibit in other ways the acts of active euthanasia due to the protection of life. According to the 'margin of appreciation doctrine', it is the decision of each Member State to legalise acts of active euthanasia and to regulate them. But, if the national authorities decide to do so, then Art. 2 ECHR obliges them to undertake precautionary measures to secure the free decision-making of the terminally-ill persons and to reduce the risks of misuse as far as possible.

²¹⁸ *Jayawickrama*, *The Judicial Application of Human Rights Law*² (2017), pp. 222-223.

²¹⁹ *Mowbray*, *Cases, Materials, and Commentary on the European Convention on Human Rights*³ (2012), p. 119; *Berger*, *Jurisprudence de la Cour Européenne des Droits de l'Homme*⁹ (2004), p. 10; *Zwaak/Haeck/Burbano Herrera* in: *Van Dijk/Van Hoof/Van Rijn/Zwaak* (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 101.

3 PROHIBITION OF TORTURE OR INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (ART. 3)

Together with Art. 2 of the Convention, Art. 3 ECHR enshrines one of the fundamental rights in democratic societies of the Member States of the CoE.²²⁰ Its guarantees constitute values “of civilisation closely bound up with respect for human dignity”²²¹, which is part of the Convention’s very essence.²²²

Unlike the most provisions of the Convention, Art. 3 ECHR is phrased in terms which allow the conclusion that its safeguards are guaranteed absolutely. Thus, every interference by the States would constitute a violation of Art. 3 ECHR. There would be no possibility for States to justify the interference regardless how dangerous the person submitted to torture or other maltreatments would appear.²²³ Nevertheless, the absolute character of the provision became a matter of dispute. Therefore, the first legal problem in the context of Art. 3 ECHR is whether there is a possibility of justification in exceptional cases. Such a special exceptional case could be on hand when the life of human beings is at stake and torture or other ill-treatments of Art. 3 ECHR are used for the sake of protection of life.²²⁴ This would mean, after all, that the guarantees of Art. 3 ECHR are not absolute. This question is relevant for the examined right to active euthanasia because it would provide the Member States, which do

²²⁰ ECtHR, 07.07.1989, no. 14038/88 (*Soering v. the UK*), para. 88; ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 49; *Schübel-Pfister/Sinner* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 83; *Schabas*, European Convention on Human Rights (2015), pp. 164, 168; *Vermeulen/Battjes* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights⁵ (2018), p. 383.

²²¹ ECtHR (GC), 28.09.2015, no. 23380/09 (*Bouyid v. Belgium*), para. 81.

²²² *Vermeulen/Battjes* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights⁵ (2018), p. 383; *Uerpmann-Witzack* in: Ehlers (Edit.), Europäische Grundrechte und Grundfreiheiten⁴ (2014), p. 112.

²²³ ECtHR, 15.11.1996, no. 22414/93 (*Chahal v. the UK*), paras. 79 ff; ECtHR (GC), 28.02.2008, no. 37201/06 (*Saadi v. Italy*), para. 127; ECtHR (GC), 01.06.2010, no. 22978/05 (*Gäfgen v. Germany*), para. 87; ECtHR, 12.06.2012, no. 54131/10 (*Bajrultanov v. Austria*), para. 71; ECtHR (GC), 17.07.2014, nos. 32541/08, 43441/08 (*Svinarenko and Slyadnev v. Russia*), para. 127; ECtHR, 24.07.2014, no. 28761/11 (*Al Nashiri v. Poland*), para. 507; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), pp. 190, 199; *Jacobs/White/Ovey*, The European Convention on Human Rights⁷ (2017), p. 187; *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 175; *Vermeulen/Battjes* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights⁵ (2018), p. 383.

²²⁴ *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 199; *Hilgendorf* in: Joerden/Szwarc (Edit.), Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen (2007), p. 179; *Hilgendorf*, Folter im Rechtsstaat?, JZ 2004, pp. 331 ff; *Maier*, Folter und Menschenwürde, JRP 2012, pp. 195 ff.

not allow legally active euthanasia, to justify this criminalisation. This applies under the precondition that the criminalisation of active euthanasia would constitute one of the maltreatments under Art. 3 ECHR.

The first opinion endorses the possibility of justification due to the protection of life according to Art. 2 ECHR.²²⁵ As a consequence, national authorities could justify laws criminalising acts of active euthanasia, if the criminalisation would be considered as an ill-treatment in the sense of Art. 3 ECHR. The second view refuses such a possibility of justification and understands the provision to be absolute without any exception.²²⁶ As a result, the States would violate the human right enshrined in Art. 3 ECHR, if the criminalisation of active euthanasia constitute a maltreatment under Art. 3 ECHR. In this case, the States would be obliged to legalise acts of active euthanasia. The legal opinions lead to different legal consequences. Thus, the dispute shall be decided.

An argument for the first opinion is that there could arise a contradiction of assessment, when States would be permitted to deprive an individual's life for the protection of life of others but would be prohibited to interfere with the individual's physical or mental integrity through maltreatment for the same sake. This opinion understands the legal value of 'life' in Art. 2 ECHR being higher than the legal value of 'physical or mental integrity' in Art. 3 ECHR. Since Art. 2 ECHR allows exceptions from the general principle of protection of the 'higher value' of life, according to the argumentum a maiore ad minus, Art. 3 ECHR should all the more include exceptions from the protection of the physical or mental integrity. Another argument is that the obligations under Art. 2 ECHR would entail torture or other ill-treatments of Art. 3 ECHR as legal means for the protection of life in certain cases.²²⁷ Therefore, Art. 3 ECHR would permit exceptions from the protection of the physical or mental integrity and provide a possibility of justification due to the preservation of life.

Against the first opinion and in favour of the second view speaks the wording of Art. 3 ECHR. While the phrasing in Art. 2 ECHR names explicitly exceptions, the text of Art. 3 ECHR does not

²²⁵ *Gaede*, in: Camprubi (Edit.), *Angst und Streben nach Sicherheit in Gesetzgebung und Praxis* (2004), pp. 155 ff.

²²⁶ *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 200; *Gaede*, in: Camprubi (Edit.), *Angst und Streben nach Sicherheit in Gesetzgebung und Praxis* (2004), pp. 155 ff; *Schübel-Pfister/Sinner* in: *Karpenstein/Mayer* (Edit.), *EMRK*² (2015), p. 84.

²²⁷ ECtHR, 25.04.1978, no. 5856/72 (*Tyler v. the UK*), para. 33; ECtHR, 25.03.1993, no. 13134/87 (*Costello-Roberts v. the UK*), para. 30; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 190.

contain any exception.²²⁸ Deriving from a historic interpretation of the provision, the drafters of the Convention had pleaded for a prohibition of an absolute character in Art. 3 ECHR. There should not exist any exception, not even for the purpose of saving life.²²⁹ Another argument follows from the systematic interpretation in conjunction with Art. 15 (2) ECHR. It allows no derogation in time of war or other public emergency in terms of Art. 3 ECHR. But it permits derogation from Art. 2 ECHR in the sense of lawful acts of war.²³⁰ This demonstrates that the Convention regulates the protection of both values in different, incomparable ways. Thus, the argumentum a maiore ad minus cannot be concluded in this case. Based on the conclusions drawn beforehand, the obligation under Art. 2 (1) ECHR cannot be understood as reaching this far that torture or other ill-treatment of Art. 3 ECHR would constitute lawful means for preserving life according to Art. 2 (1) ECHR.²³¹

In conclusion, the prevailing arguments advocate for the second view which negates any justification, even for the sake of protection of life. Thus, the guarantees of Art. 3 ECHR are of an absolute character. Regarding acts of active Euthanasia, it means that if their criminalisation constitutes one of the prohibited treatments under Art. 3 ECHR, then it results in the violation of Art. 3 ECHR. In the following, the Member State would be obliged to cease this violation by legalising acts of active euthanasia.

²²⁸ *Schabas*, European Convention on Human Rights (2015), p. 168; *Schübel-Pfister/Sinner* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 83; *Vermeulen/Battjes* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights⁵ (2018), p. 383.

²²⁹ Travaux Préparatoires to the Convention regarding Art. 3, pp. 3-5, 9, [https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH\(56\)5-EN1674940.pdf](https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH(56)5-EN1674940.pdf) (13.05.2019).

²³⁰ ECtHR, 07.07.1989, no. 14038/88 (*Soering v. the UK*), para. 88; ECtHR, 28.07.1999, no. 25803/94 (*Selmouni v. France*), para. 95; ECtHR, 15.11.1996, no. 22414/93 (*Chahal v. the UK*), para. 79; ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 49; ECtHR, 24.07.2014, no. 28761/11 (*Al Nashiri v. Poland*), para. 507; *Schübel-Pfister/Sinner* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 83; *Schabas*, European Convention on Human Rights (2015), p. 168; *Jacobs/White/Ovey*, The European Convention on Human Rights⁷ (2017), p. 187; *Vermeulen/Battjes* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights⁵ (2018), p. 384.

²³¹ ECtHR (GC), 28.02.2008, no. 37201/06 (*Saadi v. Italy*), para. 127; *Jacobs/White/Ovey*, The European Convention on Human Rights⁷ (2017), p. 187; *Schabas*, European Convention on Human Rights (2015), p. 168; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 200.

3.1 Classification of the right and its obligations

The provision of Art. 3 ECHR is phrased as a prohibition clause. It prohibits some conducts which affect 'the physical and mental integrity'.²³² As such, it is related to 'classic rights'.²³³ Bearing this classification, it contains the primary negative obligation for States to refrain from torture or inhuman or degrading treatment or punishment.²³⁴ In addition, the provision includes positive obligations for the national authorities to undertake active measures to prevent individuals from being subjected to ill-treatment in the sense of Art. 3 ECHR.²³⁵ In this respect, it is of no significance whether the violation or its concrete danger derive from conducts of the State or private individuals.²³⁶ The Member States must provide an adequate and effective protection against each of these acts within their jurisdiction according to Art. 1 ECHR. This refers to the legislative, executive and judicative power of the State.²³⁷

3.1.1 Positive obligation to establish and maintain an adequate legal and administrative framework for the protection against offences

One of these positive obligations is the duty to establish and maintain an adequate legal and administrative framework to ensure an effective protection against offences occasioning

²³² ECtHR, 25.04.1978, no. 5856/72 (Tyreer v. the UK), para. 33; ECtHR, 25.03.1993, no. 13134/87 (Costello-Roberts v. the UK), para. 30; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 190; *Schübel-Pfister/Sinner* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 83.

²³³ *Schweizer* in: Merten/Papier (Edit.), Handbuch der Grundrechte in Deutschland und Europa, Vol. Band VI/1 Europäische Grundrechte I (2010), p. 111.

²³⁴ *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 201; *Schabas*, European Convention on Human Rights (2015), p. 191; *Bank* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 547; *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 172.

²³⁵ ECtHR, 23.09.1998, no. 25599/94 (A. v. the UK), para. 22; ECtHR, 10.10.2002, no. 38719/97 (D. P. and J. C. v. the UK), para. 109; *Bank* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 547; *Vermeulen/Battjes* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights⁵ (2018), p. 385; *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 173.

²³⁶ ECtHR, 09.06.2009, no. 33401/02 (Opuz v. Turkey), para. 159; ECtHR, 28.05.2013, no. 3564/11 (Eremia v. Moldova), para. 49; *Schübel-Pfister/Sinner* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 90; *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 172; *Vermeulen/Battjes* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights⁵ (2018), p. 385.

²³⁷ ECtHR (GC), 22.03.2001, nos. 34044/96, 35532/97 and 44801/98 (Streletz, Kessler and Krenz v. Germany), para. 86; ECtHR, 17.01.2002, no. 32967/96 (Calvelli and Ciglio v. Italy), para. 49; *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), pp. 159, 172; *Schilling*, Internationaler Menschenrechtsschutz³ (2016), p. 65; *Gerards* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights⁵ (2018), p. 355; *Meyer-Ladewig/Huber*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), EMRK, Europäische Menschenrechtskonvention⁴ (2017), p. 69.

bodily or mental harm.²³⁸ The second legal question to examine in the context of Art. 3 ECHR is whether this duty obliges the States to adopt criminal laws or other instruments of prohibition against acts of active euthanasia. Thus, this analysis is undertaken from a different perspective than the first examined legal problem under Art. 3 ECHR. The acts of voluntary active euthanasia interfere with the physical integrity of the terminally-ill person. However, Art. 3 ECHR does not prohibit any interference with the physical or mental integrity (see above). Its prohibition solely refers to acts which constitute one of the maltreatments in the sense of the provision. Whether an act of active euthanasia committed by a third person at the request of the terminally-ill person constitutes such an ill-treatment is doubtful, presumed it happens at the time and by means according to the wishes of the ill person. Therefore, the positive obligation under Art. 3 ECHR might not even refer to the regulation of active euthanasia. If it does, the Member States enjoy a wide margin of appreciation in terms of “addressing complex scientific, legal and ethical issues concerning in particular [...] the end of life”²³⁹ within their positive obligations, as referred to this question under Art. 2 ECHR. This relates also to Art. 3 ECHR.²⁴⁰ There is a lack of European consensus among the Contracting Parties, since only 3 of 47 States permit legally acts of active euthanasia.²⁴¹ However, some national criminal codes of the Member States already provide impunity in the case of consensual bodily injury.²⁴² Thus, it is the decision of each State to respond legally to the concept of active euthanasia within its legislation. Art. 3 ECHR does not oblige the States to criminalise or prohibit in any other way conducts related to active euthanasia. Therefore, the positive obligation to establish and maintain an adequate legal and administrative framework for the protection against offences occasioning bodily or mental harm does not constitute any obstacle for a possible right to active euthanasia to emerge.

²³⁸ ECtHR, 04.12.2003, no. 39272/98 (*M.C. v. Bulgaria*), paras. 149 ff; ECtHR, 07.04.2012, no. 6884/11 (*Cestaro v. Italy*), paras. 204 ff; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), pp. 172-173; *Schübel-Pfister/Sinner* in: *Karpenstein/Mayer* (Edit.), *EMRK*² (2015), p. 90.

²³⁹ ECtHR (GC), 05.06.2015, no. 46043/14 (*Lambert and Others v. France*), para. 11.

²⁴⁰ *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 174.

²⁴¹ CoE, Steering Committee on Bioethics, 20.01.2003, Replies to the questionnaire for member states relating to euthanasia, CDBI/INF (2003) 8, pp. 16 ff; *Hilgendorf* in: *Joerden/Szwarc* (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 176.

²⁴² For instance, § 90 of the Austrian Criminal Code, § 228 of the German Criminal Code, providing impunity in the case of consensual bodily injury under the condition that the conduct in question does not infringe morality.

3.1.2 Negative obligation to protect individuals from ill-treatment in the meaning of Art. 3 ECHR

The examination beforehand was undertaken from the perspective whether active euthanasia has to be prohibited according to the Convention. The next analysis involves a different perspective, to which the first legal problem has already referred to. It concerns the perspective whether active euthanasia has to be legalised according to the Convention. Thus, the third legal problem in the context of Art. 3 ECHR is whether the negative obligation to protect individuals from ill-treatment include the duty not to criminalise and so to legalise acts of active euthanasia. In this context, the criminalisation of active euthanasia by the majority of Member States might constitute a maltreatment. It is because of the refusal to cease suffering resulting from terminal illness of a person. The person concerned is denied legally to put an end to the suffering through an act of active euthanasia because recourse to it would result in punishability of the third person involved. The analysis of this legal question requires the examination of the scope of protection of Art. 3 ECHR in regard to whether the criminalisation of active euthanasia constitute a maltreatment under the provision. If it does, the Member States are obliged to legalise acts of active euthanasia. If it does not, then the Member State are not obliged to cease the criminalisation and it depends on the decision of each State whether they sanction or allow active euthanasia with their jurisdiction.

3.2 Scope of protection

Art. 3 ECHR is phrased as a prohibition clause. Accordingly, ‘no one’/’nul ne’ shall be submitted to any type of ill-treatment in the meaning of Art. 3 ECHR. In conjunction with Art. 1 ECHR, the beneficiary of this right is every person within the jurisdiction of the Contracting Parties.²⁴³ In respect to certain ‘vulnerable individuals’, further reaching obligations of protection may

²⁴³ ECtHR, 23.09.1998, no. 25599/94 (A. v. the UK), para. 22; *Schabas*, European Convention on Human Rights (2015), p. 169.

arise.²⁴⁴ Among others, terminally-ill persons are regarded as belonging to vulnerable groups in cases related to end-of-life issues.²⁴⁵

Art. 3 ECHR protects the legal value of the ‘physical and mental integrity’.²⁴⁶ Its scope of protection includes significant aspects of personal integrity, but not all of them.²⁴⁷ Art. 3 ECHR prohibits only such conducts interfering with the physical and mental integrity which constitute one of the maltreatments under the provision. These are torture or inhuman or degrading treatment or punishment. In the case of the criminalisation of active euthanasia by the Member States and their refusal to legalise such acts, the relevant concept is ‘degrading treatment’ under Art. 3 ECHR. There exists no legal definition of the type of ill-treatment in question.²⁴⁸ Thus, the indefinite legal term shall be determined by legal interpretation according to Art. 31-33 VCLT.

3.2.1 Literal interpretation

The terms ‘degrading treatment’ and ‘traitements dégradants’ in the authentic English and French versions are presumed to convey the same sense according to Art. 33 (3) VCLT (see above). In line with Art. 31 (1) VCLT, the Convention shall be interpreted in accordance with the ordinary meaning of its terms.²⁴⁹

In general terms, it appears conceivable that the enactment of certain laws might constitute a treatment which is degrading. The field of active euthanasia is comprehended and assessed differently in the Member States. Thus, the enactment of criminal laws sanctioning such acts

²⁴⁴ ECtHR, 09.06.2009, no. 33401/02 (*Opuz v. Turkey*), para. 159; see also *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 198; *Bank* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 594.

²⁴⁵ *Vijayakumar/Craig Harris* in: Dudley/Silove/Gale (Edit.), *Mental Health and Human Rights* (2012), pp. 517-518.

²⁴⁶ ECtHR, 25.04.1978, no. 5856/72 (*Tyrer v. the UK*), para. 33; ECtHR, 25.03.1993, no. 13134/87 (*Costello-Roberts v. the UK*), para. 30; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 190; *Schilling*, Internationaler Menschenrechtsschutz³ (2016), p. 56; *Schübel-Pfister/Sinner* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 83.

²⁴⁷ *Uerpmann-Wittzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 81.

²⁴⁸ *Schübel-Pfister/Sinner* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 85.

²⁴⁹ *Fastenrath* in: Pabel/Schmahl (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention (2017), Vol. 1, Art. 3, p. 14.

cannot be precisely determined as conforming with any ordinary meaning of the concept in question.²⁵⁰ Therefore, the literal interpretation leaves room for further interpretation.

3.2.2 Historical interpretation

As supplementary means according to Art. 32 VCLT, the historical interpretation entails the possibility of taking into account the Travaux Préparatoires.²⁵¹ During the drafting of the Convention it was held that the meaning of the term ‘treatment’ is broader than of the word ‘punishment’ used in Art. 3 ECHR. But it “should not apply to degrading situations which might be due to general economic and social factors.”²⁵² Other determinations of legal terms are not provided by the Travaux Préparatoires because it was the intention of the drafters not to limit the scope of protection of Art. 3 ECHR to certain conducts.²⁵³ Instead, it was aimed for a comprehensive protection which should be achieved by interpretation.

In conclusion, the historical interpretation in conjunction with the literal interpretation do not submit a clear determination of the terms ‘degrading treatment’, except for the relation between ‘treatment’ and ‘punishment’. Thus, the term ‘treatment’ is to be understood in a broader sense than of the word ‘punishment’.

3.2.3 Systematic interpretation

3.2.3.1 Consideration of the whole provision of Art. 3 ECHR

In accordance with Art. 31 (2) and (3) VCLT, the systematic interpretation allows the interpretation of the legal terms in question under consideration of the rest of the

²⁵⁰ ECtHR, 29.04.2002, No. 2346/02 (*Pretty v. the UK*), para. 54; *Bank* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 594; *Schabas*, European Convention on Human Rights (2015), p. 171; *Berger*, Jurisprudence de la Cour Européenne des Droits de l’Homme⁹ (2004), p. 11.

²⁵¹ ECtHR (GC), 12.12.2001, no. 52207/09 (*Banković and Others v. Belgium and Others*), paras. 58, 65; *Heintschel von Heinegg* in: Ipsen (Edit.), Völkerrecht⁷ (2018), p. 479; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 32; *Fitzmaurice* in: Shelton (Edit.), The Oxford Handbook of International Human Rights Law (2013), p. 745; *Fitzmaurice* in: Evans (Edit.), International Law⁴ (2014), p. 181; *Schabas*, European Convention on Human Rights (2015), p. 34.

²⁵² Travaux Préparatoires to the Convention regarding Art. 3, p. 18, [https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH\(56\)5-EN1674940.pdf](https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH(56)5-EN1674940.pdf) (13.05.2019).

²⁵³ Travaux Préparatoires to the Convention regarding Art. 3, p. 8, [https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH\(56\)5-EN1674940.pdf](https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH(56)5-EN1674940.pdf) (13.05.2019).

provision.²⁵⁴ Art. 3 ECHR prohibits different types of ill-treatment as mentioned above. Their distinction follows from a ‘vertical approach’, since all types of maltreatment differs gradually.²⁵⁵ The crucial criterion is the severity of the measure in question which is assessed by a grading classification.²⁵⁶ Thus, the differences of the intensity regarding the suffering caused by the measure in question allow distinguishing between the different forms of maltreatment. The intensity is estimated according to the circumstances of each case.²⁵⁷ Accordingly, every act of torture is an inhuman or degrading treatment or punishment. However, not every inhuman or degrading treatment or punishment constitutes an act of torture. An inhuman treatment or punishment will be at the same time degrading. But any degrading treatment or punishment is not always inhuman.²⁵⁸ Therefore, the most serious type of ill-treatment under Art. 3 ECHR is ‘torture’.²⁵⁹ A ‘degrading treatment’ constitutes the weakest type of maltreatment in the sense of Art. 3 ECHR.²⁶⁰ However, the types of maltreatment are intertwined and they sometimes overlap.²⁶¹

²⁵⁴ *Schabas*, European Convention on Human Rights (2015), p. 40; *Heintschel von Heinegg* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), p. 475.

²⁵⁵ *Bank* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 548; *Schübel-Pfister/Sinner* in: Karpenstein/Mayer (Edit.), *EMRK*² (2015), p. 85; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 178.

²⁵⁶ *Jacobs/White/Ovey*, *The European Convention on Human Rights*⁷ (2017), p. 188; *Uerpmann-Witzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 82.

²⁵⁷ ECtHR, 18.01.1978, no. 5310/71 (*Ireland v. the UK*), para. 167; EComHR, 05.11.1969, nos. 3321/67, 3322/67, 3323/67, 3344/67 (*Denmark, Norway, Sweden and the Netherlands v. Greece*); *Schabas*, *European Convention on Human Rights* (2015), pp. 169, 175; *Jacobs/White/Ovey*, *The European Convention on Human Rights*⁷ (2017), p. 188; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 178; *Vermeulen/Battjes* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), pp. 384, 386.

²⁵⁸ *Harris/O’Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), p. 261; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 178; *Schabas*, *European Convention on Human Rights* (2015), p. 169; *Bank* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 548; *Uerpmann-Witzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴ (2014), p. 113.

²⁵⁹ ECtHR, 18.01.1978, no. 5310/71 (*Ireland v. the UK*), para. 167; *Uerpmann-Witzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 82; *Kau* in: Pabel/Schmahl (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 1, Art. 3, p. 16; *Uerpmann-Witzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴ (2014), p. 113; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), pp. 179-180.

²⁶⁰ *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 196; *Schübel-Pfister/Sinner* in: Karpenstein/Mayer (Edit.), *EMRK*² (2015), p. 85; *Schabas*, *European Convention on Human Rights* (2015), p. 169; *Uerpmann-Witzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 82.

²⁶¹ *Harris/O’Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), p. 261; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 178; *Schabas*, *European Convention on Human Rights* (2015), p. 169; *Bank* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 548; *Uerpmann-Witzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴ (2014), p. 113.

In conjunction with the historical interpretation, it can be held that the ‘degrading treatment’ contains the broadest scope of the different types of maltreatment. However, the determination of the terms in question requires further interpretation.

3.2.3.2 Consideration of other provisions of the ECHR

The systematic approach also allows the consideration of the whole treaty of the Convention.²⁶² Referring to it, Art. 3 ECHR shall be interpreted in accordance with Art. 2 ECHR as both provisions enshrine fundamental values (see above). Art. 2 ECHR prohibits conducts leading to the deprivation of life. The provision allows exhaustively determined exceptions to this general rule. The previous analysis of the right to life demonstrated that Art. 2 ECHR does not provide any right which would oblige the Member States to permit or facilitate to end one’s life through an act of active euthanasia. Therefore, there cannot arise any further going obligation under Art. 3 ECHR which would allow the deprivation of life by the hands of a third person. Otherwise, such manner of interpretation would undermine the scope of protection of Art. 2 ECHR and produce disharmony between the both provisions of Art. 2 and Art. 3 ECHR.²⁶³ Thus, the interpretation of the ‘degrading treatment’ cannot be performed in any way which would result in the emergence of an obligation to legalise active euthanasia.

3.2.3.3 Consideration of other legal instruments of International Human Rights

Law

The systematic interpretation considers other legal sources of International Law according to Art. 31 (2) and (3) VCLT.²⁶⁴ Due to the principles of International Law, this interpretation method may be approached only in a cautious and non-excessive manner (see above).

²⁶² *Schabas*, European Convention on Human Rights (2015), p. 40; *Heintschel von Heinegg* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), p. 475.

²⁶³ ECtHR, 07.07.1989, no. 14038/88 (*Soering v. the UK*), para. 103; ECtHR, 29.04.2002, No. 2346/02 (*Pretty v. the UK*), para. 54; see also *Hilgendorf* in: Joerden/Szwarc (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 179; *Bank* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, pp. 594-595; *Mowbray*, *Cases, Materials, and Commentary on the European Convention on Human Rights*³ (2012), p. 161; *Berger*, *Jurisprudence de la Cour Européenne des Droits de l’Homme*⁹ (2004), p. 11.

²⁶⁴ *Schabas*, European Convention on Human Rights (2015), p. 40; *Heintschel von Heinegg* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), pp. 475-477.

The ECHR is part of the “system of human rights protection”²⁶⁵. The prohibition of maltreatment can be found in various legal instruments of International Human Rights Law. For instance, the ECtHR applies Art. 1 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²⁶⁶ in a non-binding manner for the purpose of defining ‘torture’.²⁶⁷ However, the Declaration does not provide any indications in regard to the terms ‘degrading treatment’.

The ECtHR introduces the interpretation of Art. 3 ECHR in the light of Art. 5 UDHR.²⁶⁸ The clause of prohibition in Art. 3 ECHR derives from Art. 5 UDHR which prohibits torture and cruel, inhuman or degrading treatment or punishment.²⁶⁹ The circumstance that Art. 3 ECHR does not refer to the ‘cruel’ treatment or punishment has no legal consequences as to the scope of protection.²⁷⁰ The ECtHR interprets ‘cruel’ treatments or punishments as ‘torture’ in the sense of Art. 3 ECHR.²⁷¹ One objective of the UDHR is to ensure especially these guarantees which had been infringed through the atrocities during the Second World War.²⁷² Thus, it is doubtful that legislation sanctioning active euthanasia constitutes a maltreatment in the meaning of Art. 5 UDHR. Thus, no such conclusion may be drawn from it for Art. 2 ECHR.

The ECtHR also refers to Art. 7 ICCPR for the purpose of interpreting Art. 3 ECHR.²⁷³ Both provisions bear similarities safeguarding the “physical and spiritual integrity”²⁷⁴ which is threatened by ill-treatment of some degree of severity. The weakest form of ill-treatment in the meaning of Art. 7 ICCPR is the ‘degrading treatment’.²⁷⁵ Whether it considers the

²⁶⁵ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 54.

²⁶⁶ UN, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975), A/RES/3452(XXX).

²⁶⁷ ECtHR, 18.01.1978, no. 5310/71 (*Ireland v. the UK*), para. 167 and Separate Opinion of Judge Zekia; *Schabas*, European Convention on Human Rights (2015), p. 175.

²⁶⁸ ECtHR, 18.01.1978, no. 5310/71 (*Ireland v. the UK*), Separate Opinion of Judge Zekia.

²⁶⁹ Travaux Préparatoires to the Convention regarding Art. 3, p. 18, [https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH\(56\)5-EN1674940.pdf](https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH(56)5-EN1674940.pdf) (13.05.2019).

²⁷⁰ *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 181; *Schabas*, European Convention on Human Rights (2015), p. 164.

²⁷¹ ECtHR, 18.01.1978, no. 5310/71 (*Ireland v. the UK*), para. 167.

²⁷² *Tomuschat* in: *Tomuschat/Lagrange/Oeter* (Edit.), *The Right to Life* (2010), p. 4.

²⁷³ ECtHR, 18.01.1978, no. 5310/71 (*Ireland v. the UK*), Separate Opinion of Judge Zekia.

²⁷⁴ *Nowak*, U.N. Covenant on Civil and Political Rights² (2005), p. 157.

²⁷⁵ *Schabas*, European Convention on Human Rights (2015), p. 164; *Nowak*, U.N. Covenant on Civil and Political Rights² (2005), p. 165; Travaux Préparatoires to the Convention regarding Art. 3, p. 18, [https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH\(56\)5-EN1674940.pdf](https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH(56)5-EN1674940.pdf) (13.05.2019).

criminalisation of active euthanasia as a type of maltreatment, is not determined by the sources relating to Art. 7 ICCPR e. g. in the case-law of the HRC.

The wording of Art. 3 ECHR is identical to Art. 4 EU-Charter. Other substantive aspects of Art. 3 ECHR correspond e. g. to Art. 3, 18 and 19 EU-Charter.²⁷⁶ In general terms, Art. 4 EU-Charter and Art. 3 ECHR have the same scope and meaning according Art. 52 (3) EU-Charter.²⁷⁷ A wider scope of the EU-Charter is possible, though.²⁷⁸ In respect to Art. 4 EU-Charter, there exists no jurisprudence of the Court of Justice or the General Court of the EU regarding the criminalisation of active euthanasia. Thus, the interpretation turns to the jurisprudence of the ECtHR.²⁷⁹ Therefore, the consideration of the EU-Charter does not contribute to the interpretation of the terms 'degrading treatment' in Art. 3 ECHR.

The CoE adopted the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment²⁸⁰. It considers the ECtHR's jurisprudence on Art. 3 ECHR as a source of guidance in defining its legal terms.²⁸¹ However, it contains no further indications as to the notion of 'degrading treatment' which would reflect an understanding of the terms in question among the Member States of the CoE.

3.2.3.4 Interim result regarding the systematic interpretation

As a result, the method of the systematic interpretation provides a distinction between the different terms of Art. 3 ECHR regarding the severity of the measure in question. It will be assessed by a grading classification. A 'degrading treatment' constitutes the weakest type of

²⁷⁶ *Bank* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, pp. 546-547; *Folz* in: Vedder/Heintschel von Heinegg (Edit.), Europäischen Unionsrecht² (2018), p. 1321.

²⁷⁷ EU, Explanation relating to the Charter of Fundamental Rights (2007), C 303/33, pp. 2, 17; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 190; *Schübel-Pfister/Sinner* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 83; *Schabas*, European Convention on Human Rights (2015), p. 165.

²⁷⁸ *Jarass*, Charta der Grundrechte der Europäischen Union³ (2016), p. 511; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 27.

²⁷⁹ *Wolffgang* in: Lenz/Borchardt (Edit.), EU-Verträge Kommentar⁶ (2012), p. 3187; *Höfling/Kempny* in: Stern/Sachs (Edit.), Europäische Grundrechte-Charta (2016), pp. 149-150.

²⁸⁰ CoE, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987), ETS No.126.

²⁸¹ CoE, Explanatory Report to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, p. 20, <https://rm.coe.int/16806dbaa3> (22.05.2019).

maltreatment in the sense of Art. 3 ECHR. The notion of the ‘degrading treatment’ contains the broadest scope of the different types of maltreatment under Art. 3 ECHR, which shall be defined in harmony with Art. 2 ECHR. However, the interpretation does not provide any definition of the terms in question.

3.2.4 Teleological interpretation, incl. dynamic and evolutive interpretation

Art. 31 (1) VCLT includes the interpretation of a treaty in the light of its object and purpose.²⁸² The Convention’s object and purpose is not to guarantee a minimal protection, but a comprehensive and contemporary one, making its safeguards effective and practical.²⁸³ Therefore, the ECtHR applies the ‘dynamic and evolutive interpretation’ within the teleological interpretation (see above).²⁸⁴ Accordingly, the legal term of ‘degrading treatment’ shall be defined. The interpretation shall be conducted in a cautious and non-excessive manner to pay respect to the rules of International Law (see above).²⁸⁵

3.2.4.1 Development in the jurisprudence of the ECtHR

The development in the jurisprudence of the ECtHR shall be analysed for two purposes. First, the examination shall establish the general requirements for the determination of the ‘degrading treatment’ in the sense of Art. 3 ECHR. Second, it shall indicate any trends related to a possible understanding of the criminalisation of active euthanasia and the refusal to legalise such acts by the States as constituting a ‘degrading treatment’ under Art. 3 ECHR.

²⁸² *Fitzmaurice* in: Shelton (Edit.), *The Oxford Handbook of International Human Rights Law* (2013), p. 745; *Heintschel von Heinegg* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), pp. 475-478, 480-481; *Fitzmaurice* in: Evans (Edit.), *International Law*⁴ (2014), pp. 179, 182.

²⁸³ ECtHR (GC), 23.03.1995, no. 15318/89 (*Loizidou v. Turkey*), para. 71; ECtHR (GC), 27.09.1995, no.18984/91 and other (*McCann and Others v. the UK*), paras. 146-147; ECtHR, 17.12.2009, no. 4762/05 (*Mikayil Mammadov v. Azerbaijan*) para. 98; *Lester/Pannick/Herberg*, *Human Rights Law and Practice*³ (2009), p. 138; *Schabas*, *European Convention on Human Rights* (2015), p. 49; *Grewe*, *Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des Europäischen Gerichtshofs für Menschenrechte*, *ZaöRV* 2001/61, p. 459 (467).

²⁸⁴ *Heißl* in: Heißl (Hrsg.), *Handbuch Menschenrechte* (2009), p. 46; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), pp. 38-39; *Harris/O’Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), pp. 8 f; *Grabenwarter* in: Gamper/Verschraegen (Edit.), *Rechtsvergleichung als juristische Auslegungsmethode* (2013), pp. 104 f.

²⁸⁵ *Frowein* in: Frowein/Peukert (Edit.), *EMRK-Kommentar*³ (2009), p. 7.

The ECtHR has defined several general elements as being relevant for the determination of the terms ‘degrading treatment’ within the meaning of Art. 3 ECHR. Following the Court’s case-law, there are subjective and objective criteria.

The subjective criterion follows from a ‘horizontal approach’ and requires the intention of humiliation or debasement of the victim.²⁸⁶ In exceptional cases, negligence may be sufficient, e. g. in the case of neglect of detainees in execution of a prison sentence.²⁸⁷ The ECtHR even affirmed a maltreatment in despite of a lack of intent. For instance, if the treatment is considered objectively as a maltreatment or if the victim must have felt humiliated or debased by the treatment.²⁸⁸ Therefore, the subjective criterion is sometimes referred to as being facultative.²⁸⁹

In the case of the criminalisation of active euthanasia and the refusal to legalise such acts, one can hardly speak of an intention of humiliation or debasement of the terminally-ill by the Member States. The subjective criterion is not fulfilled. However, because of its facultative nature it is still possible that there might exist a degrading treatment in the sense of Art. 3 ECHR. Therefore, the objective criteria shall be examined.

On the basis of the Court’s case-law, there are four objective criteria: the existence of a ‘treatment’, which is ‘degrading’ and of ‘a certain severity’ and the State can be held responsible for. These elements are known to be mandatory.²⁹⁰

²⁸⁶ ECtHR, 16.12.1997, no. 20972/92 (Raninen v. Finland), paras. 55 ff; ECtHR, 10.07.2001, no. 33394/96 (Price v. the UK), paras. 24-30; ECtHR, 24.07.2001, no. 44558/98 (Valašinas v. Lithuania), paras. 114, 117; ECtHR, 29.04.2002, No. 2346/02 (Pretty v. the UK), para. 50.

²⁸⁷ ECtHR, 02.05.1997, no. 30240/96 (D. v. the UK), paras. 52 ff; ECtHR, 03.04.2001, no. 27229/95 (Keenan v. the UK), paras. 111 ff; *Bank* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, pp. 562, 553; *Kau* in: Pabel/Schmahl (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention (2017), Vol. 1, Art. 3, pp. 16-17.

²⁸⁸ ECtHR, 18.12.1996, no. 21987/93 (Aksoy v. Turkey), para. 64; ECtHR, 15.07.2002, no. 47095/99 (Kalashnikov v. Russia), paras. 97 ff.

²⁸⁹ ECtHR, 18.12.1996, no. 21987/93 (Aksoy v. Turkey), para. 64; ECtHR, 27.09.1999, nos. 33985/96, 33986/96 (Smith and Grady v. the UK), para. 120; ECtHR, 15.07.2002, no. 47095/99 (Kalashnikov v. Russia), para. 95; ECtHR, 24.07.2014, no. 28761/11 (Al Nashiri v. Poland), para. 508; *Bank* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, pp. 552-554, 561; *Schübel-Pfister/Sinner* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 86; *Harris/O’Boyle/Warbrick*, Law of the European Convention on Human Rights³ (2014), p. 261; *Kau* in: Pabel/Schmahl (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention (2017), Vol. 1, Art. 3, p. 17; *Meyer-Ladewig/Lehnert*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), EMRK, Europäische Menschenrechtskonvention⁴ (2017), p. 100; *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 178.

²⁹⁰ ECtHR, 03.04.2001, no. 27229/95 (Keenan v. the UK), paras. 109 ff; *Bank* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 561.

‘Treatment’ refers to all forms of conduct of the State, which do not serve the purpose of a ‘punishment’.²⁹¹ This includes actions as well as omissions.²⁹²

These requirements apply to the enactment of criminal laws prohibiting acts of active euthanasia.²⁹³ Thus, the first objective criterion is fulfilled.

The treatment can be considered as being ‘degrading’, if the objective of the measure in question was to humiliate and debase the victim.²⁹⁴ Thus, a treatment which humiliates or debases the individual is of a degrading nature. These focal points allow the distinction to an ‘inhuman treatment’, which focuses more on infliction of physical or mental suffering than humiliation or debasement.²⁹⁵

In defining the term ‘degrading’, the ECtHR refers to the human dignity.²⁹⁶ Accordingly, a treatment can also be characterised as degrading, if the measure in question lacks of respect for the human dignity or if the measure creates a diminution of the human dignity of the victim.²⁹⁷ A treatment is also considered to be degrading, if the treatment “arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical

²⁹¹ ECtHR, 18.01.1978, no. 5310/71 (Ireland v. the UK), para. 164; ECtHR, 25.04.1978, no. 5856/72 (Tyrer v. the UK), Dissenting Opinion of judge Sir Gerald Fitzmaurice, para. 4; *Schübel-Pfister/Sinner* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 85; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 190; *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 174.

²⁹² ECtHR, 07.07.1989, no. 14038/88 (Soering v. the UK), para. 111; ECtHR, 03.04.2001, no. 27229/95 (Keenan v. the UK), paras. 109 ff.

²⁹³ ECtHR, 13.06.1979, no. 6833/74 (Marckx v. Belgium), para. 66; *Schübel-Pfister/Sinner* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 86.

²⁹⁴ ECtHR, 16.12.1997, no. 20972/92 (Raninen v. Finland), paras. 55 ff; ECtHR, 10.07.2001, no. 33394/96 (Price v. the UK), paras. 24-30; ECtHR, 24.07.2001, no. 44558/98 (Valašinas v. Lithuania), para. 117; *Harris/O’Boyle/Warbrick*, Law of the European Convention on Human Rights³ (2014), p. 261; *Bank* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 560; *Kau* in: Pabel/Schmahl (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention (2017), Vol. 1, Art. 3, p. 16; *Jacobs/White/Ovey*, The European Convention on Human Rights⁷ (2017), p. 190.

²⁹⁵ ECtHR, 18.01.1978, no. 5310/71 (Ireland v. the UK), para. 167; *Uerpmann-Witzack* in: Ehlers (Edit.), Europäische Grundrechte und Grundfreiheiten⁴ (2014), p. 113; *Meyer-Ladewig/Nettesheim*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), EMRK, Europäische Menschenrechtskonvention⁴ (2017), p. 321; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 196; *Harris/O’Boyle/Warbrick*, Law of the European Convention on Human Rights³ (2014), p. 261.

²⁹⁶ ECtHR, 18.01.1978, no. 5310/71 (Ireland v. the UK), Dissenting Opinion of Judge Sir Gerald Fitzmaurice, para. 27; ECtHR, 25.04.1978, no. 5856/72 (Tyrer v. the UK), para. 33; ECtHR, 24.07.2001, no. 44558/98 (Valašinas v. Lithuania), para. 117; ECtHR, 29.04.2002, No. 2346/02 (Pretty v. the UK), para. 52; *Uerpmann-Witzack* in: Ehlers (Edit.), European Fundamental Rights and Freedoms (2007), p. 81.

²⁹⁷ ECtHR, 10.02.1983, nos. 7299/75, 7496/76 (Albert and Le Compte v. Belgium), para. 22; ECtHR, 24.07.2001, no. 44558/98 (Valašinas v. Lithuania), paras. 102, 117; ECtHR, 11.12.2003, no. 39084/97 (Yankov v. Bulgaria), para. 104; ECtHR (GC), 21.01.2011, no. 30696/09 (M. S. S. v. Belgium and Greece), para. 220; *Kau* in: Pabel/Schmahl (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention (2017), Vol. 1, Art. 3, p. 16; *Schabas*, European Convention on Human Rights (2015), p. 181; *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 185.

resistance²⁹⁸ or drives persons to act against their will or conscience.²⁹⁹ The determination of these conditions depends on the circumstances of each individual case.³⁰⁰ For instance, the ECtHR has held that the enactment of certain laws could possibly constitute a degrading treatment.³⁰¹

The specific case-law related to end-of-life issues has been already outlined under Art. 2 ECHR. These cases also provide crucial indications for the interpretation of Art. 3 ECHR. In reference to the circumstances of these cases, the following assumptions can be drawn.

The terminally-ill persons motivated their request to end their lives with the wish not to lead a life which they consider to be undignified or with other terms to die in dignity.³⁰² This motivation is often accompanied by the wish to cease the physical and/or mental suffering due to the progress of the terminal illness. The affected persons expressed to feel frightened and anxious facing the stages of their illness which often were connected with pain and dependency on care.³⁰³ Those terminally-ill persons who were physically not able to commit suicide are driven to act against their will by continuing the life they are not prepared to live anymore. This described suffering endured by the persons concerned derive mainly from their illness which occurred naturally or through an accident.³⁰⁴ However, the described emotions and suffering could be ceased by permitting the persons to act according to their requests to

²⁹⁸ ECtHR, 29.04.2002, No. 2346/02 (*Pretty v. the UK*), para. 52.

²⁹⁹ ECtHR, 03.04.2001, no. 27229/95 (*Keenan v. the UK*), paras. 110; ECtHR, 10.07.2001, no. 33394/96 (*Price v. the UK*), paras. 24-30; ECtHR, 24.07.2001, no. 44558/98 (*Valašinas v. Lithuania*), paras. 117; ECtHR (GC), 21.01.2011, no. 30696/09 (*M. S. S. v. Belgium and Greece*), para. 220; EComHR, 08.07.1993, no. 17549/90 (*Hurtado v. Switzerland*), para. 67; *Bigler/Gonin* in: *Gonin/Bigler* (Edit.), *Convention européenne des droits de l'homme, Commentaire des articles 1 à 18 CEDH* (2018), p. 139; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 196; *Schübel-Pfister/Sinner* in: *Karpenstein/Mayer* (Edit.), *EMRK*² (2015), p. 86; *Schabas*, *European Convention on Human Rights* (2015), p. 181; *Harris/O'Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), p. 261; *Bank* in: *Dörr/Grote/Marauhn* (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 560; *Kau* in: *Pabel/Schmahl* (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 1, Art. 3, p. 16; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 185.

³⁰⁰ *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 178; *Uerpmann-Witzack* in: *Ehlers* (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 82.

³⁰¹ ECtHR, 13.06.1979, no. 6833/74 (*Marckx v. Belgium*), para. 66; *Schübel-Pfister/Sinner* in: *Karpenstein/Mayer* (Edit.), *EMRK*² (2015), p. 86.

³⁰² ECtHR, 26.10.2000, no. 48335/99 (*Sanles Sanles v. Spain*); ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 8; ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 7; ECtHR, 19.07.2012, no. 497/09 (*Koch v. Germany*), para. 8.

³⁰³ ECtHR, 26.10.2000, no. 48335/99 (*Sanles Sanles v. Spain*); ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 7-8; ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 7; ECtHR, 19.07.2012, no. 497/09 (*Koch v. Germany*), para. 8; ECtHR, 14.05.2013, no. 67810/10 (*Gross v. Switzerland*), para. 10.

³⁰⁴ ECtHR, 26.10.2000, no. 48335/99 (*Sanles Sanles v. Spain*); ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 7; ECtHR, 19.07.2012, no. 497/09 (*Koch v. Germany*), para. 8.

end their lives. Through enacting legal sanctions towards active euthanasia, the State makes it impossible to cease the suffering expressed by the persons concerned. Therefore, the criminalisation results in the continuation of suffering for terminally-ill persons who wished to end life through an act of active euthanasia. Thereby, the continued suffering derives also partly from the legislation. As a result, the enactment of these criminal laws constitutes a treatment of a degrading nature. Thus, the second objective criterion is fulfilled.

According to the ECtHR, a degrading treatment falls within the scope of Art. 3 ECHR, if the measure in question is of some severity.³⁰⁵ Thus, the severity does not only indicate the distinction between the different types of ill-treatment but is also an indicator of the applicability of the scope of the provision. The maltreatment must reach “a minimum level of severity and involve[s] actual bodily injury or intense physical or mental suffering”³⁰⁶ according to the ECtHR. The qualification of the level of severity is relative and depends on the relevant circumstances of each case.³⁰⁷ Such relevant factors are e. g. the duration of the ill-treatment and the effects it has on the physical or mental integrity of the person concerned. The personal characteristics of the victim might be considered as well, e. g. the health status or the age.³⁰⁸ Other factors to be taken into account are the purpose of the maltreatment in conjunction with the intention or motivation and the context in which the treatment has been inflicted.³⁰⁹ For instance, the threshold of severity is met when the treatment causes the

³⁰⁵ ECtHR, 18.01.1978, no. 5310/71 (Ireland v. the UK), para. 162; ECtHR, 25.04.1978, no. 5856/72 (Tyner v. the UK), Dissenting Opinion of judge Sir Gerald Fitzmaurice, para. 3; ECtHR, 07.07.1989, no. 14038/88 (Soering v. the UK), para. 100; ECtHR (GC), 26.10.2000, no. 30210/96 (Kudła v. Poland), para. 86; ECtHR, 03.04.2001, no. 27229/95 (Keenan v. the UK), paras. 109.

³⁰⁶ ECtHR, 29.04.2002, No. 2346/02 (Pretty v. the UK), para. 52.

³⁰⁷ ECtHR, 18.01.1978, no. 5310/71 (Ireland v. the UK), para. 162; ECtHR, 22.09.1993, no. 15473/89 (Klaas v. the UK), paras. 23 ff; ECtHR, 27.08.1992, no. 12850/87 (Tomasi v. France), para. 114; ECtHR, 17.07.2014, nos. 32541/08, 43441/08 (Svinarenko and Slyadnev v. Russia), paras. 114 ff; *Schübel-Pfister/Sinner* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 85; *Schabas*, European Convention on Human Rights (2015), p. 171; *Bank* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 548; *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 185.

³⁰⁸ ECtHR, 25.02.1985, no. 7511/76 (Campbell and Cosans v. the UK), para. 30; ECtHR, 07.07.1989, no. 14038/88 (Soering v. the UK), para. 100; ECtHR, 03.04.2001, no. 27229/95 (Keenan v. the UK), para. 108; ECtHR, 16.10.2008, no. 5608/05 (Renolde v. France), para. 119; ECtHR, 11.10.2011, no. 38455/06 (Portmann v. Switzerland), para. 48; *Schübel-Pfister/Sinner* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 86; *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 185; *Bank* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 549; *Harris/O'Boyle/Warbrick*, Law of the European Convention on Human Rights³ (2014), p. 261; *Vermeulen/Battjes* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights⁵ (2018), p. 384.

³⁰⁹ ECtHR, 18.01.1978, no. 5310/71 (Ireland v. the UK), para. 162; ECtHR (GC), 06.04.2000, no. 26772/95 (Labita v. Italy), para. 120; ECtHR (GC), 26.10.2000, no. 30210/96 (Kudła v. Poland), para. 92; ECtHR (GC), 01.06.2010, no. 22978/05 (Gäfgen v. Germany), para. 88; ECtHR, 24.07.2014, no. 28761/11 (Al Nashiri v. Poland), para. 508;

feeling of vulnerability or powerlessness or affront for the victim and thereby humiliates the victim.³¹⁰

It shall be remarked that the Court's case-law indicates a tendency to lowering down the minimum threshold of severity. Since it is the objective of the Convention to increase the standard of human rights protection, the scope of protection responds to a greater extent of measures.³¹¹ The following interpretation shall pay respect on that account. If the threshold of the minimum of severity is nonetheless not attained, the measure in question might fall within the scope of Art. 8 ECHR.³¹²

The enactment of criminalisation of active euthanasia concerns primary persons who find themselves in situations related to the end of life. Persons suffering from a terminal illness belong to a vulnerable group. They may be in need of a more comprehensive protection than other individuals (see above). This applies in consideration of the personal characteristics as the state of health or the age.

Through the criminalisation of active euthanasia, the State refuses its subjects the legal possibility to end life in this way and by the means concerned. Hereby, the State denies terminally-ill persons the alternative of active euthanasia. Terminally-ill persons who are physically not able to commit suicide are left without any other alternative than to await the termination of the bodily functions.³¹³ This circumstance puts them in a state of powerlessness. Besides, the terminal illness may continue for many years before causing death.³¹⁴ The persons concerned would be held in the situation which they consider to be undignified and making them vulnerable and powerless for a long duration of time.

Schübel-Pfister/Sinner in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 85; *Schabas*, European Convention on Human Rights (2015), pp. 169, 171.

³¹⁰ ECtHR, 28.07.2009, no. 47709/99 (*Rachwalski and Ferenc v. Poland*), para. 61.

³¹¹ ECtHR, 28.07.1999, no. 25803/94 (*Selmouni v. France*), para. 101; *Schabas*, European Convention on Human Rights (2015), p. 176; *Vermeulen/Battjes* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 386; *Bank* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 547; *Uerpmann-Witzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 82; *Uerpmann-Witzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴ (2014), p. 113; *Kau* in: Pabel/Schmahl (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 1, Art. 3, p. 17.

³¹² *Schabas*, European Convention on Human Rights (2015), pp. 171, 370.

³¹³ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 9.

³¹⁴ ECtHR, 26.10.2000, no. 48335/99 (*Sanles Sanles v. Spain*); ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 7-8; ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 7; ECtHR, 14.05.2013, no. 67810/10 (*Gross v. Switzerland*), para. 10.

However, the endured suffering results mainly from the illness and partly from the legislation, as mentioned above. As to the severity, the assessment has to consider only the treatment, which is the enactment of criminal laws in the field of active euthanasia. Due to the imbalance between both aspects, the suffering caused by the legislation cannot attain the threshold of severity. This conclusion can be underlined by the indication deriving from the judgement of the case 'Pretty'. It is the only admissible case concerning active euthanasia in the context of Art. 3 ECHR.³¹⁵ Thus, the third objective criterion is not met.

In addition, the national authorities cannot be held responsible for the suffering, what would have been the fourth objective criterion of the analysis.³¹⁶ The Member States are naturally responsible for the enactment of criminal laws relating to active euthanasia. But as mentioned above, this treatment is not of the necessary severity.

Regarding the suffering deriving from the natural occurrence of illness or injury, the national authorities may be held responsible in some cases despite the fact that they have not inflicted it. This exception applies, "where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible"³¹⁷. Because this is an exception, it has to be interpreted narrowly. It refers to the obligation under Art. 3 ECHR to provide the necessary medical care to a certain extent.³¹⁸ Since Art. 3 ECHR has to be interpreted in harmony with Art. 2 ECHR, there cannot emerge any obligation under Art. 3 ECHR which would result in the deprivation of life (see above). Thus, the necessary medical care in the sense of Art. 3 ECHR do not extend as to the practise of active euthanasia.³¹⁹ Therefore, suffering continued due to the unavailability of active euthanasia do not constitute an exacerbation in the meaning of the exception. In further consequence, the exception does not apply. The national authorities cannot be held

³¹⁵ ECtHR, 29.04.2002, no. 2346/02 (Pretty v. the UK), paras. 52-56.

³¹⁶ ECtHR, 02.05.1997, no. 30240/96 (D. v. the UK), paras. 57; ECtHR (GC), 26.10.2000, no. 30210/96 (Kudła v. Poland), para. 97; ECtHR, 03.04.2001, no. 27229/95 (Keenan v. the UK), paras. 124; ECtHR, 29.04.2002, No. 2346/02 (Pretty v. the UK), para. 52.

³¹⁷ ECtHR, 29.04.2002, No. 2346/02 (Pretty v. the UK), para. 52; see also ECtHR, 02.05.1997, no. 30240/96 (D. v. the UK), paras. 51 ff; ECtHR, 03.04.2001, no. 27229/95 (Keenan v. the UK), paras. 112 ff; ECtHR (GC), 27.05.2008, no. 26565/05 (N. v. the UK), paras. 29, 43; *Schabas*, European Convention on Human Rights (2015), p. 191; *Reid*, A Practitioner's Guide to the European Convention on Human Rights⁵ (2015), p. 538.

³¹⁸ *Harris/O'Boyle/Warbrick*, Law of the European Convention on Human Rights³ (2014), p. 266; *Bank* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 547; *Mowbray*, Cases, Materials, and Commentary on the European Convention on Human Rights³ (2012), p. 189.

³¹⁹ ECtHR, 29.04.2002, No. 2346/02 (Pretty v. the UK), para. 53; *Reid*, A Practitioner's Guide to the European Convention on Human Rights⁵ (2015), p. 538.

responsible for the suffering due to the natural occurrence of illness or injury.³²⁰ The ECtHR comes to the same result in the case of 'Pretty'.³²¹ The fourth objective criterion is also not met.

In conclusion, the analysis of the development in the jurisprudence of the ECtHR leads to the result that there is no degrading treatment of a certain severity, for which the State would be responsible. The criminalisation of active euthanasia and the refusal to legalise such acts by the States constitute no 'degrading treatment' in the meaning of Art. 3 ECHR.

3.2.4.2 Development in soft-law of the Organs of the Council of Europe

The previous examination indicates that soft-law referring to active euthanasia does not provide any scope of protection beyond the one ensured by case-law of the ECtHR. Since the Court's case-law negates the 'degrading treatment' in the context of active euthanasia under Art. 3 ECHR, no further conclusion could be drawn from the soft-law.

3.2.4.3 Change of moral values in societies of the Member States

As mentioned under Art. 2 ECHR, moral values in the societies of the Member States have changed since the drafting of the Convention. Today, there is a socio-political claim of the public to a right to active euthanasia. The public demand for the right in question involves the argument in respect to the human dignity. The criticism refers to the State's refusal to legalise active euthanasia as putting individuals in a situation which is considered to be undignified. Thus, the criminal sanction of the practise of active euthanasia is considered to interfere with human dignity. This reasoning is similar to the requirements established by the ECtHR for defining the 'degrading treatment' in the sense of Art. 3 ECHR, though, leading to a different 'interpretation'. However, a change in society cannot create any new legal obligation on the Member States due to the principles of International Law (see above). Thus, it cannot be considered in defining the term 'degrading treatment' under Art. 3 ECHR.

³²⁰ *Peters, Praxis Internationaler Organisationen – Vertragswandel und völkerrechtlicher Ordnungsrahmen* (2016), p. 41; *Reid, A Practitioner's Guide to the European Convention on Human Rights*⁵ (2015), p. 538.

³²¹ ECtHR, 29.04.2002, No. 2346/02 (*Pretty v. the UK*), paras. 52-53.

3.2.4.4 Interim result of the dynamic and evolutive interpretation

In conclusion, the casuistic approach of the ECtHR allowed the establishment of general criteria defining 'degrading treatment' in the sense of Art. 3 ECHR. As a consequence, neither the development in the Court's case-law nor the change of the moral values in the societies of the Member States established the criminalisation of active euthanasia and the refusal to legalise such acts as being a degrading treatment under the provision concerned.

3.3 Result

Summarising the results of the different methods of interpretation leads to the conclusion that the criminalisation of active euthanasia and the refusal to legalise such acts by the Member States do not constitute a 'degrading treatment' under Art. 3 ECHR. Since the 'degrading treatment' constitutes the weakest type of maltreatment in the sense of Art. 3 ECHR,³²² the scope of protection of Art. 3 ECHR does not apply in regard to the raised question concerning the criminalisation of active euthanasia.

As a conclusion, the third legal problem may be answered in terms that there is no negative obligation for States cease criminalisation of active euthanasia.³²³ Thus, there arises no duty to legalise such acts. Therefore, the right to active euthanasia does not derive from Art. 3 ECHR.

As mentioned above, measures which do not fall within the scope of Art. 3 ECHR, can be included by the protection of Art. 8 ECHR.³²⁴ The conclusion of the examination of Art. 2 ECHR also refers to Art. 8 ECHR as being a possible legal basis for a right to active euthanasia (see above). Therefore, the following examination shall consider Art. 8 ECHR.

³²² *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 196; *Schübel-Pfister/Sinner* in: *Karpenstein/Mayer* (Edit.), EMRK² (2015), p. 85; *Schabas*, European Convention on Human Rights (2015), p. 169; *Uerpmann-Wittzack* in: *Ehlers* (Edit.), European Fundamental Rights and Freedoms (2007), p. 82.

³²³ ECtHR, 29.04.2002, No. 2346/02 (*Pretty v. the UK*), para. 55; *Hilgendorf* in: *Joerden/Szwarc* (Edit.), Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen (2007), p. 179; *Berger*, Jurisprudence de la Cour Européenne des Droits de l'Homme⁹ (2004), p. 101; *Mowbray*, Cases, Materials, and Commentary on the European Convention on Human Rights³ (2012), p. 160; *Bank* in: *Dörr/Grote/Marauhn* (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 595; *Meyer-Ladewig/Lehnert*, in: *Meyer-Ladewig/Nettesheim/von Raumer* (Edit.), EMRK, Europäische Menschenrechtskonvention⁴ (2017), p. 101.

³²⁴ *Uerpmann-Wittzack* in: *Ehlers* (Edit.), European Fundamental Rights and Freedoms (2007), p. 81.

4 RIGHT TO RESPECT FOR PRIVATE LIFE (ART. 8)

The provision of Art. 8 ECHR contributes together with Art. 2 and Art. 3 ECHR to the safeguard of the human dignity.³²⁵ Its guarantees are comprehensive and multifarious.³²⁶ Art. 8 ECHR constitutes alongside with Art. 2 and Art. 3 ECHR a unity of the protection of the physical and mental integrity of a person, highlighting the self-determination of individuals.³²⁷

Unlike the provisions of Art. 2 and 3 ECHR, the derogation from Art. 8 ECHR is permitted in peace time as well as in wartime or other public emergency according to Art. 15 ECHR.³²⁸

4.1 Classification of the right and its obligations

Art. 8 of the Convention is to be classified as a 'classic right'.³²⁹ As such, it contains the negative obligation of the Member State to refrain from unjustified interferences in the development of the personality of individuals.³³⁰ The wording of the Art. 8 ECHR phrases the 'right to respect'/'droit au respect' and is understood to contribute to an enjoyment of the right concerned in an effective manner. Therefore, the provision also includes positive obligations for the Member States. The Contracting Parties are obliged to undertake active measures for the protection of the right to respect for private and family life. This includes the protection against unjustified interferences by the national authorities and by other private

³²⁵ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 49-52, 65; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 896; *Meyer-Ladewig/Nettesheim*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), EMRK, Europäische Menschenrechtskonvention⁴ (2017), p. 321; *Hilgendorf* in: Joerden/Szwarc (Edit.), Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen (2007), p. 182.

³²⁶ *Jacobs/White/Ovey*, The European Convention on Human Rights⁷ (2017), p. 400.

³²⁷ *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 902.

³²⁸ *Wildhaber/Breitenmoser* in: (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention (2017), Vol. 2, p. 13.

³²⁹ *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 279; *Harris/O'Boyle/Warbrick*, Law of the European Convention on Human Rights³ (2014), p. 523; *Pätzold* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 254; *Schweizer* in: Merten/Papier (Edit.), Handbuch der Grundrechte in Deutschland und Europa, Vol. Band VI/1 Europäische Grundrechte I (2010), p. 112.

³³⁰ *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 463; *Pätzold* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 254; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 279; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 897.

individuals.³³¹ The Member States must provide an adequate and effective protection against each of these acts within their jurisdiction according to Art. 1 ECHR. This refers to the conducts of the legislative, executive and judicative power of the State.³³²

The first legal problem to be examined in the context of Art. 8 ECHR is whether the negative obligation of the States to refrain from unjustified interferences in the right to respect for private and family life requires the Member States not to criminalise the acts of active euthanasia. If the obligation would include the duty in question, the States would have to cease this violation of Art. 8 ECHR through the legalisation of the practise of active euthanasia. Thus, the right to active euthanasia could emerge under Art. 8 ECHR. To answer this legal question, it is necessary to examine the scope of protection of Art. 8 (1) ECHR and to determine whether it applies to the decision to end one's life by an act of active euthanasia. If it does, it shall be analysed whether the criminalisation by law constitute an interference and whether it is justified according to the provision's requirements of Art. 8 (2) ECHR.

4.2 Scope of protection

The beneficiary of Art. 8 (1) ECHR is 'everyone'/'toute personne' according to the wording of the provision.³³³ In conjunction with Art. 1 ECHR the right to respect for private and family life entitles every person within the jurisdiction of the Member States.

³³¹ ECtHR, 13.06.1979, no. 6833/74 (*Marckx v. Belgium*), para. 31; ECtHR, 20.03.2007, no. 5410/03 (*Tysi c v. Poland*), para. 112; ECtHR, 13.11.2012, nos. 47039/11, 358/12 (*Hristozov and Others v. Bulgaria*), para. 117; ECtHR (GC), 12.11.2013, no. 5786/08 (*S derman v. Sweden*), para. 80; *De Vries* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁴ (2018), p. 669; *Grabenwarter/Pabel*, *Europ ische Menschenrechtskonvention*⁶ (2016), p. 279; *Schabas*, *European Convention on Human Rights* (2015), p. 366; *Harris/O'Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), p. 523; *Meyer-Ladewig/Nettesheim*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europ ische Menschenrechtskonvention*⁴ (2017), pp. 318-319; *Wildhaber/Breitenmoser* in: (Edit.), *Internationaler Kommentar zur Europ ischen Menschenrechtskonvention* (2017), Vol. 2, p. 13; *P tzold* in: *Karpenstein/Mayer* (Edit.), *EMRK*² (2015), p. 254; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 463.

³³² ECtHR (GC), 22.03.2001, nos. 34044/96, 35532/97 and 44801/98 (*Streletz, Kessler and Krenz v. Germany*), para. 86; ECtHR, 17.01.2002, no. 32967/96 (*Calvelli and Ciglio v. Italy*), para. 49; *Marauhn/Thorn* in: *D rr/Grote/Marauhn* (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 932.

³³³ *Grabenwarter/Pabel*, *Europ ische Menschenrechtskonvention*⁶ (2016), p. 280; *De Vries* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁴ (2018), p. 667; *Hengstschl ger/Leeb*, *Grundrechte*² (2013), p. 169; *Marauhn/Thorn* in: *D rr/Grote/Marauhn* (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 932.

The ‘right to respect for private and family life’ includes four categories of protection, which are intertwined with each other.³³⁴ These are the protection of the private life, family life, home and correspondence according to the wording of the provision.³³⁵ In regard to the raised question, the category of ‘private life’ might be concerned with the field of active euthanasia.

The legal term of ‘private life’/‘la vie privée’³³⁶ is not defined in the ECHR. Its content shall be determined by the application of the methods of interpretation according Art. 31-33 VCLT.³³⁷

4.2.1 Literal interpretation

The term ‘private life’/‘la vie privée’ in the authentic English and French versions are presumed to convey the same sense according to Art. 33 (3) VCLT (see above). In line with Art. 31 (1) VCLT, the Convention shall be interpreted in accordance with the ordinary meaning of its terms.³³⁸

The wording of Art. 8 ECHR indicates superficially an entitlement “to be left alone”³³⁹ in respect to private matters referring to the restraint of regulation by the State. In accordance with it, it seems at least possible to include the personal decision to end one’s life by an act of active euthanasia under the term in question. But a clear determination is not attainable. Therefore, further interpretation is required.

³³⁴ *Zysset*, *The ECHR and Human Rights Theory* (2016), p. 199; *Wildhaber/Breitenmoser* in: (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 2, p. 9; *Schilling*, *Internationaler Menschenrechtsschutz*³ (2016), p. 131; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), pp. 279, 281; *Marauhn/Thorn* in: *Dörr/Grote/Marauhn* (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 955; *De Vries* in: *Van Dijk/Van Hoof/Van Rijn/Zwaak* (Edit.), *Theory and Practice of the European Convention on Human Rights*⁴ (2018), p. 669; *Frowein* in: *Frowein/Peukert* (Edit.), *EMRK-Kommentar*³ (2009), p. 288; *Harris/O’Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), p. 524.

³³⁵ *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 281; *Uerpman-Witzack* in: *Ehlers* (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 68.

³³⁶ ECtHR, 23.07.1968, nos. 1474/62 and other (*Belgian Linguistics Case v. Belgium*); ECtHR (GC), 10.04.2007, no. 6339/05 (*Evans v. the UK*), para. 71.

³³⁷ *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 461.

³³⁸ *Fastenrath* in: *Pabel/Schmahl* (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 1, Art. 8, p. 14.

³³⁹ *Schabas*, *European Convention on Human Rights* (2015), p. 366.

4.2.2 Historical interpretation

As supplementary means according to Art. 32 VCLT, the historical interpretation entails the consideration of the drafting of the ECHR to establish the intention of the drafters.³⁴⁰

The Travaux Préparatoires to Art. 8 ECHR focuses more on the phrasing of the Art. 8 (2) ECHR than providing a possible determination of the term 'private life' in Art. 8 (1) ECHR.³⁴¹ The Travaux Préparatoires refer to totalitarian regimes, though.³⁴² Bearing in mind that the drafting of the Convention in the 1940s was influenced by the atrocities in the context of active euthanasia committed by the Regime of National Socialism (see above), it may be assumed that the drafters would not have expected a right to active euthanasia to be included into the protection of the 'private life' due to the awareness of the risk of abuse. As a result, the historical interpretation in conjunction with the literal interpretation do not provide a clear determination of the term in question. Further interpretation is thus necessary.

4.2.3 Systematic interpretation

4.2.3.1 Consideration of the whole provision of Art. 8 ECHR

In accordance with Art. 31 (2) and (3) VCLT, the systematic interpretation allows the interpretation of the legal term in question under consideration of the rest of the provision.³⁴³ Art. 8 (1) and (2) ECHR shall be read as a whole.³⁴⁴ The consideration demonstrates that the right to 'private life' may be limited through justified interferences and therefore the right is not an absolute one. However, it does not provide any definition.

³⁴⁰ ECtHR (GC), 12.12.2001, no. 52207/09 (*Banković and Others v. Belgium and Others*), paras. 58, 65; *Fitzmaurice* in: Shelton (Edit.), *The Oxford Handbook of International Human Rights Law* (2013), p. 745; *Heintschel von Heinegg* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), p. 479; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 32; *Fitzmaurice* in: Evans (Edit.), *International Law*⁴ (2014), p. 181; *Schabas*, *European Convention on Human Rights* (2015), p. 34.

³⁴¹ *Wildhaber/Breitenmoser* in: (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 2, p. 22; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, pp. 876-877.

³⁴² Travaux Préparatoires to the Convention regarding Art. 8, p. 4, [https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH\(56\)12-EN1674980.pdf](https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH(56)12-EN1674980.pdf) (19.05.2019).

³⁴³ *Schabas*, *European Convention on Human Rights* (2015), p. 40; *Heintschel von Heinegg* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), p. 475.

³⁴⁴ *Wildhaber/Breitenmoser* in: (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 2, pp. 11, 14.

4.2.3.2 Consideration of other provisions of the ECHR

The systematic approach takes also into account the whole treaty of the Convention.³⁴⁵ Referring to it, Art. 8 ECHR shall be interpreted in accordance with Art. 2 and Art. 3 ECHR as these provisions enshrine together the physical and mental integrity of a person.³⁴⁶ The prior examinations of Art. 2 and Art. 3 ECHR did not provide any right to active euthanasia. Both articles had to be interpreted in 'harmony' meaning that Art. 3 ECHR could not provide any further right related to the deprivation of life than the Art. 2 ECHR would have permitted it itself. This is due to the circumstance, that these provisions safeguard the physical and mental integrity from the aspect of the 'existence of life and health' (see above). Art. 8 ECHR guarantees the physical and mental integrity from the aspect of self-determination regarding life and health. This allows an interpretation of the matter of dispute from a different perspective. This means in the context of Art. 3 ECHR that a certain conduct or omission of the State might not constitute a violation of Art. 3 ECHR because of the lack of severity of the measure in question. But the same measure may constitute a violation under Art. 8 ECHR (see above).³⁴⁷ In the context of Art. 2 ECHR, its obligation to the preservation of life must be respected. However, this obligation includes only such acts intended to end one's life which are not taken freely and without the comprehension of what is involved (see above). If these requirements are met, Art. 8 ECHR may contain the allowance of disposition regarding the own life and health, even if this decision include to put oneself in harm's way or to cease life.³⁴⁸ Therefore, the circumstance that the Art. 2 and Art. 3 ECHR do not provide any right to active euthanasia do not exclude the possibility for the right in question to emerge under Art. 8 ECHR and to remain harmony between the provisions concerned.³⁴⁹

³⁴⁵ *Heintschel von Heinegg* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), p. 475; *Schabas*, *European Convention on Human Rights* (2015), p. 40.

³⁴⁶ *Berger*, *Jurisprudence de la Cour Européenne des Droits de l'Homme*⁹ (2004), p. 11; *Marauhn/Thorn* in: *Dörr/Grote/Marauhn* (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 902.

³⁴⁷ ECtHR, 25.03.1993, no. 13134/87 (*Costello-Roberts v. the UK*), para. 36; ECtHR, 27.09.1999, nos. 33985/96, 33986/96 (*Smith and Grady v. the UK*), para. 122; ECtHR, 13.05.2008, no. 52515/99 (*Juhnke v. Turkey*), para. 70.

³⁴⁸ ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 54.

³⁴⁹ *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), pp. 461.

4.2.3.3 Consideration of other legal instruments of International Human Rights Law

The systematic interpretation considers other legal sources of International Law according to Art. 31 (2) and (3) VCLT.³⁵⁰ Due to the principles of International Law, this interpretation method may be approached only in a cautious and non-excessive manner (see above).

The ECHR is part of the “system of human rights protection”³⁵¹. The right to private life is enshrined in various legal instruments of International Human Rights Law.

For instance, the right to ‘privacy’ is guaranteed in Art. 12 UDHR. It is the direct ancestor of Art. 8 ECHR. The different phrasing seems to contain no legal consequences.³⁵² The draft of Art. 8 ECHR referred explicitly to Art. 12 UDHR. In the end, the reference had been deleted.³⁵³ Its substantial influence remained, though.³⁵⁴ In regard to active euthanasia, it remains undetermined whether ‘privacy’ includes decisions about ending the own life. Thus, the interpretation of ‘private life’ requires further examination.

The right to ‘privacy’ is also enshrined in Art. 17 ICCPR. Its phrasing seems to contain no legal differences as to Art. 8 ECHR.³⁵⁵ The close connection between both provisions is expressed by the draft of Art. 8 ECHR.³⁵⁶ Art. 17 ICCPR guarantees the “individual existence of the human being”³⁵⁷ relating to several facets of ‘privacy’. It contains the individual autonomy bearing

³⁵⁰ *Schabas*, European Convention on Human Rights (2015), p. 40; *Heintschel von Heinegg* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), pp. 475-477.

³⁵¹ ECtHR, 29.04.2002, No. 2346/02 (*Pretty v. the UK*), para. 54; see also *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, pp. 875, 878.

³⁵² *Schabas*, European Convention on Human Rights (2015), p. 369.

³⁵³ *Travaux Préparatoires to the Convention regarding Art. 8*, pp. 2-5, 9, [https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH\(56\)12-EN1674980.pdf](https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH(56)12-EN1674980.pdf) (19.05.2019).

³⁵⁴ *Wildhaber/Breitenmoser* in: (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 2, p. 22; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 876; *Schabas*, European Convention on Human Rights (2015), pp. 358-359.

³⁵⁵ *Schabas*, European Convention on Human Rights (2015), p. 369; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 878; *Meyer-Ladewig/Nettesheim*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 318.

³⁵⁶ *Travaux Préparatoires to the Convention regarding Art. 8*, p. 10, [https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH\(56\)12-EN1674980.pdf](https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH(56)12-EN1674980.pdf) (19.05.2019).

³⁵⁷ *Nowak*, U.N. Covenant on Civil and Political Rights² (2005), pp. 378-388.

the notion of self-fulfilment.³⁵⁸ Due to a wide interpretation of the term in question, the right to privacy safeguards the right to end life by committing suicide.³⁵⁹ But it was believed not to include means of active euthanasia so far.³⁶⁰ Recently, the HRC emphasised “the central importance to human dignity of personal autonomy”³⁶¹ in the context of active euthanasia. The HRC acknowledged that providing active euthanasia by States does not intervene with the obligations under the ICCPR when there is a “robust legal and institutional safeguards”³⁶² verifying the existence of a self-determined decision of the person concerned. Although, the HRC has no authority to create obligations within the ICCPR, its statement on how the HRC interprets the ICCPR’s guarantees have not only an impact on the right to life, but also to the right to privacy. In conclusion, it may be seen as an inspiration to understand the right to private life in Art. 8 ECHR as applying to decisions to terminate life through active euthanasia.

Art. 8 ECHR corresponds to Art. 7 EU-Charter. Other substantive aspects of Art. 8 ECHR are related e. g. to Art. 8, 15, 16, 33-35, 37 and 38 EU-Charter.³⁶³ In general terms, Art. 4 EU-Charter and Art. 3 ECHR have the same scope and meaning according Art. 52 (3) EU-Charter.³⁶⁴ A wider scope of the EU-Charter is possible, though.³⁶⁵ In the field of active euthanasia, there exists no jurisprudence of the Court of Justice or the General Court of the EU. Thus, the interpretation of Art. 7 EU-Charter turns to the jurisprudence of the ECtHR.³⁶⁶ Therefore, the consideration of the EU-Charter does not contribute to answer the raised legal question.

³⁵⁸ *Nowak*, U.N. Covenant on Civil and Political Rights² (2005), pp. 378-388.

³⁵⁹ *Nowak*, U.N. Covenant on Civil and Political Rights² (2005), p. 389; *Marauhn/Thorn* in: *Dörr/Grote/Marauhn* (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 878.

³⁶⁰ *Nowak*, U.N. Covenant on Civil and Political Rights² (2005), p. 389.

³⁶¹ UN, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, p. 2, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf (22.05.2019).

³⁶² UN, General comment No. 36 (2018), CCPR/C/GC/36, p. 2.

³⁶³ *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 280; *Schabas*, *European Convention on Human Rights* (2015), p. 359.

³⁶⁴ EU, Explanation relating to the Charter of Fundamental Rights (2007), C 303/33, pp. 4, 17; *Marauhn/Thorn* in: *Dörr/Grote/Marauhn* (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 880; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 280; *Schabas*, *European Convention on Human Rights* (2015), p. 359.

³⁶⁵ *Jarass*, *Charta der Grundrechte der Europäischen Union*³ (2016), p. 511; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 27.

³⁶⁶ *Wolffgang* in: *Lenz/Borhardt* (Edit.), *EU-Verträge Kommentar*⁶ (2012), p. 3187; *Höfling/Kempny* in: *Stern/Sachs* (Edit.), *Europäische Grundrechte-Charta* (2016), pp. 149-150.

4.2.4 Teleological interpretation, including evolutive and dynamic interpretation

Art. 31 (1) VCLT includes the interpretation of a treaty in the light of its object and purpose.³⁶⁷ As mentioned above, the Convention's object and purpose is not to guarantee a minimal protection, but a comprehensive and contemporary one, making its safeguards effective and practical.³⁶⁸ Therefore, the ECtHR applies the 'dynamic and evolutive interpretation' within the teleological interpretation (see above).³⁶⁹ Accordingly, the legal term of 'private life' shall be defined. The interpretation shall be conducted in a cautious and non-excessive manner to pay respect to the rules of International Law (see above).³⁷⁰

4.2.4.1 Development in the jurisprudence of the ECtHR

The development in the jurisprudence of the ECtHR shall be analysed for two purposes. First, the examination shall establish the general meaning of the legal term 'private life' according Art. 8 (1) ECHR. Second, it shall indicate any trends regarding the question whether the decision to end one's life by active euthanasia is part of 'private life' under Art. 8 (1) ECHR.

The legal term of 'private life' includes a broad concept which has been expended over the time covering a range of aspects.³⁷¹ In the beginning, the EComHR has described it as "the

³⁶⁷ *Fitzmaurice* in: Shelton (Edit.), *The Oxford Handbook of International Human Rights Law* (2013), p. 745; *Heintschel von Heinegg* in: Ipsen (Edit.), *Völkerrecht*⁷ (2018), pp. 475-478, 480-481; *Fitzmaurice* in: Evans (Edit.), *International Law*⁴ (2014), pp. 179, 182.

³⁶⁸ ECtHR (GC), 23.03.1995, no. 15318/89 (*Loizidou v. Turkey*), para. 71; ECtHR (GC), 27.09.1995, no.18984/91 and other (*McCann and Others v. the UK*), paras. 146-147; ECtHR, 17.12.2009, no. 4762/05 (*Mikayil Mammadov v. Azerbaijan*) para. 98; *Lester/Pannick/Herberg*, *Human Rights Law and Practice*³ (2009), p. 138; *Schabas*, *European Convention on Human Rights* (2015), p. 49; *Grewe*, *Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des Europäischen Gerichtshofs für Menschenrechte*, *ZaöRV* 2001/61, p. 459 (467).

³⁶⁹ *Heißl* in: Heißl (Hrsg.), *Handbuch Menschenrechte* (2009), p. 46; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), pp. 38-39; *Harris/O'Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), pp. 8 f; *Grabenwarter* in: Gamper/Verschraegen (Edit.), *Rechtsvergleichung als juristische Auslegungsmethode* (2013), pp. 104 f.

³⁷⁰ *Frowein* in: *Frowein/Peukert* (Edit.), *EMRK-Kommentar*³ (2009), p. 7.

³⁷¹ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 61; ECtHR, 19.07.2012, no. 497/09 (*Koch v. Germany*), para. 51; *De Vries* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁴ (2018), p. 667; *Uerpmann-Witzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴ (2014), p. 98; *Schilling*, *Internationaler Menschenrechtsschutz*³ (2016), p. 131; *Harris/O'Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), p. 524; *Peters*, *Einführung in die Europäische Menschenrechtskonvention* (2003), p. 41.

right to privacy, the right to live, as far as one wishes, protected from publicity”³⁷² as well as “the right to establish and develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one’s own personality.”³⁷³ Thus, the notion of ‘private life’ refers to personal autonomy within a private and public sphere.³⁷⁴

The ECtHR has confirmed this understanding of ‘private life’ and developed its notion further according to a casuistic approach.³⁷⁵ Thereby, the Court uses a broad approach instead of a narrow one. As a result, the definition provided by the Court is not exhaustive and the concept of ‘private life’ is relatively undetermined.³⁷⁶ The reasons are, first, that Art. 8 (1) ECHR is a general rule and requires to be interpreted broadly and, second, to avoid a limitation of the scope of protection.³⁷⁷ Thirdly, a broad interpretation allows the adaption to changing conditions and legal opinions regarding the extend of the state-free sphere.³⁷⁸

In accordance with the casuistic approach, the concept of ‘private life’ includes the field of a person’s health.³⁷⁹ The topic of active euthanasia concerns the life and health of individuals (see above). Thus, ‘private life’ as one of the four categories of protection comes into consideration.³⁸⁰

The concept of ‘private life’ can be divided in further sub-categories according to the ECtHR’s case-law. These are, for instance, privacy, relationships with other persons, reproductive rights, reputation, identity, self-determination and physical and psychological integrity.³⁸¹ As

³⁷² EComHR, 18.05.1976, no. 6825/74 (X. v. Iceland).

³⁷³ EComHR, 18.05.1976, no. 6825/74 (X. v. Iceland).

³⁷⁴ *Jacobs/White/Ovey*, The European Convention on Human Rights⁷ (2017), pp. 400-401; *Schabas*, European Convention on Human Rights (2015), p. 369; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 28.

³⁷⁵ ECtHR, 16.12.1992, no. 13710/88 (*Niemietz v. Germany*), para. 29; ECtHR, 29.04.2002, No. 2346/02 (*Pretty v. the UK*), para. 61; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 896; *Uerpmann-Witzack* in: Ehlers (Edit.), European Fundamental Rights and Freedoms (2007), p. 69.

³⁷⁶ ECtHR, 17.10.1986, no. 9532/81 (*Rees v. the UK*), para. 37; ECtHR, 25.03.1992, no. 13343/87 (*B. v. France*), para. 44; ECtHR, 20.03.2007, no. 5410/03 (*Tysi c v. Poland*), para. 112; ECtHR, 29.04.2002, No. 2346/02 (*Pretty v. the UK*), para. 61; ECtHR, 28.01.2003, no. 44647/98 (*Peck v. the UK*), para. 57; *P tzold* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 255; *Meyer-Ladewig/Nettesheim*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), EMRK, Europäische Menschenrechtskonvention⁴ (2017), p. 320; *De Vries* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights⁴ (2018), p. 690.

³⁷⁷ *Harris/O’Boyle/Warbrick*, Law of the European Convention on Human Rights³ (2014), p. 525.

³⁷⁸ *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 461.

³⁷⁹ *Cohen-Jonathan* in: Macdonald/Matscher/Petzold (Edit.), The European System for the Protection of Human Rights (1993), pp. 405, 407.

³⁸⁰ *Halstead*, Unlocking Human Rights (2009), p. 272.

³⁸¹ ECtHR, 22.10.1981, no. 7525/76 (*Dudgeon v. The UK*), para. 41; ECtHR, 17.10.1986, no. 9532/81 (*Rees v. the UK*), para. 47; ECtHR, 26.10.1988, no. 10581/83 (*Norris v. Ireland*), para. 38; ECtHR, 27.10.1990, no. 10843/84 (*Cossey v. the UK*), para. 36; ECtHR, 16.12.1992, no. 13710/88 (*Niemietz v. Germany*), para. 29; ECtHR,

mentioned, the list is unexhaustive. The sub-categories are not divided neatly and may overlap.³⁸² Any allegation of violation of the right to private life may concern several sub-categories.³⁸³ The subject of the following examination shall be the ‘physical and psychological integrity’ and ‘personal autonomy’.

The ECtHR has established in the jurisprudence the ‘physical and moral integrity’ of a person as a part of ‘private life’.³⁸⁴ The development in the Court’s case-law demonstrates that the Court sometimes refers to the concept in question also as the ‘physical and psychological integrity’.³⁸⁵ The terms ‘psychological’ and ‘moral’ are supposed to have the same substantial meaning and to be interchangeable.³⁸⁶ In the case of ‘Pretty’, the ECtHR has connected this sub-category with the ‘personal autonomy’ in the field of active euthanasia.³⁸⁷ The concept of ‘personal autonomy’ means self-determination in private matters.³⁸⁸ It includes the “right to

22.02.1994, no. 16213/90 (*Burghartz v. Switzerland*), para. 24; ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 61; ECtHR (GC), 11.07.2002, no. 28957/95 (*Goodwin v. the UK*), para. 77; ECtHR (GC), 10.04.2007, no. 6339/05 (*Evans v. the UK*), para. 71; ECtHR, 21.09.2010, no. 34147/06 (*Polanco Torres and Movilla Polanco v. Spain*), para. 40; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 281; *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 462; *Schilling*, Internationaler Menschenrechtsschutz³ (2016), p. 131.

³⁸² *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 461; *Schabas*, European Convention on Human Rights (2015), p. 366.

³⁸³ *Wildhaber/Breitenmoser* in: (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention (2017), Vol. 2, p. 9.

³⁸⁴ ECtHR, 26.03.1985, no. 8978/80 (*X. and Y. v. the Netherlands*), para. 22; *Harris/O’Boyle/Warbrick*, Law of the European Convention on Human Rights³ (2014), p. 526.

³⁸⁵ ECtHR, 26.03.1985, no. 8978/80 (*X. and Y. v. the Netherlands*), para. 22; ECtHR, 09.03.2004, no. 46210/99 (*Wretlund v. Sweden*); ECtHR, 13.05.2008, no. 52515/99 (*Juhnke v. Turkey*), paras. 71-76; ECtHR, 06.02.2001, no. 44599/98 (*Bensaid v. the UK*), para. 46; ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 61; ECtHR, 13.02.2003, no. 42326/98 (*Odièvre v. France*), para. 29; ECtHR (GC), 04.12.2008, nos. 30562/04, 30566/04 (*S. and Marper v. the UK*), para. 66; ECtHR, 12.01.2010, no. 4158/05 (*Gillan and Quinton v. the UK*), paras. 64 ff; EComHR, 10.12.1984, no. 10435/83 (*Acmanne v. Belgium*); *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 875; *Schilling*, Internationaler Menschenrechtsschutz³ (2016), p. 131; *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), pp. 461-462.

³⁸⁶ ECtHR, 28.05.2013, no. 3564/11 (*Eremia v. Moldova*), para. 73; *Jacobs/White/Ovey*, The European Convention on Human Rights⁷ (2017), p. 400.

³⁸⁷ ECtHR, 29.04.2002, No. 2346/02 (*Pretty v. the UK*), para. 61; *Harris/O’Boyle/Warbrick*, Law of the European Convention on Human Rights³ (2014), p. 526; *Gollwitzer*, Menschenrechte im Strafverfahren MRK und IPBPR (2005), p. 461; *Schilling*, Internationaler Menschenrechtsschutz³ (2016), p. 132; *Reid*, A Practitioner’s Guide to the European Convention on Human Rights⁵ (2015), p. 538; *Peters*, Einführung in die Europäische Menschenrechtskonvention (2003), p. 41.

³⁸⁸ ECtHR, 29.04.2002, No. 2346/02 (*Pretty v. the UK*), paras. 61 ff; ECtHR (GC), 11.07.2002, no. 28957/95 (*Goodwin v. the UK*), para. 90; ECtHR, 19.07.2012, no. 497/09 (*Koch v. Germany*), para. 51; ECtHR, 20.05.2014, no. 4241/12 (*McDonald v. the UK*), para. 47; *Meyer-Ladewig/Nettesheim*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), EMRK, Europäische Menschenrechtskonvention⁴ (2017), p. 320.

live one's life in the manner of one's choosing"³⁸⁹. Together these two sub-categories of 'private life' guarantee the right to self-determination regarding the personal physical and psychological integrity.³⁹⁰ It contains the personal autonomy of an intelligent, informed individual to make free decisions in the sense of a power of disposition regarding the own life and health for the sake of personal development and fulfilment.³⁹¹ This applies also in the bioethical context and to questions related to end-of-life issues.³⁹²

After establishing the general meaning of the legal term 'private life' and its sub-categories of 'physical and psychological integrity' in conjunction with 'personal autonomy', the following analysis shall define whether the 'right to self-determination regarding the personal physical and psychological integrity' applies to decisions to end one's life by an act of active euthanasia.

In the case of 'Sanles Sanles' the legal question has been raised whether Art. 8 ECHR guarantees a right to non-interference with the wish to end one's life.³⁹³ However, the ECtHR did not deal with the substantive matter due to the inadmissibility of the complaint.

An answer to the raised question derives from the case 'Pretty'. The ECtHR held that 'private life' in the meaning of Art. 8 (1) ECHR covers the decision to terminate one's life by the time and means according to the choice of an individual. However, this applies only under the condition that the person concerned is capable to make a free decision and comprehend of what is involved, so that the person may act upon it.³⁹⁴ First, the Court's judgement demonstrates a distinction between the scope of Art. 8 and Art. 2 ECHR. Due to the personal

³⁸⁹ *Jacobs/White/Ovey*, *The European Convention on Human Rights*⁷ (2017), p. 400; see also *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 285; *Meyer-Ladewig/Nettesheim*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), pp. 320-321.

³⁹⁰ ECtHR, 29.04.2002, No. 2346/02 (*Pretty v. the UK*), para. 61; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 904.

³⁹¹ EComHR, 11.07.1980, no. 8307/78 (*Deklerck v. Belgium*); *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 896.

³⁹² ECtHR, 29.04.2002, No. 2346/02 (*Pretty v. the UK*), para. 61; *Halstead*, *Unlocking Human Rights* (2009), p. 272; *Schilling*, *Internationaler Menschenrechtsschutz*³ (2016), p. 131.

³⁹³ ECtHR, 26.10.2000, no. 48335/99 (*Sanles Sanles v. Spain*).

³⁹⁴ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 67; *Schabas*, *European Convention on Human Rights* (2015), p. 382; *Meyer-Ladewig/Nettesheim*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 322; *Pätzold* in: Karpenstein/Mayer (Edit.), *EMRK*² (2015), p. 255; *Wildhaber* in: (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 2, p. 102; *Reid*, *A Practitioner's Guide to the European Convention on Human Rights*⁵ (2015), p. 538.

autonomy enshrined in Art. 8 (1) ECHR, the provision includes the choices of a person “what [...] to do with his or her life”³⁹⁵ into its scope. Thus, Art. 8 (1) ECHR is concerned with the ‘quality of living’ as opposed to the scope of Art. 2 ECHR which the Court found not to refer to the ‘quality of living’ of individuals.³⁹⁶ This provides the legal possibility to consider the wishes of the person concerned. The ECtHR pointed out that the concept of personal autonomy in conjunction with the physical and psychological integrity also contains a right to make a choice which can affect the physical and psychological health of a person in a negative way.³⁹⁷ This includes choices entailing danger or harm to health or even a threat to life.³⁹⁸

Second, the ECtHR took into account the argument of human dignity.³⁹⁹ The medical progress in science and technology and the expectation of longer life concern persons as “they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity”⁴⁰⁰.

Combining the first and second thought, the Court acknowledged that the free decision to refuse medical treatment, even if it leads to death, is protected by the personal autonomy in conjunction with the physical and psychological integrity according to Art. 8 (1) ECHR.⁴⁰¹ In this way, the provision shall ensure a dignified end of life.⁴⁰² However, this relates more to the concept of passive euthanasia. In regard to termination of life by active euthanasia, the ECtHR held in a reluctant manner that the Court was “not prepared to exclude”⁴⁰³ it from the scope of protection under Art. 8 (1) ECHR.⁴⁰⁴ In conclusion, the judgment cannot be understood in a

³⁹⁵ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 39.

³⁹⁶ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 39, 61-64; ECtHR (GC), 11.07.2002, no. 28957/95 (*Goodwin v. the UK*), para. 90; *Schabas*, *European Convention on Human Rights* (2015), p. 127; *Peters*, *Einführung in die Europäische Menschenrechtskonvention* (2003), p. 41; *Meyer-Ladewig/Nettesheim*, in: *Meyer-Ladewig/Nettesheim/von Raumer* (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 320; *De Vries* in: *Van Dijk/Van Hoof/Van Rijn/Zwaak* (Edit.), *Theory and Practice of the European Convention on Human Rights*⁴ (2018), pp. 696-697.

³⁹⁷ *De Vries* in: *Van Dijk/Van Hoof/Van Rijn/Zwaak* (Edit.), *Theory and Practice of the European Convention on Human Rights*⁴ (2018), p. 696.

³⁹⁸ ECtHR, 19.02.1997, nos. 21627/93, 21826/93, 21974/93 (*Laskey, Jaggard and Brown v. the UK*); EComHR, 10.12.1984, no. 10435/83 (*Acmanne and Others v. Belgium*).

³⁹⁹ *Reid*, *A Practitioner’s Guide to the European Convention on Human Rights*⁵ (2015), p. 538.

⁴⁰⁰ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 65.

⁴⁰¹ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 63; *De Vries* in: *Van Dijk/Van Hoof/Van Rijn/Zwaak* (Edit.), *Theory and Practice of the European Convention on Human Rights*⁴ (2018), p. 696.

⁴⁰² ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 65-67; *Gerards* in: *Van Dijk/Van Hoof/Van Rijn/Zwaak* (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 357.

⁴⁰³ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 67.

⁴⁰⁴ *Marauhn/Thorn* in: *Dörr/Grote/Marauhn* (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 905; *Hilgendorf* in: *Joerden/Szwarc* (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 179.

different way than including the decision to end one's life by an act of active euthanasia into the scope of Art. 8 (1) ECHR.

The ECtHR has confirmed this decision in the case of 'Haas' by stating that the term 'private life' in the sense of Art. 8 (1) ECHR safeguards the right to decide about time and means by which the own life shall terminate. The Court emphasised the condition of the capability of the person concerned to decide freely under full comprehension of what is involved and the capability to act upon it.⁴⁰⁵ In the 'Haas' case, the ECtHR developed further suggestions to ensure the conditions under which such a decision could arise, e. g. a full psychiatric assessment attesting the capability of a person to take a decision unimpaired.⁴⁰⁶ In this way, the State would not be obliged by Art. 2 ECHR to intervene (see above).

In addition, the Court dealt with the question whether Art. 8 (1) ECHR contains a right to the State's assistance which would entail a positive obligation to facilitate a dignified death.⁴⁰⁷ It concerned the availability of lethal medication without medical prescription for the sake of a painless death without the risk of failure.⁴⁰⁸ However, the case of 'Haas' dealt with this question from the perspective of self-administration and not administered by a third person. Therefore, it concerned the concept of assisted suicide and not active euthanasia. In its judgement, the Court negated the obligation in question to arise under Art. 8 (1) ECHR. The reason found the Court in the circumstance that there was no consensus among the Member States regarding the subject what provided them with a wide margin of appreciation.⁴⁰⁹

In the cases of 'Koch' and 'Gross', the ECtHR confirmed the findings in the cases of 'Pretty' and 'Haas' about Art. 8 (1) ECHR safeguarding the decision to end one's life.⁴¹⁰ Since the ECtHR dealt in the case of 'Koch' primarily with the procedural aspect of Art. 8 ECHR, the Court left

⁴⁰⁵ ECtHR, 20.01.2011, no. 31322/07 (Haas v. Switzerland), para. 51; *Harris/O'Boyle/Warbrick*, Law of the European Convention on Human Rights³ (2014), pp. 547-548; *Reid*, A Practitioner's Guide to the European Convention on Human Rights⁵ (2015), p. 538; *Gerards* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights⁵ (2018), p. 357.

⁴⁰⁶ ECtHR, 20.01.2011, no. 31322/07 (Haas v. Switzerland), para. 58.

⁴⁰⁷ ECtHR, 20.01.2011, no. 31322/07 (Haas v. Switzerland), para. 61.

⁴⁰⁸ ECtHR, 20.01.2011, no. 31322/07 (Haas v. Switzerland), para. 53; *Reid*, A Practitioner's Guide to the European Convention on Human Rights⁵ (2015), p. 538; *Harris/O'Boyle/Warbrick*, Law of the European Convention on Human Rights³ (2014), pp. 547-548.

⁴⁰⁹ ECtHR, 20.01.2011, no. 31322/07 (Haas v. Switzerland), para. 53; *Schübel-Pfister* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 67.

⁴¹⁰ ECtHR, 19.07.2012, no. 497/09 (Koch v. Germany), paras. 51-52; ECtHR, 14.05.2013, no. 67810/10 (Gross v. Switzerland), paras. 58-59.

open the raised question regarding the wish to obtain lethal medication in the context of assisted suicide.⁴¹¹ In the 'Gross' case, though, the ECtHR held that the right to private life includes the matter of availability of lethal medication in the same context.⁴¹² It applies not only to the request of terminally-ill persons for such medication, but also to one of those who are not suffering from terminal illness. In this regard, the Court underlined the necessity of laws providing sufficient clear guidelines regulating prescription for lethal medication.⁴¹³

In conclusion, the decision to end one's life by an act of active euthanasia falls within the meaning of the concepts of 'personal autonomy' in conjunction with 'physical and psychological integrity'. Thus, the wish to terminate life by active euthanasia is included by meaning of the legal term 'private life' and falls within the scope of protection of Art. 8 (1) ECHR.⁴¹⁴

In addition, the development in the ECtHR's case-law demonstrates a change in terms of the availability of lethal medication. Although, the cases dealt with the matter in the context of assisted suicide, it is also of significance to active euthanasia. It is because the distinction between both concepts lies only in the act of administration either by oneself or by a third person. Moreover, the liberal interpretation on this subject indicates a liberal change of interpretation in respect to end-of-life issues.

4.2.4.2 Development in soft-law of the Organs of the Council of Europe

The previous examination indicates that soft-law referring to active euthanasia does not provide any scope of protection beyond the one ensured by the case-law of the ECtHR. Since the Court's case-law declares the decision to end one's life by active euthanasia to fall within the scope of protection of Art. 8 (1) ECHR, no further conclusion may be drawn from soft-law.

⁴¹¹ ECtHR, 19.07.2012, no. 497/09 (Koch v. Germany), para. 53; *Jacobs/White/Ovey*, The European Convention on Human Rights⁷ (2017), p. 447.

⁴¹² ECtHR, 14.05.2013, no. 67810/10 (Gross v. Switzerland), para. 60.

⁴¹³ ECtHR, 14.05.2013, no. 67810/10 (Gross v. Switzerland), para. 65; *Harris/O'Boyle/Warbrick*, Law of the European Convention on Human Rights³ (2014), p. 548; *Jacobs/White/Ovey*, The European Convention on Human Rights⁷ (2017), p. 447.

⁴¹⁴ ECtHR, 29.04.2002, No. 2346/02 (Pretty v. the UK), para. 61; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 905; *Jacobs/White/Ovey*, The European Convention on Human Rights⁷ (2017), p. 447; *Halstead*, Unlocking Human Rights (2009), p. 272.

4.2.4.3 Change of moral values in societies of the Member States

The dynamic and evolutive interpretation by the ECtHR considers the progress in technology and the change in society highlighting the self-determination. Thus, the findings of the Court correspond to the socio-political claim for the legalisation of active euthanasia in regard to Art. 8 (1) ECHR.⁴¹⁵

4.2.5 Interim result

The teleological interpretation including the dynamic and evolutive interpretation lead to the result that the legal term 'private life' safeguards the decision to end one's life by an act of active euthanasia. The condition is that the person concerned is capable to take a free decision and comprehend of what is involved, so that the person may act upon it. Thus, the decision to terminate life by active euthanasia falls within the scope of protection of Art. 8 (1) ECHR.

The answering of the raised legal problem, whether the negative obligation of the States to refrain from unjustified interferences in the right under Art. 8 ECHR requires the Member States to refrain from criminalisation of active euthanasia, requires further examination. It is necessary to determine whether the criminalisation by law constitutes an interference and whether it is justified according to the requirements of Art. 8 (2) ECHR.

4.3 Interference of the State

The right to private life is not guaranteed in absolute terms (see above).⁴¹⁶ It is possible for the Member States to undertake measures which might interfere with the right in question. The interferences must attain a certain severity, which is assessed by quantitative and qualitative criteria, for instance, the duration of the measure and its effects on the private life

⁴¹⁵ *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 881; *Harris/O'Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), p. 523; *Wildhaber* in: (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 2, p. 102.

⁴¹⁶ ECtHR, 23.07.1968, nos. 1474/62 and other (*Belgian Linguistics Case v. Belgium*), para. 5; ECtHR, 21.02.1975, no. 4451/70 (*Golder v. the UK*), para. 38; *Wildhaber/Breitenmoser* in: (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 2, p. 11; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 939.

of the individual.⁴¹⁷ In general terms, prohibitions by criminal laws are capable to constitute an interference.⁴¹⁸ The majority of the Member States criminalises acts of active euthanasia.⁴¹⁹ According an earlier opinion of the EComHR, legislation criminalising assisted suicide was not considered as being an interference in the right to private life, though.⁴²⁰ In the case of 'Pretty', the ECtHR held in a reluctant manner that the Court was "not prepared to exclude"⁴²¹ that law criminalising active euthanasia constitutes an interference with the right enshrined in Art. 8 (1) ECHR.⁴²² This conclusion has been positively confirmed by the Court in further judgements.⁴²³ Thus, criminal laws of the Member States penalising active euthanasia are interferences with the right to private life in Art. 8 ECHR.

The answer of the legal problem concerning the negative obligation of States to refrain from unjustified interferences in the right under Art. 8 ECHR requires the examination whether the criminalisation by law is justified according to the requirements of Art. 8 (2) ECHR.

4.4 Reasonable justification

The interference with the scope of protection does not already constitute a violation of the right guaranteed in Art. 8 (1) ECHR. The interference could be justified. The general limitation clauses of Art. 15 and 17 ECHR and the specific restriction clause of Art. 8 (2) ECHR apply in regard to the right to private life under Art. 8 ECHR.⁴²⁴ The provision of Art. 8 (2) ECHR is relevant in regard to the examined legal question.

⁴¹⁷ ECtHR, 16.12.1997, no. 20972/92 (Raninen v. Finland), para. 64; EComHR, 13.03.1980, no. 8427/78 (X. v. the Netherlands); *Pätzold* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 269; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 933.

⁴¹⁸ ECtHR, 26.10.1988, no. 10581/83 (Norris v. Ireland); ECtHR, 22.09.1993, no. 15473/89 (Klaas v. the UK), paras. 23 ff; *Mowbray*, Cases, Materials, and Commentary on the European Convention on Human Rights³ (2012), p. 589; *Schilling*, Internationaler Menschenrechtsschutz³ (2016), p. 134.

⁴¹⁹ *Feldmann* in: Taupitz/Raspe/Oehlich (Edit.), Medizin – Recht – Wirtschaft (2009), Vol. 7, p. 395; *Schübel-Pfister* in: Karpenstein/Mayer (Edit.), EMRK² (2015), pp. 67-68; *Zwaak/Haack/Burbano Herrera* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights⁵ (2018), p. 100.

⁴²⁰ EComHR, 04.07.1983, no. 10083/82 (Reed v. the UK), para. 13.

⁴²¹ ECtHR, 29.04.2002, no. 2346/02 (Pretty v. the UK), para. 67.

⁴²² ECtHR, 29.04.2002, no. 2346/02 (Pretty v. the UK), para. 67; *Hilgendorf* in: Joerden/Szwarc (Edit.), Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen (2007), pp. 179-180.

⁴²³ ECtHR, 20.01.2011, no. 31322/07 (Haas v. Switzerland), para. 51; ECtHR, 19.07.2012, no. 497/09 (Koch v. Germany), paras. 51-52; ECtHR, 14.05.2013, no. 67810/10 (Gross v. Switzerland), paras. 58-59; see also *Martin/Podriguez-Pinzón/Brown*, Human Rights of Older People (2015), p. 162.

⁴²⁴ *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 939; *Uerpmann-Witzack* in: Ehlers (Edit.), Europäische Grundrechte und Grundfreiheiten⁴, p. 105.

The restriction clause of Art. 8 (2) ECHR defines the following requirements. The measure which constitutes an interference with the scope of protection must be, first, in accordance with the law. Second, it must pursue at least one of the legitimate aims mentioned by Art. 8 (2) ECHR. And, third, the measure in question must be necessary in a democratic society.⁴²⁵

4.4.1 Requirement ‘in accordance with the law’

The measure constituting an interference with the right to private life in Art. 8 (1) ECHR must be, first, in ‘accordance with the law’/‘prévüe par la loi’ due to Art. 8 (2) ECHR.⁴²⁶ This requirement can be found in all the substantive restriction clauses in the second paragraph of Art. 8 – 11 ECHR. While the Art. 9 (2) – 11 (2) ECHR speak of the requirement as to be ‘prescribed by law’, the Art. 8 (2) ECHR uses the phrase ‘accordance with the law’. Thus, the second legal question in the context of Art. 8 ECHR is whether this requirement refers to the necessity of a legal basis for the interference or whether any interference is possible without an explicit legal basis as long as it is in accordance with the existing national legal order.⁴²⁷

The wording of Art. 9 (2) – 11 (2) ECHR ‘prescribed by law’ requires the existence of a legal basis. In the context of Art. 8 (2) ECHR, its phrasing does not seem to include the same requirement.⁴²⁸ However, the French wordings of the Art. 8 (2) – 11 (2) ECHR are all phrased in same terms referring to ‘prévüe/s par la loi’. The meaning is equivalent to the English expression ‘prescribed by law’ and thus explicitly requiring a legal basis. It indicates that the different English versions have the same substantial meaning and are used as synonyms.⁴²⁹ This can be confirmed by Art. 33 (3) VCLT stating that the English and French versions, here of

⁴²⁵ *Jacobs/White/Ovey*, *The European Convention on Human Rights*⁷ (2017), p. 445; *Wildhaber/Breitenmoser* in: (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 2, pp. 11, 14; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), pp. 461, 463; *Uerpmann-Wittzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 74; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 301; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 939; *Pätzold* in: Karpenstein/Mayer (Edit.), *EMRK*² (2015), p. 275; *Uerpmann-Wittzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴, p. 104.

⁴²⁶ *Peters*, *Einführung in die Europäische Menschenrechtskonvention* (2003), p. 42; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 301; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, pp. 939-940; *Pätzold* in: Karpenstein/Mayer (Edit.), *EMRK*² (2015), p. 275; *Uerpmann-Wittzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴, p. 104.

⁴²⁷ *Uerpmann-Wittzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 74; *Schabas*, *European Convention on Human Rights* (2015), p. 402.

⁴²⁸ *Uerpmann-Wittzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 74.

⁴²⁹ *Schabas*, *European Convention on Human Rights* (2015), p. 402; *Uerpmann-Wittzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 74.

Art. 8 (2) ECHR, are presumed to convey the same meaning (see above). The result corresponds also the jurisprudence of the ECtHR.⁴³⁰ In conclusion, any interference requires a legal basis. Its existence may be assumed in regard to the criminal laws of the Member States prohibiting active euthanasia.⁴³¹

The third legal problem in the context of Art. 8 ECHR is whether the legal basis refers to laws within a formal or substantive meaning.⁴³² The wording 'law'/'loi' in Art. 8 (2) ECHR indicates the requirement of a law in the substantive sense, meaning statutory law.⁴³³ This would apply neatly to the law traditions of Continental Europe.⁴³⁴ However, the interpretation must also pay respect to other legal systems of the Member States, e. g. the common law system.⁴³⁵ It requires a larger comprehension of the term 'law'. This leads to the assumption that the term in question include laws in a formal and substantive sense.⁴³⁶ Accordingly, a valid legal basis for an interference may be found in written as well as unwritten laws, enactments "by the Government under their regulatory powers"⁴³⁷ or in the judge-made law.⁴³⁸ These regulations must themselves be enacted on the basis of a parliamentary law. This circumstance pay respect to the rule of law and the principle of democracy, which are both laid down in the Preamble of the ECHR. Moreover, the legal basis for any interference must be accessible,

⁴³⁰ ECtHR, 26.04.1979, no. 6538/74 (*Sunday Times v. the UK*), para. 48; ECtHR, 23.09.1998, no. 27273/95 (*Petra v. Romania*), paras. 36-39.

⁴³¹ *Feldmann* in: Taupitz/Raspe/Oehrich (Edit.), *Medizin – Recht – Wirtschaft* (2009), Vol. 7, p. 395; *Schübel-Pfister* in: Karpenstein/Mayer (Edit.), *EMRK*² (2015), pp. 67-68; *Zwaak/Haack/Burbano Herrera* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 100.

⁴³² *Schilling*, *Internationaler Menschenrechtsschutz*³ (2016), p. 134; *Meyer-Ladewig/Nettesheim* in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 356; *Harris/O'Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), p. 755; *Schabas*, *European Convention on Human Rights* (2015), p. 402; *Pätzold* in: Karpenstein/Mayer (Edit.), *EMRK*² (2015), p. 276.

⁴³³ ECtHR, 16.05.2019, no. 66554/14 (*Halabi v. France*), para. 57.

⁴³⁴ *Uerpmann-Wittzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 74.

⁴³⁵ *Uerpmann-Wittzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴, p. 104; *Uerpmann-Wittzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 74.

⁴³⁶ ECtHR, 25.05.1993, no. 14307/88 (*Kokkinakis v. Greece*), paras. 37 ff; ECtHR, 29.05.2018, no. 64406/09 (*Gülbahar Özer and Yusuf Özer v. Turkey*), para. 28; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 940; *Schabas*, *European Convention on Human Rights* (2015), p. 402.

⁴³⁷ ECtHR, 26.03.1987, no. 9248/81 (*Leander v. Sweden*), paras. 19, 52.

⁴³⁸ ECtHR, 25.03.1983, no. 5947/72 (*Silver v. the UK*), para. 89; ECtHR, 02.08.1984, no. 8691/79 (*Malone v. the UK*), para. 66; ECtHR, 24.04.1990, no. 11801/85 (*Kruslin v. France*), para. 30; ECtHR, 02.05.2019, no. 54558/15 (*Vetsev v. Bulgaria*), para. 23; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 301; *Uerpmann-Wittzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴, p. 104; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 940; *Uerpmann-Wittzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 75; *Meyer-Ladewig/Nettesheim* in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 354.

sufficiently precise and thus foreseeable and may not entail arbitrariness.⁴³⁹ The criminal laws of the Member States prohibiting active euthanasia must conform to these requirements.⁴⁴⁰

4.4.2 Requirement of a 'legitimate aim' according to Art. 8 (2) ECHR

The second requirement of any justification is that the measure constituting an interference must pursue at least one of the legitimate aims mentioned by Art. 8 (2) ECHR.⁴⁴¹ The list is exhaustive.⁴⁴² Art. 8 (2) ECHR constitutes an exception, as such its legal terms has to be interpreted in a restrictive manner.⁴⁴³ The listed legitimate aims contain an autonomous meaning. Thus, their comprehension may not derive from concepts of national laws.⁴⁴⁴

The criminalising legislations of the Member States prohibiting active euthanasia are in pursuit of the preservation of life. This corresponds with the aim to protect the rights and freedoms of others in Art. 8 (2) ECHR.⁴⁴⁵ In the same context, the pursuit of the protection of health

⁴³⁹ ECtHR, 29.06.2006, no. 54934/00 (*Weber and Saravia v. Germany*), para. 90; ECtHR, 02.09.2010, no. 35623/05 (*Uzun v. Germany*), para. 60; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 940; *Uerpmann-Witzack* in: Ehlers (Edit.), Europäische Grundrechte und Grundfreiheiten⁴, p. 104; *Pätzold* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 276; *Schabas*, European Convention on Human Rights (2015), p. 403.

⁴⁴⁰ *Feldmann* in: Taupitz/Raspe/Oehrich (Edit.), Medizin – Recht – Wirtschaft (2009), Vol. 7, p. 395; *Schübel-Pfister* in: Karpenstein/Mayer (Edit.), EMRK² (2015), pp. 67-68; *Zwaak/Haack/Burbano Herrera* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights⁵ (2018), p. 100.

⁴⁴¹ *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 939.

⁴⁴² ECtHR, 21.02.1975, no. 4451/70 (*Golder v. the UK*), para. 44; ECtHR (GC), 27.08.2015, no. 46470/11 (*Parrillo v. Italy*), para. 163; *Wildhaber/Breitenmoser* in: (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention (2017), Vol. 2, p. 13; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 943; *Schilling*, Internationaler Menschenrechtsschutz³ (2016), p. 134; *Pätzold* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 276; *Uerpmann-Witzack* in: Ehlers (Edit.), Europäische Grundrechte und Grundfreiheiten⁴, p. 105; *Uerpmann-Witzack* in: Ehlers (Edit.), European Fundamental Rights and Freedoms (2007), p. 75.

⁴⁴³ ECtHR (GC), 27.08.2015, no. 46470/11 (*Parrillo v. Italy*), para. 163; *Wildhaber/Breitenmoser* in: (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention (2017), Vol. 2, p. 21; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 939; *Schabas*, European Convention on Human Rights (2015), p. 404; *Schilling*, Internationaler Menschenrechtsschutz³ (2016), p. 134.

⁴⁴⁴ *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, pp. 943-944; *Uerpmann-Witzack* in: Ehlers (Edit.), Europäische Grundrechte und Grundfreiheiten⁴, p. 105; *Pätzold* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 276; *Uerpmann-Witzack* in: Ehlers (Edit.), European Fundamental Rights and Freedoms (2007), p. 75.

⁴⁴⁵ ECtHR, 22.10.1981, no. 7525/76 (*Dudgeon v. The UK*), paras. 49, 62; ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 69; ECtHR, 09.01.2003, no. 45330/99 (*S. I. v. Austria*), paras. 39 ff; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 305; *Peters*, Einführung in die Europäische Menschenrechtskonvention (2003), p. 42; *Uerpmann-Witzack* in: Ehlers (Edit.), Europäische Grundrechte und Grundfreiheiten⁴ (2014), p. 119; *Pätzold* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 278.

might be assumed, since every act terminating life also interferes with health. But according to general legal rules, any violation of health can be regarded as being consummated by the violation of life. Thus, this aspect will not be subject to any further examination, especially as the same arguments apply to both legal interests.

Besides, the criminal laws of the Member States prohibiting active euthanasia pursue the maintenance of ethics in the context of biomedicine.⁴⁴⁶ This goal relates to the protection of morals according to Art. 8 (2) ECHR.⁴⁴⁷ In conclusion, the criminal laws in question serve two legitimate aims according to Art. 8 (2) ECHR.

4.4.3 Requirement of the ‘necessity in a democratic society’

According to the third requirement, the measure constituting an interference must be necessary in a democratic society.⁴⁴⁸ The assessment of ‘necessity’ requires the measure to correspond to an existing ‘pressing social need’ and to be “proportionate to the legitimate aim pursued”⁴⁴⁹.

The requirement serves the purpose of assessing whether the Member States have balanced the competing public and individual interests in a fairly manner.⁴⁵⁰ In this regard, the determination of the ‘necessity in a democratic society’ shall consider the doctrine of the ‘margin of appreciation’.⁴⁵¹ The ECtHR acknowledges that the national authorities are in the best position to assess the local situation in the certain State due to their knowledge of and

⁴⁴⁶ *Hilgendorf* in: Joerden/Szwarc (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), pp. 175-176; see also, for instance, the Austrian and German Criminal Laws, https://www.parlament.gv.at/PAKT/PR/JAHR_2016/PK0780/, <https://www.bundestag.de/dokumente/textarchiv/sterbehilfe-529962> (22.05.2019).

⁴⁴⁷ ECtHR, 07.12.1976, no. 5493/72 (*Handyside v. the UK*), paras. 45-47; ECtHR, 24.05.1988, no. 10737/84 (*Müller and Others v. Switzerland*), para. 30.

⁴⁴⁸ ECtHR, 13.08.1981, nos. 7601/76, 7806/77 (*Young, James and Webster v. the UK*), para. 63; ECtHR, 12.11.2002, no. 26761/95 (*Płoski v. Poland*), para. 30; ECtHR, 29.05.2018, no. 64406/09 (*Gülbahar Özer and Yusuf Özer v. Turkey*), para. 29; ECtHR, 11.04.2019, no. 48798/14 (*Guimon v. France*), para.40; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 462; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 939; *Pätzold* in: Karpenstein/Mayer (Edit.), *EMRK*² (2015), p. 277; *Uerpman-Wittzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴, p. 104; *Meyer-Ladewig/Nettesheim* in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 359; *Schabas*, *European Convention on Human Rights* (2015), p. 406.

⁴⁴⁹ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 70; ECtHR, 16.05.2019, no. 66554/14 (*Halabi v. France*), para. 62.

⁴⁵⁰ ECtHR, 26.05.1994, no. 16969/90 (*Keegan v. Ireland*), para. 49.

⁴⁵¹ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 70; ECtHR, 16.05.2019, no. 66554/14 (*Halabi v. France*), para. 62.

acquaintance with the local circumstances. Their decisions can nevertheless be reviewed through the ECtHR regarding their conformity with the ECHR. The extend of the review depends on the individual circumstances of each case (see above).⁴⁵²

The case of criminal legislation prohibiting active euthanasia addresses “complex scientific, legal and ethical issues concerning in particular [...] the end of life”⁴⁵³. In this regard, there is a lack of European consensus among the Contracting Parties, since only 3 of 47 Member States permit legally acts of active euthanasia.⁴⁵⁴ Due to both facts, the Member States enjoy a wide margin of appreciation regulating the field of active euthanasia (see above).⁴⁵⁵ This circumstance must be respected in examining the following requirements.

4.4.3.1 Pressing social need

The measure constituting the interference must correspond to an existing ‘pressing social need’. It requires the certain measure to be sufficient and eligible in pursuing the legitimate

⁴⁵² ECtHR, 25.11.1994, no. 18131/91 (*Stjerna v. Finland*), para. 39; ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 70; ECtHR (GC), 10.04.2007, no. 6339/05 (*Evans v. the UK*), paras. 77-81; ECtHR, 16.05.2013, no. 20390/07 (*Garnaga v. Ukraine*), paras. 39 ff; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 305; *Uerpmann-Witzack* in: Ehlers (Edit.), Europäische Grundrechte und Grundfreiheiten⁴, p. 105; *Meyer-Ladewig/Nettesheim* in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), EMRK, Europäische Menschenrechtskonvention⁴ (2017), p. 359.

⁴⁵³ ECtHR (GC), 05.06.2015, no. 46043/14 (*Lambert and Others v. France*), para. 11; see also ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 71.

⁴⁵⁴ ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 55; Steering Committee on Bioethics, Council of Europe, 20.01.2003, Replies to the questionnaire for member states relating to euthanasia, CDBI/INF (2003) 8, pp. 16 ff; *Hilgendorf* in: Joerden/Szwarc (Edit.), Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen (2007), p. 176.

⁴⁵⁵ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 71; ECtHR (GC), 04.12.2007, no. 44362/04 (*Dickson v. the UK*), paras. 41-44; ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*); *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶ (2016), p. 307; *Marauhn/Thorn* in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar² (2013), Vol. 1, p. 948; *Pätzold* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 277; *Schabas*, European Convention on Human Rights (2015), p. 406; *Schübel-Pfister* in: Karpenstein/Mayer (Edit.), EMRK² (2015), p. 63; *Reid*, A Practitioner’s Guide to the European Convention on Human Rights⁵ (2015), p. 537; *Mowbray*, Cases, Materials, and Commentary on the European Convention on Human Rights³ (2012), p. 588; *Meyer-Ladewig/Nettesheim*, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), EMRK, Europäische Menschenrechtskonvention⁴ (2017), p. 320; *Jacobs/White/Ovey*, The European Convention on Human Rights⁷ (2017), pp. 445-447; *Wildhaber/Breitenmoser* in: (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention (2017), Vol. 2, p. 21;

aims.⁴⁵⁶ The criminal laws create the legal situation that any person who attempts to terminate life by an act of active euthanasia have to face the risk of prosecution and conviction. This circumstance is sufficient and eligible to prevent a person from requesting or performing active euthanasia.⁴⁵⁷ Thus, the criminal legislation is sufficient and eligible to aim for the preservation of life. The same applies to the protection of morals under Art. 8 (2) ECHR. In conclusion, the criminalising legislation corresponds to a pressing social need.

4.4.3.2 Principle of ‘proportionality’

The measure constituting the interference shall not be ‘arbitrary or disproportionate’/‘arbitraire ou disproportionnée’ to the pursued legitimate aim.⁴⁵⁸ The ECtHR applies in this regard a ‘test of proportionality’.⁴⁵⁹

First, the interference must be necessary to pursue the legitimate aim meaning that there is no less restrictive measure which is equally suitable.⁴⁶⁰ In general terms, the enactment of criminal laws is a restrictive measure, especially if these criminal sanctions do not contain any exceptional grounds. It may be assumed that this applies to the criminal laws of the Member States prohibiting active euthanasia.⁴⁶¹ This also applies to criminal laws which allow “lesser penalties to be imposed”⁴⁶² because it leads nevertheless to the same results of prosecution

⁴⁵⁶ *Uerpmann-Wittzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 75; *Pätzold* in: *Karpenstein/Mayer* (Edit.), *EMRK*² (2015), p. 277; *Schabas*, *European Convention on Human Rights* (2015), p. 406; *Meyer-Ladewig/Nettesheim* in: *Meyer-Ladewig/Nettesheim/von Raumer* (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 359; *Uerpmann-Wittzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴, p. 105.

⁴⁵⁷ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 10 ff.

⁴⁵⁸ ECtHR, 22.10.1981, no. 7525/76 (*Dudgeon v. The UK*), para. 61; ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 76-77; ECtHR, 05.01.2010, no. 22933/02 (*Frasik v. Poland*), para. 90; ECtHR, 05.01.2010, no. 24023/03 (*Jaremowicz v. Poland*), paras. 48, 50; ECtHR, 16.05.2019, no. 66554/14 (*Halabi v. France*), para. 64; *Harris/O’Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), p. 523; *Gollwitzer*, *Menschenrechte im Strafverfahren MRK und IPBPR* (2005), p. 462; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 305; *Pätzold* in: *Karpenstein/Mayer* (Edit.), *EMRK*² (2015), p. 277; *Uerpmann-Wittzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴, p. 105.

⁴⁵⁹ ECtHR, 30.11.1999, no. 34374/97 (*Baghli v. France*), para. 45; *Uerpmann-Wittzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 75; *Schabas*, *European Convention on Human Rights* (2015), p. 406.

⁴⁶⁰ *Uerpmann-Wittzack* in: Ehlers (Edit.), *Europäische Grundrechte und Grundfreiheiten*⁴, p. 105; *Pätzold* in: *Karpenstein/Mayer* (Edit.), *EMRK*² (2015), p. 277.

⁴⁶¹ For instance, §§ 77, 78 of the Austrian Criminal Code, § 216 of the German Criminal Code, see also *Feldmann* in: *Taupitz/Raspe/Oehlrich* (Edit.), *Medizin – Recht – Wirtschaft* (2009), Vol. 7, p. 395; *Schübel-Pfister* in: *Karpenstein/Mayer* (Edit.), *EMRK*² (2015), pp. 67-68; *Zwaak/Haack/Burbano Herrera* in: *Van Dijk/Van Hoof/Van Rijn/Zwaak* (Edit.), *Theory and Practice of the European Convention on Human Rights*⁵ (2018), p. 100.

⁴⁶² ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 76.

and conviction. It also applies to criminal laws which request the consent of the prosecutor for criminal proceedings,⁴⁶³ because such a regulation remains unforeseeable for private individuals. Possible milder means are e. g. criminal or administrative regulations allowing clear exceptions from its application or specific laws on the subject which regulate but not penalise acts of active euthanasia. However, these suggestions may not be considered as being equally suitable as criminal sanctions to pursue the legitimate aims of protecting life and morals. This is due to the effect of deterrence of criminal laws. Therefore, they can be regarded as being necessary to serve the pursued aims.

Second, the interference must be adequate meaning to be “proportionate stricto sensu”⁴⁶⁴. Therefore, the ECtHR strikes a balance between the interest of the public and the interest of the individual.⁴⁶⁵ The public interests are in this case the aim to protect the rights and freedoms of others meaning the right to life and the public health according Art. 8 (2) ECHR. The competing interest of the individual is the right to self-determination concerning the physical and psychological integrity according to Art. 8 (1) ECHR, manifesting in the request for or the performance of an act of active euthanasia.

Arguments for the interest to protect public health and preserve life according to Art. 8 (2) ECHR are the following ones. The first argument relates to the difficulties to ensure a free decision-making process of a person and the protection of vulnerable individuals. The national authorities are not obliged under Art. 2 (1) ECHR to prevent individuals from taking their own lives “if the decision has not been taken freely and with full understanding of what is involved”⁴⁶⁶. To ensure a voluntary decision-making process without pressure on the fully informed person concerned, the national authorities shall establish effective procedures (see above).⁴⁶⁷ However, the realisation is no easy task considering the “difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices

⁴⁶³ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 76; *Hilgendorf* in: Joerden/Szwarc (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 180.

⁴⁶⁴ *Uerpmann-Wittzack* in: Ehlers (Edit.), *European Fundamental Rights and Freedoms* (2007), p. 75.

⁴⁶⁵ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 69 ff; ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 56; ECtHR, 19.07.2012, no. 497/09 (*Koch v. Germany*), paras. 47 ff, 54.

⁴⁶⁶ ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 54.

⁴⁶⁷ ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 58.

which must be made in terms of priorities and resources”⁴⁶⁸. Due to these difficulties, the State could not guarantee for issued decisions to correspond to the described requirements in some cases. Thus, decisions to terminate life could be implemented which were issued by persons who are not capable to make such a decision or by other vulnerable individuals.⁴⁶⁹ The regulation of active euthanasia in an absolute manner is suitable to not let arise such situations in the first place.

The second argument refers to the risk of abuse. Notwithstanding the establishment of procedures safeguarding the free decision-making process, there is still a risk of abuse of active euthanasia.⁴⁷⁰ The apprehension is understandable that the relaxation of the prohibition on active euthanasia could give rise to the risk of abuse.⁴⁷¹ It must be admitted that such a risk is higher in regard to the form of active euthanasia than e. g. of assisted suicide. In terms of assisted suicide, the final act of termination of life is committed by the person who take the voluntary decision. In contrast to it, active euthanasia does not only involve a voluntary decision of the terminally-ill person but also the commitment of the final act by a third person without ‘selfish or other reprehensible’ motives.

The third argument pays attention to the risk of increase of active euthanasia after its legalisation and its effects.⁴⁷² The opponents of this form of euthanasia are apprehensive of an increasing number of requests for this form of termination of life. It might create a social pressure on old or ill persons to end their lives. This pressure is connected to various social reasons, e. g. not to be a burden for family and friends due to the dependency on care.

The fourth argument highlights the human dignity. The European debate on active euthanasia refers to concepts of ‘undignified life’ and ‘dignified death’.⁴⁷³ Persons requesting to end life

⁴⁶⁸ ECtHR, 17.12.2009, no. 4762/05 (*Mikayil Mammadov v. Azerbaijan*), para. 99.

⁴⁶⁹ ECtHR, 03.04.2001, no. 27229/95 (*Keenan v. the UK*), para. 91; ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 74; ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 54; *De Vries* in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), *Theory and Practice of the European Convention on Human Rights*⁴ (2018), p. 697.

⁴⁷⁰ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 74; CoE, Parliamentary Assembly of the Council of Europe, Opinion on Euthanasia of the Committee on Legal Affairs and Human Rights, Rapporteur McNamara, Doc. 9923, 23.09.2003, p. 7; *Reid*, *A Practitioner’s Guide to the European Convention on Human Rights*⁵ (2015), p. 538; *Peters*, *Einführung in die Europäische Menschenrechtskonvention* (2003), p. 42.

⁴⁷¹ ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 74; *Reid*, *A Practitioner’s Guide to the European Convention on Human Rights*⁵ (2015), p. 538; *Peters*, *Einführung in die Europäische Menschenrechtskonvention* (2003), p. 42.

⁴⁷² CoE, Parliamentary Assembly of the Council of Europe, Opinion on Euthanasia of the Committee on Legal Affairs and Human Rights, Rapporteur McNamara, Doc. 9923, 23.09.2003, pp. 7 f.

⁴⁷³ CoE, Recommendation 1418 (1999) of the Parliamentary Assembly, Protection of the human rights and dignity of the terminally ill and the dying, paras. 1 ff; *Hilgendorf* in: Joerden/Szwarc (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), pp. 175-176.

motivate their decision on the ground that they consider their lives not to be dignified anymore.⁴⁷⁴ The opponents of active euthanasia argue that legalisation would symbolise an acknowledgment of the existence of ‘undignified life’ referring to illness as the ground for termination of life. This brings about connotations in regard to the atrocities committed in the field of active euthanasia under the Regime of National Socialism. Besides, any acknowledgment of the concept of ‘undignified life’ is incompatible with the principle of human dignity. The human dignity is inherent and unalienable in all human beings regardless of sex, age or status of health or other characteristics.⁴⁷⁵ Accordingly, there exists no ‘undignified life’ and in consequence no ground for termination of life speaking in legal terms.

The following arguments concern the right of an individual to self-determination concerning the physical and psychological integrity under Art. 8 (1) ECHR in the context of active euthanasia. Beforehand, it shall be remarked that interests at stake could not be preferred only for the reason of being shared by the majority. The democratic society considers the interests of the individual as well as public interests of the society.⁴⁷⁶

The first argument takes up the risk of abuse and refers to the dangers of the secret practise of active euthanasia due to its criminalisation by law. The risk of abuse must be taken seriously. However, banning active euthanasia through criminal laws does not prove itself in practice as being a solution to this problem. In despite of the legal prohibition, active euthanasia is practised in secret.⁴⁷⁷ Any preventing measures are even more difficult under such circumstances. Thus, the criminalisation by law aggravates the problem. Instead

⁴⁷⁴ ECtHR, 26.10.2000, no. 48335/99 (*Sanles Sanles v. Spain*); ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 7-8; ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 7; ECtHR, 19.07.2012, no. 497/09 (*Koch v. Germany*), para. 8; ECtHR, 14.05.2013, no. 67810/10 (*Gross v. Switzerland*), para. 10.

⁴⁷⁵ *Brown*, *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (2016), p. 44.

⁴⁷⁶ ECtHR (GC), 29.04.1999, no. 25088/94, 28331/95, 28443/95 (*Chassagnon and Others v. France*), para. 113; ECtHR, 13.08.1981, nos. 7601/76, 7806/77 (*Young, James and Webster v. the UK*), para. 63; *Marauhn/Thorn* in: *Dörr/Grote/Marauhn* (Edit.), *EMRK/GG Konkordanz-Kommentar*² (2013), Vol. 1, p. 947; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), p. 305; *Meyer-Ladewig/Nettesheim* in: *Meyer-Ladewig/Nettesheim/von Raumer* (Edit.), *EMRK, Europäische Menschenrechtskonvention*⁴ (2017), p. 361.

⁴⁷⁷ ECtHR, 26.10.2000, no. 48335/99 (*Sanles Sanles v. Spain*); ECtHR, 20.01.2011, no. 31322/07 (*Haas v. Switzerland*), para. 57; ECtHR, 19.07.2012, no. 497/09 (*Koch v. Germany*), paras. 8 ff; CoE, Parliamentary Assembly of the Council of Europe, Report on Euthanasia of the Social, Health and Family Affairs Committee, Rapporteur Marty, Doc. 9898, 10.09.2003, pp. 4, 13; CoE, Parliamentary Assembly of the Council of Europe, Opinion on Euthanasia of the Committee on Legal Affairs and Human Rights, Rapporteur McNamara, Doc. 9923, 23.09.2003, p. 4; *Hilgendorf* in: *Joerden/Szwarc* (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 176.

adequate regulation and supervision by national authorities could contribute to the reduction of risk of abuse. Misuse affects negatively the free manifestation of self-determination. Therefore, reducing the risk of abuse means the empowerment of self-determination.

The second argument corresponds to the increased demand of active euthanasia. As mentioned above, the opponents of this form of euthanasia are apprehensive of an increasing number of requests for this form of termination of life. However, if active euthanasia is conducted in accordance with the law on the basis of a free decision according to the requirements than an increased demand is not a negative thing in itself. It is the expression of a self-determined will of the person concerned which shall be respected in a 'democratic society' promoting "pluralism, tolerance and broadmindedness"⁴⁷⁸.

The third argument shall consider the progress in biomedical science in conjunction with the demographic ageing in European societies. The achievements of biomedicine and technology provide the possibility of prolonging life of patients. Due to this circumstance and the longer life expectations, persons become "concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity"⁴⁷⁹. The criminal prohibition by the States deny the persons concerned of the possibility to terminate life by the alternative of active euthanasia. Especially, terminally-ill persons who are physically not able to commit suicide are left without any other alternative than to await the termination of the bodily functions.⁴⁸⁰ This creates a situation of powerlessness. Besides, the terminal illness may continue for many years before causing death. The dying process entails in some cases severe pain and suffering and cause anxiety for the ill person facing the end of life under such circumstances.⁴⁸¹ Taking part in the events of life is a part of personal fulfilment under Art. 8 (1) ECHR. It includes also the dying process.⁴⁸² Therefore, the State should facilitate the termination of life based on a full responsible decision allowing individuals to depart life in a legal and safe manner without unnecessary suffering, particularly when attempts "are unsuccessful and [...] have serious

⁴⁷⁸ ECtHR, 27.09.1999, nos. 33985/96, 33986/96 (Smith and Grady v. the UK), para. 87.

⁴⁷⁹ ECtHR, 29.04.2002, no. 2346/02 (Pretty v. the UK), para. 65.

⁴⁸⁰ ECtHR, 29.04.2002, no. 2346/02 (Pretty v. the UK), para. 9.

⁴⁸¹ ECtHR, 26.10.2000, no. 48335/99 (Sanles Sanles v. Spain); ECtHR, 29.04.2002, no. 2346/02 (Pretty v. the UK), paras. 7-8; ECtHR, 20.01.2011, no. 31322/07 (Haas v. Switzerland), para. 7; ECtHR, 14.05.2013, no. 67810/10 (Gross v. Switzerland), para. 10.

⁴⁸² *Hilgendorf* in: Joerden/Szwarc (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 181.

consequences for the individuals concerned and for their families”⁴⁸³. It shall be remarked that the right to life shall not turn into an ‘obligation to live’.

The fourth argument pays respect to the human dignity.⁴⁸⁴ As mentioned above, the concept of ‘undignified life’ is contradictory to the principle of human dignity as it is inherent and unalienable in all human beings regardless any characteristics e. g. age or health status. But opponents of active euthanasia use this argument in a misleading way. They refer to the ‘human dignity’ in a legal sense. However, when a terminally-ill person motivates the wish to end life for this reason, the person refers to a personal consideration based on a subjective non-legal understanding of the term in question. The assessment of the own life as being ‘dignified’, “embrace aspects of an individual's physical and social identity”⁴⁸⁵. As such, it remains a part of self-determination on which ground individuals wish to participate in life or wish to depart life. It shall be underlined that however the personal decision might be, the person concerned always preserve his or her human dignity in the legal sense.

After balancing the interest of the public and of the individual, it shall be concluded that both interests are grounded on equally strong arguments. On the matter of ‘active euthanasia’, the Member States enjoy a wide margin of appreciation. It provides the States with discretionary powers in order to assess any risks and other incidents regarding a highly disputed subject as active euthanasia. It shall be taken into account that the outweighing majority of the Contracting Parties to the Convention prevail more weight to the interest of preservation of life than to the interest of a self-determined decision to terminate life.⁴⁸⁶ As long as this fact remains, the margin of appreciation allows each State to decide whether there shall be a criminal sanction in the field of active euthanasia.

In conclusion, the criminal laws sanctioning active euthanasia are proportionate and correspond to a pressing social need. Thus, the measure in question may be assessed as being necessary in a democratic society.

⁴⁸³ ECtHR, 20.01.2011, no. 31322/07 (Haas v. Switzerland), para. 55.

⁴⁸⁴ Reid, A Practitioner’s Guide to the European Convention on Human Rights⁵ (2015), p. 538.

⁴⁸⁵ ECtHR, 29.04.2002, no. 2346/02 (Pretty v. the UK), para. 61.

⁴⁸⁶ ECtHR, 29.04.2002, no. 2346/02 (Pretty v. the UK), para. 74; ECtHR, 20.01.2011, no. 31322/07 (Haas v. Switzerland), para. 55; Peters, Einführung in die Europäische Menschenrechtskonvention (2003), p. 42.

4.4.4 Very core of the right

The right to private life enshrined in the Convention is not guaranteed in absolute terms, but there is a very core of protection which must not be undermined.⁴⁸⁷ The ECtHR has developed the examination of the very essence of a right to the examination of the proportionality in its jurisprudence.⁴⁸⁸ As such, the analysis of the very core of the right under Art. 8 ECHR may not lead to a different result as the examination of the proportionality. Accordingly, the criminal legislation concerning active euthanasia does not undermine the very core of the right to private life under Art. 8 ECHR.

4.4.5 Interim result

In conclusion, the criminalisation by law concerning active euthanasia fulfils the requirements of Art. 8 (2) ECHR. The criminal laws of the Member States are enacted in accordance with the law and in pursuit of the protect the right to life and public health in the sense of Art. 8 (2) ECHR. Finally, these laws are necessary in a democratic society. Thus, the criminal laws of the Member States constituting the interference with the right to private life are justified.⁴⁸⁹

4.5 Result

The decision to terminate life through an act of active euthanasia falls within the scope of protection of the right to private life under Art. 8 (1) ECHR. The Member States' criminalisation by law concerning active euthanasia constitutes an interference with the scope of protection. However, these laws are justified according to the requirements under Art. 8 (2) ECHR.

⁴⁸⁷ ECtHR, 23.07.1968, nos. 1474/62 and other (Belgian Linguistics Case v. Belgium), para. 5; ECtHR, 21.02.1975, no. 4451/70 (Golder v. the UK), para. 38; *Wildhaber/Breitenmoser* in: (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 2, p. 11.

⁴⁸⁸ *Grabenwarter*, *European Convention on Human Rights – Commentary* (2014), pp. 319 f.

⁴⁸⁹ See also ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), paras. 67, 78; *Pätzold* in: *Karpenstein/Mayer* (Edit.), *EMRK*² (2015), p. 278; *Harris/O'Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), p. 547; *Hilgendorf* in: *Joerden/Szwarc* (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 180; *Wildhaber* in: (Edit.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2017), Vol. 2, p. 104; *Jacobs/White/Ovey*, *The European Convention on Human Rights*⁷ (2017), p. 445.

The legal problem raised first in the context of Art. 8 ECHR concerned the question whether the negative obligation to refrain from unjustified interferences in the right of Art. 8 ECHR requires the Member States not to criminalise the acts of active euthanasia. The previous examination lead to the result that negative obligation do not respond to the criminal legislation in the field of active euthanasia. As a result, this legislation does not constitute any violation of Art. 8 ECHR. Thus, the provision provides no right to active euthanasia.

5 CONCLUSION AND ASSESSMENT

The analysis focused on active euthanasia, as defined in the first chapter. The main legal question was whether a right to active euthanasia emerges under Art. 2, 3 or 8 ECHR. The examination leads to the following conclusions, which shall be recaptured in the form of propositions.

Art. 2 ECHR guarantees no right to active euthanasia. The positive obligation to ‘establish and maintain an adequate legal framework to ensure protection against offences occasioning deprivation of life’ and the positive obligation to ‘prevent risks to which individuals submit themselves voluntarily’ do not oblige the Member States to criminalise acts of active euthanasia. So, these duties do not prevent the emergence of the right in question. Private individuals are not prevented neither to participate in the practise of active euthanasia since there is no obligation under Art. 2 ECHR in the sense of a ‘unmittelbare Drittwirkung’.

However, the scope of protection does not include a negative aspect of the right to life under Art. 2 ECHR. The main arguments refer to the right to life as being unconcerned with the quality of living and safeguarding the sole physical existence of individuals without considering the individual’s choices about life. Therefore, Art. 2 ECHR does not entail any negative obligation for the Member States to cease sanctioning active euthanasia.

The absolute prohibition clause of Art. 3 ECHR provides no right to active euthanasia. Like under Art. 2 ECHR, the positive obligation to ‘establish and maintain an adequate legal framework to ensure protection against offences occasioning bodily or mental harm’ does not oblige the Member States to criminalise acts of active euthanasia. Thus, this duty does not prevent the emergence of the examined right.

The legislation of criminal laws referring to active euthanasia does not constitute a ‘degrading treatment’ in the sense of Art. 3 ECHR, though. The main arguments relate to the necessity of a certain degree of severity of the maltreatment and to the insufficient responsibility of the States in the examined case. Thus, no negative obligation emerges for the Member States to cease criminalisation of active euthanasia.

The right to private life according Art. 8 ECHR safeguards no right to active euthanasia. Contrary to Art. 3 ECHR, the provision applies also to measures which lack a certain severity. In contrast to Art. 2 ECHR, the enshrined right involves the quality of living and the choices about life and death made by individuals as an expression of self-determination. Thus, the scope of protection of Art. 8 (1) ECHR applies in the matter of dispute. The domestic criminal laws regarding active euthanasia interfere with it. However, the interference is justified. The Member States enjoy a wide 'margin of appreciation' regulating issues of termination of life. Besides, there is no European consensus among the Member States regarding the matter in question. Accordingly, the decision as to criminalise or legalise acts of active euthanasia remains with each State. The Convention itself, though, contains no negative obligation for the Member States to refrain from sanctioning such acts.

As a result, the right to active euthanasia does not emerge under none of the analysed rights in the provisions of Art. 2, 3 or 8 ECHR. These conclusions may be assessed as follows, demonstrating the core problem related to the examined right.

The given conclusions are influenced primarily through the jurisprudence of the ECtHR. The dynamic and evolutive interpretation of the Court provides an outstanding possibility to apply the human rights guarantees adopted in 1950 in the context of contemporary challenges of the 21st century. At the same time, the method of interpretation bears some potential to become the trigger for political conflicts.

Judgments issued by the ECtHR may establish precedents and entail more comprehensive obligations on the Contracting Parties.⁴⁹⁰ The Member States do not have any possibility to submit reservations in the sense of Art. 2 (1) lit. d VCLT in regard to the Court's judgments as suggested under Art. 19 ff VCLT. States are obliged to implement the Court's decisions, the execution is supervised by the Committee of Ministers according Art. 46 ECHR. Thus, the application of the dynamic and evolutive interpretation by the ECtHR may amount to judicial law-making what encounters opposition of the Contracting Parties in certain cases. Considering the application of the ECHR being subjected to the principles of Public International Law including the principle of consensus, there exists constant political pressure

⁴⁹⁰ ECtHR, 29.04.2002, no. 2346/02 (Pretty v. the UK), para. 75.

on the ECtHR not to overstrain the States' acceptance as to the extension of obligations under the Convention.⁴⁹¹ It proves especially difficult on matters lacking a European consensus among the Member States due to cultural, economic, religious, moral or social differences as e. g. in the field of active euthanasia. The reason lies in the circumstance that the Court's judgments can be understood as a light form of 'harmonisation' because the general principles deriving from the Court's case-law shall be observed not only by the State party of dispute, but by all Member States as precisating the obligations under the rights concerned. In acknowledgment of these difficulties, the ECtHR grants the States a wide 'margin of appreciation' in matters lacking a consensus.⁴⁹² It provides the opportunity for the States to decide whether and by what means the subject matter shall be regulated. The application of the margin of appreciation is limited by the test of proportionality.⁴⁹³ It appears to constitute the gateway of political influence within judicial assessment as it shows in the field of active euthanasia. For not interfering at a large scale with the States' discretion, the ECtHR sometimes not only tend to avoid dealing with the substantive matter of dispute by focusing on the procedural facts of the cases related to end-of-life issues, but its argumentation also sometimes amounts to a kind of 'creative interpretation'.⁴⁹⁴ It applies, for instance, to the argumentation regarding the scope of protection of the right to life. The Court focused on the arguments negating a negative aspect of Art. 2 ECHR but it did not take into account the arguments advocating it. The reason is that active euthanasia constitutes a taboo within many of the domestic politics of the Member States.⁴⁹⁵ As a consequence, the basic problem on the subject of a possible right to active euthanasia in the light of the ECHR is the mixing of judicial

⁴⁹¹ *Faßbender*, *Lebensschutz am Lebensende und Europäische Menschenrechtskonvention*, JURA 2004, p. 115 (119); *Vijayakumar/Craig Harris* in: *Dudley/Silove/Gale* (Edit.), *Mental Health and Human Rights* (2012), p. 517.

⁴⁹² ECtHR, 25.11.1994, no. 18131/91 (*Stjerna v. Finland*), para. 39; ECtHR, 29.04.2002, no. 2346/02 (*Pretty v. the UK*), para. 70; ECtHR (GC), 10.04.2007, no. 6339/05 (*Evans v. the UK*), paras. 77-81; ECtHR, 16.05.2013, no. 20390/07 (*Garnaga v. Ukraine*), paras. 39 ff; ECtHR, 16.05.2019, no. 66554/14 (*Halabi v. France*), para. 62.

⁴⁹³ ECtHR, 13.05.1980, no. 6694/74 (*Artico v. Italy*), para. 33; ECtHR, 07.07.1989, no. 14038/88 (*Soering v. the UK*), para. 87; ECtHR, 04.05.2001, no. 24746/94 (*Jordan v. the UK*), para. 104; ECtHR (GC), 12.07.2001, no. 44759/98 (*Ferrazzini v. Italy*), para. 26; ECtHR (GC), 16.12.2010, no. 25579/05 (*A., B. and C. v. Ireland*), paras. 244 ff; ECtHR, 24.03.2011, no. 23458/02 (*Giuliani and Gaggio v. Italy*), para. 182; *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*⁶ (2016), pp. 173-181; *Harris/O'Boyle/Warbrick*, *Law of the European Convention on Human Rights*³ (2014), pp. 203, 384. *Jacobs/White/Ovey*, *European Convention on Human Rights* (2017), 7th edition, p. 555.

⁴⁹⁴ *Smet*, *Resolving Conflicts between Human Rights* (2017), p. 104; *Jacobs/White/Ovey*, *The European Convention on Human Rights*⁷ (2017), p. 447; *Milanović*, *A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law* (2010), *Journal of Conflict & Security Law*, pp. 468-469.

⁴⁹⁵ *Hilgendorf* in: *Joerden/Szwarc* (Edit.), *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen* (2007), p. 184-185.

decisions with political concern. Bearing in mind the socio-political claim of the public to a right to active euthanasia, the connection between the Court's judgements and the politics of the Member States entail a discrepancy between them and the European societies.

The solution of this problem is anything but an easy task to deal with. It is primary a domestic affair to smooth over discrepancies between politics and socio-political demands. But the European human rights protection system of the ECtHR is also requested to encourage conciliation. This applies especially in the currently emergence of the ideas of the 'strong souverain national State' and 'policies of closure'. It is the Court's task to ensure a comprehensive standard of human rights protection as it derives from the purpose and objective of the Convention itself.

BIBLIOGRAPHY

Alleweldt, Recht auf Leben, in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar, Vol. 1: Kapitel 1-19, 2nd edition, 2013.

Amos, Human Rights Law, 2nd edition, 2014.

Bank, Das Verbot von Folter, unmenschlicher oder Erniedrigender Behandlung oder Strafe, in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar, Vol. 1: Kapitel 1-19, 2nd edition, 2013.

Bantekas/Oette, International Human Rights Law and Practice, 2013.

Baumgarten, Right to die? Rechtliche Probleme um Sterben und Tod, Suizid – Sterbehilfe – Patientenverfügung – “Health Care Proxy” – Hospiz im internationalen Vergleich, 2nd edition, 2000.

Bergdolt, Das Gewissen der Medizin, Ärztliche Moral von der Antike bis heute, 2004.

Berger, Jurisprudence de la Cour Européenne des Droits de l’Homme, 9th edition, 2004.

Bigler, Art. 2 CEDH, in: Gonin/Bigler (Edit.), Convention européenne des droits de l’homme, Commentaire des articles 1 à 18 CEDH, 2018.

Bigler/Gonin, Art. 3 CEDH, in: Gonin/Bigler (Edit.), Convention européenne des droits de l’homme, Commentaire des articles 1 à 18 CEDH, 2018.

Breuer, Grundrechtecharta und EMRK im Bereich der Fundamentalrechte, in: Grabenwarter (Edit.), Enzyklopädie Europarecht, Vol. 2: Europäischer Grundrechtsschutz, 2014.

Brown, The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World, A report by the Global Citizenship Commission, 2016.

Brown/Stevenson/Trumble, Shorter Oxford English Dictionary on Historical Principles, 6th edition, Vol. 1, 2007.

Cariat, Niveau de protection, in: Picod/Van Drooghenbroeck/Rizcallah (Edit.), Charte des droits fondamentaux de l’Union européenne, 2018.

Cohen-Jonathan, Respect for Private and Family Life, in: Macdonald/Matscher/Petzold (Edit.), The European System for the Protection of Human Rights, 1993.

Cremer, Die Regeln der Konventionsinterpretation, in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar, Vol. 1: Kapitel 1-19, 2nd edition, 2013.

De Schutter, International Human Rights Law, 2010.

De Vries, Right to Respect for Private and Family Life, in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights, 4th edition, 2018.

Dörr, Allgemeine Rechtsgrundsätze, in: Ipsen (Edit.), Völkerrecht, Ein Studienbuch, 7th edition, 2018.

Ehlers, Allgemeine Lehren der EMRK, in: Ehlers (Edit.), Europäische Grundrechte und Grundfreiheiten, 4th edition, 2014.

Epping, Der Staat als die „Normalperson“ des Völkerrechts, in: Ipsen (Edit.), Völkerrecht, Ein Studienbuch, 7th edition, 2018.

Fastenrath, Art. 1 EMRK, in: Pabel/Schmahl (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention, Vol. 1, 2017.

Faßbender, Lebensschutz am Lebensende und Europäische Menschenrechtskonvention, JURA 2004, p. 115.

Feldmann, Die Strafbarkeit der Mitwirkungshandlungen am Suizid, Ein Vergleich der Rechtslage in Deutschland und Spanien unter Berücksichtigung der historischen Entwicklungen in beiden Ländern mit rechtspolitischer Ausrichtung, in: Taupitz/Raspe/Oehrich (Edit.), Medizin – Recht – Wirtschaft, Vol. 7, 2009.

Fitzmaurice, Interpretation of Human Rights Treaties, in: Shelton (Edit.), The Oxford Handbook of International Human Rights Law, 2013.

Fitzmaurice, The practical Working of the Law of Treaties, in: Evans (Edit.), International Law, 4th edition, 2014.

Folz, Artikel 2 GR-Charta, Artikel 3 GR-Charta, in: Vedder/Heintschel von Heinegg (Edit.), Europäischen Unionsrecht, Handkommentar, 2nd edition, 2018.

Frewer, Entwicklungsprozesse auf dem Weg zur Moral des NS-Staates: Diskussionen im Spiegel der Zeitschrift >> Ethik<< 1922-1938, in: Frewer/Neumann (Edit.), Medizingeschichte und Medizinethik, Kontroversen und Begründungsansätze 1900 – 1950, 2001.

Frowein, Einführung, in: Frowein/Peukert (Edit.), Europäische Menschenrechtskonvention, EMRK-Kommentar, 3rd edition, 2009.

Gaede, Die Fragilität des Folterverbots – Präventiv begründete Ausnahmen vom absoluten Folterverbot zur Herstellung absoluter Sicherheit?, in: Camprubi (Edit.), Angst und Streben nach Sicherheit in Gesetzgebung und Praxis, 2004.

Gerards, Right to Life, in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights, 5th edition, 2018.

Goetzeler, Gedanken zum Problem der Euthanasie de lege lata und de lege ferenda, in: Lohmann (Edit.), Euthanasie in der Diskussion, Zu Beiträgen aus Medizin und Theologie seit 1945, 1975.

Gollwitzer, Menschenrechte im Strafverfahren MRK und IPBPR, Kommentar, 2005.

Grabenwarter, European Convention on Human Rights – Commentary, 2014.

Grabenwarter, Funktionalität und Bedeutung der Rechtsvergleichung in der Judikatur des EGMR, in: Gamper/Verschraegen (Edit.), Rechtsvergleichung als juristische Auslegungsmethode, 2013.

Grabenwarter/Pabel, Europäische Menschenrechtskonvention, Ein Studienbuch, 6th edition, 2016.

Grewe, Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des Europäischen Gerichtshofs für Menschenrechte, ZaöRV 2001/61, p. 459.

Halstead, Unlocking Human Rights, 2009.

Haratsch/Koenig/Pechstein, Europarecht, 11th edition, 2018.

Harris/O'Boyle/Warbrick, Law of the European Convention on Human Rights, 3rd edition, 2014.

Heintschel von Heinegg, Auslegung völkerrechtlicher Verträge, in: Ipsen (Edit.), Völkerrecht, Ein Studienbuch, 7th edition, 2018.

Heißl, Einführung – Grundlagen, in: Heißl (Edit.), Handbuch Menschenrechte, 2009.

Hengstschläger/Leeb, Grundrechte, Lehrbuch, 2nd edition, 2013.

Herdegen, Völkerrecht, 17th edition, 2018.

Hilgendorf, Folter im Rechtsstaat?, JZ 2004, 59. Jahrgang, Nr. 7, p. 331.

Hilgendorf, Sterbehilfe in Europa, in: Joerden/Szwarc (Edit.), Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen, Schriften zum Strafrecht, Heft 185, 2007.

Hilpold, Präambel EMRK, in: Pabel/Schmahl (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention, Vol. 1, 2017.

Höfling/Kempny, Art. 2 GRCh, in: Stern/Sachs (Edit.), Europäische Grundrechte-Charta GRCh, Kommentar, 2016.

Hutchinson, The Margin of Appreciation Doctrine in the European Court of Human Rights, International and Comparative Law Quarterly, Vol. 48/3, 1999, p. 638.

Jacobs/White/Ovey, The European Convention on Human Rights, 7th edition, 2017.

Jarass, Charta der Grundrechte der Europäischen Union 3rd edition, 2016.

Jayawickrama, The Judicial Application of Human Rights Law, National, Regional and International Jurisprudence, 2nd edition, 2017.

Joseph/Castan, The International Covenant on Civil and Political Rights, Cases, Materials, and Commentary, 3rd edition, 2013.

Kau, Art. 3 EMRK, in: Pabel/Schmahl (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention, Vol. 2, 2017.

Kerschbaumer, Beschwerde an den Europäischen Gerichtshof für Menschenrechte und an weitere internationale Institutionen, in: Heißl (Edit.), Handbuch Menschenrechte, 2009.

Kneihls, Sterbehilfe durch EMRK nicht geboten / Der Fall Pretty, EuGRZ 2002, p. 242.

Lagodny, Art. 2 EMRK, in: Pabel/Schmahl (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention, Vol. 1, 2017.

Lester/Pannick/Herberg, Human Rights Law and Practice, 3rd edition, 2009.

Maehle, Zwischen medizinischem Paternalismus und Patientenautonomie: Albert Molls >>Ärztliche Ethik<< (1902) im historischen Kontext, in: Frewer/Neumann (Edit.), Medizingeschichte und Medizinethik, Kontroversen und Begründungsansätze 1900 – 1950, 2001.

Maier, Folter und Menschenwürde, JRP 2012, Heft 3, p. 195.

Marauhn/Thorn, Privat- und Familienleben, in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar, Vol. 1: Kapitel 1-19, 2nd edition, 2013.

Martin/Podríguez-Pinzón/Brown, Human Rights of Older People, Universal and Regional Legal Perspectives, 2015.

Mayer, F. C., Einleitung, in: Karpenstein/Mayer, F. C. (Edit.), EMRK, Konvention zum Schutz der Menschenrechte und Grundfreiheiten, Kommentar, 2nd edition, 2015.

Meyer-Ladewig/Huber, Recht auf Leben, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), EMRK, Europäische Menschenrechtskonvention, 4th edition, 2017.

Meyer-Ladewig/Lehnert, Verbot der Folter, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), EMRK, Europäische Menschenrechtskonvention, 4th edition, 2017.

Meyer-Ladewig/Nettesheim, Einleitung, Recht auf Achtung des Privat- und Familienlebens, in: Meyer-Ladewig/Nettesheim/von Raumer (Edit.), EMRK, Europäische Menschenrechtskonvention, 4th edition, 2017.

Milanović, A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law, *Journal of Conflict & Security Law*, 2010.

Mowbray, Cases, Materials, and Commentary on the European Convention on Human Rights, 3rd edition, 2012.

Nettesheim, Die Allgemeine Erklärung der Menschenrechte und ihre Rechtsnatur, in: Merten/Papier (Edit.), *Handbuch der Grundrechte in Deutschland und Europa*, Vol. VI/2 Europäische Grundrechte II – Universelle Menschenrechte, 2009.

Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentry, 2nd edition, 2005.

Opsahl, The Right to Life, in: Macdonald/Matscher/Petzold (Edit.), *The European System for the Protection of Human Rights*, 1993.

Pätzold, Art. 8, in: Karpenstein/Mayer F. C. (Edit.), EMRK, Konvention zum Schutz der Menschenrechte und Grundfreiheiten, Kommentar, 2nd edition, 2015.

Peters, Einführung in die Europäische Menschenrechtskonvention, Mit rechtsvergleichenden Bezügen zum deutschen Grundgesetz, 2003.

Peters, Praxis Internationaler Organisationen – Vertragswandel und völkerrechtlicher Ordnungsrahmen, 2016.

Peters/König, Kapitel 21: Das Diskriminierungsverbot, in: Dörr/Grote/Marauhn (Edit.), EMRK/GG Konkordanz-Kommentar, Vol. 2: Kapitel 20-33, Register, 2nd edition, 2013.

Reid, A Practitioner's Guide to the European Convention on Human Rights, 5th edition, 2015.

Rodley, Integrity of the Person, in: Moeckli/Shah/Sivakumaran (Edit.), *International Human Rights Law*, 3rd edition, 2014.

Schabas, The European Convention on Human Rights, A Commentary, 2015.

Schilling, Internationaler Menschrechtsschutz, Das Recht der EMRK und des IPbPR, 3rd edition, 2016.

Schipperges, Zur psychischen und sozialen Situation des Sterbenden in historischer Sicht, in: Eser (Edit.), Suizid und Euthanasie, 1976.

Schübel-Pfister, Art. 2, in: Karpenstein/Mayer F. C. (Edit.), EMRK, Konvention zum Schutz der Menschenrechte und Grundfreiheiten, Kommentar, 2nd edition, 2015.

Schübel-Pfister/Sinner, Art. 3, in: Karpenstein/Mayer F. C. (Edit.), EMRK, Konvention zum Schutz der Menschenrechte und Grundfreiheiten, Kommentar, 2nd edition, 2015.

Schweizer, Allgemeine Grundsätze, in: Merten/Papier (Edit.), Handbuch der Grundrechte in Deutschland und Europa, Vol. VI/1 Europäische Grundrechte I, 2010.

Smet, Resolving Conflicts between Human Rights, 2017.

Starmer, Blackstone's Human Rights Digest, 2001.

Stein/von Buttlar/Kotzur, Völkerrecht, 14th edition, 2017.

Steiner/Alston/Goodman, International Human Rights in Context Law, Politics, Morals, 3rd edition, 2008.

Stone, Textbook on Civil & Human Rights, 10th edition, 2014.

Tomuschat, The Right to Life – Legal and Political Foundations, in: Tomuschat/Lagrange/Oeter (Edit.), The Right to Life, 2010.

Uerpmann-Wittzack, Höchstpersönliche Rechte und Diskriminierungsverbote, in: Ehlers (Edit.), Europäische Grundrechte und Grundfreiheiten, 4th edition, 2014.

Uerpmann-Wittzack, Personal Rights and the Prohibition of Discrimination, in: Ehlers (Edit.), European Fundamental Rights and Freedoms, 2007.

Vermeulen/Battjes, Prohibition of Torture and other Inhuman or Degrading Treatment or Punishment, in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights, 5th edition, 2018.

Vijayakumar/Craig Harris, The Veil of Silence – Human Rights and Suicide, in: Dudley/Silove/Gale (Edit.), Mental Health and Human Rights, vision, praxis, and courage, 2012.

Vitzthum, Begriff, Geschichte und Rechtsquellen des Völkerrechts, in: Vitzthum/Proelß (Edit.), Völkerrecht, 7th edition, 2016.

Weindling, Gerechtigkeit aus der Perspektive der Medizingeschichte: >>Euthanasie<< im Nürnberger Ärzteprozeß, in: Frewer/Neumann (Edit.), Medizingeschichte und Medizinethik, Kontroversen und Begründungsansätze 1900 – 1950, 2001.

Wildhaber/Breitenmoser, Art. 8 EMRK, in: Pabel/Schmahl (Edit.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention, Vol. 2, 2017.

Wolffgang, Würde des Menschen, in: Lenz/Borchardt (Edit), EU-Verträge Kommentar EUV, AEUV, GRCh, 6th edition, 2012.

Zwaak/Haeck/Burbano Herrera, Procedure Before the Court, in: Van Dijk/Van Hoof/Van Rijn/Zwaak (Edit.), Theory and Practice of the European Convention on Human Rights, 5th edition, 2018.

Zysset, The ECHR and Human Rights Theory: Reconciling the Moral and Political Conceptions, 2016.

INTERNET RESOURCES

Chart of signatures and ratifications of Treaty 114, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty:

https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114/signatures?p_auth=tjXZYeNI (status as of 22.05.2019).

Chart of signatures and ratifications of Treaty 187, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances:

https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=tjXZYeNI (status of 22.05.2019).

Chart of signatures and ratifications of Treaty 213, Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms:

https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=rQsUXNk1 (status as of 22.05.2019).

CoE, Explanatory Report to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment:

<https://rm.coe.int/16806dbaa3>
(status as of 22.05.2019).

Debate of euthanasia and assisted suicide in the Parliament of the Republic of Austria in 2016:

https://www.parlament.gv.at/PAKT/PR/JAHR_2016/PK0780/
(status as of 22.05.2019).

Debate of euthanasia and assisted suicide in the Parliament of the Federal Republic of Germany in 2014/2015:

<https://www.bundestag.de/dokumente/textarchiv/sterbehilfe-529962>
(status as of 22.05.2019).

Debate of euthanasia and assisted suicide in the Parliament of the French Republic in 2017:

<http://www.assemblee-nationale.fr/15/propositions/pion0517.asp>
(status as of 22.05.2019).

Debate of euthanasia and assisted suicide in the Parliament of the Portuguese Republic in 2018:

<https://www.parlamento.pt/Paginas/2018/maio/MorteAssistida.aspx>
(status as of 22.05.2019).

UN, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36:

https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf (status as of 22.05.2019).

Travaux Préparatoires to the Convention:

https://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf
(status as of 22.05.2019).

Travaux Préparatoires to the Convention regarding Art. 3:

[https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH\(56\)5-EN1674940.pdf](https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART3-DH(56)5-EN1674940.pdf)
(status as of 22.05.2019).

Travaux Préparatoires to the Convention regarding Art. 8:

[https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH\(56\)12-EN1674980.pdf](https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH(56)12-EN1674980.pdf) (status as of 22.05.2019).

TABLE OF CASES

Cases of the European Court of Human Rights in chronological order:

ECtHR, 23.07.1968, nos. 1474/62 and other (Belgian Linguistics Case v. Belgium)
ECtHR, 21.02.1975, no. 4451/70 (Golder v. the UK)
ECtHR, 07.12.1976, no. 5493/72 (Handyside v. the UK)
ECtHR, 18.01.1978, no. 5310/71 (Ireland v. the UK)
ECtHR, 25.04.1978, no. 5856/72 (Tyrer v. the UK)
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ECtHR, 26.04.1979, no. 6538/74 (Sunday Times v. the UK)
ECtHR, 13.06.1979, no. 6833/74 (Marckx v. Belgium)
ECtHR, 09.10.1979, no. 6289/73 (Airey v. Ireland)
ECtHR, 13.05.1980, no. 6694/74 (Artico v. Italy)
ECtHR, 13.08.1981, nos. 7601/76, 7806/77 (Young, James and Webster v. the UK)
ECtHR, 22.10.1981, no. 7525/76 (Dudgeon v. The UK)
ECtHR, 15.07.1982, no. 8130/78 (Eckle v. Germany)
ECtHR, 10.02.1983, nos. 7299/75, 7496/76 (Albert and Le Compte v. Belgium)
ECtHR, 25.03.1983, no. 5947/72 (Silver v. the UK)
ECtHR, 02.08.1984, no. 8691/79 (Malone v. the UK)
ECtHR, 25.02.1985, no. 7511/76 (Campbell and Cosans v. the UK)
ECtHR, 26.03.1985, no. 8978/80 (X. and Y. v. the Netherlands)
ECtHR, 17.10.1986, no. 9532/81 (Rees v. the UK)
ECtHR, 26.03.1987, no. 9248/81 (Leander v. Sweden)
ECtHR, 24.05.1988, no. 10737/84 (Müller and Others v. Switzerland)
ECtHR, 26.10.1988, no. 10581/83 (Norris v. Ireland)
ECtHR, 07.07.1989, no. 14038/88 (Soering v. the UK)
ECtHR, 24.04.1990, no. 11801/85 (Kruslin v. France)
ECtHR, 27.10.1990, no. 10843/84 (Cossey v. the UK)
ECtHR, 25.03.1992, no. 13343/87 (B. v. France)
ECtHR, 27.08.1992, no. 12850/87 (Tomasini v. France)
ECtHR, 16.12.1992, no. 13710/88 (Niemi v. Germany)

ECtHR, 25.03.1993, no. 13134/87 (Costello-Roberts v. the UK)

ECtHR, 25.05.1993, no. 14307/88 (Kokkinakis v. Greece)

ECtHR, 30.06.1993, no. 16130/90 (Sigurður A. Sigurjónsson v. Iceland)

ECtHR, 22.09.1993, no. 15473/89 (Klaas v. the UK)

ECtHR, 22.02.1994, no. 16213/90 (Burghartz v. Switzerland)

ECtHR, 26.05.1994, no. 16969/90 (Keegan v. Ireland)

ECtHR, 23.09.1994, no. 15890/89 (Jersild v. Denmark)

ECtHR, 25.11.1994, no. 18131/91 (Stjerna v. Finland)

ECtHR (GC), 23.03.1995, no. 15318/89 (Loizidou v. Turkey)

ECtHR (GC), 27.09.1995, no. 18984/91 and other (McCann and Others v. the UK)

ECtHR (GC), 16.09.1996, no. 21893/93 (Akdivar and Others v. Turkey)

ECtHR, 15.11.1996, no. 22414/93 (Chahal v. the UK)

ECtHR, 18.12.1996, no. 21987/93 (Aksoy v. Turkey)

ECtHR, 19.02.1997, nos. 21627/93, 21826/93, 21974/93 (Laskey, Jaggard and Brown v. the UK)

ECtHR, 02.05.1997, no. 30240/96 (D. v. the UK)

ECtHR, 16.12.1997, no. 20972/92 (Raninen v. Finland)

ECtHR, 09.06.1998, no. 23413/94 (L. C. B. v. the UK)

ECtHR, 23.09.1998, no. 25599/94 (A. v. the UK)

ECtHR, 23.09.1998, no. 27273/95 (Petra v. Romania)

ECtHR (GC), 29.04.1999, no. 25088/94 and other (Chassagnon and Others v. France)

ECtHR, 28.07.1999, no. 25803/94 (Selmouni v. France)

ECtHR, 27.09.1999, nos. 33985/96, 33986/96 (Smith and Grady v. the UK)

ECtHR, 30.11.1999, no. 34374/97 (Baghli v. France)

ECtHR (GC), 06.04.2000, no. 26772/95 (Labita v. Italy)

ECtHR (GC), 26.10.2000, no. 30210/96 (Kudła v. Poland)

ECtHR, 26.10.2000, no. 48335/99 (Sanles Sanles v. Spain)

ECtHR, 16.11.2000, no. 21422/93 (Tanribilir v. Turkey)

ECtHR, 06.02.2001, no. 44599/98 (Bensaid v. the UK)

ECtHR (GC), 22.03.2001, nos. 34044/96 and other (Streletz, Kessler and Krenz v. Germany)

ECtHR, 03.04.2001, no. 27229/95 (Keenan v. the UK)

ECtHR, 04.05.2001, no. 24746/94 (Jordan v. the UK)

ECtHR, 10.05.2001, no. 29392/95 (Z. and Others v. the UK)

ECtHR, 10.07.2001, no. 33394/96 (Price v. the UK)
ECtHR (GC), 12.07.2001, no. 44759/98 (Ferrazzini v. Italy)
ECtHR, 24.07.2001, no. 44558/98 (Valašinas v. Lithuania)
ECtHR (GC), 12.12.2001, no. 52207/99 (Banković and Others v. Belgium and Others)
ECtHR, 17.01.2002, no. 32967/96 (Calvelli and Ciglio v. Italy)
ECtHR, 29.04.2002, no. 2346/02 (Pretty v. the UK)
ECtHR (GC), 28.05.2002, no. 46295/99 (Stafford v. the UK)
ECtHR (GC), 11.07.2002, no. 28957/95 (Goodwin v. the UK)
ECtHR, 15.07.2002, no. 47095/99 (Kalashnikov v. Russia)
ECtHR, 10.10.2002, no. 38719/97 (D. P. and J. C. v. the UK)
ECtHR, 12.11.2002, no. 26761/95 (Płoski v. Poland)
ECtHR, 09.01.2003, no. 45330/99 (S. I. v. Austria)
ECtHR, 28.01.2003, no. 44647/98 (Peck v. the UK)
ECtHR, 13.02.2003, no. 42326/98 (Odièvre v. France)
ECtHR, 24.07.2003, no. 40016/98 (Karner v. Austria)
ECtHR, 04.12.2003, no. 39272/98 (M.C. v. Bulgaria)
ECtHR, 11.12.2003, no. 39084/97 (Yankov v. Bulgaria)
ECtHR, 09.03.2004, no. 46210/99 (Wretlund v. Sweden)
ECtHR (GC), 30.11.2004, no. 14967/89 (Öneryildiz v. Turkey)
ECtHR, 01.03.2005, no. 69869/01 (Bone v. France)
ECtHR, 29.06.2006, no. 54934/00 (Weber and Saravia v. Germany)
ECtHR, 20.03.2007, no. 5410/03 (Tysiāc v. Poland)
ECtHR (GC), 10.04.2007, no. 6339/05 (Evans v. the UK)
ECtHR (GC), 04.12.2007, no. 44362/04 (Dickson v. the UK)
ECtHR (GC), 29.01.2008, no. 13229/03 (Saadi v. the UK)
ECtHR (GC), 28.02.2008, no. 37201/06 (Saadi v. Italy)
ECtHR, 13.05.2008, no. 52515/99 (Juhnke v. Turkey)
ECtHR (GC), 27.05.2008, no. 26565/05 (N. v. the UK)
ECtHR, 16.10.2008, no. 5608/05 (Renolde v. France)
ECtHR (GC), 12.11.2008, no. 34503/97 (Demir and Baykara v. Turkey)
ECtHR (GC), 04.12.2008, nos. 30562/04, 30566/04 (S. and Marper v. the UK)
ECtHR, 22.12.2008, nos. 55185/08 and other (Ada Rossi and Others v. Italy)

ECtHR, 15.01.2009, no. 46598/06 (Tomašić and Others v. Croatia)
ECtHR (GC), 10.02.2009, no. 14939/03 (Zolotukhin v. Russia)
ECtHR, 09.06.2009, no. 33401/02 (Opuz v. Turkey)
ECtHR, 28.07.2009, no. 47709/99 (Rachwalski and Ferenc v. Poland)
ECtHR, 17.12.2009, no. 4762/05 (Mikayil Mammadov v. Azerbaijan)
ECtHR, 05.01.2010, no. 22933/02 (Frasik v. Poland)
ECtHR, 05.01.2010, no. 24023/03 (Jaremowicz v. Poland)
ECtHR, 12.01.2010, no. 4158/05 (Gillan and Quinton v. the UK)
ECtHR (GC), 01.06.2010, no. 22978/05 (Gäfgen v. Germany)
ECtHR, 02.09.2010, no. 35623/05 (Uzun v. Germany)
ECtHR, 21.09.2010, no. 34147/06 (Polanco Torres and Movilla Polanco v. Spain)
ECtHR (GC), 16.12.2010, no. 25579/05 (A., B. and C. v. Ireland)
ECtHR, 20.01.2011, no. 31322/07 (Haas v. Switzerland)
ECtHR (GC), 21.01.2011, no. 30696/09 (M. S. S. v. Belgium and Greece)
ECtHR, 24.03.2011, no. 23458/02 (Giuliani and Gaggio v. Italy)
ECtHR (GC), 07.07.2011, no. 23459/03 (Bayatyan v. Armenia)
ECtHR, 11.10.2011, no. 38455/06 (Portmann v. Switzerland)
ECtHR (GC), 15.03.2012, no. 39692/09, 40713/09, 41008/09 (Austin and Others v. the UK)
ECtHR, 07.04.2012, no. 6884/11 (Cestaro v. Italy)
ECtHR, 12.06.2012, no. 54131/10 (Bajsultanov v. Austria)
ECtHR, 19.07.2012, no. 497/09 (Koch v. Germany)
ECtHR, 13.11.2012, nos. 47039/11, 358/12 (Hristozov and Others v. Bulgaria)
ECtHR, 17.01.2013, no. 52013/08 (Mosendz v. Ukraine)
ECtHR, 14.05.2013, no. 67810/10 (Gross v. Switzerland)
ECtHR, 16.05.2013, no. 20390/07 (Garnaga v. Ukraine)
ECtHR, 28.05.2013, no. 3564/11 (Eremia v. Moldova)
ECtHR (GC), 12.11.2013, no. 5786/08 (Söderman v. Sweden)
ECtHR, 20.05.2014, no. 4241/12 (McDonald v. the UK)
ECtHR, 17.07.2014, nos. 32541/08, 43441/08 (Svinarenko and Slyadnev v. Russia)
ECtHR, 24.07.2014, no. 28761/11 (Al Nashiri v. Poland)
ECtHR (GC), 05.06.2015, no. 46043/14 (Lambert and Others v. France)
ECtHR, 23.06.2015, nos. 2478/15, 1787/15 (Nicklinson and Lamb v. the UK)

ECtHR (GC), 27.08.2015, no. 46470/11 (Parrillo v. Italy)
ECtHR (GC), 28.09.2015, no. 23380/09 (Bouyid v. Belgium)
ECtHR, 27.06.2017, no. 39793/17 (Gard and Others v. the UK)
ECtHR, 21.09.2017, no. 53661/15 (Severe v. Austria)
ECtHR, 26.10.2017, no. 28475/12 (Ratzenböck and Seydl v. Austria)
ECtHR, 23.01.2018, no. 1828/18 (Afiri and Biddarri v. France)
ECtHR, 29.05.2018, no. 64406/09 (Gülbahar Özer and Yusuf Özer v. Turkey)
ECtHR, 11.04.2019, no. 48798/14 (Guimon v. France)
ECtHR, 02.05.2019, no. 54558/15 (Vetsev v. Bulgaria)
ECtHR, 16.05.2019, no. 66554/14 (Halabi v. France)
ECtHR, no. 78017/17 (Mortier v. Belgium), case pending before the European Court of Human Rights

Cases of the European Commission of Human Rights in chronological order:

EComHR, 05.11.1969, nos. 3321/67, 3322/67, 3323/67, 3344/67 (Denmark, Norway, Sweden and the Netherlands v. Greece)
EComHR, 18.05.1976, no. 6825/74 (X. v. Iceland)
EComHR, 13.03.1980, no. 8427/78 (X. v. the Netherlands)
EComHR, 11.07.1980, no. 8307/78 (Deklerck v. Belgium)
EComHR, 04.07.1983, no. 10083/82 (Reed v. the UK)
EComHR, 10.12.1984, no. 10435/83 (Acmanne v. Belgium)
EComHR, 04.10.1989, no. 13371/87 (Adler v. Germany)
EComHR, 10.02.1993, no. 20527/92 (Widmer v. Switzerland)
EComHR, 08.07.1993, no. 17549/90 (Hurtado v. Switzerland)