The right to life in Europe -Its beginning and end

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Abstract

The European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) was adopted in 1950. One of the most important rights established therein is the right to life, which can be found in article 2.

The purpose of this thesis is to examine how far the scope of this right reaches concerning the beginning and the end of life. This is mainly done by examining the case-law of the European Court of Human Rights (“the Court”) which is set to monitor the observance of the rights. To make this thesis manageable, the three areas of abortion, euthanasia and the death penalty have been chosen as the starting-point of the examination.

The position of the three areas among the member states varies. Abortion and euthanasia have been regarded by the Court as sensitive areas in which the states have a wide margin of appreciation to decide on their own. This is much due to the lack of consensus within the states as to how they should be regulated.

Whether the unborn foetus is protected by the Convention and in such case to what extent is still in dispute. This is also the case concerning when life begins. The Court has stated that any right the foetus may possess is limited by the rights of the mother. They have also said that they do not want to impose a certain view on the member states.

The Commission has stated that if the foetus would have an absolute right to life under the Convention, then it would lead to serious implications for the mother, as she would not be able to have an abortion in any circumstance. Also, in Vo v. France one of the dissenting judges stated that the foetus’ right to life have to be narrower in scope than the right of the born.

In the case Pretty v. the United Kingdom the Court unanimously ruled that article 2 does not include a right to die. However some member states, like the Netherlands, have made euthanasia legal without being found to violate its obligations under the Convention. Consequently, it does not seem to be against the Convention for states to make their own legislation allowing for euthanasia to be practiced.

One important aspect to this debate is whether one considers life to be inalienable or not. The Parliamentary Assembly of the Council of Europe has said that even though the rights of the terminally ill should be respected, it does not mean that one has the right to die at the hands of someone else. The Court has also said that in this area, it is important to protect those vulnerable from being used, and therefore states have the right to legislate against euthanasia.

The situation is different when it comes to the death penalty. Two additional protocols have been adopted restricting or completely abolishing the penalty since the adoption of the Convention. In 1950 there was no possibility to exclude the right to use the death penalty from the Convention since many European states still retained it in their domestic laws. However, the development since has moved towards a complete abolition. This is for instance evident since aspiring members of the Council of Europe have to be willing to abolish the penalty to be accepted.

The Court has dealt with the death penalty in several cases. In Soering v. the United Kingdom they said that extraditing someone to a state where he or she risks being executed not automatically means a violation of the right to life or the prohibition of torture. In Öcalan v. Turkey they established that the imposition of the death penalty after an unfair trial was a violation of article 3. Also, they considered the death penalty to now be regarded as an unacceptable punishment in peace time. Abolition of the death penalty is something the Council of Europe has worked for in decades to realise.
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Chapter 1

Introduction

1.1 The European Convention on Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “the Convention”) was adopted in Rome in 1950 by the members of the Council of Europe and consists of 59 articles.\(^1\) The Convention came into force in 1953 after it had been ratified by the necessary number of states required for it to do so.\(^2\) Since its entry into force 14 additional protocols have been adopted.\(^3\) The Convention is based on the Universal Declaration of Human Rights which was adopted by the United Nations in 1948. Since that document was a declaration and therefore not legally binding, the Council of Europe decided to create an instrument which would make the provisions of the Declaration binding on the member states.\(^4\)

Worth noting also is the fact that the rights set out in the Convention and the additional protocols are only minimum standards, the states are free to set higher standards in their domestic law.\(^5\)

This thesis will examine article 2 of the Convention which regulates the right to life. The article will be dealt with in chapter 2 and it reads as follows:

\begin{itemize}
  \item[1] Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
  \item[2] Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
    \begin{itemize}
      \item[a] in defence of any person from unlawful violence;
      \item[b] in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
      \item[c] in action lawfully taken for the purpose of quelling a riot or insurrection.\(^6\)
    \end{itemize}
\end{itemize}

1.2 Purpose

The purpose of this thesis is to examine article 2 of the Convention and see if it has been established any clear guidelines as to when life begins and ends according to the law of the Convention and the case-law of the European Court of Human Rights (hereinafter “the Court”). The three situations chosen are abortion, euthanasia and the death penalty, which all are controversial subjects with people arguing for both sides. The only one of these mentioned in the article itself is the death penalty. It is also the only one that up until this point has got its own protocol. It is precisely for these reasons it is interesting to see how the Court has expressed itself and what conclusions can be drawn from that.

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\(^3\) Ibid. p. 18.
\(^4\) Ibid. p. 17.
\(^6\) Ibid. art. 2.
1.3 Problem formulation
What this thesis wishes to answer is when life, according to article 2 of the Convention, begins and ends. In doing this, article 2 of the Convention will be the starting-point of the examination and the following analysis. The question will also be tried to be answered by looking at how the Court has expressed itself regarding the three areas chosen in connection to the main question of the beginning and the end of life.

To sum up what has been said in the previous paragraph, the problem for this thesis reads as follows: How far does the scope of “the right to life” set out in the Convention reach concerning the beginning and the end of life?

1.4 Delimitation
This thesis will focus on the law in Europe, more precisely on the law concerning the European countries that are members of the Council of Europe and part of the Convention. This author is aware of the fact that there are human rights instruments in other parts of the world, most notably through the United Nations but also regional charters such as the American Convention on Human Rights and the African Charter on Human and People’s Rights. However, for this thesis there is not time nor scope to examine all of them, although relevant influences from regional charters will be touched upon when necessary but only in short. This is to see if there are possible solutions in other parts of the world that can be applied in Europe also.

This thesis will focus on the work of the Council of Europe and the Court, and it will therefore not be a comparative study of its member states domestic law. Furthermore, examining article 2 has many possible angles. Although this author finds many of them interesting, as with the choice to focus on Europe, the time and scope does not allow for the examination of them all. Because of this, aspects concerning state’s obligation to protect life in general, their duty to investigate and prosecute those guilty of homicide, what constitutes as necessary regarding killing someone in self-defence and so on will not be dealt with in this thesis. As mentioned in the section “purpose” above, the focus will set on the beginning and the end of life in the circumstances concerning abortion, euthanasia and the death penalty.

One decisive reason for choosing the European human rights system is because of the fact that it has been around for a long time and therefore had time to establish itself. Its system is effective and has influenced other systems. Another important but not crucial reason for choosing this system as the main focus as opposed to any other regional system or an international one or to make a comparative study is that the author finds it interesting to see what protection to their life the citizens in the European states have on the regional level.

1.5 Material
The material that will be used is first and foremost article 2 of the Convention, additional Protocols no. 6 and no. 13 to the Convention regarding the abolition of the death penalty and relevant case-law from the Court, as they make up the primary sources. The database of the Court’s case-law, HUDOC, has been used to search for relevant cases which could clear the situation as to the scope of the right in article 2.

Relevant material from the Council of Europe such as recommendations, opinions and resolutions will be examined, as well as books and articles written in conjunction to article 2 and the three subjects chosen. Statements from the Council of Europe can also be important guides as to see in what direction the situation may develop or should develop. Also, the Convention stems from the will of the member states making up the Council, which means that the Council and the Convention are connected. This in turn means that the opinions expressed by the Council in these materials should not be forgotten. The official websites of the Council and the Court have both been important sources of information.
In addition to this, articles and books written on the subject have been read and used. To find articles the databases of ELIN, Hein-on-line and Westlaw has been used. Also important to note is that views from sources such as third parties in the case-law or internet forums such as Newsmill has to be examined critically.

1.6 Disposition and method
This introductory chapter will be followed by a chapter that describes the content of article 2, the two additional protocols regarding the death penalty and the principle of margin of appreciation. The following three chapters will deal with the three areas abortion, euthanasia and the death penalty respectively. Each of those three chapters will contain relevant case-law concerning each area which later will be discussed in the chapters “analysis” and “conclusion”. Various statements made by the Council of Europe and other material will also be accounted for in each relevant chapter.

Since this thesis concerns the beginning and the end of life, the author finds it most appropriate to depict them in that same order. Consequently, that is why the chapters will come in the order of abortion, euthanasia and lastly the death penalty. After that follows an analysis and the conclusion, each in a separate chapter, ending with a list of references.

This thesis will use the legal dogmatic method, which means that one examines the law of a certain area to determine the legal position in that area.\(^7\)

Chapter 2

Legislation and principles

2.1 Article 2- right to life

1 Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a in defence of any person from unlawful violence;

b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c in action lawfully taken for the purpose of quelling a riot or insurrection.8

One of the most important provisions of the Convention is the right to life. The importance of this right was established by the Court in for example the case Pretty v. the United Kingdom.9 In this case, the Court says that without life, one cannot enjoy any of the other rights set out in the Convention.10 This argument can also be seen in the case Kasa v. Turkey.11 Furthermore, the Court notes that together with article 3 which prohibits torture, article 2 “enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which depravation of life may be justified must therefore be strictly construed”.12 The Court also emphasizes the article’s importance by saying that when confronted with a case where an applicant alleges a breach of the right to life, the Court must “subject allegations of breach of this provision to the most careful scrutiny”.13

Something that is important about article 2 (1) is that the Court which sentences a person to death shall be independent and impartial.14 Besides the fact that the death sentence must be prescribed in the domestic law of the state in question, the character of the Court which convicts the person must be in line with article 6 (1) of the Convention, which states the right to a fair trial.15 It is also stated by the Court that “the most rigorous standards of fairness be

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9 The European Court of Human Rights, case of Pretty v. the United Kingdom (application no. 2346/02) 29 April 2002. For more on the case see chapter 4.
10 Ibid. p. 26 para. 37.
12 Ibid. p. 12 para. 72. The case concerned the applicant’s son who was killed during an attempted arrest by the Turkish police. The applicant alleged that the killing was in violation of article 2 of the Convention. He also meant that the investigation that followed had not been effective. The Court found that the use of force by the police did not exceed what was necessary and cleared Turkey on those charges. However, the Court found that they had failed in conduction an effective investigation and that they therefore had violated article 2.
13 Ibid. p. 13 para. 76.
14 The European Court of Human Rights, case of Öcalan v. Turkey (application no. 46221/99) 12 May 2005, p. 32 para. 166. For more on the case see chapter 5.
15 The European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950 art. 2. See also art. 6 (1) of the Convention. The relevant part of the article reads as follows: “In the determination of
observed in the criminal proceedings”. The demand for the death penalty to be stated in the domestic law of the state in question also means that the law has to be accessible and foreseeable to the public.\textsuperscript{16}

Apart from the fact that the right to life is protected by the Convention as mentioned above, it is also established from article 15 (2) that states are not allowed to derogate from that right:

\begin{quote}
2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.\textsuperscript{17}
\end{quote}

\section*{2.2 The additional protocols concerning the abolition of the death penalty}

The two relevant additional protocols for this thesis are Protocol no. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty and Protocol no. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances.\textsuperscript{18}

In 1980, the Parliamentary Assembly of the Council of Europe (hereinafter “the Parliamentary Assembly”) adopted a resolution where they urged its member states to abolish the death penalty in their domestic law, calling the death penalty “inhuman”.\textsuperscript{19} The Parliamentary Assembly referred to their resolution in a recommendation adopted the same year, in which it noted that a person lawfully could be deprived of his or her life according to article 2 of the Convention, and that the article should be amended as to be in conformity with the statement they had made in the resolution referred to.\textsuperscript{20}

The first of the additional protocols was adopted in Strasbourg in 1983 and abolishes the death penalty in peace time. Its short preamble states that the tendency in many European states shows a move towards the abolition of the death penalty.\textsuperscript{21}

The death penalty did not become completely abolished with Protocol no. 6 since it still allowed for it to be used during a time of war or at the threat of war.\textsuperscript{22} This is why Protocol no. 13 was adopted in Vilnius in 2002, which abolishes the death penalty in all circumstances. The preamble of this protocol acknowledges the fact that Protocol no. 6 did not abolish the death penalty completely. It also states that one of the reasons for adopting a new protocol

\begin{quote}
his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”.
\end{quote}

\textsuperscript{16} The European Court of Human Rights, case of Öcalan v. Turkey (application no. 46221/99) 12 May 2005, p. 32 para. 166. For more on the case see chapter 5.

\textsuperscript{17} The European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950, art. 15 (2). Article 3 reads as follows: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Article 4 (1) states: “No one shall be held in slavery or servitude”. Lastly, article 7 says: “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations.”.


\textsuperscript{19} Parliamentary Assembly of the Council of Europe resolution 727 (1980).

\textsuperscript{20} Parliamentary Assembly of the Council of Europe recommendation 891 (1980).

\textsuperscript{21} Protocol no. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, Strasbourg 1983.

\textsuperscript{22} Ibid. art. 2.
concerning the death penalty is to strengthen the right to life established in article 2 of the Convention. Further, to abolish the death penalty completely is an important step on the way to protect the right to life and to recognize “the inherent dignity of all human beings”.23

As of this day, all member states of the Council of Europe are parties to the 6th protocol except for Russia who has signed it but not ratified it. There are five states that have not ratified the 13th protocol, namely Armenia, Azerbaijan, Latvia, Poland and Russia. Out of those 5, Azerbaijan and Russia have not signed it either.24

The Court has not dealt with any case concerning Protocol no. 6 yet. Consequently, it has not been clarified what is meant by “in time of war or of imminent threat of war”. Although, if one considers international humanitarian law, it suggests that the protocol only allows for the death penalty to be used during international armed conflict. This means that states who are parties to the protocol cannot use the death penalty in internal conflicts or against terrorists. As Protocol no. 13 abolishes the death penalty in peace time as well as in time of war the penalty cannot be used, unless the state denounces itself from the protocol.25

2.3 The principle of margin of appreciation

When the Court makes a judgement in a case before it, it has to consider each state’s margin of appreciation. It is considered that the national courts are better equipped to make judgments concerning their national legislation. Also, it is regarded that the domestic courts are more familiar with the local way of thinking and local habits which can affect the outcome of the judgement, as well as possible national interests that has to be considered. Because of these aspects, the Court is reluctant in changing a judgement made by a domestic court of a state party. Thus the state parties own a certain margin of appreciation when interpreting their conventional duties because of the aspects considered above. For the Court to bypass the domestic courts decisions there have to be extraordinary reasons.26

Also, the margin of appreciation is considered when states interfere with rights of the Convention and when it is examined whether that interference was necessary or not. Apart from the necessity criterion, there also has to be good reasons for making such interference.27

An example regarding this is the case Sunday Times v. the United Kingdom.28 Here the Court found that the measures taken by the United Kingdom to limit article 10, which protects freedom of expression, went further than was necessary to reach the aim.29

The necessity criterion and the notion of margin of appreciation were also mentioned by the Court in Pretty v. the United Kingdom.30 They stated that for something to be necessary, it

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27 Ibid. p. 49.
28 The European Court of Human rights, case of Sunday Times v. the United Kingdom (application no. 6538/74) 26 April 1979.
29 Ibid. para. 58. The relevant part of art. 10 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads as follows:” Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...".
requires the interference to be linked to a “pressing social need”. The interference also has to be proportionate in relation to the aim pursued by the state when considering if it is “necessary in a democratic society”. In these circumstances the state parties enjoy a certain margin of appreciation, which will vary depending on the issue and what interests has to be considered.31

As mentioned in the previous paragraph, the margin of appreciation might differ depending on what right is in question. When that reason concerns for example national security or morals, the Court is reluctant to interfere. The grounds for not dealing with the moral reasons of a state’s actions is that the moral view differs in the state parties and therefore it is considered that the state in question is best suited to make the call as to what should and should not be accepted in that particular state.32

Wada wrote that “the margin of appreciation is a core principle”. Further, the principle is often used when there is a lack of consensus regarding an issue. Factors such as different domestic laws and culture are things that are considered. This is especially the case when there are sensitive issues to regard, such as euthanasia.33

The scope of this principle may vary. This depends on all the circumstances in the case. Also, the width of the principle may have a part in what protection is required by the states. One the one hand one has to measure to what extent the right is a fundamental one. On the other hand stands the importance of the measure by the state and to what degree it is objective. Wade also noted that it is difficult to determine the applicability of the principle, and that it has been developed over time.34

The Court has developed the principle of margin of appreciation in various cases over the years. One of those is Ireland v. the United Kingdom.35 Here the Court stated that “By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.” They continued by saying that the authorities have a wide margin of appreciation. However, they pointed out that the states power is limited and it is the responsibility of the Court to monitor actions taken by them.36 A similar statement was made in Sunday Times v. the United Kingdom. The Court noted that it had “the final ruling” on whether or not an action taken by a state was reasonable. It concluded that “The domestic margin of appreciation thus goes hand in hand with a European supervision”.37

30 The European Court of Human Rights, case of Pretty v. the United Kingdom (application no. 2346/ 02) 29 April 2002.
31 Ibid. p. 35 para. 70.
34 Ibid. p. 279-280.
35 The European Court of Human Rights, case of Ireland v. the United Kingdom (application no. 5310/ 71) 18 January 1978.
36 Ibid. para. 207.
37 The European Court of Human Rights, case of Sunday Times v. the United Kingdom (application no. 6538/ 74) 26 April 1979, para. 59.
Chapter 3

Abortion

3.1 Introduction
The European Commission, whilst in existence, never resolved whether or not the foetus is covered by article 2 of the Convention.38 They have said that it is not excluded that foetuses may have some protection under article 2 in certain circumstances. If that view was taken as absolute, then abortions would have to be prohibited by the national authorities and punished if performed.39

The issue has consequently been left open by the Commission although it has noted that many states have attached certain rights to the unborn. The Commission has further said that the term “life” may be interpreted differently depending on the circumstances.40

Author Hogan noted that the Commission did not seem to be willing to act on states that have liberal abortion legislation but not on states that have very restricted legislation either.41 Author Jayawickrama believes that the reason for the Commission not giving a definite answer as to whether or not foetuses are included in article 2 is because the opinions of the member states vary on the subject.42 Also, the abortion laws in the member states domestic legislation varies considerably, and therefore the Commission did not find it necessary to decide on the matter. They further said that on such a delicate matter, the member states “must have a certain discretion”.43

Further, in a recommendation from the Parliamentary Assembly regarding among other things human embryos in research, it is stated that the legal status of the foetus is not defined by law.44 The Commission has also given the opinion that if article 2 is assumed to protect the unborn, then the rights and interests of the people concerned will have to be “weighed against each other in a reasonable way”. Since the question of the applicability of article 2 regarding the unborn at least has not been said to be no yet, each case has to be considered individually with the reasonableness argument in mind.45

40 Jayawickrama, Nihal, The judicial application of human rights law: National, regional and international jurisprudence, Cambridge University press, first edition 2002, p. 246. Regarding rights of the unborn, see the European Court of Human Rights, case of Brüggemann and Scheuten v. Germany (application no. 6959/ 75) 12 July 1977. Regarding the different interpretations of “life”, see the European Court of Human Rights, case of Paton v. the United Kingdom (application no. 8416/ 78) 13 May 1980. These two cases have only been read about in the literature since the author could not find the original documents of the cases. This also applies to the European Court of Human Rights, case of Boso v. Italy (application no. 50490/ 99) 2002 and the European Court of Human Rights, case of H v. Norway (application no. 17004/ 90) 1992 cited in 3.2 below.
Castberg writes that article 2 cannot mean that there is a complete prohibition of abortions. Although at the same time, to have no restrictions at all on abortions would probably not be in line with the article either.\textsuperscript{46} The right to life of the foetus has for example not been seen to be violated due to abortions for medical or social reasons. This would mean that any right to life the foetus may possess is limited.\textsuperscript{47}

To conclude, the author Hogan has compiled a short list of principles which he considers can be derived from the case-law of the Court and the Commission. It states that the foetus probably is not covered by article 2, and in the case it might, its right is limited by the mother’s right to life. Also, the Convention does not prevent any state party from making legislation forbidding abortions, since it falls within the scope of each state’s margin of appreciation regarding morals.\textsuperscript{48}

### 3.2 Various cases on abortion from Europe

A couple of cases regarding abortion have been under the consideration of the Court or the Commission throughout the years, for example: \textit{Brüggemann and Scheuten v. Germany},\textsuperscript{49} \textit{Paton v. the United Kingdom},\textsuperscript{50} \textit{H v. Norway},\textsuperscript{51} \textit{Open door and Dublin well woman v. Ireland}\textsuperscript{52} and \textit{Boso v. Italy}.\textsuperscript{53} All of these were declared inadmissible except for \textit{Open door and Dublin well woman v. Ireland}. In the cases from the United Kingdom, Norway and Italy the applicants were men who alleged a breach of the Convention because the domestic law in those states did not give them any say in their partner’s choice to have abortions.\textsuperscript{54}

In \textit{Paton v. the United Kingdom} the Commission examined the terms “everyone” and “life” in relation to the unborn. By looking at the formulation of article 2 and its limitations, they came to the conclusion that “everyone” was to be read as those who had been born. However, they did not exclude the possibility that in certain circumstances the foetus may be covered. The argument that the foetus had an absolute right to life under the Convention was nothing that the Commission could agree with, saying that the foetus was connected with the mother and could not be viewed in isolation from her.\textsuperscript{55}

In the case the Commission further discussed the implications that may arise if the foetus were to have an absolute right to life. That would mean that the life of the foetus was higher regarded than the life of the mother since it would be forbidden to perform an abortion, even at the risk of the mother’s life. According to the Commission, such an interpretation would be contrary to the purpose of the Convention. At the time of the examination of this case, almost

\textsuperscript{49} The European Court of Human Rights, case of Brüggemann and Scheuten v. Germany (application no. 6959/ 75) 12 July 1977.
\textsuperscript{50} The European Court of Human Rights, case of Paton v. the United Kingdom (application no. 8416/ 78) 13 May 1980.
\textsuperscript{51} The European Court of Human Rights, case of H v. Norway (application no. 17004/ 90) 1992.
\textsuperscript{52} The European Court of Human Rights, case of Open door and Dublin well woman v. Ireland (application no. 14234/ 88; 14235/ 88) 29 October 1992.
\textsuperscript{53} The European Court of Human Rights, case of Boso v. Italy (application no. 50490/ 99) 2002.
all of the state parties allowed abortions in cases where the mother’s life was at risk. In the instant case, the Commission did not find the father’s rights to have been violated.  

The case of H v. Norway concerned an abortion that was legal in the Norwegian domestic law. The ground for the abortion was not the woman’s health but her social life. In the case the Commission said that states have certain discretion when it comes to this, and they found that Norway had not exceeded their right to discretion.

Another case brought before the Commission was Boso v. Italy. In the case it was found that the abortion performed because of the risk of the physical or mental health of the woman did not violate article 2. The Commission thought that the Italian domestic law contained the necessary balance to be considered concerning the interest of the foetus’ life and the health of the mother.

In the case Brüggemann and Scheuten v. Germany the applicants argued that they had the right to an abortion under article 8 of the Convention, which protects private life. The applicants were two women complaining about the formation of the German domestic law which according to them did not provide enough possibility to have an abortion. Neither woman was pregnant at the time of the complaint. This was the first case before the Commission raising questions regarding abortion. The German law provided for abortions in cases where the mother’s life or health was at risk. The commission concluded that there was no violation of article 8 as alleged by the applicants.

The authors Harris, O’ Boyle, Bates and Buckley argued that if one is successful in a claim like the one in Brüggemann and Scheuten v. Germany, it is evident that if the right to abortion is protected by article 8, then the same right cannot be a breach of another article in the Convention, in this case article 2. They also noted that if a right to abortion is not seen as being protected by article 8 that does not mean it is not protected by article 2.

The only case that reached the Court is Open door and Dublin well woman v. Ireland, in which the two non-profit organisations “Open door” and “Dublin well woman” complained about a restriction posed by the Irish courts. The restriction forbids them to provide pregnant women with information regarding abortion facilities outside Ireland. The applicants argued that this restriction violated the right to impart and receive information under article 10.

The Court noted that the state’s right to determination regarding morals is possible for the Court to review. The Court further noted that states have a wide margin of appreciation concerning morals, and especially regarding something as important as life. Since there is no consensus on morals in the state parties, they have been regarded as being better equipped to determine when it is necessary to make restrictions to uphold morals. Even so, the Court is

58 Ibid. p. 54. See also the European Court of Human Rights, case of Boso v. Italy (application no. 50490/99) 2002.
59 Ibid. p. 54-55.
63 The European Court of Human Rights, case of Open door and Dublin well woman v. Ireland (application no. 14234/88; 14235/88) 29 October 1992 para. 9.
64 Ibid. para. 36.
The Court reacted at the restriction due to its absolute character and found it disproportionate. What the organisations do is to inform women of the possibilities of abortion; they do not persuade them in one direction or another. The decision whether to act or not is up to the woman. Therefore the Court did not find the link between the organisations and the possible abortions to be that definite. One further argument by the Court was that the information may be obtained in other ways also.

To conclude, the Court did not find the imposed restriction to be proportional to the aim pursued, and therefore found that Ireland had violated article 10.

One last remark regarding Ireland and its abortion laws will be made here. Ireland together with Andorra, Lichtenstein, San Marino, Malta and Monaco are the only countries in Europe not allowing abortions except for strictly reasons of health of the mother.

**3.3 Case of Vo v. France**

In the case of *Vo v. France* from 2004, the applicant alleged a breach of article 2. The reason was that the conduct of a doctor who caused the death of her unborn child did not constitute unintentional homicide according to French law.

The applicant had visited Lyon’s General Hospital for a scheduled check-up regarding her pregnancy. There she was mixed up with another woman who had the same last name as her. Due to this and the fact that neither woman spoke French that well, the doctor attending Mrs. Vo mistook her for being the other Mrs. Vo. He started the procedure the other Mrs. Vo had been scheduled to have without examining her properly first, causing her to lose a lot of amniotic fluid. As a result her pregnancy later had to be terminated on health grounds.

In her application to the domestic court, Mrs. Vo alleged unintentional injury to herself and unintentional homicide of her unborn child. Regarding the unintentional injury, the doctor was acquitted due to an amnesty act. The court further said that since there lacked a legal definition that could determine the foetus’ position in French law, they turned to science. Science says that a foetus is viable at 6 months and not at 20-21 weeks which was the age of Mrs. Vo’s unborn child. Therefore the court did not find the foetus to be a human person and the criminal code could not apply.

Mrs. Vo appealed and sought monetary compensation for the doctor’s personal neglect. The Lyon’s Court of Appeal upheld the judgement regarding the unintentional injury because they found it to be time-barred. However, they did find that the doctor had been neglectful, thus finding him guilty of unintentional homicide. Mrs. Vo was therefore granted compensation.

Later, the Court of Cassation reversed the judgement of the Lyon’s Court of Appeal.

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65 The European Court of Human Rights, case of Open door and Dublin well woman v. Ireland (application no. 14234/88; 14235/88) 29 October 1992 para. 68.
66 Ibid. para. 73-74.
67 Ibid. para. 75-76.
68 Ibid. para. 80.
70 The European Court of Human Rights, case of Vo v. France (application no. 53924/00) 8 July 2004.
71 Ibid. p. 1 para. 3.
72 Ibid. p. 3 para. 10-12.
73 Ibid. p. 3 para. 13.
74 Ibid. p. 5-6 para. 19.
75 Ibid. p. 6 para. 20.
76 Ibid. p. 8 para. 22.
The applicant’s claims
The applicant claimed lack of protection for the unborn due to the domestic court’s assessment that they are not included in the French criminal law. By excluding unborn from the legislation of unintentional homicide, France breached its commitment to the Convention, she claimed. Also, the remedy available through the administrative courts was not effective since the French law did not acknowledge the homicide of her unborn child. Also, she pointed out that she had the possibility to choose between criminal and administrative proceedings, and she had chosen criminal proceedings.77

Before the Court, the applicant claimed that it was proven through science that life began at conception and that the foetus therefore was a person. She also claimed that the term “everyone” in article 2 meant “human beings rather than individuals with legal personality.”78

Further, she claimed that all forms of abortions but therapeutic ones violated the Convention because it “interfered with the right to life of the conceived child.” The applicant then continued her reasoning by saying that even if there were exceptions to the right to life, it should still be possible to punish someone who through negligence caused the death of an unborn child. This should be done by including the unborn in the criminal offence of unintentional homicide. The applicant pointed at states obligation to protect the right to life through effective criminal law and through law-enforcement to back it up.79

The government’s claims
When the case came before the Court, the government of France claimed that article 2 was not applicable to the unborn. They also stated that Mrs. Vo had not exhausted all domestic remedies.80

The government’s arguments before the Court were firstly that there has not been given any definite answer as to when a foetus becomes a human being. Secondly, article 2 does not protect the foetus since the term “everyone” only applies after birth. The restrictions set out in the article are only applicable to those who have been born. The government argued that “it would be neither consistent nor justified to detach that right from the entity in which it was invested, namely the person.”81 Thirdly, the parties to the Convention would not have predicted that development since almost all of them had legalised abortion in some sort at the time of the adoption of the Convention. The government meant that to include the unborn in article 2 would place the foetus and the life of the mother at the same level.82 States that have legalised abortion in certain circumstances would be guilty of violating their responsibilities.83

The government argued that if the member states wanted the article to cover the foetus as well, a separate protocol or suchlike had to be drawn up.84 They also meant that the foetus was protected indirectly through the mother.85

Lastly, the government argued that the remedies available where effective enough and that the foetus therefore did not need protection through criminal law as well.86

77 The European Court of Human Rights, case of Vo v. France (application no. 53924/00) 8 July 2004, p. 21-22 para. 43.
78 Ibid. p. 23 para. 47.
80 Ibid. p. 21 para. 42.
81 Ibid. p. 25 para. 51.
82 Ibid. p. 25 para. 51.
83 Ibid. p. 26 para. 53.
84 Ibid. p. 26 para. 54.
85 Ibid. p. 26 para. 56.
Third parties
Arguments against the applicant’s claim that foetuses should be included in article 2 came from several third parties. The Centre for Reproductive Rights argued that there was no legal basis for it. By referring to the case Brüggemann and Scheuten v. Germany (cited in 3.2 above) they further argued that the Court had stated that an absolute prohibition of abortions would be a breach of article 8 which regulates the right to private life. Also, the life and health of the pregnant woman was the priority. By referring to another case, Open door and Dublin Well Woman v. Ireland (cited in 3.2 above) they further stated that “a woman’s health interest prevailed over a state’s declared moral interest in protecting the rights of the foetus”.

Another third party, Family Planning Association, argued that if article 2 would be interpreted as to cover the foetus, the laws of many state parties would come into question. They further stated that such a decision would have substantial consequences for individuals.

General opinions and assessment of the Court
The Court noted that it had to examine whether article 2 was applicable to involuntary abortions. Also, it had to consider whether a criminal remedy was necessary or if the administrative courts were enough.

The Court also noted that article 2 does not state the limits as to the beginning of life, and that it also does not say whose life is to be protected. Abortion is not mentioned in article 2 (2) which list the lawful exceptions for taking lives. It further concludes that the Court still has to determine when everyone’s right to life begins and if that includes the foetus.

The Court, like the Centre for Reproductive Rights, referred to the case Brüggemann and Scheuten v. Germany saying that the parties to the Convention did not wish to “bind themselves in favour of any particular solution” regarding abortion.

It further referred to a statement made by the Commission in a previous case, where it said that the term “everyone” in article 2 could not be read as to include the unborn. Also, regarding the beginning of life the Commission noted: “While some believe that it starts already with conception, others tend to focus upon the moment of nidation, upon the point that the foetus becomes ‘viable’, or upon live birth.” The Commission further made this statement: “The ‘life’ of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman.” From this the Commission draw the conclusion that if a foetus’ right to life was unlimited, it would mean that an abortion was prohibited, even in a case where the continuation of a pregnancy would risk the life of the mother. Concerning the two other options where the foetus had no right at all or the option where it had limited rights, the Commission gave no opinions. The Commission has also noted that almost all of the state parties to the Convention allow abortions in certain circumstances and that the tendency shows a development for further liberalisation.

The Court made a referral to the case H v. Norway (cited in 3.2 above) in which the Commission stated the following regarding abortion: “in such a delicate area the Contracting
States had to have a certain discretion. The Court came to the conclusion that if a foetus has any rights in the Convention, they are limited by the rights of the mother. Though, the Court pointed out that sometimes it is possible for certain rights to be extended to the foetus. The Court has to weigh different rights and interests against each other, and sometimes the conflict may regard the interest of a mother and a foetus respectively.

In examining the case, the Court started by finding that they had to assess whether it is a criminal offence under article 2 to harm a foetus. They went on by saying that this means that they had to examine whether they should “intervene in the debate as to who is a person and when life begins.”

From their own case-law they found that when it comes to abortion and article 2, it is desired to try to strike a balance, but also to bare in mind the different opinions of the member states, and, like mentioned above, the discretion given to the member states on the issue. The Court thought that since there is no consensus on the matter yet, it would be inappropriate for them to impose one view on all the member states. When life begins falls within the margin of appreciation of each state.

Here they also noted that the Convention is a living instrument, which means that it has to be able to chance as the time is changing. To conclude, the Court found that there is no consensus on the European level as to when life begins, but there is also no consensus in the member states.

The Court found that in French law, the status of the foetus is yet to be determined. Under the criminal code, someone responsible of accidentally killing a foetus cannot be charged for unintentional homicide. This might come in question though if the child dies after birth.

The only thing the Court found there to be a consensus about regarding the status of the foetus is that it belongs to the human race and that it has the capacity of becoming a person. However, it is not seen as a person yet, and therefore not being entitled to protection under article 2. The Court made this statement: “it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention.”

The Court went on by saying that it would examine, as mentioned under the section “General opinions and assessment of the Court” above, whether the remedies available under French law was enough to fulfil the requirements of article 2. The Court further noted that the unborn child did have some protection under French law, through the mother. Also, they found that the interests of the mother and the unborn child in this case coincided.

From here they went on by examining the effectiveness of the remedies available for Mrs. Vo regarding compensation for her and responsibility for the doctor. Mrs. Vo had argued that for the obligation of an effective remedy to be fulfilled, there had to be criminal remedies available. This, the Court disagreed about. The principle that the states have an obligation to safeguard the people within their jurisdiction and to have an effective judicial system

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95 The European Court of Human Rights, case of Vo v. France (application no. 53924/00) 8 July 2004, p. 35 para. 78.
96 Ibid. p. 36 para. 80.
97 Ibid. p. 36 para. 81.
98 Ibid. p. 36-37 para. 82.
99 Ibid. p. 36-37 para. 82.
100 Ibid. p. 37 para. 83.
101 Ibid. p. 38 para. 84.
102 Ibid. p. 38 para. 85.
103 Ibid. p. 38 para. 85.
104 Ibid. p. 38 para. 86.
105 Ibid. p. 39 para. 87.
106 Ibid. p. 39 para. 87.
applies to the health-system too. However, it is not always necessary to have criminal remedies available. Other steps such as disciplinary measures may sometimes be sufficient according to the Court.\textsuperscript{107}

To conclude, the Court found that the remedy available for Mrs. Vo in the administrative court were effective enough, and therefore found no violation of article 2. This even considered that article 2 applied to the foetus.\textsuperscript{108}

Separate and dissenting opinions
There were both separate and dissenting opinions to this decision.\textsuperscript{109} One judge, who was joined by four other judges, found that article 2 was not applicable on this case. First, it is referred to the facts presented in the case, that the legal status of the foetus is yet to be determined both in the domestic law of France but also in Europe as a whole. Further, the judges found that the right to life of the foetus is not secured yet. Even if you think life begins before birth, it does not mean that the foetus has the same right as a child after birth. The right to life of the foetus is narrower in scope, according to the judges. Therefore, the foetus is not protected by article 2.\textsuperscript{110}

Also, the judges found the reasoning of the majority to be “problematic”. They had been reluctant in applying article 2 on this case, and yet they continued by arguing with article 2 as a starting-point, albeit finding no violation of it. They linked the foetus’ life with the life of the mother and where thus able to use article 2 anyway. The judges who where of separate opinions here stated that article 2 were not applicable since the mother’s life never was at risk.\textsuperscript{111}

The other separate opinion came from one judge who was joined by another one. This judge found article 2 to be applicable and not violated. The judge thought the Court’s reasoning was “cautious” since they said that they did not have to decide whether article 2 was applicable or not, because even if it would be, there was no violation.\textsuperscript{112} What should have been done according to this judge was to actually deal with the terms “everyone" and “the right to life” and establish what they mean.\textsuperscript{113} The judge stated: “I do not believe that it is possible to take the convenient way out by saying that Mrs. Vo, a “person”, had a right to life (of her unborn child).”. In the case with Mrs. Vo the question concerned the argument that the foetus had a right to life, and that question could only apply if the Court accepts that the foetus has a right to life.\textsuperscript{114} The conclusion made by the judge was therefore that the Court already considered article 2 to apply to the foetus. If not, there had been no point in examining the case at all.\textsuperscript{115}

Also argued by the judge was the fact that many state parties have legislation permitting abortion in certain circumstances without having problems with the Court about it. Lastly, different state parties have themselves found article 2 to be applicable to the foetus in limited ways, and therefore the judge saw no point in the Court being “less bold” about it.\textsuperscript{116}

Next follows a dissenting opinion from a judge who did not think it was enough with the remedies available in the administrative courts to protect the unborn from negligence. The judge thought that remedies through criminal law are better due to their deterrent effect. It is

\textsuperscript{107} The European Court of Human Rights, case of Vo v. France (application no. 53924/ 00) 8 July 2004, p. 39-40 para. 88-90.
\textsuperscript{108} Ibid. p. 41 para. 94-95.
\textsuperscript{109} Ibid. p. 42.
\textsuperscript{110} Ibid. p. 43.
\textsuperscript{111} Ibid. p. 44.
\textsuperscript{112} Ibid. p. 45 para. 2-3.
\textsuperscript{113} Ibid. p. 46 para. 7.
\textsuperscript{114} Ibid. p. 46 para. 9.
\textsuperscript{115} Ibid. p. 47 para. 10.
\textsuperscript{116} Ibid. p. 47-48 para. 12.
through them the message that an important value such as life has to be protected is most clearly stated. The judge thought that the financial penalty will not state as good as an example since doctors usually are protected against them.\textsuperscript{117} Although, the dissenting judge did not say that France has to change their legislation, but rather that the disciplinary actions they take will have to be strict for them to meet the obligations they have regarding effective remedies under article 2.\textsuperscript{118}

The judge agreed that there is a different scope as to the protection of a foetus compared to a child after birth. However, he did not think the foetus can be protected only through the mother. They are “separate ‘human beings’”, and therefore “need separate protection.”.\textsuperscript{119}

Also, the judge noted that the term “everyone” has included children before birth and that birth in itself is only a stage. The judge further noted that both the Commission and the Court have indicated that the unborn is included in the protection of article 2. The judge also refers to the concept of balance between the individual’s interest and the society’s interest in the matter. Here the judge also referred to the state parties who have laws concerning abortion. The argument of the judge here was that those types of laws would not be necessary if states did not consider the foetus’ life worth protecting.\textsuperscript{120} Lastly, the judge thought that there should be no margin of appreciation when it comes to article 2.\textsuperscript{121}

To conclude, since the judge found article 2 to be applicable to foetuses, and that the remedies available in France were not efficient, there had been a violation of article 2 in this case. The suggestion from the judge was to either take more strict disciplinary actions or to change the criminal law as to include the foetus.\textsuperscript{122}

The last dissenting opinion came from two judges who came to the conclusion, like the above mentioned judge, that there has been a violation of article 2 due to the fact that there were, in their opinion, no effective remedies available for the applicant.\textsuperscript{123}

They did not find the remedies available enough to meet the requirements of article 2. They further noted that the possibility of the unborn to be covered by article 2 has not been excluded and the travaux préparatoires to the Convention do not mention how far the right to life reaches or if it includes the unborn.\textsuperscript{124} The foetus in Vo v. France was very close to the age of which children have survived outside the womb, and the judges believed that the foetus were to be seen separately from the mother. Even if the foetus does not have legal personality until it is born, that does not mean that the foetus is not entitled to any right to life. The abortion is the exception to the rule that life is to be protected. The judges thought that life had not been protected in this case and thus France had violated its duty under article 2.\textsuperscript{125}

3.4 External opinions on the decision in Vo v. France

Author Goldman criticised the Court for not making a clear statement as to the position of the foetus under article 2. She considered that it is the responsibility of the Court to interpret the Convention, no matter how hard the subject may be. Goldman suggested that if the Court had

\textsuperscript{117} The European Court of Human Rights, case of Vo v. France (application no. 53924/ 00) 8 July 2004, p. 50 para. 1.
\textsuperscript{118} Ibid. p. 51 para. 2.
\textsuperscript{119} Ibid. p. 51 para. 3.
\textsuperscript{120} Ibid. p. 51-52 para. 4.
\textsuperscript{121} Ibid. p. 53 para. 8.
\textsuperscript{122} Ibid. p. 53 para. 9.
\textsuperscript{123} Ibid. p. 54.
\textsuperscript{124} Ibid. p. 56-57.
\textsuperscript{125} Ibid. p. 58. The foetus was between 20-21 weeks old. See p. 5-6 para. 19 of the case.
looked at other international instruments or the intent of the drafters of the Convention, they might have come to the conclusion that foetuses are not included in article 2.\textsuperscript{126} Goldman also noted the fact that all judges who had dissenting or concurring opinions said that it were in the Court’s area to make a decision in the matter.\textsuperscript{127} Goldman thought that the best solution was presented by the dissenting opinions of judges Caflisch, Fischbach, Lorenzen, Thomassen and Rozaki. They meant that the unborn should be protected, but not to the same extent as children who are born. This would make room for the states to make their own legislation and not causing the Court to have to force a certain moral view on the member states.\textsuperscript{128}

Goldman referred to the travaux preparatoires of the Convention which is silent as to the meaning of the terms “everyone” and “life” that both occur in article 2. As mentioned in the case Vo v. France above, abortion is not included in the list of exceptions in article 2 (2). Also, arguments about the abortion laws of the member states and the position of the mother are mentioned by the author when considering the implications if the foetus was to be found by the Court to be covered by article 2.\textsuperscript{129}

Another argument by Goldman in favour of the Court making a decision on the matter was that it would make the provision of article 2 clearer, which in turn might make it easier for the member states since they probably will be more reluctant to the Convention and the Court if its terms are hard to foresee. The fact that the Court gave no clear decision in Vo v. France means that the issue may come up on several occasions again until the confusion is settled.\textsuperscript{130}

Lastly, she noted that the Court indicated that the foetus was not covered by article 2 when they said that the foetus could be regarded as being a part of the human race, but not a person in the sense as it would be covered by article 2.\textsuperscript{131}

The author Aurora Plomer also examines the implications of the Court’s decision in Vo v. France. Plomer noted that the previous case-law regarding abortion showed that if one assumes that the foetus is protected under article 2, then that protection can be limited by the interest of the expectant mother’s life and health. She drew parallels to a debate in the United States, where it had been proposed that when a foetus dies due to violence against the expecting mother, the point of viability of the foetus can be used to determine when states have a duty to legislate.\textsuperscript{132}

Something that made the case Vo v. France different from previous case-law on abortion was that this situation concerned an involuntary abortion performed due to the negligence of the doctor. Therefore, the issue here was not whether or not the mother had a right to an abortion, but rather if the foetus was protected through the Convention.\textsuperscript{133}

Plomer further noted that the reasoning of the Court in Vo v. France showed that there are two types of violations that may occur, namely a substantive one, or like in Vo v. France, a procedural one. The procedural aspect concerns remedies if a life is taken. Plomer found a problem here, because the case did not entail the relationship between the substantive and the procedural rights, and to what degree they can be separated from each other.\textsuperscript{134}

\begin{footnotesize}
\begin{enumerate}
\item[127] Ibid. p. 279.
\item[128] Ibid. p. 280-281.
\item[129] Ibid. p. 281.
\item[130] Ibid. p. 282.
\item[131] Ibid. p. 282.
\item[132] Plomer, Aurora, A foetal right to life? The case of Vo v France, Human rights law review, vol. 5 2005, p. 313.
\item[133] Ibid. p. 321.
\item[134] Ibid. p. 325.
\end{enumerate}
\end{footnotesize}
In *Vo v. France* the Court did not answer whether or not the foetus had a substantive right. In other cases the Court has found that there has been a fair balance as to the abortion laws existing in the state parties. In this case that aspect was not examined, but if it had been, the author thought that an unintentional homicide of a foetus due to negligence would not be in line with article 2, if one assumes the foetus is protected by the article. In the instant case, there is no interest of the doctor that needs to be weighed against the life of the foetus.  

Another aspect raised by Plomer was that if the Court would have found that there was a breach of article 2 in the instant case, then there would be a problem if the right that has been breached was only applied hypothetically to the victim.

Mrs. Vo’s stand that criminal remedies would have been necessary in her case gained some support from the author. Criminal law, Plomer argued, has the purpose to deter and to punish the ones guilty of a crime. Civil actions are often voluntary, while criminal actions are handled by the state because of the interest of the public in those types of crimes. Therefore, her conclusion was that there is a big difference between civil and criminal actions. But as noted by the Court, not many member states consider that unintentional homicide of unborn should generate criminal offences, which means that there would have been implications for them if the Court had ruled in favour of Mrs. Vo on that matter. As noted by Plomer though, the civil remedies available concerns the harm caused on the woman, and not the foetus. The foetus is thus seen as a part of the woman’s body and not a separate entity.

The concluding remarks from Plomer suggested that article 2 is given the meaning it historically was intended to, namely that it does not cover the unborn. To be protected by article 2 one has to have a legal personality and consequently be born. However, this interpretation does not mean that the foetus cannot be protected anyways through voluntary legislations in state parties that choose to do so.

Another author who examined the arguments by the Court in *Vo v. France* was Hewson. She noted that prior to the examination of this case the Court had not dealt with the question whether foetuses are protected under the Convention. Also, she noted that the Court was reluctant in making a decision on the matter.

Hewson noted that the Court did not decide on the matter for two reasons: The member states have not agreed upon what legal protection the foetus should have. Also, there is no agreement on when life begins. She also found it hard to understand why the Court did not give a clear answer as to the applicability of article 2 in this case, but still applied it. She questioned how the loss of the foetus could make the article applicable to Mrs. Vo’s right to life, wondering if the Court found that the applicant had to sacrifice her baby to save herself.

One argument Hewson made was that if the applicant’s allegations had been accepted by the Court, then there would have been consequences for the maternity care. She suspected that if a mistake could lead to criminal liability of that magnitude, people would not want to work in that profession, and those who did work would be to cautious because they were concerned about making a mistake. This in turn is negative for the pregnant women.

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136 Ibid. p. 328.
137 Ibid. p. 329-330.
138 Ibid. p. 331.
140 Ibid. p. 364.
141 Ibid. p. 369.
142 Ibid. p. 372.
143 Ibid. p. 373.
Another aspect Hewson mentioned was the fact that the subject of abortion never has been dealt with in detail by the Supreme Courts of the United States or Canada. Because of this, Hewson argues, the Court might have had a hard time finding opinions to regard.\textsuperscript{144}

3.5 The inter-American Commission on Human Rights

The Inter-American Court, which is connected to the American Convention on Human Rights, has not dealt with the question of abortion yet. Though, the Inter-American Commission on Human Rights has. The Commission is connected to the American Declaration of the Rights and Duties of Man, and is therefore not a binding instrument. Even so, the Commission and the Declaration are considered to be important due to their connection to the Convention.\textsuperscript{145}

In 1977 the Commission received a complaint about a claimed violation of article 1 of the Declaration due to an abortion which was carried out in 1973.\textsuperscript{146} The complainants argued on behalf of the foetus, referred to as “baby boy”, which they claimed had been violated of his right to life due to the abortion.\textsuperscript{147}

The complainants referred to two earlier cases decided by the United States’ Supreme Court which in their mind had lead to the acquittal of the doctor in this case. They believed the government had breached article 1 of the Declaration because of the actions taken by its Supreme Court. The doctor who performed the abortion had been found guilty of manslaughter in the first instance but was acquitted of the charges on appeal. The reason for his acquittal was that the court found that there was not enough evidence as to the doctor’s recklessness and whether or not his belief in the viability of the foetus outside the womb was incorrect.\textsuperscript{148}

The government of the United States of America responded to the complainant’s allegations against it, arguing that there had been no violation. Firstly, by referring to the working process of the adoption of the Declaration, they claimed that the article did not extend to the unborn. Secondly, the Declaration and the American Convention on human rights were to be analysed separately.\textsuperscript{149} Also, the article on the right to life is formulated in a different manner.\textsuperscript{150}

The government commented on the article by saying that the term “in general” meant that the states had the possibility of including abortion laws in their domestic legislation. Also, when considering an abortion as an arbitrary deprivation of someone’s life, consideration had to be taken to the circumstances of each case.\textsuperscript{151}

The government also responded to the allegations regarding the arbitrariness of the two cases from the Supreme Court, arguing that what it had done was to establish the guidelines as to how states should regulate abortions. In the first case, \textit{Roe v. Wade}, there was a law which only permitted abortions in cases where the mother’s life was at stake. This was found to be in

\textsuperscript{144} Hewson, Barbara, Dancing on the head of a pin? Foetal life and the European Convention, Feminist legal studies, vol. 13 issue 3 2005, p. 374.

\textsuperscript{145} Icelandic Human Rights Centre: http://www.humanrights.is/the-human-rights-rpoject/humanrightscasesandmaterials/comparativeanalysis/life/euthanasiaandabortion/ (read 12 April 2010).

\textsuperscript{146} Ibid.


\textsuperscript{148} Ibid. para. 3 c-d “Summary of the case”.

\textsuperscript{149} Ibid. para. 14 “Summary of the case”.

\textsuperscript{150} Art. 4 (1) of the American Convention on Human Rights reads as follows: “Everyone has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.” Art. 1 of the American Declaration of the Rights and Duties of Man says: “Every human being has the right to life, liberty and the security of his person.”.

breach of the fundamental right of privacy. The only way a state can limit a fundamental right is to protect a state interest, which in this case was found not to be in greater need of protection than the right to privacy of the expecting mother. Further, the Supreme Court said that during the first trimester, the decision was up to the doctor. However, they also pointed out that the right to privacy was not absolute and that the mother could not be allowed to have an abortion “at whatever time, in whatever way and for whatever reason”. Also, the government noted that the doctor performing the abortion in the instant case was of the opinion that the foetus would not be viable.152

In the second case, Doe v. Bolton, the Supreme Court stated the following: up until the end of the first trimester it is for the doctor to decide. After that regulations may be done but they should be related to the health of the mother. After the stage of viability of the foetus the state may regulate and forbid abortion but consider the protection of the life or health of the mother. The Supreme Court also noted that it is not for them to decide when it is “morally justifiable” to perform an abortion.153

The Commission stated in its opinion that “there is no logical or legal relation between the presumption of the truth of the facts, described by the petitioners and the request involving legal issues, as set forth in the petition”.154 They went on by saying that if article 4 of the Convention should be interpreted in the absolute way that the applicant’s argue, it would affect the domestic law of many of the American states.155 The words “in general” where added precisely because of the domestic legislations.156 The Commission also said that even if article 4 of the Convention was to be interpreted as absolute, the obligations of the Convention cannot be imposed on a state not party to the Convention, and the United States is not.157 To conclude, the Commission found no violation of the Supreme Court’s decisions or the case concerning the doctor performing the abortion on the “baby boy”.158

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153 Ibid. para. 8 “Whereas”.
154 Ibid. para. 11 “Whereas”.
155 Ibid. para. 18 “Whereas”.
156 Ibid. para. 25 “Whereas”.
157 Ibid. para. 31 “Whereas”.
158 Ibid. para. 1 “The Inter-American Commission on Human Rights resolves”.

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Chapter 4

Euthanasia

4.1 Introduction

The debate on euthanasia has two sides. On the one hand are those who think that everyone has the right to his or her life. This includes the right to decide whether or not to continue living when terminally ill. A grown up, sound person who feels that his or her life is not worth living anymore, should not be forced to go on living. On the other hand are those who consider life to be inviolable, nothing for each individual to tamper with and for the society to protect. 159

In a recommendation from the Parliamentary Assembly regarding human rights of terminally ill, it is stated that the right to life is recognised in the Convention and therefore guaranteed by the conventional parties, and also that “recognising... a terminally ill... person’s wish to die never constitutes any legal claim to die at the hand of another person.” 160

Further, the Parliamentary Assembly stated that the terminally ill should be both respected and protected, but it is also important that states make sure that “unless the patient chooses otherwise, a terminally ill or dying person will receive adequate pain relief and palliative care, even if this treatment as a side-effect may contribute to the shortening of the individual’s life”. 161

The Committee of Ministers replied to this recommendation, saying that it “fully shares the Assembly’s concerns in this respect.”. Regarding the self-determination of terminally ill, they referred to article 9 of the Bioethics Convention which reads: “The previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account.”. The Committee noted that this formulation was in accordance with the view of most states who participated in the adoption of the Convention. While it is prohibited to take the life of a terminally ill, the domestic law regarding euthanasia differs in the member states. 162

In 1991 the Parliamentary Assembly made a recommendation for the adoption of the Convention referred to above, noting the new possibilities in medicine which they considered required regulation. The Council and various member states had become aware of the necessity to deal with these new issues and the Assembly found it best to adopt a Convention to unify the position on these matters. 163 The Convention was adopted in 1997. 164

To conclude, the Committee believed that the “protection of the individual’s fundamental rights - including those of the ill or dying - is a matter for the member states, under the supervision, where appropriate, of the European Court of Human Rights.”. 165

160 Parliamentary Assembly of the Council of Europe recommendation 1418 (1999) para. 9 c.
161 Ibid. para. 9 a.
162 Reply from the Committee of Ministers of the Council of Europe to Parliamentary Assembly of the Council of Europe recommendation 1418 (1999).
165 Reply from the Committee of Ministers of the Council of Europe to Parliamentary Assembly of the Council of Europe recommendation 1418 (1999).
Merrills and Robertson have written that they find it hard to understand why it would be a violation of article 2 if euthanasia is carried out with the consent of the individual. They further noted that the Commission stated that actively withholding treatment should not be a crime. The authors therefore reached the conclusion that switching off a life support machine should not be a crime either, if it is the wish of the terminally ill person.  

Merrills and Robertson further noted that when it comes to euthanasia, but also abortion, the member states of the Council of Europe have different views on the matter. As will be seen in chapter five, the agreement regarding the death penalty is much greater, so when dealing with either euthanasia or abortion, “human rights decision-makers are left to do the best they can with texts which are deliberately unhelpful.”

The lack of consensus in the domestic law of the member states regarding euthanasia are also noted by the authors van Dijk and van Hoof. They connect euthanasia and the right to die with article 3 of the Convention, which is set to protect individuals from inhuman or degrading treatment. They mean that those rights have to be weighed against each other, and the decisive matter is whether one considers life to be inalienable or not. Life being inalienable means that it is not for the person in question to decide what to do with his or her life. He or she cannot give it away or give it up. One conclusive matter noted by the author Keown is that the question of a right to physician-assisted suicide has been rejected by the Supreme Courts of both Canada and the United States.

Again, references can be made to the Court’s case-law regarding the margin of appreciation. In Ireland v. the United Kingdom the Court said that state parties enjoy a certain margin of appreciation when deciding on a provision of the Convention. Also, as mentioned in the case Sunday Times v. the United Kingdom, since the Court’s duty is to monitor those decisions, these two parts work together. On the one hand is the margin of appreciation of the state and on the other hand is the monitoring by the Court.

The principle of margin of appreciation is often used when there are different views among the member states as to how to interpret a provision. Important to emphasis is also whether it is a sensitive area such as euthanasia, in which the principle will give states a wider margin to decide on their own.

4.2 Case of Pretty v. the United Kingdom

The case concerned Mrs. Pretty who suffered from a degenerative disease which was incurable. The disease causes the muscles to weaken, and there is no treatment available.

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167 Ibid. p. 34.
171 The European Court of Human Rights, case of Ireland v. the United Kingdom (application no. 5310/71) 18 January 1978, para. 207.
172 The European Court of Human Rights, case of Sunday Times v. the United Kingdom (application no. 6538/74) 26 April 1979, para. 59.
174 The European Court of Human Rights, case of Pretty v. the United Kingdom (application no. 2346/02) 29 April 2002, p. 1 para. 3.
175 Ibid. p. 2 para. 7.
The applicant was at an advanced stage of the disease, and it was considered that she would only live for a couple of months more at the most. However, there was nothing wrong with Mrs. Pretty’s mind and her ability to make decisions. Since the final stages of the disease are distressing, undignified and causes a lot of suffering, she wanted to control when her life would end.\(^\text{176}\)

Because of her illness she was not able to commit suicide herself, so her husband had agreed to assist her. She had asked the Director of Public Prosecutions to grant immunity for her husband if he assisted her, since assisted suicide is a criminal offence in the United Kingdom. The Director of Public Prosecutions had refused to grant that request.\(^\text{177}\)

When the applicant’s request was refused, she applied for a judicial review of the decision at the Divisional Court. They also refused the request, saying that the Director of Public Prosecutions did not have the power to grant such a request. They also found their domestic law to be in line with article 2 of the Convention.\(^\text{178}\) Consequently, the applicant appealed to the House of Lords who upheld the judgement of the Divisional Court. While regretting the situation which Mrs. Pretty was in,\(^\text{179}\) they found that it would not be allowed to accept that the state parties have a duty to recognise a right to assisted suicide.\(^\text{180}\)

**The applicant’s claims**

The applicant alleged that article 2 contained not only a right to life but also a right to decide whether or not to continue to live. She argued that the wordings concerning depravation of life were directed towards third parties, and not toward oneself. The logical effect of the right to life was a right to die.\(^\text{181}\)

Mrs. Pretty claimed that she had a right to have her husband assisting her in committing suicide. Since that act is criminalised under English law, she alleged that the United Kingdom had breached article 2 of the Convention. It is for the individual to decide whether or not to live. Consequently, according to Mrs. Pretty article 2 protects self-determination regarding life and death.\(^\text{182}\)

Mrs. Pretty also complained under article 3, which gives states a positive obligation to protect its citizens from treatment that could be regarded as inhuman. Mrs. Pretty considered that being prevented from taking her own life with the assistance of her husband constituted inhuman treatment.\(^\text{183}\)

The applicant also alleged a breach of article 8 which protects private life.\(^\text{184}\) She argued that it was in that article the right to self-determination was most clearly guaranteed, continuing by saying that within that term included a right to make decisions about her own body. In this included the right to choose whether to live or die. Hence, by refusing her to decide that on her own, the state had breached article 8. Lastly, she argued that interference on such an intimate part of ones private life had to have serious reasons. Reasons which the applicant thought the government had failed to show.\(^\text{185}\)

\(^{176}\) The European Court of Human Rights, case of Pretty v. the United Kingdom (application no. 2346/02) 29 April 2002, p. 3 para. 8.

\(^{177}\) Ibid. p. 3 para. 9-11.

\(^{178}\) Ibid. p. 3 para. 12-13.

\(^{179}\) Ibid. p. 3 para. 14.

\(^{180}\) Ibid. p. 7 para. 14.

\(^{181}\) Ibid. p. 25 para. 35.

\(^{182}\) Ibid. p. 4 para. 14.

\(^{183}\) Ibid. p. 28 para. 44.

\(^{184}\) Art. 8 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads as follows: “Everyone has the right to respect for his private and family life, his home and his correspondence.”

\(^{185}\) The European Court of Human Rights, case of Pretty v. the United Kingdom (application no. 2346/02) 29 April 2002, p. 32 para. 58-59.
The government’s claims
The government of the United Kingdom considered that the applicant’s claim that article 2 gave her a right to die was a misinterpretation of the provision. The logical effect of the right to life was not the right to die. They considered the right to die to be the antithesis of the right to life. The only situations when deprivation of life is permitted are laid down in article 2, and the situation in this case is not one of them. 186

When considering the applicant’s claim regarding a breach of article 8, the government once again stated that the right to life did not include a right to die. The article concerned they way one conducted his or her life, not how one left it. 187

Third parties
The first third party to intervene was the Voluntary Euthanasia Society, a leading research organisation on euthanasia in the United Kingdom. They claimed that a legislation that has the effect of forcing someone to die painfully and with indignity is a breach of article 3 of the Convention. 188

They further noted that England and Wales, with the exception of Ireland, had the most restrictive legislation in Europe regarding euthanasia, it being absolute. As an example, they referred to the countries of Belgium, Switzerland, Germany, France, Finland, Sweden and the Netherlands which all have abolished euthanasia as a criminal offence, although one has to seek assistance from a medical practitioner. In other countries, the penalty for the offence has been downgraded. 189

The second third party intervener was the Catholic Bishops’ conference of England and Wales. Firstly, they referred to their religious belief that life is a gift from God and that any action taken which destroys that gift is not permitted. They referred to other believes but also the Convention to back up their argument. 190

They also noted that those who commit or try to commit suicide often are depressed. Legalising euthanasia would in their mind be catastrophic for those individuals but also for the medical profession. In their experience, most people would withdraw their request to die if their pain could be eased. 191 Also, even if only a limited form of euthanasia was permitted, it would be impossible to make sure it was contained and not affecting the vulnerable. 192

General opinions and assessment of the Court
In this case the Court once again noted the importance of article 2. They further noted that there are limited situations when life can be deprived, and when those situations are alleged by a state the Court applies a strict scrutiny. The Court continued by reminding of that the state parties has obligations under article 2, to protect the life of the people within their jurisdiction. 193

The general conclusion of the Court was that when looking at its previous case-law, the returning issue almost always concerned the obligation for the state parties to protect life. The Court further said that it was not convinced that article 2 contained a negative aspect of the right to life. The article does not involve the quality of the life protected or what one chooses

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186 The European Court of Human Rights, case of Pretty v. the United Kingdom (application no. 2346/02) 29 April 2002, p. 25 para. 36.
187 Ibid. p. 33 para. 60.
188 Ibid. p. 22 para. 25.
190 Ibid. p. 23 para. 29.
191 Ibid. p. 23 para. 30.
192 Ibid. p. 23 para. 31.
to do with his or her life. These aspects may come into question in other articles of the Convention or in other international instruments. However, to interpret article 2 as to guarantee the right to die is to alter the language of the article. The Court also said that the article does not give a person the type of self-determination which gives him or her right to choose death before life.\(^\text{194}\)

The Court concluded that article 2 does not contain a right to die, may it be by the hands of a third party or a public authority. Therefore, the United Kingdom had not breached their conventional obligation by criminalising euthanasia.\(^\text{195}\)

The Court again pointed at the importance of article 2, but also article 3, in relation to their role in the democratic societies of the member states of the Council of Europe.\(^\text{196}\) In the case before it, the Court established that the state had not ill-treated the applicant or prevented her from receiving adequate care.\(^\text{197}\)

The claim from the applicant was that by refusing to ensure that her husband would not be prosecuted if assisting her in taking her life, the state was guilty of inhuman and degrading treatment prohibited under article 3 of the Convention. This was also alleged to be the case regarding the criminal law in England prohibiting assisted suicide. The Court considered that this claim extended the meaning of the term “treatment”. The Court went on by saying that the primarily aim of article 2 is to protect individuals from lethal force, and does not contain a duty for states to permit help for individuals to commit suicide.\(^\text{198}\)

The Court came to the conclusion that states do not have any positive obligations under article 3 making them having to ensure that the applicant’s husband is not prosecuted, nor to legalise assisted suicide. Therefore, no violation of article 3 was found.\(^\text{199}\)

Then the Court turned to assess the alleged violation of article 8. Regarding the government’s claim that it refers to how one conduct his or her life, the Court noted that “private life” is a broad term and does not have any limitations. The court further found that the principle of personal autonomy is important in this context.\(^\text{200}\)

The Court agreed that imposing treatment on someone without the consent of that person may be a breach of article 8.\(^\text{201}\) The issue of quality of life was discussed in relation to article 2 above. This the Court considered could come into question regarding article 8.\(^\text{202}\) The fact that English law prevented the applicant from living the life she wanted was something that in the Courts view might interfere with article 8.\(^\text{203}\)

The Court continued by discussing the need for vulnerable people to be protected and that states are allowed to make legislation doing that. The more serious the issue under consideration is the more will balance in favour of the state to regulate against the autonomy of the individual in order to protect those individuals and the interest at stake. They further stated that even though Mrs. Pretty may not have fallen in the category of the vulnerable, the law preventing her from seeking assisted suicide was, in the view of the Court, justified to protect those who are vulnerable.\(^\text{204}\) The Court therefore did not find the law to be

\(^{194}\) The European Court of Human Rights, case of Pretty v. the United Kingdom (application no. 2346/02) 29 April 2002, p. 26-27 para. 39.

\(^{195}\) Ibid. p. 27 para. 40.

\(^{196}\) Ibid. p. 29 para. 49.

\(^{197}\) Ibid. p. 31 para. 53.

\(^{198}\) Ibid. p. 31 para. 54.

\(^{199}\) Ibid. p. 32 para. 56.

\(^{200}\) Ibid. p. 33 para. 61.

\(^{201}\) Ibid. p. 34 para. 63.

\(^{202}\) Ibid. p. 34 para. 65.

\(^{203}\) Ibid. p. 35 para. 67.

\(^{204}\) Ibid. p. 36 para. 74.
disproportionate. They also did not find the refusal to grant Mrs. Pretty’s wish to not prosecute her husband to be unreasonable. The interference was therefore justified, it was necessary to protect others and consequently did not constitute a violation of article 8.

The Court also considered the applicant’s claim that her rights under article 9 and 14 had been violated. Regarding article 9, the Court noted that “her claims do not involve a form of manifestation of a religion or belief” and therefore dismissed her claim.

In this situation also, the Court noted that the state parties enjoy a margin of appreciation regarding when different treatment in similar situations are justified. However, there has to be an objective and reasonable argument for doing so. What the applicant claimed was that there is a difference between disabled and not disabled persons regarding their possibility to commit suicide according to English law. The Court however found that the reasons for not including the disabled were justified, and that there was no violation of article 14 either.

4.3 External opinions on the decision in Pretty v. the United Kingdom

Author Hale noted an important distinction to have in mind, namely the one between killing and letting someone die. In English law, one can commit suicide or refuse life-saving measures. Assisting someone in taking their own life however is forbidden.

Hale was a member of the English Divisional Court who handled Mrs. Pretty’s case before it was brought before the Court. In the Divisional Court the judges agreed that states do not have a duty to take positive steps to ensure that life is forced upon those who are unwilling to live. This, the author believes, might give the possibility for member states to have certain laws permitting euthanasia without violating article 2.

She further stated that she did not believe that assisted suicide would be a part of the right to life. If suicide was a right under article 2 then states could not legislate against them, and it would not be possible to rescue those who tried to commit suicide. However, Hale noted that the Court did not make any statement as to whether permitting euthanasia would be a breach of article 2. The author considered this to be a good thing, since there are member states that do permit euthanasia.

Author Wada wrote that since the Court did not find article 2 to include a right to self-determination regarding life and death, states that have criminalised assisted suicide does not have a duty to change their legislation.

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205 The European Court of Human Rights, case of Pretty v. the United Kingdom (application no. 2346/02) 29 April 2002, p. 36 para. 76.
206 Ibid. p. 37 para. 77-78.
207 The relevant part of art. 9 in the European Convention for the Protection of Human Rights and Fundamental Freedoms reads: “Everyone has the right to freedom of thought, conscience and religion...”. Also, art. 14 states: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination...”.
208 The European Court of Human Rights, case of Pretty v. the United Kingdom (application no. 2346/02) 29 April 2002, p. 38 para. 82-83.
209 Ibid. p. 40 para. 87.
210 Ibid. p. 40 para. 88-89.
211 Hale, Brenda, A pretty pass: when is there a right to die?, Common law world review, vol. 32 issue 1 2003.
212 Ibid. p. 9.
213 Ibid. p. 1.
214 Ibid. p. 9.
215 Ibid. p. 10.
216 Wada, Emily, A pretty picture: the margin of appreciation and the right to assisted suicide, Loyola of Los Angeles international and comparative law review, vol. 27 issue 2 2005, p. 284-285. See also 4.5 below.
217 Ibid. p. 275.
Also, the author finds the case of Pretty v. the United Kingdom to be a perfect example of when the state parties have a wide margin of appreciation.\textsuperscript{218} The case is the first in which the Court deals with the issue of whether the Convention provides for a right to die.\textsuperscript{219} Wada noted that the Court reasoned that it would be inconsistent to interpret a right to die in an article designed to protect life, say for some exceptions stated in that same article.\textsuperscript{220}

The author also discussed the difficulty in reaching a conclusion in the case when trying to balance the different interests engaged. Wada considered the interests protected through the criminalisation of euthanasia in this case had greater weight, therefore leaving the United Kingdom with a wide margin of appreciation.\textsuperscript{221}

Author Byk noted that it was only after the Pretty v. the United Kingdom judgement the Parliamentary Assembly came with their resolution stating an absolute prohibition of euthanasia.\textsuperscript{222} Byk also noted that states that allow euthanasia have not been seen as violating the Convention. However, that does not automatically work the other way around, meaning that states that forbid euthanasia violate the Convention.\textsuperscript{223}

Also, the judgement showed that since article 2 is an absolute right, the positive obligations posed on states cannot mean that they have a positive obligation other than regarding preservation of life.\textsuperscript{224} Lastly, Byk stated that the Court was afraid of making a clear statement in such a sensitive area as euthanasia, thus finding it more appropriate to leave the state parties with a wide margin of appreciation.\textsuperscript{225}

\textbf{4.4 The Council of Europe and euthanasia}

The issue of euthanasia has for example been dealt with by the Council of Europe in their “human rights handbooks” series.\textsuperscript{226} There it can be read that a series of questions might arise when one considers the issue of euthanasia. Firstly, when do life and the right to its protection by law, end? Secondly, is it acceptable to treat someone who is terminally ill in a way that as a consequence shortens or might shorten that person’s life? Thirdly, does the state have to protect an individual’s life even if that person does not want to live? Fourthly, does the state have a right to end the life of someone who is suffering, even if that person cannot express his or her will on his or her own?\textsuperscript{227}

First it is noted that neither the Commission nor the Court has dealt with questions one, two or four yet. However, the Council considers that the case-law regarding abortion can give some clues as to how the Court might reason if any of those situations were to come before them. The same can be said about euthanasia as with abortion; there is no legal or scientific

\begin{footnotesize}
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\item \textsuperscript{218} Wada, Emily, A pretty picture: the margin of appreciation and the right to assisted suicide, Loyola of Los Angeles international and comparative law review, vol. 27 issue 2 2005, p. 276.
\item \textsuperscript{219} Ibid. p. 278.
\item \textsuperscript{220} Ibid. p. 277-278. Art. 2 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms which regulates the exceptions say: “Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: a in defence of any person from unlawful violence; b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c in action lawfully taken for the purpose of quelling a riot or insurrection.”.
\item \textsuperscript{221} Ibid. p. 283.
\item \textsuperscript{222} Council of Europe publishing, Euthanasia volume 1-ethical and human aspects, first edition 2003, p. 110. See also Parliamentary Assembly of the Council of Europe resolution 1418 (1999) cited in 4.1 above.
\item \textsuperscript{223} Ibid. p. 114.
\item \textsuperscript{224} Ibid. p. 125.
\item \textsuperscript{225} Ibid. p. 126.
\item \textsuperscript{226} Korff, Douwe, Human rights handbooks no. 8: The right to life a guide to the implementation of article 2 of the European Convention on human rights, Council of Europe, first edition 2006.
\item \textsuperscript{227} Ibid. p. 15.
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agreement in Europe about when life begins or when it ends. Since this is the case, it is considered that this question is left for each state to decide, as it is regarding abortion. Regarding the second question the Council, as does the Court in *Pretty v. the United Kingdom*, refers to a statement made by the Parliamentary Assembly (see 4.1 above). The statement entails that if a terminally ill person declines care, that wish should be respected even though it might mean that he or she will die. Since there seem to be a consensus on the matter considering that the Parliamentary Assembly made a statement about it, it is likely that the Court will not regard it as a breach of the Convention if a terminally ill individual had the option to decline care in a member state.

The fourth question with the so called “mercy killings” is also dealt with in the Parliamentary Assembly recommendation (see 4.1 above). Regarding that subject the Parliamentary Assembly states that they are not lawful. No member state within the Council of Europe allows for them other than at the permission from the person in question.

### 4.5 Domestic legislation in Europe

Author Wada noted that euthanasia is not criminalised in most European states. However, there are very few countries that has actively legalised it. Those countries are Switzerland, Belgium and the Netherlands. Countries that do not have a certain law prohibiting euthanasia criminalise it under their regular penal code concerning homicide and suchlike.

The Netherlands have a law concerning euthanasia, in which it is stated certain requirements for it to apply. Firstly, there has to be some sort of severe suffering to the person in question. Secondly, the consent of the person has to be obtained. The person must have been informed of his or her situation and how it will develop. The law also allows for children between the age of 12-16 to request for euthanasia after the consent from the child and the parents. One requisite here is that the child is deemed to understand the situation.

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228 Korff, Douwe, Human rights handbooks no. 8: The right to life a guide to the implementation of article 2 of the European Convention on human rights, Council of Europe, first edition 2006, p. 15.

229 Ibid. p. 16. See also Parliamentary Assembly of the Council of Europe recommendation 1418 (1999) para. 9.


232 Ibid. p. 286. The United Kingdom has recently changed their guidelines so that relatives who assist someone in committing suicide will not be charged if the act is done out of mercy. See for example [http://www.dn.se/nyheter/sverige/fa-lander-tillater-aktiv-dodshjalp-1.1064090](http://www.dn.se/nyheter/sverige/fa-lander-tillater-aktiv-dodshjalp-1.1064090) (read 7 May 2010).

Chapter 5

The death penalty

5.1 Introduction

The death penalty is referred to in the second sentence of article 2 (1) of the Convention. When the Convention was adopted there were many states that still maintained the death penalty within their domestic legislation, although its use had already declined. Since the adoption of the Convention, two additional protocols have been adopted to limit or completely take away the possibility for states to use the death penalty.

Article 2 has to be read in the light of the entire Convention. This means that there are certain aspects that have to be considered when deciding whether the imposed death sentence is legitimate or not. Firstly, there must have been a fair trial according to article 6. Secondly, the penalty cannot be disproportionate in relation to the crime and the manner of the execution cannot be in such a way so that it breaches the provision not to be treated inhuman in article 3. Thirdly, the penalty must have been available for the crime in question when the act was committed according to article 7 and fourthly, the death penalty must not be imposed in a way that is discriminatory according to article 14.

The Council of Europe has been opposed to the death penalty for several decades. Their justification for this stand has been that it is an unacceptable punishment “from a human rights perspective”. Also, they find the punishment “arbitrary, discriminatory and irreversible”. If an error is made and an innocent is subjected to the death penalty, it is not possible to correct. It is also never possible to rule out the fact that mistakes do happen. Lastly, the Council considers that states retaining the death penalty will have a “more brutal society resulting from state institutions killing their citizens in the name of justice.”.

The Parliamentary Assembly has also made statements concerning the abolition of the death penalty. In 1994 the Assembly stated that the arguments against the death penalty are unchallengeable. They also urged member states who still maintained the death penalty to abolish it and to ratify Protocol no. 6. They further considered that ratifying the protocol

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234 The European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2 (1). The second sentence says: “No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”.
235 Korff, Douwe, Human rights handbooks no. 8: The right to life a guide to the implementation of article 2 of the European Convention on human rights, Council of Europe, first edition 2006, p. 86.
236 Protocol no. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, Strasbourg 1983 and Protocol no. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances, Vilnius 2002. The two protocols have been discussed in 2.2 above.
238 Ibid. p. 303. Art. 7 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.” Art. 14 states: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground.”.
should be a prerequisite for becoming a member of the Council of Europe. Lastly they urged governments of other states in the world to follow the example of the states of the Council of Europe and abolish the death penalty if not having done so already.\textsuperscript{241}

In 1994 the Parliamentary Assembly made a recommendation regarding the creation and adoption of a protocol abolishing the death penalty in all circumstances, which later would become Protocol no. 13. Here the Assembly stated that “the death penalty has no legitimate place in the penal systems of modern civilised societies”\textsuperscript{242} continuing by saying that its application may constitute torture within the scope of article 3 of the Convention. They also made other arguments against its application, saying that it did not have the effect of deterring further crimes and also noting the risk of innocent people being executed. Regarding the suggested protocol, the Assembly noted that if the death penalty was forbidden during peace time, there was no reason for allowing it during a time of war. A strong argument against its application in war time is, in the mind of the Assembly, that it is usually carried out hastily, affecting the legal safeguards and increasing the risk of executing innocent people. For these reasons, the Assembly recommended the Committee to draw up an additional protocol that abolishes the death penalty completely.\textsuperscript{243}

The Committee of Ministers replied to the Parliamentary Assembly’s recommendation, saying that they have noted the efforts made by the Assembly to “strengthen… the international protection against the death penalty.” The Committee further stated that they worked on encouraging the member states to abolish the death penalty.\textsuperscript{244}

The continuing development of the second optional protocol was commented on by the Assembly in 2002, in which they welcomed the decision to draft a protocol. Here they refer to article 2 and their long wish to remove the sentence therein which allows for the death penalty. They back up their view by referring to the fact that newer national and international documents do not include a right to use the death penalty. Lastly, the Assembly urges the member states to ratify this protocol also, when finished.\textsuperscript{245}

In 1996 the Assembly once again urged member states to abolishe the death penalty and ratify Protocol no. 6. They also reminded of the requisite that aspiring members of the Council have to be willing to take these actions in order to become members.\textsuperscript{246}

A few years later the Assembly was happy to announce that the application of the death penalty had decreased. They also mentioned that they were going to do all in their power to assure that the commitments entered by the member states are followed.\textsuperscript{247} In 2001 the Assembly stated that the Council of Europe now was “a de facto death penalty-free zone”.\textsuperscript{248}

\subsection*{5.2 The Council of Europe’s work towards abolition}

Author Yorke has discussed the work by the Council to abolish the death penalty.\textsuperscript{249} It took about 30 years and much discussion for the arguments against the death penalty to take form. After the adoption of Protocol no. 6, debates followed regarding the exception in war time.

\begin{itemize}
\item \textsuperscript{241} Parliamentary Assembly of the Council of Europe resolution 1044 (1994) para. 3 and 5-7.
\item \textsuperscript{242} Parliamentary Assembly of the Council of Europe recommendation 1246 (1994) para. 3 and 6. See also Parliamentary Assembly of the Council of Europe resolution 1253 (2001) para. 1.
\item \textsuperscript{243} Ibid. para. 3-6. See also Parliamentary Assembly of the Council of Europe resolution 1253 (2001) para. 2.
\item \textsuperscript{244} Interim reply from the Committee of Ministers of the Council of Europe to Parliamentary Assembly of the Council of Europe recommendation 1246 (1994).
\item \textsuperscript{245} Parliamentary Assembly of the Council of Europe opinion no. 233 (2002) para. 1, 5 and 7.
\item \textsuperscript{246} Parliamentary Assembly of the Council of Europe resolution 1097 (1996) para. 1, 5-7. See also Parliamentary Assembly of the Council of Europe resolution 1187 (1999) para. 1, 8-9.
\item \textsuperscript{247} Parliamentary Assembly of the Council of Europe resolution 1187 (1999) para. 2 and 6.
\item \textsuperscript{248} Parliamentary Assembly of the Council of Europe resolution 1253 (2001) para. 3.
\item \textsuperscript{249} Yorke, Jon, The right to life and abolition of the death penalty in the Council of Europe, European law review, vol. 34 issue 2 2009.
\end{itemize}
Even though Protocol no. 13 had been adopted, the author found that neither protocol really amended the text of article 2.\textsuperscript{250}

Yorke noted that there was opposition within the Council of Europe against including the death penalty in article 2 already from the beginning. A sub-committee was created to investigate the issues of the death penalty. In 1973 a motion was presented, asking for a resolution abolishing the death penalty.\textsuperscript{251}

The arguments for this were several: first it was established that the punishment was irreversible. Secondly, the punishment does not work as a deterrent. Thirdly, the punishment should not be used in civilised societies. Consequently, the death penalty needed to be abolished. However, the motion was not received well within the Parliamentary Assembly and was sent back to the Committee on legal affairs who stalled it. A few years later a report was made on the issue which the Committee on legal affairs after discussions decided not to forward to the Parliamentary Assembly. The unpublished report stated that the discussion on the matter ought to continue, since there were strong arguments for abolishing the death penalty. The Committee on legal affairs once again hindered the efforts, saying that the issue should be postponed.\textsuperscript{252}

In 1980 the new rapporteur of the Committee on legal affairs presented a report, saying to the Parliamentary Assembly that the issue of the death penalty is a controversial one but also a very important one. This report was similar to the one presented in 1973. However, in this report it was restricted to getting through abolition in peace time, since the rapporteur considered abolition a difficult task which required them to work in several steps. He considered the death penalty as “barbaric” and not something that states had an exclusive right to decide upon anymore. The conflict was between the sovereignty of the state and centralisation regarding whether to use the death penalty or not. In the Parliamentary Assembly the following statement was made: “we believe that nobody in this world should have a monopoly or claim the right to put an end to the life of others, not even the state”.\textsuperscript{253} Further arguments, such as that the right to life is the most fundamental right and that no other right can be enjoyed without it, was used when the Parliamentary Assembly adopted resolution 727 and recommendation 891 (discussed in 2.2 above).\textsuperscript{254}

However, disputes arose whether the Parliamentary Assembly should encourage this. The only way to change the Convention would be to adopt an additional protocol, according to the Chairman of the Committee of legal affairs. Also, it was argued that it should be up to each state to decide on this, and not something the Parliamentary Assembly should meddle with.\textsuperscript{255}

In 1981 however, the Committee gave directions to draft an additional protocol which would abolish the death penalty in peace time. This protocol, which would become Protocol no. 6, was the first regional document restricting the use of the death penalty. The additional protocol was adopted in 1983 and gave supporters the opportunity to show their view on the matter and at the same time work on convincing other states to follow their lead.\textsuperscript{256} Yorke considered that this was an attempt to correct the wordings of the Convention which left too much for the state and not enough for the right of the individual.\textsuperscript{257}

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\textsuperscript{250} Yorke, Jon, The right to life and abolition of the death penalty in the Council of Europe, European law review, vol. 34 issue 2 2009. p. 206.
\textsuperscript{251} Ibid. p. 207.
\textsuperscript{252} Ibid. p. 208. The Committee on legal affairs and human rights is part of the Parliamentary Assembly of the Council of Europe. They work as its legal advisor, giving opinions on draft conventions among other things. See http://assembly.coe.int/Main.asp?link=/Committee/JUR/role_E.htm (read 4 May 2010).
\textsuperscript{253} Ibid. p. 209.
\textsuperscript{256} Ibid. p 211.
\textsuperscript{257} Ibid. p 212.
\end{flushright}
Also, the additional protocol was used as a model for both the United Nations and the Organisation of American States when they followed the example of the Council of Europe a few years later.258

In the beginning of the 1990’s the work on abolishing the death penalty completely gained further weight. However, not all member states had ratified Protocol no. 6 yet, and the Committee of ministers approached the issue with caution. The Parliamentary Assembly on the other hand was more willing to call for a complete abolition.259

The determination of the Parliamentary Assembly is what finally made the Committee to act, but what worried the Committee however was the impact an additional protocol would have on the sovereignty of the states. The Parliamentary Assembly did not back down, even though it is the Committee that has the legislative power.260 The Committee neither opposed nor endorsed the view of the Assembly. In 2001 however, the Committee was presented with and accepted a draft that eventually would become Protocol no. 13.261

The rapporteur of the Committee on legal affairs at the time suggested that when Protocol no. 13 was ratified by all member states, it should be seen as the proof that the text of article 2 now could be altered. However, this suggestion was not included by the Committee.262 That action by the Committee gave the impression that the abolition of the death penalty in all circumstances was seen as important, but at the same time they let the punishment stay put. The idea was that the additional protocols would imply that the death penalty was abolished in practice, and therefore it did not call for a change of the wordings in article 2.263

At present, the two additional protocols together provides for the abolition of the death penalty. However, if states were to denounce themselves from them, it would mean that they regain the possibility to use the death penalty.264

The work of the Council to abolish the death penalty has been criticised by author Hodkinson. He was concerned that to focus so strongly on the ratification of Protocol no. 6 might conceal other ways to abolition. He worried that many states imposed to ratify do whatever it takes to be a part of Europe and therefore sign anything, no matter what their stand on the matter might be. It concerned him that this might undermine the work of the Council. He also considered that after ratification, the pressure on the state disappears.265

5.3 Observer states and the death penalty
The Assembly has discussed the situation in the observer states of the Council of Europe, namely Canada, Mexico, Japan and the United States. Out of these four, Japan and the United States still use the death penalty and the Assembly criticised them for this. They especially worried about executions of young and mentally ill, but also the lack of a mandatory appeal system and the conditions for those on death row. The “death row phenomenon” has been established by the Court as being a violation of the Convention.266

261 Ibid. p 216.
262 Ibid. p 217.
263 Ibid. p 218.
264 Ibid. p 228-229.
266 Parliamentary Assembly of the Council of Europe resolution 1253 (2001) para. 4 and 5. See also the European Court of Human Rights, case Soering v. the United Kingdom (application no. 14038/88) 7 July 1989 regarding the “death row phenomenon”.

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While noting the difficulties in abolishing the death penalty because, among other things, its big public support, the Assembly wished that Japan and the United States would overcome these difficulties as had been done in Europe. The Assembly required them to abolish the death penalty since it was a breach of the commitments they had taken on. Otherwise, their position as observer states might come into question.  

This problem has been discussed by author Hodgkinson. He mentions a report drawn up by the Parliamentary Assembly’s rapporteur on the death penalty, Dr. Wohlwend, which was sent to Japan and the United States. This report contained information on the Council of Europe’s stand on the matter and suggestions for these states on how to make the abolition a reality. Japan responded in detail but no response was received from the United States.

5.4 Various cases on the death penalty from Europe

In the case Shamayev and others v. Georgia and Russia the Court established that a state not party to either Protocol no. 6 or no. 13 has the possibility to use the death penalty in certain circumstances as laid down in article 2.

In the case Koktysh v. Ukraine the applicant alleged that if he were extradited to Belarus he would risk an unfair trial for which the outcome would probably be punishment in the form of the death penalty. The Court noted that there had to be “near-certainty” that the applicant would lose his life if the expulsion would constitute a violation of article 2.

Considerations have to be made to the situation in the state to which the applicant is to be sent, but also his or her personal circumstances. This to determine what consequences may come from sending the person in question to where he or she is wanted. The Court also has to examine whether a potential diplomatic assurance that has been given is likely to give a guarantee in reality.

In the Court’s view it is enough for article 3 of the Convention to apply if there is a possibility that the death penalty may be used, together with possibility of an unfair trial. A situation like that is considered to cause anguish and mental suffering for the individual, falling within the scope of that article. The Court came to the conclusion that assurances needed was not enough, causing them to declare Ukraine guilty of violating article 3 if they sent the applicant to Belarus. They Court also found it unnecessary to consider article 2 separately.

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267 Parliamentary Assembly of the Council of Europe resolution 1253 (2001) para. 6-8 and 10.
269 The European Court of Human Rights, case of Shamayev and others v. Georgia and Russia (application no. 36378/02) 12 April 2005. The case concerned 13 applicants originating in Georgia and Russia. They had crossed the border to Georgia and were detained there. Russia requested for there extradition. The applicants alleged that if the request were granted they would run the risk of being treated contrary to article 2 and 3 of the Convention.
270 Ibid. p. 85 para. 333.
271 The European Court of Human Rights, case of Koktysh v. Ukraine (application no. 43707/07) 10 December 2009, p. 7-8 para. 43.
272 Ibid. p. 9 para. 54.
273 Ibid. p. 10 para. 58.
275 Ibid. p. 11 para. 62.
276 Ibid. p. 11 para. 64-66.
The case *Bader and Kanbor v. Sweden* concerned two applicants and their two children, originating in Syria. They alleged that if they were deported from Sweden, the first applicant would risk arrest and execution contrary to articles 2 and 3 of the Convention.\(^{277}\)

In this case the Court stated that deporting someone may in certain circumstances be a violation of article 3, if the person risks being subjected to treatment contrary to that article. Also, the Court did not exclude the possibility that article 2 or article 1 of Protocol no. 6 may be considered as being violated if deporting someone to where that person “is seriously at risk of being executed, as a result of the imposition of the death penalty or otherwise.”\(^{278}\)

The Court went on by saying that the fact that almost all member states had ratified Protocol no. 6, it could be said that the death penalty was unacceptable within the Council of Europe and no longer permissible.\(^{279}\)

Also, article 2 and 3 may be violated if the trial at which the person was sentenced to death was unfair, raising an issue under article 6.\(^{280}\) The applicant had been convicted for murder in Syria and sentenced to death. The authenticity of the judgement had been confirmed, and it was established that the death penalty was still used in Syria.\(^{281}\) The Court further agreed with the applicants that the assurances the Swedish government received from Syria about the reopening of the case and the risk of getting the death penalty were vague and imprecise. The Court considered that there were no sure answers as to what would happen to the applicant if returned to Syria. This meant that the applicant would be put at serious risk.\(^{282}\)

The Court found the applicant’s fear of being executed to be “justified and well-founded”.\(^{283}\) When considering the circumstances of the trial in Syria, the Court found it to have been unfair, and that the outcome of the applicant’s possible retrial was uncertain. Also, the Court thought that being sentenced to death after an unfair trial would cause fear and anguish. That put together with the fact that there was a substantial risk that the sentence would be enforced made the Court come to the conclusion that there had been a violation of both article 2 and 3.\(^{284}\)

In his concurring opinion, one judge stated that there had been a violation in this case but of article 1 in Protocol no. 13.\(^{285}\) He continued by saying that this case was the first in which the Court clearly said that deporting someone to a state were he or she might be subjected to the death penalty following an unfair trial was a violation of article 2.\(^{286}\) The judge reasoned that since Protocol no. 13 had entered into force, article 2 was unnecessary. By ratifying the protocol, states bound themselves to never put anyone at risk of being subjected to the death penalty. Consequently, the judge considered it unnecessary to consider the circumstances surrounding the applicant, since a death sentence always is a breach of Protocol no. 13.\(^{287}\)

\(^{277}\) The European Court of Human Rights, case of Bader and Kanbor v. Sweden (application no. 13284/04) 8 November 2005, p. 1 para. 1 and 3.

\(^{278}\) Ibid. p. 9 para. 41-42. Art. 1 of Protocol no. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty says: “The death penalty shall be abolished. No one shall be condemned to such penalty or executed.”.

\(^{279}\) Ibid. p. 9-10 para. 42.

\(^{280}\) Ibid. p. 10 para. 42.

\(^{281}\) Ibid. p. 11 para. 44.

\(^{282}\) Ibid. p. 11 para. 45.

\(^{283}\) Ibid. p. 12 para. 46.

\(^{284}\) Ibid. p. 12 para. 47-48.

\(^{285}\) The European Court of Human Rights, case of Bader and Kanbor v. Sweden (application no. 13284/04) 8 November 2005, p. 14. Art. 1 of Protocol no. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances states: “The death penalty shall be abolished. No one shall be condemned to such penalty or executed.”.

\(^{286}\) Ibid. p. 14.

\(^{287}\) Ibid. p. 15.
5.5 Case of Soering v. the United Kingdom
The case Soering v. the United Kingdom 288 concerned the German national Jens Soering who lodged an application with the Court against the United Kingdom. He was detained in the United Kingdom due to murder charges against him in Virginia in the United States, to where the government planned to extradite him. 289

A request was made by the government to the United States that if they extradited Mr. Soering the death penalty should not be imposed or carried out, because it was abolished in the United Kingdom. 290 At the time German authorities also requested for Mr. Soering’s extradition, after which the United States requested their application to be given priority. 291 The government notified Germany that they would extradite the applicant to the United States. The government then received a note from the attorney in the United States that he would present the request of the United Kingdom before the judge. Later in the proceedings however it was noted that the attorney did not plan to make any more assurances, stating that he planned to seek the death penalty. 292 If the matter concerns state laws, then the federal government has no possibility to make any legally binding assurances that the death penalty will not be imposed. 293

The applicant’s claims
The applicant alleged that if extradited to the United States, he would most likely be sentenced to death. Because of this he would be subjected to the death row phenomenon which according to him was contrary to article 3. He also did not believe that the assurances given by the United States was enough. 294

A consultant forensic psychiatrist stated that the applicant was “immature and inexperienced”. 295 The applicant further alleged that the assurance of the United States was not enough. Mr. Soering also worried about possible physical violence in the Virginian prison and stated that he might commit suicide. He further stated that if the government where to decide to extradite him to Germany, he would not oppose that. 296

The “death row phenomenon” is what Mr. Soering would be subjected to if convicted for the murder and sentenced to death in Virginia. In conjunction to this, the Commission considered that extraditing someone may be a violation of article 3. The applicant also alleged that under article 3, states had the obligation not to send people to states where they may be subjected to treatment contrary to the article. Assurances have to be made that the person will enjoy the same rights as protected in the Convention. 297

The government’s claims
The government said that article 3 could not be interpreted as to give states responsibility for what happens outside their jurisdiction. They further claimed that the suggestion made by the applicant meant that they had obligations outside their jurisdiction. At the very least, they considered that those obligations should be limited to situations when there is certainty of a

288 The European Court of Human Rights, case of Soering v. the United Kingdom (application no. 14038/ 88) 7 July 1989.
289 Ibid. p. 4 para. 11.
290 Ibid. p. 4-5 para. 15.
291 Ibid. p. 5 para. 16-17.
292 Ibid. p. 6 para. 19-20.
293 Ibid. p. 21 para. 69.
294 Ibid. p. 23 para. 76.
295 Ibid. p. 6 para. 21.
297 Ibid. p. 25 para. 81-82.
serious an imminent treatment contrary to article 3. States must have the possibility to comprehend and punish those guilty of crimes.298

Also, they claimed that much of the “death row phenomenon” was due to the prisoner’s own appeals, which took time and prolonged the waiting period.299

The government also referred to the fact that the applicant was very young, his mental stage and the fact that he had not been previously charged with any crimes, were things that the Court in Virginia would consider during the proceedings. The government considered that the assurances made by the United States reduced the risk of the death penalty being imposed.300

General opinions and assessment of the Court

The question in this case was whether article 3 applied since the possible breach would occur in another state, in which the extraditing state does not have jurisdiction.301 It is considered that the state extraditing someone cannot be freed from responsibility from consequences that might be foreseeable. The provisions of the Convention have to be effective in practice.302

Another question in this context was whether extradition to a state where the person in question might be subjected to treatment contrary to article 3 automatically would be a breach of that article. It would be questionable to consider that extraditing someone knowing that he or she might be subjected to torture would not be a breach of article 3. Even if that circumstance is not literally mentioned in the article, it would be contrary to its purpose.303 Therefore, extraditing someone may be a violation of article 3. There has to be “substantial grounds” which shows a “real risk” for the person to be treated inhumanly if sent to the state in question.304

All circumstances of each case have to be taken into account when deciding whether a treatment is contrary to article 3. There has to be balance between the state’s interest to protect the community and the interest of the individual to enjoy his or her rights. The Court also mentions that there cannot be “safe havens” for those fleeing justice.305

First, the Court considered whether Mr. Soering actually risked being executed if extradited to the United States, since the alleged ill-treatment was connected to him being sentenced to death.306 The Court found that there was “a significant risk” that the death penalty would be imposed, since the committed murders were brutal.307 Also, the assurance given to the government was according to the Court not enough, and they also reminded of the Attorney’s decision to seek the death penalty. Therefore, they found that there was a real risk that Mr. Soering would be subjected to the “death row phenomenon”.308

For there to be a breach of article 3, the treatment has to reach a certain level of severity. This is measured through all the circumstances of the case. This can for example be “the nature and context of the treatment”, “the manner and method of its execution” as well as “its duration”. Also, the mental and physical effects of the treatment are weighed in, as well as the sex, age and health of the person in question.309 Also, things like the punishment’s

298 The European Court of Human Rights, case of Soering v. the United Kingdom (application no. 14038/88) 7 July 1989, p. 25-26 para. 83.
299 Ibid. p. 35 para. 106.
300 Ibid. p. 30 para. 93.
301 Ibid. p. 26 para. 85.
302 Ibid. p. 27 para. 86-87.
303 Ibid. p. 27-28 para. 88.
304 Ibid. p. 28-29 para. 91.
305 Ibid. p. 28 para. 89.
306 Ibid. p. 29 para. 92.
307 Ibid. p. 30 para. 94-95.
308 Ibid. p. 31-32 para. 98-99.
309 Ibid. p. 32 para. 100.
proportionality to the crime and the condition in which one awaits his or her sentence is considered. Here the Court also said that “Present-day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded.”

The pain experienced is not the only thing taken in consideration, but also how long someone have to wait before the sentence is carried out, since that might cause anguish.

The Court however stated that extraditing a person to a state where he or she risks being sentenced to death does not automatically mean that there has been a violation of article 2 or 3. They go on by saying that “the Convention is a living instrument which... must be interpreted in the light of present-day conditions”. Also, the Court acknowledged the development in the member states, that very few of those retained the death penalty.

The Court said that since the Convention should be read as a whole, it cannot be said that article 3 forbids the death penalty when article 2 has made an exception allowing it. Since abolishing the death penalty was made through an additional protocol, the Court considered each state to be allowed to choose on its own when it was ready to commit itself to it.

Returning to the case, Mr. Soering was only 18 years old when the murders took place. Also, he was not mentally stable to take responsibility for them. Those factors were taken into account by the Court when deciding whether his possible long stay on death row was contrary to article 3. The Court also took into account the fact that Germany was willing to prosecute him, which meant that he was not able to flee justice. In Germany he would not risk being subjected to the death row.

To conclude, the long waiting period on death row, his age and health and the fact that the aim, to prosecute him for the murders, could be attained in Germany where he would not risk the same treatment as in the United States, made the Court come to the conclusion that article 3 would be violated if he was extradited.

Concurring opinion
There was one concurring opinion to this judgement. The judge thought there had been a violation, but of the applicant’s right to life. If sent to the United States he might be sentenced to death. That penalty was not available in the United Kingdom. The judge considered that since the penalty was not available in the United Kingdom, they could not let it be imposed on the suspect by extraditing him to a state where it was used. The judge also referred to the development in the European states, and that the death penalty is not consistent with the way these states work today. The judge thought that they only way the extradition could be lawful was if the United States had given an absolute assurance that the death penalty would not be used. Such assurance could not be given.

5.6 External opinions on the decision in Soering v. the United Kingdom
Author Gappa criticised the Court’s decision in the Soering case, saying that they could not show an actual breach of article 3. Gappa considered that Soering had not yet been

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310 The European Court of Human Rights, case of Soering v. the United Kingdom (application no. 14038/88) 7 July 1989, p. 34 para. 104.
311 Ibid. p. 33 para. 100.
312 Ibid. p. 33 para. 101-102.
313 Ibid. p. 34 para. 103.
314 Ibid. p. 36 para. 108.
316 Ibid. p. 38 para. 111.
317 Ibid. p. 45-46.
318 Gappa, David L., European Court of Human Rights-extradition-inhuman or degrading treatment or punishment, Soering case, Georgia journal of international and comparative law, vol. 20 issue 2 1990 p. 479.
convicted by the Virginian authorities, and he thought that the Court did not put enough emphasis on the fact that much of the death row phenomenon is because of the convicted criminal’s own appeals. While recognising that it is understandable that one wishes to do everything possible to avoid a death sentence, he considered these efforts to “only delay the inevitable.” Gappa also criticised the Court, saying that they imposed their cultural view on criminal procedure, by stopping the United Kingdom from extraditing Soering because of the risk of him being executed. This was not in their place to do, since there was no international consensus on the matter, according to Gappa. Gappa found it problematic that someone risking a death sentence could go to a state within the Council of Europe and through such action have his or her sentence reduced to life imprisonment. Consequently, Gappa considered it unlikely that in the future, member states of the Council would extradite people to states where they might face the death penalty.

Author Lenihan criticised the Court on the same basis as Gappa, by arguing that there had been no trial in Virginia yet. He considered there to be a completely different matter if Soering had already had his trial and been sentenced to death. Lenihan also questioned the Court’s conclusion that the death row phenomenon was enough to violate article 3.

Schabas noted that the Court rejected that the prohibition to extraditing someone did not apply to the death penalty in the Soering case. However, by referring to the Öcalan case, he did not think that they would have reached the same conclusion today.

5.7 Case of Öcalan v. Turkey
The circumstances of Soering v. the United Kingdom came into question once again in the case Öcalan v. Turkey almost 20 years later. This case also refers to Soering v. the United Kingdom on several occasions. Öcalan v. Turkey was the first case before the Court which dealt with the imposition of the death penalty in the territory of the state in question. A trial was first held in 2003, after which both the applicant and the government of Turkey requested the case to be referred to the Grand Chamber of the Court.

The case concerned the leader of the Worker’s Party of Kurdistan (PKK). He had lived in Syria for many years but was then expelled. Afterwards he spent time in Greece, Russia and Italy. After once again going to Greece, he was taken to Kenya by the Greek authorities. There he was later informed by the same officials that they would arrange for his leave, since the

320 Ibid. p. 481.
321 Ibid. p. 485.
322 Ibid. p. 487.
323 Ibid. p. 488.
325 Ibid. p. 186.
327 Korff, Douwe, Human rights handbooks no. 8: The right to life a guide to the implementation of article 2 of the European Convention on human rights, Council of Europe, first edition 2006, p. 86. See also the European Court of Human Rights, case of Öcalan v. Turkey (application no. 46221/99) 12 May 2005.
328 The European Court of Human Rights, case of Öcalan v. Turkey (application no 46221/99) 12 May 2005.
331 Ibid. p. 4 para. 13.
Kenyan authorities did not want him there. When arriving at the airport to leave Kenya he was arrested by Turkish authorities. Turkey had issued several arrest warrants for the applicant and he was also wanted by Interpol. He was accused because of him being the founder of the PKK and the various terrorist acts performed by them.332

The applicant’s claims
The applicant alleged violations of several articles, among them articles 2 and 3.333 He meant that article 2 no longer permitted the death penalty to be imposed or used.334 He considered the use of the death penalty to be against both article 2 and 3.335 The penalty had by the practice of the states been abolished, and the penalty constituted inhuman treatment, he argued.336 He also stated that to impose the death penalty on someone after an unfair trial also constituted a breach of those two articles as well as article 6 which protects the right to a fair trial.337

The government’s claims
The government did not think that to impose the death penalty after an unfair trial was a violation of article 3. Also, they referred to the fact that there had been a moratorium on the death penalty in Turkey, and that they wished to follow the norm in Europe to not use the penalty. This removed the risk for the applicant to be subjected to the penalty in their mind.338

General opinions and assessment of the Court
The Court considered that there had been a change since Soering v. the United Kingdom and that the death penalty now had been abolished in all member states except Russia, in which a moratorium was established. Also, all member states but Russia, Armenia and Turkey had signed Protocol no. 6. The Court further referred to the fact that membership in the Council of Europe now required states to abolish the death penalty. The Court considered this to be a sign that the states had agreed to modify article 2. They also questioned whether they had to wait for all states to sign Protocol no. 6 before they could say that article 2 was modified. The Court thus stated: “it can be said that capital punishment in peace time has come to be regarded as an unacceptable... form of punishment that is no longer permissible under article 2.”. The Court further noted that the adoption of Protocol no. 13 also confirmed this view.339

The Court stated that “Even if the death penalty were still permissible under Article 2, the Court considers that an arbitrary deprivation of life pursuant to capital punishment is prohibited.”. They further said that “An arbitrary act cannot be lawful under the Convention”. Consequently, to impose the death penalty after an unfair trial would constitute a breach of article 2.340

Considering that the applicant was the founder and leader of PKK, he was the most wanted man in Turkey. It was not possible to rule out that the applicant may have been executed during the time he was detained until his sentence was changed to imprisonment.341 Because of the fact that the death penalty had been abolished in Turkey and the applicant’s sentence

332 The European Court of Human Rights, case of Öcalan v. Turkey (application no 46221/99) 12 May 2005, p. 4-5 para. 14-16 and 18.
333 Ibid. p. 2 para. 3.
334 Ibid. p. 28 para. 150.
335 Ibid. p. 28-29 para. 151.
336 Ibid. p. 29 para. 157.
337 Ibid. p. 29 para. 160.
338 Ibid. p. 29-30 para. 161.
339 Ibid. p. 31 para. 163-164.
340 Ibid. p. 32 para. 166.
341 Ibid. p. 33 para. 172.
had been reduced, his complaint under article 2 and 3 could not be seen as being violated according to the Court.\textsuperscript{342}

To conclude, the Court did not find a violation of article 2, however they found that article 3 had been violated due to the unfair trial which resulted in the imposition of the death penalty.\textsuperscript{343}

**Dissenting opinion**

One judge had a partly dissenting opinion regarding article 3 in this decision. While he agreed that there was a violation of article 3 due to the unfair trial, he did not think that was the real problem in this case.\textsuperscript{344} He regretted that the Court implied that the death penalty could be regarded as not being permitted anymore, but still did not “express that position in a universally binding manner.”\textsuperscript{345}

The judge considered that the question concerned was who had the power to make such binding declaration, if the Court could say what according to him was obvious: the death penalty is now regarded as inhuman treatment.\textsuperscript{346} The judge referred to the *Soering* case. When that case was decided in 1989 not as many states had signed and ratified Protocol no. 6 as had done that in 2005 when this case was decided. Therefore, the judge found it premature for the Court to have made any decisions then. He also found it to be undisputed that the member states no longer regarded the death penalty as an acceptable form of punishment.\textsuperscript{347}

**5.8 External opinions on the decision in Öcalan v. Turkey**

Author Bodansky argued that the Court interpreted article 2 too narrow when they did not consider it to have been violated due to the fact that Turkey was not going to implement the death penalty on the applicant. Bodansky thought that the right to life is affected not only by the implementation of the death penalty but also its mere imposition. This is why the additional protocols are necessary, he argued.\textsuperscript{348}

Bodansky also criticised the Court for doing, in his opinion, the same thing as it had done in the *Soering* case, only this time it concerned Protocol no. 13 and that time it was Protocol no. 6. The Court had said that since not all member states had ratified Protocol no. 13, they could not say that the states through their action had modified article 2 of the Convention.\textsuperscript{349}

\textsuperscript{342} The European Court of Human Rights, case of Öcalan v. Turkey (application no 46221/ 99) 12 May 2005, p. 29 para. 154-155.

\textsuperscript{343} Ibid. p. 33 para. 175 and p. 40 para. 7.

\textsuperscript{344} Ibid. p. 42 para. 1.

\textsuperscript{345} Ibid. p. 42 para. 2.

\textsuperscript{346} Ibid. p. 42 para. 3.

\textsuperscript{347} Ibid. p. 43 para. 5.

\textsuperscript{348} Bodansky, Daniel, International decisions, American journal of international law, vol. 100 2006, p. 185.

\textsuperscript{349} Ibid. p. 185.
Chapter 6

Analysis

6.1 General

The problem formulation of this thesis reads as follows: How far does the scope of “the right to life” set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms reach concerning the beginning and the end of life? This thesis has focused on the Convention and the case-law of the European Court of Human Rights, to see if any conclusions can be drawn that answers the problem formulation cited above.

The three subjects examined in this thesis; abortion, euthanasia and the death penalty, are all subjects that are controversial and stir up moral and ethical questions, no matter what stand one takes. Also, since Europe is a place with many countries that have different values, culture and history, it can be hard to reach any agreement in these sensitive areas. The right for the states to decide themselves is wide, which considering the lack of consensus is understandable. On the other hand, this means that the right to life will vary depending on what state in Europe you live in, which can lead to an uncertain legal position. The predictability for individuals can be called into question.

On these subjects it is important to discuss the principle of margin of appreciation. This is an important principle which controls how the Court will decide in a certain matter. It also decides to what degree the states have the power to make their own decisions on the matter.

Important factors as to when it is used and to what degree states may enjoy it, are whether there is consensus on the matter in the states and whether it is a sensitive area. The lesser the agreement is among member states the greater is the margin for each state to decide themselves. Herein lay the difficulty to give a straight answer to the problem formulation.

6.2 Abortion

The now abolished Commission never said that article 2 could not be applied to the foetus, but rather that all cases had to be considered individually. Further, the Court is quite evasive on the subject of abortion in my opinion. They say that the foetus may be covered by the article in some circumstances. However, the Court’s reluctance to make a clear statement might be understandable since there are different views as to when life begins and to what degree the foetus should be protected. The case-law of the Court also shows that any right the foetus may possess is limited by the right to life of the mother.

An important aspect is whether one considers life to be inalienable or not. However, I think some sort of decision should be made by the Court, as some of the dissenting judges in the case Vo v. France also considered. Until then, I am sure more cases will come before the Court in which people will try to have their view on the matter confirmed.

Hogan noted that the Commission was not willing to act on states that had liberal legislations on abortion, but not on the ones that had restrictive abortion laws either. Author Castberg considered that there can not be a complete ban on abortions, nor can there be no restrictions at all. Women cannot be allowed to choose to have an abortion at any time they want. This is related to the fact laid down by the Court, that the state has to weigh interests against each other, there has to be a balance and action has to be taken with reasonableness. In the case Paton v. the United Kingdom the Court stated that if the foetus had an absolute right to life, it would mean that the foetus’ life was regarded higher than the mother’s life. No abortion could be allowed, and this was considered to be against the purpose of the Convention.

Something the Court returns to is the state’s right to discretion in “delicate” areas. There are various views on abortions in the member states which mean that it is difficult to reach a
conclusion. The Court also said that when the Convention was adopted the state parties did not want to bind themselves regarding the right to life and abortion. The Court also did not want to impose one view since there are such variation in how to handle the question of abortion. Because of this, states have a wide margin of appreciation in this area.

My opinion on this is that the Court is right when saying that they should not impose a certain view on states. Such action I think could cause a lot of anger and resentment in the member states, since there are strong views on abortions, often linked to certain religious or moral and ethical views. The Court must be careful so that the states do not turn against it. This was also considered by the author Goldman.

However, I do not think that this means that they should leave states to decide completely on their own. I think there should be some reasonable balance on the one hand to the right of the mother to choose and for there to be consideration to her health, and the right of the foetus on the other hand.

Even if the degree as to the liberalisation of the abortion laws varies in the member states, there is always some consideration to the woman’s health. Abortion I think is something that is very private and intimate and affects the woman very deeply. In my opinion the abortion laws should not be too liberal or too restrictive. I think it is reasonable to have some restrictions so that a woman cannot have an abortion whenever she wants, it should not be allowed to have an abortion when the foetus would survive on its own. However, questions may arise as to when that stage is. At the same time, the state should not be allowed to decide that a woman cannot have an abortion at all, even in circumstances when she might die. That is to intervene too much on the mother’s right to privacy. Her life should in my opinion not be put in danger in order to uphold the foetus’ right to life.

The case examined on this subject, Vo v. France, I think is interesting due to all the dissenting opinions from the judges. One judge thought that the rights of the foetus, in case it should have any, were narrower in scope than those of a child that is born. The conclusion was that the foetus could not be protected by article 2. Another judge agreed that the foetus’ right was narrower. However, he also found that the foetus cannot be protected only through the mother. According to him, they are separate and need separate protection.

I agree that the foetus cannot have the same protection as a child that is born. I think one reason for this is that no matter what the dissenting judge said about it, a foetus is dependant on the mother and her health as long as it is not born. A child that is born is physically separated from the mother and is therefore not affected by and dependant on her health. The same thing goes the other way around. As long as the foetus is growing inside the woman, what affects the foetus affects the mother too. It is in my opinion impossible to completely separate the mother and the foetus at that stage, both practically and in law. To me it is impossible for the foetus to be a separate legal personality as long as it is dependent on the mother and her legal rights. This was also stated in the case Paton v. the United Kingdom.

The fact that the mother is a living being who functions on her own and the foetus is not, I think is an important argument for giving the mother’s life and health precedence, as the Court seems to do. The Court said that if the foetus were given an absolute right to life, it would mean that abortions are forbidden in all circumstances, even when the mother’s life is at danger. If one considers the argument I mentioned above, that the mother already is a living and functioning being, it seems wrong to me to give the foetus’ life more importance. There is always a risk that the expectant mother may come in danger during the pregnancy, and I think her life in such case should be considered more important, however harsh that might sound.

The dissenting opinions in the case of Vo v. France are very interesting. One judge criticised how the Court linked together the lives of the foetus and the mother and in that way managed to apply article 2. However, the judge thought that since the mother’s life was never at risk, the article should not have been used at all. This is an interesting point I think. The
Court does not in my opinion seem to want to spell out whether the foetus is covered by the article due to what implications it might have on the state parties. But at the same time they seem to want to include the foetus anyways, and by connecting the foetus to the mother the foetus gains some of the mother’s rights, such as the right to life. Another dissenting opinion in the case had something similar in mind. He wondered why the Court would even bother to examine the case if they did not consider the article to apply to the foetus. The third dissenting opinion came from a judge who said that many states have abortion laws. Why would they be necessary if the states did not consider the foetus’ life worthy protection?

My conclusion to this is that the Court wants to include the foetus, but they cannot go so far as to say straight out that it is included in the article. There are also the arguments already mentioned above, that the foetus cannot have the same rights as the ones who are born. My thought is that the Court has to find a way to be able to use article 2 in order to protect the foetus as far as possible in the case in question, without interfering with the privacy of the mother or making the states feel like the Court has gone too far in deciding how they should handle abortion.

There is also a lot of critique from external reviewers such as Goldman, Plomer and Hewson who all thought that the Court evaded the real issue. Goldman agreed with one of the dissenting judges that the best way is to give the foetus a limited right to life, not to the same extent as those who are born. This would make article 2 clearer, but at the same time still let states have their margin of appreciation as to how to interpret the provision.

Plomer considered that another way to make article 2 clearer without interfering with the state’s margin of appreciation is to take after a debate in the United States. There it was considered that the point of viability of the foetus should be used to determine when states had a duty to legislate. To me, that is a stage to draw the line and make the article clearer. What could be problematic however is if there is dispute as to when viability occur. This will neither work with those states that are absolute opponents of abortion.

The Supreme Court of the United States gave some guidelines on abortion that I think are good and also can be used to clear the situation in the European states as well. According to the Supreme Court, it is up to the doctor to decide up to the end of the first trimester. After that, regulations may be done but consideration should be made to the health of the woman. After the point of viability abortion may be prohibited, but here also the mother’s health should be considered.

It is a delicate issue, and the current policy to leave states with a wide margin of appreciation is perhaps the best solution as long as there are such various opinions in the member states. Even though such practice can cause confusion and lead to uncertainty, there is in my view no other way at the moment. To me it seems that one could try to make a case before the Court in any direction, but the Court will probably let the state in question decide. Consequently, individuals with another view on the matter than the state will probably not have much success in their claims. One has to review each state’s view on the matter to understand what line is followed in the particular state.

The Court has said that states have a wide margin of appreciation when it comes to morals, and especially when it concerns something as important as life. The states have been seen as being best equipped to determine that on their own. There is no consensus as to the beginning of life in science either. My hope and thought is that if there is progress in the area of medical science, maybe there will be at least a little more consensus in the legal area as well.

6.3 Euthanasia
Authors van Dijk and van Hoof considered there to be two sides to this issue. One fundamental aspect is whether one considers life to be inalienable or not. If this is answered in the affirmative, then according to author Ramcharan it is impossible to consider that someone
would be allowed to end his or her life on his or her own or with the help of someone. Even if that person may suffer, they do not have the authority to make that decision. One might come to another conclusion however if that is not how one views it, as for example can be seen in the debate on the internet on this matter. In this case the emphasis is on the individual. Within the right to life contains the right to decide what to do with one’s life. If someone terminally ill does not feel that the life given to him or her is enjoyable anymore due to the illness, then that person should not be prevented from ending that life.

My opinion is that one should be able to choose what to do with one’s life. As authors Merrills and Robertson argued, why should article 2 be violated if the act is carried out with the consent of the person affected? They referred to the Commission who stated that to withhold treatment is no violation, so then the authors wondered why for example switching off a life support machine should be any different. The Parliamentary Assembly has the same view on the matter as the Commission. According to them the wish of terminally ill should be recognized, but to die at the hands of someone else is not permitted.

I agree with the authors, it is difficult to see why these two should be viewed differently. The Parliamentary Assembly has said that the wish of the terminally ill should be respected. If that person wishes to die but cannot do it on his or her own, as in the case with Mrs. Pretty, then there is in my opinion no reason for denying that person his or her wish. Like stated by the Voluntary Euthanasia Society in the Pretty case, denying someone this right I think might be regarded as treatment contrary to article 3, which prohibits torture and inhuman treatment.

However, the reason for the Court to reject Mrs. Pretty’s claim was among other things that the legislation existed to protect vulnerable, and even if Mrs. Pretty did not fall within that category, it is a serious issue in which the state is given more room to regulate against the autonomy of the individual. The problem in this case is that Mrs. Pretty suffered due to this, which I think is regrettable and I wish there could have been some way to avoid that. I understand that states must be able to protect its citizens since it is hard to draw the line between those like Mrs. Pretty and those who really are vulnerable.

Another aspect mentioned by the Catholic Bishop’s conference of England and Wales, which I also understand, is that it is hard to determine whether it really is the will of the person or if it is something forced upon. Something I think is interesting to mention here is that “mercy killings” are not lawful in any member state according to the Parliamentary Assembly. Also, the right to physician-assisted suicide was rejected by the Supreme Courts of both Canada and the United States. This I think shows that the tendency leans toward protection of the vulnerable rather than towards those who wish to see more liberal legislation in favour of euthanasia.

Pretty v. the United Kingdom is the first case in which the Court had to examine whether or not article 2 contains a right to die, as noted by author Hale. The Court unanimously held that article 2 could not be interpreted as containing a right to die. The Court found that such interpretation would be inconsistent, since the article is designed to protect life, which sounds logical to me. Hale further said that this case is a good example of a situation in which states have a wide margin of appreciation. The Court also said that article 2 does not concern the quality of the life, but this aspect may come into question in other articles. However, since the Court only says may I think it is uncertain whether this aspect will actually be protected by the Convention, and I think it should. There is in my opinion no point in having the right to life if one does not consider that life to be worth living. The substance of the life should be enjoyable, it should be worth something in practice as well as in theory.

Problem arises when it comes to those who for some reason cannot speak for themselves but regards their life to not be worthy living. Unfortunately, I do not have a good solution here. The important aspect to me is that it is clear that the wish comes from the person in question since I think one should have the legal power over one’s own body.
An interesting aspect is that it is possible for member states to have legislation permitting euthanasia without violating the Convention, since the Netherlands do. The conclusion to this is, in my opinion, that even if article 2 does not include a right to die, the Convention at least does not forbid assisted suicide as long as the domestic legislation permits it. Therefore, the solution to this issue will vary depending on what country one is looking at.

6.4 The death penalty

The death penalty is the only one of these three subjects that is mentioned in article 2. It is also the only one to have additional protocols. One reason for this I think is because this is the only subject on which there is a big consensus among the member states. For an additional protocol to be adopted and enter into force there has to be a certain number of states behind the idea. Today there is no such consensus on abortion or euthanasia.

Both the Council of Europe and its Parliamentary Assembly are against the death penalty. The Parliamentary Assembly’s arguments against it are that it does not have a place in modern states, that it may constitute torture, it has not been proven to have a deterring effect, there is a risk of innocent being executed, it is not included in newer international or regional documents and aspiring members of the Council of Europe must be willing to abolish it. The Assembly has also stated that no one, not even the state, should have the right to end people’s lives anymore. This is something that is also mentioned by the rapporteur of the Committee on legal affairs. Author Yorke however mentioned a conflict in this, namely the sovereignty of states to decide whether to use this penalty or not. In my opinion this is not a problem since the article itself has not been altered, the way to be bound by these new provisions is to voluntarily ratify the protocols.

There is one problem with the fact that the article was not altered but amended through the additional protocols, as noted by author Yorke. States have the possibility to denounce from them, making it possible to reintroduce the death penalty. However, as noted by the Court, I think this might have been the only way to do this, at least back in 1983. If the member states had wished to alter the article, I do not think it would have been possible to do at that time since there was still reluctance in some states to abolish the death penalty. In that case, we would have had to wait another couple of years. Also, by adopting those protocols and letting states decide on their own, those states ready to make such commitment at the time of the adoption could also use the protocol to sway the states that were uncertain.

Yorke has also written that the idea with the additional protocols was that they would imply that the article itself had changed. In my opinion there might be a downside in assuming this. It opens the possibility for states to interpret it differently depending on the situation. Another to me interesting opinion of Yorke’s is that the adoption of additional Protocol no. 6 was an attempt to correct the Convention which according to him gave to much room for states and too little for the rights of the individual.

The Convention is to be read in its entirety. By using this as a starting point, authors van Dijk and van Hoof compiled a list of criterions that are important to consider when determining whether the penalty is a breach of the Convention. Firstly the trial must be fair, secondly the punishment cannot be disproportionate to the crime, thirdly the manner of the execution cannot be a violation of article 3, fourthly the punishment must have been available when the crime was committed and lastly the penalty is not to be imposed in a discriminatory way. I think this is important because there has to be some sort of guidelines as to how to impose the death penalty. Since it is a penalty with such serious repercussions, if it is to be used at all these safeguards are important so that it is used only on the most serious crimes and that people are aware of the fact that their actions might lead to the death penalty.

The following will deal with statements made in the Court’s case-law throughout the years. In the case Bader and Kanbor v. Sweden the Court gives, in my opinion, a quite vague
statement that since almost all member states have ratified Protocol no. 6, it could be said that the death penalty is unaccepted and no longer permissible.

In *Soering v. the United Kingdom* from 1989 the Court stated that since article 2 provides for the death penalty, then another article in the Convention cannot forbid it. However, that did not mean that article 3 can never come into question regarding the death penalty. For example, how the sentence is imposed or executed, the personal circumstances of the accused such as age, if the sentence is disproportionate to the crime and the conditions of the detention period prior to the execution are things that may lead the Court to find a violation of the article. The Court also said that it would be against the purpose of article 3 to extradite someone knowing that there are “substantial grounds” for believing that there is a “real risk” of the person being subjected to torture. Each case has to be viewed with all its circumstances, but a balance has to be struck between the interest of the state and the interest of the individual.

Further criterions are stated by the Court in the case *Koktysh v. Ukraine* from 2009, in which they said that there has to be “near-certainty” that if expelled, the applicant will loose his or her life. Also, the death penalty used after a possible unfair trial is considered by the Court to cause anguish and mental suffering, contrary to article 3. This I think is an interesting aspect. It is not something I had thought might lead to a violation of article 3 prior to writing this thesis, but it does make much sense.

Returning to the *Soering* case, the severity of the treatment also has to reach a certain level to be a breach of article 3. The nature and context of the treatment, the manner, method and duration of its execution, the mental and physical effects, the sex, age and health of the accused, the proportionality to the crime and conditions in which the applicant have to await execution are all important aspects to this. Consequently, not only the pain experienced by the accused but also the waiting period prior to the execution is important, something that was a surprise to me, but after thinking about it seems reasonable.

After *Soering* the Court was faced with the case of *Öcalan v. Turkey*. Between these judgements the death penalty had been abolished in all member states but Russia, and membership in the Council now required states to abolish the death penalty. One dissenting judge in that case said that it was regrettable that the Court only implied that the death penalty could be regarded as not being permitted anymore. They did not express this opinion in a way that would make it universally binding.

I agree that the Court was vague and unclear, but I am not sure that the Court could make such statement since not all member states have ratified both protocols yet. These protocols are optional, meaning that its provisions cannot be forced upon those who have not agreed to them yet. Protocol no. 6 has been ratified or signed by all member states, so the provisions of that Protocol I think may be imposed on the states. There is a difference however when it comes to Protocol no. 13. This case concerned Protocol no. 6, so I think the dissenting judge was right in his observation, and I agree with him. The situation was different when the *Soering* case was judged, and I understand that the Court could not give any general statements on the matter then. But as I said previously, this had changed when the *Öcalan* case came before the Court in 2005. Now it was possible to say that the death penalty is regarded as obsolete at least in peace time, and the Court should have said so.
Chapter 7

Conclusion

The right to life set out in the Convention does not seem to completely leave out the foetus. However the foetus cannot, at least at this point, have the same rights as a child that is born. Whatever right the foetus may possess is narrower in scope. This is because of the special nature in which the foetus is positioned. It is connected to the mother during the pregnancy, and this is something that cannot be overlooked. The mother’s life is regarded higher because she is already living. The foetus cannot live on its own. Even at the stage when the foetus may be viable outside the womb, the life of the mother will be given priority if it is at stage. Also, the fact that there are different views to this in the member states and that it is a sensitive area means that they will be given a wide margin of appreciation to decide this on their own. Thus, it is hard to give a general answer that applies to all member states as to when life begins.

Euthanasia is much in the same position as the subject of abortion. It is also a sensitive area where the states have a wide margin of appreciation. However, there is a relatively greater agreement on this subject than on abortion. No member state allows “mercy killings” for example. What is in dispute is whether it should be allowed to assist someone in taking their own life if that person wishes to die. Today, this is not possible in most member states. Both the Assembly and the Commission has stated that assisted suicide is not allowed, while at the same time saying that the wish of the terminally ill should be respected. In most states, assisting someone in taking their own life is prohibited, through special legislation or the regular penal code. The Netherlands however do allow it. Even though the Court has stated that article 2 does not include a right to die or to determine when to end one’s life, it seems that the Convention will not hinder states from adopting such legislation voluntarily. Otherwise, the Netherlands would have been seen as violating the Convention.

When the Convention was adopted there were still many member states that retained the death penalty in their penal codes, even though its use was declining. A lot has happened since 1950, with the adoption of the two additional protocols. States that have ratified both protocols have committed themselves to not subject anyone to the death penalty under any circumstances. The scope to use the death penalty has become increasingly narrower, and the view on the penalty is that it is not something that should be used in modern, democratic states. The circumstance in which the penalty is imposed or executed can also constitute a breach of article 3. This means that states that do not use the penalty anymore also have a responsibility not to extradite people to states where they may be subjected to treatment contrary to article 3. Sending Soering to the United States was a violation of the United Kingdom’s duties because of the “death row phenomenon” for example. However, not all situations of extradition to states where the death penalty is still used are considered a breach of article 2 or 3. Thus, as long as there are states outside the Council that use the death penalty, people cannot be completely protected from it through the Convention. Within the member states however, the death penalty will not be used in peace time. Only time will tell whether this will come to apply to times of war also.

There is a different degree of consensus among the member states on these three subjects today. Something I ask myself is whether abortion and euthanasia will ever reach the same consensus as the death penalty has? Are these subjects somehow more sensitive? Is it easier to say that the death penalty is wrong than to reach an agreement as to whether the foetus’ life is protected in the Convention and in that case to what extent? Also, states like the Netherlands have already decided that terminally ill should be able to decide when to die. Then is it possible in the future to reach such agreement within the Council also? As long as there is no consensus however, there will be different interpretations to these subjects.
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http://www.dn.se/nyheter/sverige/fa-lander-tillater-aktiv-dodshjalp-1.1064090 (read 7 May 2010)

The debate on euthanasia: