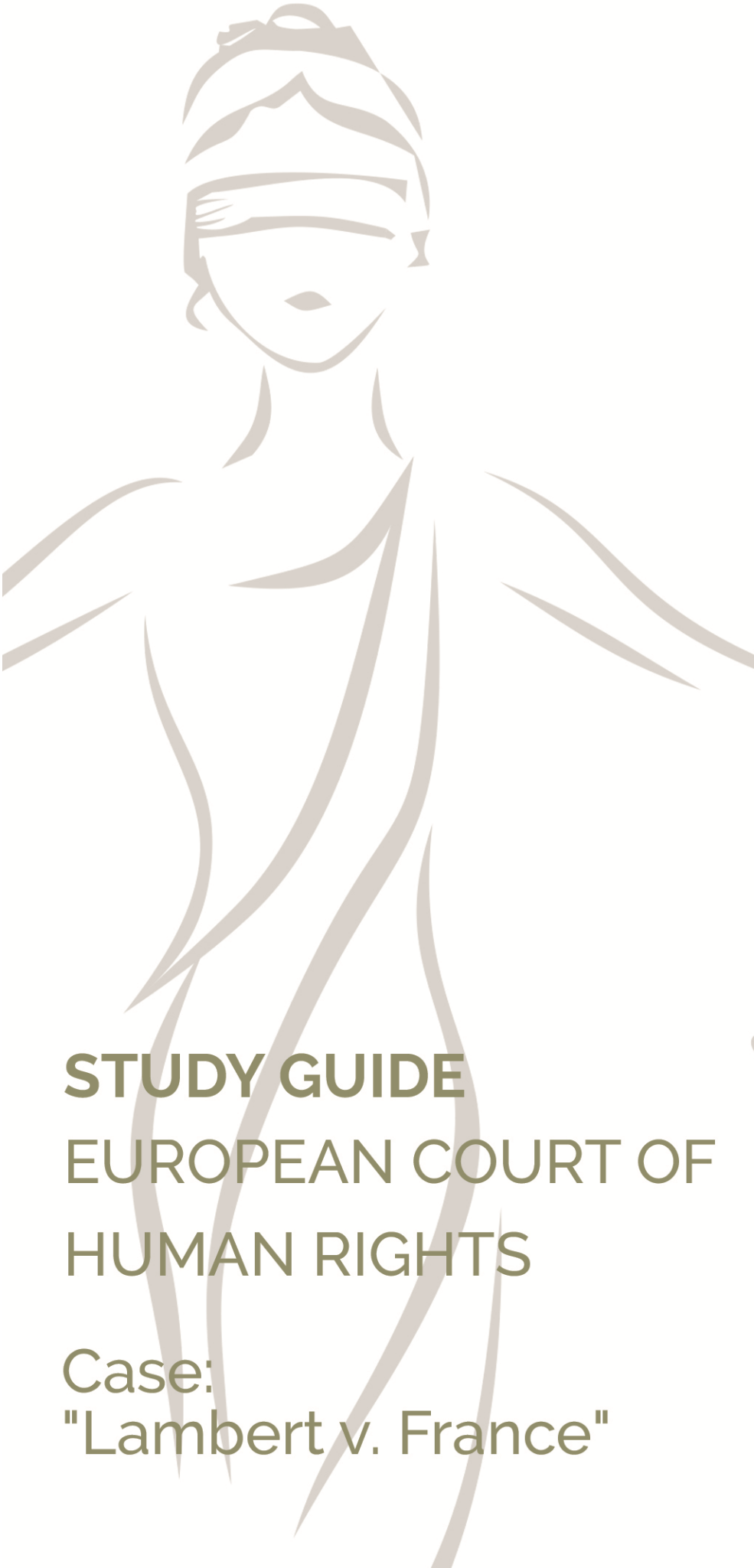

STUDY GUIDE

EUROPEAN COURT OF HUMAN RIGHTS

Case:
"Lambert v. France"

Letter From the Secretary General

Honourable participants;

It is an immense honour for me, as the Secretary-General of the conference, to introduce to you Themis Court Simulations 2022 edition.

As a leading example for the moot court conferences in Turkey, whether at academic expertise, organizational excellence, dedication for the utmost pleasure for the participants or in our persistency to outdo the previous editions, Themis Court Simulations has always advanced itself each passing year.

In this year, we are more than excited to continue this tradition and announce our courts. Ranging from human rights discussions to various types of international arbitrations, from English to Turkish, we have prepared five unique and interesting courts which are, in no specific order; The European Court of Human Rights (ECtHR), International Chamber of Commerce (ICC), Court of Arbitration for Sports (CAS), Istanbul Tahkim Merkezi (ISTAC) and T.C. Anayasa Mahkemesi.

As you could suspect besides the courts and magnificent academy, Themis Court Simulation's magnificent organization team will welcome with their kind hospitality to make your experience as convenient as possible. Through these regards I would like to thank our Director-General Edige Doğan and his team of colleagues for their exquisite efforts for the conference and its organizational excellence.

On behalf of the Themis Court Simulations, I would like to express my excitement to host all of you once more and say that we cannot wait to define justice together once again.

Kind Regards,

Tolga Yeşil

Secretary General, TCS'22

Letter from the Under Secretary Generals

Most Esteemed Participants,

It is our utmost pleasure to welcome all of you to the 6th annual session of Themis Court Simulations. We are Ayben Tecer and Sena Coskun, both of us are senior year students at Yeditepe University and Marmara University. This year, we have the distinct honor of serving you as the Under-Secretary-General responsible for the European Court of Human Rights.

In this year's edition, we have altered the facts of a landmark case concerning passive euthanasia: Lambert v. France. The participants are getting ready to face the challenges set out by a complex issue regarding right to live and State's positive obligation to maintain it. In order to increase the quality of discussions, we have changed some of the circumstances regarding the facts, we wish you will enjoy the treats that will lead you as much as we did while we were creating them. European Court of Human Rights has not set a precedent on the matter yet therefore, we hope this case will provide a platform for participants to enrich their ability to intrepret articles in their own unique way.

Before concluding our words, we would like to express our gratitude to our Secretary-General Tolga Yesil for being so incredibly supportive and for making us a part of the Academic Team. In addition, we would like to thank our lovely Academic Assistant Asil Boran Eri for his great effort and dedication. Last but not least, we would like to express our appreciation to our whole organization team, for all their hard work to bring this conference and us together.

It was an enriching experience to prepare the guide for ECHR on 6th annual session of Themis Court Simulations. We are looking forward to meeting you on the conference.
If you have any questions, please do no hesitate to contact us.

Best Regards,

Ayben Tecer
Sena Coskun

Under Secretary Generals Responsible for the European Court of Human Rights

PART I: EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights (the Court) is an international court based in Strasbourg in France. The Court is the oldest, best established, and most influential of the three regional human rights systems in existence today. Its judgments are binding in the Member States of the Council of Europe. (Weller, 2018)

It has 47 judges – one from each Member State of the Council of Europe which has ratified the European Court of Human Rights. The Court adjudicates complaints against States under the European Convention on Human Rights. Remarkably, individuals can make a complaint or application to the Court if they feel their rights have been breached. States can also make complaints against other States. The Court decides whether the ECHR rights have been violated in individual cases. It issues written judgments setting out its decisions. Judgments of the Court are binding on the Member States. This means that States are under a duty to comply with the judgments of the Court. (Weller, 2018)

Failure to abide by the judgments of the Court can, in theory, have significant political consequences for the concerned Member State, including exclusion from the Council of Europe. In reality, such sanctions have never been applied because Contracting Parties generally have a good record of compliance with the Court's judgments

I. HISTORY OF ECHR

In 1949, only a few years after the end of the Second World War, when Europe still strongly felt the effects of the War, ten Western European states created the Council of Europe. These ten countries were: Belgium, France, Luxembourg, the Netherlands, the United Kingdom, Ireland, Italy, Denmark, Norway, and Sweden. These were all Western European countries, with common or civil law traditions. The founding states wanted to take steps towards European unity. (Steiner & Alston, 2000)

The two main influences pushing towards the creation of the Council of Europe were the experiences of the Second World War and the beginning of the Cold War. The founding fathers of the Council of Europe took up the fight against Nazism and Fascism and wanted to make it impossible for the horrors and brutality to return. The French delegate Teitgen stressed in his speech during the first meeting of the preparatory commission of the Council of Europe his

private experiences of having been a victim of the Nazis. He pointed out not only the threat of Fascism but also the threat of Communism. Freedom meant to him "political freedom and economic liberalism, freedom of competition, profit and money".

> *"We should need years of mutual understanding, study, and collective experiments, even to attempt after many years, with any hope of success, to formulate a complete and general definition of all the freedoms and all the rights which Europe should confer on the Europeans. Let us, therefore, discard for the moment this desirable maximum. Failing this, however, let us be content with the minimum which we can achieve in a very short period, and which consists in defining the seven, eight, or ten fundamental freedoms that are essential for a democratic way of life and which our countries should guarantee to all their people. It should be possible to achieve a common definition of these." (Teitgen, 1949)*

The Council of Europe created the legal text and the institutions for monitoring human rights in Europe. The legal basis for European human rights protection is the Convention. Based on this Convention, supervisory machinery was built, which today is the Court. The Court is embedded in the institutional structure of the Council of Europe. The function of the Court is to monitor the implementation of the Convention.

II.SOURCES OF ECHR

a. The European Convention on Human Rights

ECHR was adopted on November 4, 1950, by the Member States of the Council of Europe. It is an international treaty that all Member States of the Council of Europe have ratified. The ECHR contains a list of fundamental rights that the Member States have agreed to secure to all those within their jurisdiction. Since it entered into force in 1953, 5 substantive protocols have been adopted which bolster the rights and liberties in the initial text of the ECHR and also amend some procedural rules. Not all of the member States have ratified all the Protocols.

It represents the minimum human rights standards to which the European States could agree to more than 50 years ago and is primarily concerned with the protection of civil and political rights, rather than economic, social, or cultural rights.

The Convention consists of three sections and a total of 59 Articles:
a. The rights and freedoms are listed in Section 1 (Articles 1-18);
b. Section 2 (Articles 19–51) deals with the establishment of the Court as well as its duties and powers;
c. Section 3 (Articles 52-59) contains miscellaneous provisions concerning such issues as territorial application, reservations, denunciations, signature, and ratification (Equality Human Rights, 2017).

The substantive rights and freedoms guaranteed by the Convention are set out in Articles 2–14 of the Convention. They are:

– Article 2 Right to life;
– Article 3 Prohibition of torture;
– Article 4 Prohibition of slavery and forced labor;
– Article 5 Right to liberty and security;
– Article 6 Right to a fair trial;
– Article 7 No punishment without law;
– Article 8 Right to respect for private and family life;
– Article 9 Freedom of thought, conscience, and religion;
– Article 10 Freedom of expression;
– Article 11 Freedom of assembly and association;
– Article 12 Right to marry;
– Article 13 Right to an effective remedy;
– Article 14 Prohibition of discrimination.

It is Article 1 which transforms this declaration of rights into a set of obligations for the States which ratified the Convention" (Robin, Jacobs & White, 2010). Pursuant to Article 1 of the Convention, Contracting Parties undertake to secure to everyone within their jurisdiction the rights and freedoms set out in the Convention. Difficulties that have arisen in establishing the boundaries of the Contracting Parties' "jurisdiction" within the meaning of this Article have been resolved by the Court in its case law.

Under Article 32, the Court's jurisdiction extends to all matters concerning the interpretation

and application of the Convention and the Protocols. Because the Court regards the Convention as a "living instrument", it interprets and defines Convention rights in light of present-day conditions, not conditions obtained when it was drafted more than 50 years ago. In the same vein, the Court strives to interpret and apply the Convention "in a manner which renders its rights practical and effective, not theoretical and illusory".

b. The Protocols

Following the entry into force of the Convention in 1953, a number of Protocols have been adopted within the Council of Europe by virtue of which some of the Contracting Parties have undertaken to protect a number of additional rights and freedoms within their jurisdictions. Protocol Nos. 2, 3, 5, 8, 9, 10, 11, and 14 are Protocols that amended Convention proceedings and did not include any additional rights or freedoms. These Protocols have been signed by all Contracting Parties.

The remaining Protocols, and the rights and freedoms they guarantee, are as follows:

– Protocol No.1, which entered into force on 18 May 1954: protection of property, the right to education, and the right to free elections.

– Protocol No. 4, which entered into force on 2 May 1968: prohibition of imprisonment for debt, freedom of movement, the prohibition of the expulsion of nationals, and the prohibition of collective expulsion of aliens.

– Protocol No. 6, which entered into force on 1 March 1985, provides for the abolition of the death penalty but includes a provision to allow the Contracting Parties to prescribe the death penalty in their legislation in a time of war or of imminent threat of war.

– Protocol No. 7, which entered into force on 1 November 1988: procedural safeguards relating to expulsion of aliens, the right of appeal in criminal matters, the right to compensation for wrongful conviction, the right not to be tried or punished twice for the same offense, and equality between spouses.

– Protocol No. 12, which entered into force on 1 April 2005: created a free-standing prohibition of discrimination. Unlike Article 14 of the Convention, which prohibits

discrimination in the enjoyment of "the rights and freedoms outlined in the Convention", Protocol No. 12 prohibits discrimination in the enjoyment of "any right set forth by law" and not just those rights guaranteed under the Convention.

– Protocol No. 13, which entered into force on 1 July 2003: abolished the death penalty in all circumstances. Applicants should note that the Protocols mentioned above have not been ratified by all the Contracting Parties. It follows that a complaint made under an Article of one of the Protocols against a State that has not ratified that Protocol will be declared inadmissible. The table of Dates of Entry into Force of the Convention and its Protocols reproduced in "Textbox i" above should be consulted.

Applicants should note that the Protocols mentioned above have not been ratified by all the Contracting Parties. It follows that a complaint made under an Article of one of the Protocols against a State that has not ratified that Protocol will be declared inadmissible.

III. STRUCTURE

A.THE COURT

Section II of the European Convention of Human Rights is about creating the European Court of Human Rights as a monitoring tool. Article 19-51 is the constitution of the Court.

• The Court has 47 members each from the Contracting States. They serve one term for 9 years or when they reach seventy years old.
• All members panel creates the Plenary Court whose duties are listed on Article 25 of the Convention. Plenary Court mostly has administrative duties.
• Article 26 of the Convention creates four different structures to consider the cases brought before it

o Single Judge Formation
o Committee of Three Judges
o Chambers of Seven Judges
o The Grand Chamber consisting of 17 members

a. Single Judge Formation

Single judges review the admissibility of the application, and they can strikeout of the list the cases that they deem inadmissible submitted under Article 34 (individual applications). Their decisions are final. If they deem admissible, they refer to Committees.

b. Committee of Three Judges

Committees are three-judge panels within a section. The President (with the advice of Section Presidents) decides the number of members of the Court. The committees are set up for twelve months and members of the section will participate in rotation with the exception of Section President.

1. It reviews the admissibility and may declare an application inadmissible; it is a final decision.

2. It can render a judgment on the merits of the case if the case is about established case law of the court. It is a final decision.

c. Chambers of Seven Judges

If no decision or judgment was made by a single judge and the committee, the chamber will decide on the admissibility and merits of individual applications. But in interstate cases, both admissibility and judgment on the merits will be decided by the Chamber assigned by the President. Each chamber has seven members from a particular section. Each chamber will consist of the Section's president and the judge elected in respect of the State concerned. If the case is not in the national judge's section, then the national judge shall sit as an ex officio member of the Chamber. Other five members of the Chamber will be designated by the section's president in rotation from among the members of the section. Members of the section who do not sit will be substitute judges.

B. THE GRAND CHAMBER

a. General

Article 26 of the Convention mandates the formation of a Grand Chamber including seventeen judges. National judges (the judge elected in respect of the Contracting State) sit in cases concerning their country in the Grand Chamber as ex officio members.

Grand Chamber consists of

- The President of the Court
- The Vice-Presidents
- The Presidents of the Chambers (If unable to sit, President of the Chamber will be replaced by the Vice-President of the respective chamber.)
- Elected Judges
- National judges

In addition to seventeen judges, there must be at least three substitute judges.

Sections: Sections are not the judicial part of the Court but the rules of the Court create them as an administrative structure. They are established by the plenary court on a proposal by the President for three years. Rule 25 requires at least four sections to be set up. Rule 25.5 lets the plenary Court create another section which it did. This resulted in the first four sections having nine judges and the fifth one having eleven members on it. President of the Section will be elected by the plenary court according to Rule 8.

1. Submitting an Application to the Court

Rule 46 demands contracting parties or parties intending to bring an interstate application shall file an application to the Court's registry. It is required to include

(a) the name of the Contracting Party against which the application is made;
(b) a statement of the facts;
(c) a statement of the alleged violation(s) of the Convention and the relevant arguments;
(d) a statement on compliance with the admissibility criteria (exhaustion of domestic remedies and the six-month rule) laid down in Article 35 § 1 of the Convention;
(e) the object of the application and a general indication of any claims for just satisfaction made under Article 41 of the Convention on behalf of the alleged injured party or parties; and
(f) the name and address of the person or persons appointed as Agent; and accompanied by
(g) copies of any relevant documents and in particular the decisions, whether judicial or not, relating to the object of the application.

2. General Principles

• Rule 34.1 declares English and French as the official languages of the Court.
• Parties may be represented by a lawyer.

3. Proceedings on Admissibility

After the application is made to the Court pursuant to Rule 46, the President of the Court shall notify the respondent State and it shall assign one of the sections. This is the main difference of procedure in interstate cases, inter-state applications' admissibility and merits will both be reviewed by a Chamber, unlike individual applications which will be reviewed by a single judge or a committee of three judges.

The president of the Section shall set up a chamber pursuant to Rule 26. Both applicant and respondent states' national judges shall sit as ex officio members of the Chamber constituted by the Section. The contracting party will be invited to submit its observations in writing on the admissibility of the application. The information also will be communicated to the applicant state, and the applicant state may submit a written observation in reply. Before the admissibility decision, the Chamber or the President of the Section may require the parties to submit further observations in writing.

A plea of inadmissibility of the respondent state must be in written or oral observations on the admissibility of the application submitted under the same rules of responding observations being submitted. The decision of the Chamber shall be communicated by the Registrar to the applicant. It shall also be communicated to the Contracting Party or Parties concerned and to any third party, including the Council of Europe Commissioner for Human Rights, where these have previously been informed of the application in accordance with the present Rules.

4. Proceedings after the Admission of an Application

Once the Chamber has decided to admit an application made under Article 33 of the Convention, the President of the Chamber shall, after consulting the Contracting Parties concerned, lay down the time limits for the filing of written observations on the merits and to produce any further evidence. The President may, however with the agreement of the Contracting Parties concerned, direct that a written procedure is to be dispensed with. A hearing on the Procedure of the Court merits shall be held if one or more of the Contracting Parties concerned so requests or if the Chamber so decides of its own motion. The President of the Chamber shall fix the oral procedure.

5. Hearings

The President of the Chamber shall organize and direct hearings and shall prescribe the order in which those appearing before the Chamber shall be called upon to speak. Any judge may put questions to any person appearing before the Chamber. Hearings are public unless there otherwise shall be in the interests of morals, public order, or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Chamber in special circumstances where publicity would prejudice the interests of justice.

6. Grand Chamber Procedure

Any rule of procedure before the Chamber also applies to proceedings before the Grand Chamber. Regardless of the type of application, the Grand Chamber has appellate jurisdiction on the applications. There are two types for the jurisdiction of the Grand Chamber, first one is the "Chamber relinquishing its power in favor of the Grand Chamber" regulated under Rule 72.

A chamber might relinquish its power if there is an important question in the interpretation of the Convention or the protocols or if the outcome of the case is likely to be against established precedent. The second type of jurisdiction of the Grand Chamber is called "referral". Article 31 (a) of the Convention and Rule 73.1 of the Rules of the Court establishes appellate jurisdiction on the inter-state and individual application in three months by the applicants or the contracting state.

Rules of the Court require the case to raise a serious question affecting the interpretation or application of the Convention or the Protocols or the serious issue of general importance. Thiscriterium shall be reviewed by a panel of five judges from the Grand Chamber.
Panel: shall examine the request solely based on the existing case file. It shall accept the request only if it considers that the case does raise such a question or issue. Reasons need not be given for a refusal of the request. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

Referral to the Grand Chamber is to be granted "if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto or a serious issue of general importance", the "discovery of a fact which might by its nature have a decisive

influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known" to at least one of the parties is a reason for requesting revision of the judgment. Therefore, where a referral request is based on the discovery of such a fact, the Panel may decide to refuse referral but to transmit the party's observations to the original Chamber, which should, in turn, examine whether the conditions for revising its judgment are complied with.

The Panel declares inadmissible any referral requests which:
(a) challenge the Chamber's decision declaring a complaint inadmissible
(b) do not comply with the three-month rule set out in Article 43 § 1 of the Convention.

Usually, Grand Chamber hears applications if there is a new precedent being established, the section's judgment being contrary to established precedent or there is a serious issue of general importance. General practice suggests that inter-state applications are reviewed as credible for the Grand Chamber referral.

PART II: LAMBERT v. FRANCE

I. OVERVIEW

The case is against French Republic lodged with the Court under Article 34 of the Convention for Protection of Human Rights and Fundamental Freedoms by one French national, Rachel Lambert.

The applicants alleged, in particular, inaplication of the decision for withdrawal of Vincent Lambert's artificial nutrition and hydration would be in breach of the State's obligations under Article 2 of the Convention, that it would constitute illtreatment amounting to torture within the meaning of Article 3 of the Convention and would infringe his physical integrity, in breach of Article 8 of the Convention.

The case went to the Chamber of the Fifth Section and then relinquished jurisdiction in favour of the Grand Chamber. The applicants and the Government each filed observations on the admissibility and merits of the case.

Observations were also received from Rachel Lambert, François Lambert and Marie-Geneviève Lambert, the wife, nephew and half-sister respectively of Vincent Lambert, and from the National Union of Associations of Head Injury and Brain Damage Victims' Families, the association Amréso-Bethel and the Human Rights Clinic of the International Institute of Human Rights, to all of whom the President had given leave to intervene as third parties in the written procedure.

II. FACTS OF THE CASE

The applicant, who is a French national, Rachel Lambert who was born on 12 June 1989 and lives in Paris is Vincent Lambert's wife.

Vincent Lambert sustained serious head injuries in a road-traffic accident on 29 September 2008, which left him tetraplegic and in a state of complete dependency. According to the expert medical report ordered by the Conseil d'État on 14 February 2014, he is in a chronic vegetative state.

From September 2008 to March 2009 he was hospitalised in the resuscitation wing, and subsequently the neurology ward, of Châlons-en-Champagne Hospital. From March to June 2009 he was cared for in the heliotherapy centre in Berck-sur-Mer, before being moved on 23 June 2009 to the unit in Reims University Hospital providing follow-up and rehabilitative care to patients in a vegetative or minimally conscious state, where he remains to date. The unit accommodates eight patients. Vincent Lambert receives artificial nutrition and hydration which is administered enterally, that is, via a gastric tube.

In July 2011 Vincent Lambert was assessed by a specialised unit of Liège University Hospital, the Coma Science Group, which concluded that he was in a chronic neuro-vegetative state characterised as "minimally conscious plus". In line with the recommendations of the Coma Science Group he received daily sessions of physiotherapy from September 2011 to the end of October 2012, which yielded no results. He also received eightyseven speech and language therapy sessions between March and September 2012, in an unsuccessful attempt to establish a code of communication. Attempts were also made to sit the patient in a wheelchair.

a. First Decision Under the Law of 22 April 2005 on patients' rights and end-of-life issues (Leonetti Act)

As Vincent Lambert's carers had observed increasing signs in 2012 of what they believed to be resistance on his part to daily care, the medical team initiated in early 2013 the collective procedure provided for by the Law of 22 April 2005 on patients' rights and end-of-life issues. Rachel Lambert, the patient's wife, was involved in the procedure and stated that since she is also a medical servant, people whose in the position of Mr Lambert usually wanted to end their lives because of the vegetative state and also she indicates that they discussed the opportunities as a couple for those kind of situations and Mr Lambert verbally state that he is also wanted his life to be end when it comes to that point.

The procedure resulted in a decision by Dr Kariger, the doctor in charge of Vincent Lambert and head of the department in which he is hospitalised, to withdraw the patient's nutrition and reduce his hydration. The decision was put into effect on 10 April 2013.

b. Injunction of 11 May 2013

On 9 May 2013 Mr Pierre Lambert, Mrs Viviane Lambert, Mr David Philippon and Mrs Anne Tuarze, respectively parents, half brother and sister of Mr Vincent Lambert applied to the Châlons-en-Champagne Administrative Court an urgent application. In an order dated 11 May 2013, the urgent-applications judge granted their requests. The judge held that, since no advance directives had been drawn up by Vincent Lambert, and in the absence of a person of trust within the meaning of the relevant provisions of the Public Health Code, the collective procedure should be continued with his family, despite the fact that the latter was divided as to what should become of the patient. The judge noted that, while Vincent Lambert's wife had been involved in the procedure, it was clear from examination of the case that his parents had not been informed that it had been applied, and that the decision to withdraw nutrition and limit hydration, the nature of and reasons for which had not been disclosed to them, had not respected their wishes.

The judge held accordingly that these procedural shortcomings amounted to a serious and manifestly unlawful breach of a fundamental freedom, namely the right to respect for life, and ordered the hospital to resume feeding and hydrating Vincent Lambert normally and to provide him with whatever care his condition required.

c. Second decision under the Leonetti Act

In September 2013 a fresh collective procedure was initiated. Dr Kariger consulted six doctors, including three from outside the hospital (a neurologist, a cardiologist and an anaesthetist with experience in palliative medicine) chosen by Vincent Lambert's parents, his wife and the medical team respectively.

Dr Kariger also convened two meetings with the family, on 27 September and 16 November 2013, which were attended by Vincent Lambert's wife and parents and his eight siblings. Rachel Lambert and six of the eight brothers and sisters spoke in favour of discontinuing artificial nutrition and hydration, while the applicants were in favour of continuing it. On 9 December 2013 Dr Kariger called a meeting of all the doctors and almost all the members of the care team. Following that meeting Dr Kariger and five of the six doctors consulted stated that they were in favour of withdrawing treatment.

On completion of the consultation procedure Dr Kariger announced on 11 January 2014 his intention to discontinue artificial nutrition and hydration on 13 January, subject to an application to the administrative court. His decision, comprising a reasoned thirteen-page report, a seven-page summary of which was read out to the family, observed in particular that Vincent Lambert's condition was characterised by irreversible brain damage and that the treatment appeared to be futile and disproportionate and to have no other effect than to sustain life artificially. According to the report, the doctor had no doubt that Vincent Lambert had not wished, before his accident, to live under such conditions. Dr Kariger concluded that prolonging the patient's life by continuing his artificial nutrition and hydration amounted to unreasonable obstinacy.

d. Administrative Court judgment of 16 January 2014

On 13 January 2014 the parents of Mr Lambert made a further urgent application to the Châlons-en-Champagne Administrative Court for seeking an injunction prohibiting the hospital and the doctor concerned from withdrawing Vincent Lambert's nutrition and hydration.

The Administrative Court, sitting as a full court of nine judges, held a hearing on 15 January 2014. In a judgment of 16 January 2014, it suspended the implementation of Dr Kariger's decision of 11 January 2014.

The Administrative Court began by observing that Article 2 of the Convention did not prevent States from making provisions for individuals to object to potentially life-prolonging treatment, or for a doctor in charge of a patient who was unable to express his or her wishes and whose treatment the doctor considered, after implementing a series of safeguards, to amount to unreasonable obstinacy, to withdraw that treatment, subject to supervision by the Medical Council, the hospital's ethics committee, where applicable, and the administrative and criminal courts.

The Administrative Court went on to find that it was clear from the relevant provisions of the Public Health Code, as amended following the Leonetti Act and as elucidated by the parliamentary proceedings, that artificial enteral nutrition and hydration – which were subject, like medication, to the distribution monopoly held by pharmacies, were designed to supply specific nutrients to patients with impaired functions and which required recourse to invasive techniques to administer them – constituted a form of treatment.

Observing that Dr Kariger's decision had been based on the wish apparently expressed by Vincent Lambert not to be kept alive in a highly dependent state, and that the latter had not drawn up any advance directives or designated a person of trust, the Administrative Court found that the views he had confided to his wife and one of his brothers had been those of a healthy individual who had not been faced with the immediate consequences of his wishes, and had not constituted the formal manifestation of an express wish, irrespective of his professional experience with patients in a similar situation. The court further found that the fact that Vincent Lambert had had a conflictual relationship with his parents, since he did not share their moral values and religious commitment, did not mean that he could be considered to have expressed a clear wish to refuse all forms of treatment, and added that no unequivocal conclusion as to his desire or otherwise to be kept alive could be drawn from his apparent resistance to the care provided. The Administrative Court held that Dr Kariger had incorrectly assessed Vincent Lambert's wishes.

The Administrative Court also noted that Vincent Lambert was in a minimally conscious state, implying the continuing presence of emotional perception and the existence of possible responses to his surroundings. Accordingly, the administering of artificial nutrition and hydration was not aimed at keeping him alive artificially. Lastly, the court considered that, as long as the treatment did not cause any stress or suffering, it could not be characterised as futile or disproportionate. It therefore held that **Dr Kariger's decision had constituted a serious and manifestly unlawful breach of Vincent Lambert's right to life.** It issued an order suspending the implementation of the decision while rejecting the request for the patient to be transferred to the specialised extended-care facility in Oberhausbergen.

e. Conseil d'État (French Court of Appeal) ruling of 14 February 2014

In three applications lodged on 31 January 2014, Rachel Lambert, François Lambert and Reims University Hospital appealed against that judgment to the urgent-applications judge of the Conseil d'État. The applicants lodged a cross-appeal, requesting Vincent Lambert's immediate transfer to the specialised extended-care facility. The National Union of Associations of Head Injury and Brain Damage Victims' Families sought leave to intervene as a third party.

The hearing before the full court took place on 13 February 2014. In his submissions to the Conseil d'État, the public rapporteur cited, inter alia, the remarks made by the Minister of Health to the members of the Senate examining the bill known as the "Leonetti Bill":
"While the act of withdrawing treatment ... results in death, the intention behind the act [is not to kill; it is] to allow death to resume its natural course and to relieve suffering. This is particularly important for care staff, whose role is not to take life."

The Conseil d'État delivered its ruling on 14 February 2014. The Conseil d'État went on to find that its task was to satisfy itself, having regard to all the circumstances of the case, that the statutory conditions governing any decision to withdraw treatment whose continuation would amount to unreasonable obstinacy had been met. To that end it needed to have the fullest information possible at its disposal, in particular concerning Vincent Lambert's state of health. Accordingly, it considered it necessary before ruling on the application to order an expert medical report to be prepared by practitioners with recognised expertise in neuroscience. The experts – acting on an independent and collective basis, after examining the patient, meeting the medical team and the care staff and familiarising themselves with the patient's entire

medical file – were to give their opinion on Vincent Lambert's current condition and provide the Conseil d'État with all relevant information as to the prospect of any change.

f. Expert medical report and general observations,

The experts examined Vincent Lambert on nine occasions. On 5 May 2014 the experts sent their preliminary report to the parties for comments. Their final report, submitted on 26 May 2014, provided the following replies to the questions asked by the Conseil d'État.
The experts found that Vincent Lambert's clinical condition corresponded to a vegetative state, with no signs indicating a minimally conscious state. Furthermore, they stressed that he had difficulty swallowing and had seriously impaired motor functions of all four limbs, with significant retraction of the tendons. They noted that his state of consciousness had deteriorated since the assessment carried out in Liège in 2011.

The experts pointed out that the two main factors to be taken into account in assessing whether or not brain damage was irreversible were, firstly, the length of time since the accident which had caused the damage and, secondly, the nature of the damage. In the present case they noted that five and a half years had passed since the initial head injury and that the imaging tests showed severe cerebral atrophy testifying to permanent neuron loss, near-total destruction of strategic regions such as both parts of the thalamus and the upper part of the brain stem, and serious damage to the communication pathways in the brain. They concluded that the brain damage was irreversible. They added that the lengthy period of progression, the patient's clinical deterioration since July 2011, his current vegetative state, the destructive nature and extent of the brain damage and the results of the functional tests, coupled with the severity of the motor impairment of all four limbs, pointed to a poor clinical prognosis.

In the light of the tests carried out, and particularly in view of the fact that the course of speech and language therapy carried out in 2012 had not succeeded in establishing a code of communication, the experts concluded that Vincent Lambert was not capable of establishing functional communication with those around him.

The experts observed that Vincent Lambert reacted to the care provided and to painful stimuli, but concluded that these were non-conscious responses. In their view, it was not possible to

interpret them as conscious awareness of suffering or as the expression of any intent or wish with regard to the withdrawal or continuation of treatment.

On 22 and 29 April and 5 May 2014 the Conseil d'État received the general observations of the National Medical Council, Mr Jean Leonetti, rapporteur for the Law of 22 April 2005 (Leonetti Act), the National Medical Academy and the National Ethics Advisory Committee. The National Medical Council made clear in particular that, in using the expression "no other effect than to sustain life artificially" in Article L. 1110-5 of the Public Health Code, the legislature had sought to address the situation of patients who not only were being kept alive solely by the use of methods and techniques replacing key vital functions, but also, and above all, whose cognitive and relational functions were profoundly and irreversibly impaired. It emphasised the importance of the notion of temporality, stressing that where a pathological condition had become chronic, resulting in the person's physiological deterioration and the loss of his or her cognitive and relational faculties, obstinacy in administering treatment could be regarded as unreasonable if no signs of improvement were apparent.

Mr Leonetti stressed that the Law of 22 April 2005 was applicable to patients who had brain damage and thus suffered from a serious condition which, in the advanced stages, was incurable, but who were not necessarily "at the end of life". Accordingly, the legislature had referred in its title to "patients' rights and end-of-life issues" rather than "patients' rights in end-of-life situations". He outlined the criteria for unreasonable obstinacy and the factors used to assess it and stated that the reference to treatment having "no other effect than to sustain life artificially", which was stricter than the wording originally envisaged (namely, treatment "which prolongs life artificially") was more restrictive and referred to artificially sustaining life "in the purely biological sense, in circumstances where, firstly, the patient has major irreversible brain damage and, secondly, his or her condition offers no prospect of a return to awareness of self or relationships with others". He pointed out that the Law of 22 April 2005 gave the doctor sole responsibility for the decision to withdraw treatment and that it had been decided not to pass that responsibility on to the family, in order to avoid any feelings of guilt and to ensure that the person who took the decision was identified. The National Medical Academy reiterated the fundamental prohibition barring doctors from deliberately taking another's life, which formed the basis for the relationship of trust between doctor and patient. The Academy reiterated its long-standing position according to which the Leonetti Act was applicable not only to the various "end-of-life" situations, but also to situations raising the very

difficult ethical issue of the "ending of life" in the case of patients in "survival" mode, in a minimally conscious or chronic vegetative state. The National Ethics Advisory Committee conducted an in-depth analysis of the difficulties surrounding the notions of unreasonable obstinacy, treatment and sustaining life artificially, summarised the medical data concerning minimally conscious states, and addressed the ethical issues arising out of such situations. It recommended, in particular, a process of reflection aimed at ensuring that the collective discussions led to a genuine collective decision-making process and that, where no consensus could be reached, there was a possibility of mediation.

g. Conseil d'État judgment of 24 June 2014

The Conseil d'État delivered its judgment on 24 June 2014. After granting leave to Marie-Geneviève Lambert, Vincent Lambert's half-sister, to intervene as a third party, and reiterating the relevant provisions of domestic law as commented on and elucidated in the general observations received, the Conseil d'État examined in turn the applicants' arguments based on the Convention and on domestic law.

On the first point the Conseil d'État reiterated that, where the urgent-applications judge was called on to hear an application under Article L. 521-2 of the Administrative Courts Code (urgent application for protection of a fundamental freedom) concerning a decision taken by a doctor under the Public Health Code which would result in treatment being discontinued or withheld on the ground of unreasonable obstinacy, and implementation of that decision would cause irreversible damage to life, the judge was required to examine any claim that the provisions in question were incompatible with the Convention.

Conseil d'État replied in the following terms to the arguments based on Articles 2 and 8 of the Convention:

> *"Firstly, the disputed provisions of the Public Health Code defined a legal framework reaffirming the right of all persons to receive the most appropriate care, the right to respect for their wish to refuse any treatment and the right not to undergo medical treatment resulting from unreasonable obstinacy. Those provisions do not allow a doctor to take a life-threatening decision to limit or withdraw the treatment of a person incapable of expressing his or her wishes, except on the dual, strict condition that continuation of that treatment would amount to unreasonable obstinacy and that the*

requisite safeguards are observed, namely that account is taken of any wishes expressed by the patient and that at least one other doctor and the care team are consulted, as well as the person of trust, the family or another person close to the patient. Any such decision by a doctor is open to appeal before the courts in order to review compliance with the conditions laid down by law. Hence the disputed provisions of the Public Health Code, taken together, in view of their purpose and the conditions attaching to their implementation, cannot be said to be incompatible with the requirements of Article 2 of the Convention ..., or with those of Article 8 ..."

The Conseil d'État went on to find that it was its task, in the light of all the circumstances of the case and the evidence produced in the course of the adversarial proceedings before it, in particular the expert medical report, to ascertain whether the decision taken by Dr Kariger on 11 January 2014 had complied with the statutory conditions imposed on any decision to withdraw treatment whose continuation would amount to unreasonable obstinacy. The Conseil d'État went on to find that it was its task, in the light of all the circumstances of the case and the evidence produced in the course of the adversarial proceedings before it, in particular the expert medical report, to ascertain whether the decision taken by Dr Kariger on 11 January 2014 had complied with the statutory conditions imposed on any decision to withdraw treatment whose continuation would amount to unreasonable obstinacy.

In that connection the Conseil d'État ruled as follows:

"Firstly, it is clear from the examination of the case that the collective procedure conducted by Dr Kariger ..., prior to the taking of the decision of 11 January 2014, was carried out in accordance with the requirements of Article R. 4127-37 of the Public Health Code and involved the consultation of six doctors, although that Article simply requires that the opinion of one doctor and, where appropriate, of a second be sought. Dr Kariger was not legally bound to allow the meeting of 9 December 2013 to be attended by a second doctor designated by Mr Lambert's parents in addition to the one they had already designated. Nor does it appear from the examination of the case that some members of the care team were deliberately excluded from that meeting. Furthermore, Dr Kariger was entitled to speak with Mr François Lambert, the patient's nephew. The fact that Dr Kariger opposed a request for him to withdraw from Mr Lambert's case and for the patient to be transferred to another establishment, and the fact that he expressed his views publicly, do not amount, having regard to all the

circumstances of the present case, to a failure to comply with the obligations implicit in the principle of impartiality, which Dr Kariger respected. Accordingly, contrary to what was argued before the Châlons-en-Champagne Administrative Court, the procedure preceding the adoption of the decision of 11 January 2014 was not tainted by any irregularity.

Secondly, the experts' findings indicate that 'Mr Lambert's current clinical condition corresponds to a vegetative state', with 'swallowing difficulties, severe motor impairment of all four limbs, some signs of dysfunction of the brainstem' and 'continued ability to breathe unaided'. The results of the tests carried out from 7 to 11 April 2014 to assess the patient's brain structure and function ... were found to be consistent with such a vegetative state. The experts found that the clinical progression, characterised by the disappearance of the fluctuations in Mr Lambert's state of consciousness recorded during the assessment carried out in July 2011 by the Coma Science Group at Liège University Hospital and by the failure of the active therapies recommended at the time of that assessment, were suggestive of 'a deterioration in the [patient's] state of consciousness since that time'. Furthermore, according to the findings set out in the experts' report, the exploratory tests which were carried out revealed serious and extensive brain damage, as evidenced in particular by 'severe impairment of the structure and metabolism of the sub-cortical regions of crucial importance for cognitive function' and 'major structural dysfunction of the communication pathways between the regions of the brain involved in consciousness'. The severity of the cerebral atrophy and of the damage observed, coupled with the five-and-a-half-year period that had elapsed since the initial accident, led the experts to conclude that the brain damage was irreversible. Furthermore, the experts concluded that 'the lengthy period of progression, the patient's clinical deterioration since 2011, his current vegetative state, the destructive nature and the extent of the brain damage, the results of the functional tests and the severity of the motor impairment of all four limbs' pointed to a 'poor clinical prognosis'. Lastly, while noting that Mr Lambert was capable of reacting to the care administered and to certain stimuli, the experts indicated that the characteristics of those reactions suggested that they were non-conscious responses. The experts did not consider it possible to interpret these behavioural reactions as evidence of 'conscious awareness of suffering' or as the expression of any intent or wish with regard to the withdrawal or continuation of the treatment keeping the patient alive. These findings, which the experts reached unanimously following a collective

assessment in the course of which the patient was examined on nine separate occasions, thorough cerebral tests were performed, meetings were held with the medical team and care staff involved and the entire file was examined, confirm the conclusions drawn by Dr Kariger as to the irreversible nature of the damage and Mr Lambert's clinical prognosis. The exchanges which took place in the adversarial proceedings before the Conseil d'État subsequent to submission of the experts' report do nothing to invalidate the experts' conclusions. While it can be seen from the experts' report, as just indicated, that Mr Lambert's reactions to care are not capable of interpretation and thus cannot be regarded as expressing a wish as to the withdrawal of treatment, Dr Kariger in fact indicated in the impugned decision that the behaviour concerned was open to various interpretations, all of which needed to be treated with great caution, and did not include this aspect in the reasons for his decision. Thirdly, the provisions of the Public Health Code allow account to be taken of a patient's wishes expressed in a form other than advance directives. It is apparent from the examination of the case, and in particular from the testimony of Mrs Rachel Lambert, that she and her husband, both nurses, had often discussed their respective professional experiences in dealing with patients under resuscitation and those with multiple disabilities, and that Mr Lambert had on several such occasions clearly voiced the wish not to be kept alive artificially if he were to find himself in a highly dependent state. The tenor of those remarks, reported by Mrs Rachel Lambert in precise detail and with the corresponding dates, was confirmed by one of Mr Lambert's brothers. While these remarks were not made in the presence of Mr Lambert's parents, the latter did not claim that their son could not have made them or that he would have expressed wishes to the contrary, and several of Mr Lambert's siblings stated that the remarks concerned were in keeping with their brother's personality, past experience and personal opinions. Accordingly, in stating among the reasons for the decision at issue his certainty that Mr Lambert did not wish, before his accident, to live under such conditions, Dr Kariger cannot be regarded as having incorrectly interpreted the wishes expressed by the patient before his accident. Fourthly, the doctor in charge of the patient is required, under the provisions of the Public Health Code, to obtain the views of the patient's family before taking any decision to withdraw treatment. Dr Kariger complied with this requirement in consulting Mr Lambert's wife, parents and siblings in the course of the two meetings referred to earlier. While Mr Lambert's parents and some of his brothers and sisters opposed the discontinuing of treatment, Mr Lambert's wife and his other siblings stated

their support for the proposal to withdraw treatment. Dr Kariger took these different opinions into account. In the circumstances of the case, he concluded that the fact that the members of the family were not unanimous as to what decision should be taken did not constitute an impediment to his decision. It follows from all the above considerations that the various conditions imposed by the law before any decision can be taken by the doctor in charge of the patient to withdraw treatment which has no effect other than to sustain life artificially, and whose continuation would thus amount to unreasonable obstinacy, may be regarded, in the case of Mr Vincent Lambert and in the light of the adversarial proceedings before the Conseil d'État, as having been met. Accordingly, the decision taken by Dr Kariger on 11 January 2014 to withdraw the artificial nutrition and hydration of Mr Vincent Lambert cannot be held to be lawful since Mr Lambert has never give its open consent for ending his life and this can not constitute an implied artificial consent."

Accordingly, the Conseil d'État ruled in favor of Administrative Court's judgment and dismissed the applicants' claims. After that decision Rachel Lambert applied to ECHR.

III. CLAIMS

a. Claims of the Claimant Party

(i) Claimant submits that the State violated its positive obligation to protect the right to live with dignity under the Leonetti Act. The act was sufficiently clear for the purposes of Article 2 of the Convention, to regulate with the precision the decisions taken by the doctors in situations such as describing the concepts of "treatment that could be withdrawn or limited" and "unreasonable obstinacy" and by detailing the factors to be taken into account in the decision-making process.

(ii) Efficiency within the legal system is granted under Article 6 of the European Convention on Human Rights. While the Claimant was bringing the case in front of Administrative Courts then Conseil d'État, the patient endoured great deal of suffering because of its vegatative state. Therefore the State violated Article 3, prohibition of torture and Article 6, right to fair trial of the Convention.

(iii) The decision of passive ethounisa was “a collective decision” ,made according to medical team reports and wishes of the patient and his relatives. It was the doctor in charge of the patient who alone took the decision. The patient’s wishes had to be taken into account and the decision itself had to be accompanied by reasons and was added to the patient’s medical file. Even though this process aims to create a decision that would fall under the positive requirements of the State to protect right to live, State disregarded the collective decision. Claimant submits that the State violated Article 8 of the Convention, right to respect private life and personal autonomy.

b. Claims of the Respondent Party

(i) No consensus existed among the Council of Europe member States in favour of permitting the withdrawal of artificial life-sustaining treatment, although the majority of States appeared to allow it. While the detailed arrangements governing the withdrawal of treatment varied from one country to another, there was nevertheless consensus as to the paramount importance of the patient’s wishes in the decision-making process, however those wishes were expressed. Accordingly, States should be afforded a margin of appreciation, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as to the means of striking a balance between the protection of patients’ right to life and the protection of their right to respect for their private life and their personal autonomy. Therefore, State submits that the legal approach of Conseil d’Etat falls under the margin of appreciation under Article 8 provision 2 of the Convention, resulting to no violation.

(ii) The movement for the legalization of euthanasia is driven by anecdotes of people who suffer greatly in the period before they die. But the overwhelming majority of these anecdotes describe either situations for which legal alternatives exist today, or situations in which the individual would not be legally eligible for assisted suicide. It is legal in State of France for an individual to create an advance directive that requires the withdrawal of treatment under any conditions the person wishes and for a patient to refuse any treatment or to require any treatment to be withdrawn. It is legal to receive sufficient painkillers to be comfortable, and we now know this will not hasten death. Vincent Lambert was aware of this opportunity, yet he did not create an advance directive prior to his death. State submits that the alleged consent is not applicable within the circumstances of this case.

(iii) The patient's consent to euthanasia is essential and one of the aspects of the right to respect for private life. In this case, there is no written or explicit declaration made by Mr. Lambert indicating that he demands euthanasia. In this regard, verifying the existence of consent to euthanasia is not possible. There are only conversations made with his wife on euthanasia which was transmitted by his wife as well. His wife also claimed that she is in full knowledge of the facts considering that Mr. Lambert and she had in view of his professional experience as a nurse. It is not possible to find these claims valid and considered that all these claims can only constitute hypothetical consent.

IV. APPLICABLE LAW

A. EUROPEAN CONVENTION ON HUMAN RIGHTS

ARTICLE 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

Freedom of expression

1. 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

B. CASE LAW

Haas v. Switzerland [1]

(20 January 2011, Chamber judgment)

This case raised the issue of whether, by virtue of the right to respect for private life, the State should have ensured that a sick person wishing to commit suicide could obtain a lethal substance (sodium pentobarbital) without a prescription, by way of derogation from the law, so as to be able to end his/her life without pain and with no risk of failure. The applicant, who had been suffering from a serious bipolar affective disorder for around twenty years and

[1] European Courts of Human Rights, Factsheet – End of life and the ECHR (2022), https://www.echr.coe.int/documents/fs_euthanasia_eng.pdf.

considered that, as a result, he could no longer live in a dignified manner, argued that his right to end his life in a safe and dignified manner had been violated in Switzerland as a result of the conditions that had to be met – and which he had not met – in order to be able to obtain the substance in question. The Court held that there had been no violation of Article 8 (right to respect for private life) of the Convention, finding that, even assuming that States had a positive obligation to take measures to facilitate suicide in dignity, the Swiss authorities had not breached that obligation in the applicant's case. The Court noted in particular that the member States of the Council of Europe were far from having reached a consensus as regards the right of an individual to choose how and when to end his life. Although assistance in suicide had been decriminalised (at least partly) in certain member States, the vast majority of them appeared to attach more weight to the protection of the individual's life than to his right to end it. The Court concluded that States had a wide margin of appreciation in such matters. Although the Court further accepted that the applicant might have wished to commit suicide in a safe and dignified manner and without unnecessary pain, it nevertheless considered that the requirement under Swiss law for a medical prescription in order to obtain sodium pentobarbital had a legitimate aim, namely to protect people from taking hasty decisions and to prevent abuse, the risks of which should not be underestimated in a system that facilitated access to assisted suicide. The Court considered that the requirement of a prescription, issued on the basis of a thorough psychiatric assessment, was a means of satisfying the obligation on States to put in place a procedure capable of ensuring that a person's decision to end his/her life did in fact reflect his/her free will. As lastly regards the question whether the applicant had had effective access to a medical assessment that might have allowed him to obtain sodium pentobarbital (if not, his right to choose when and how he died would have been theoretical and illusory), the Court was not persuaded that it had been impossible for him to find a specialist willing to assist him as he had claimed.

Pretty v. the United Kingdom [2]

(29 April 2002, Chamber judgment)

[2] European Courts of Human Rights, Factsheet – End of life and the ECHR (2022), https://www.echr.coe.int/documents/fs_euthanasia_eng.pdf.

The applicant was dying of motor neurone disease, a degenerative disease affecting the muscles for which there is no cure. Given that the final stages of the disease are distressing and undignified, she wished to be able to control how and when she died. Because of her disease, the applicant could not commit suicide alone and wanted her husband to help her. But, although it was not a crime in English law to commit suicide, assisting a suicide was. As the authorities refused her request, the applicant complained that her husband had not been guaranteed freedom from prosecution if he helped her die. The Court held that there had been no violation of Article 2 (right to life) of the Convention, finding that the right to life could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die. The Court also held that there had been no violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention. Even if it could not but be sympathetic to the applicant's apprehension that without the possibility of ending her life she faced the prospect of a distressing death, nonetheless, the positive obligation on the part of the State which had been invoked would require that the State sanction actions intended to terminate life, an obligation that could not be derived from Article 3. The Court lastly held that there had been no violation of Articles 8 (right to respect for private life), 9 (freedom of conscience) and 14 (prohibition of discrimination) of the Convention.

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