THEORY OF POSITIVE STATE OBLIGATIONS UNDER ARTICLE 2.1 OF THE CONVENTION TO PROTECT THE LIVES OF PERSONS WITH MENTAL DISORDERS IN STATE PSYCHIATRIC INSTITUTIONS. ANALYSIS OF ECTHR CASE-LAW

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SUMMARY

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I. INTRODUCTION

In cases such as *Fernandes de Oliveira v. Portugal*[2] or *Hiller v. Austria*[3], the State is charged for breaching the substantive limb of Article 2 of the Convention to protect the life of the patient, because of the negligent behaviour of the psychiatric institution where they were hospitalised, which led to their suicide. The issue arisen is the need for the Court to establish whether the positive obligations under Article 2 shall be compromised according to the circumstances of the case, namely the duty to put in place a normative framework obliging the hospital to take appropriate measures for the protection of patients' lives, on the one hand, and to take preventive operational measures to protect an individual from self-harm, on the other.

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[2] *Fernandes de Oliveira v. Portugal* [GC] [2019] no. 78103/14.

[3] *Hiller v. Austria* [2016] no. 1967/14.

Making concepts clear, the ECtHR, according with its judgment of *Osman v. United Kingdom*[4] explicitly recognised the positive duty of States, drawn from the interpretation of the Convention, to safeguard the lives of those within its jurisdiction[5].

The scope of this doctrine usually focuses on the risk to a private's life from the criminal acts of third parties. However, case law nuances that the risk may come from the victim himself; it is, from "self-harm"[6]. The main difference between them is the need for a higher level of vigilance when it comes to the latter, as they often involve vulnerable persons in the custody of the State. For example, in *Keenan v. UK*, the authorities were under a duty to take special protection of the applicant's son as correspond to his special needs resulting from his disability, namely paranoid schizophrenia, while he was serving a sentence. The applicant's son ended committing suicide[7].

On these basics, proving that the patient is in a vulnerability position due to their mental disorder, could be concluded that they require major degree of state protection. The problem is whether "*the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk*"[8]. The real sense of these words is based in *Osman* assessment.

The ECtHR concluded that the national authorities must evaluate such risk taking into account all the relevant circumstances, such us previous attempts to commit suicide or a history of mental health problems. That was used to find State's responsibility on *Reynolds v. UK* [9] or *Hiller v. Austria*[10] cases. So, at the first instance, was the patient subject to a real and immediate risk of self-harm foreseeable in the light of the circumstances of the case?

Once discussed, it should be analyzed whether the authorities established a promptly and reasonable response to avoid the loss of life. One of the most common arguments put forward by applicants is that the patients were left in *"open door"* regimes with poor surveillance procedures[11]. The Strasbourg Court pointed two milestones *ad hoc* in *Hiller,* and to be discussed below. Firstly, that in the special context of health care the positive obligations of the State must be in conjunction

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[4] *Osman v. United Kingdom* [1998] no. 87/1997/871/1083, para. 115.

[5] Also reached at *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC] [2014] no. 47848/08.

[6] Mowbray, A. (2004). *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights*. Bloomsbury Publishing Plc. https://ebookcentral-proquest-com.bibliotecauned.idm.oclc.org/lib/unedbiblioteca-ebooks/detail.action?pq-origsite=primo&docID=1778898#; p. 15.

[7] *Keenan v. the United Kingdom* [2001] no. 27229/95, para. 91.

[8] *Osman v. United Kingdom* [1998] no. 87/1997/871/1083, paras. 94 and 95.

[9] *Reynolds v. the United Kingdom* [2012] no. 2694/08, para. 61.

[10] *Hiller v. Austria* [2016] no. 1967/14, para. 48.

[11] *Fernandes de Oliveira v. Portugal* [GC] [2019] no. 78103/14, para. 86.

with the principle of treating patients under the least restrictive regime possible, without violating their personal autonomy. Second, there must be a causal link between the negligent act or omission of state organs and the death of the victim. Factors such as the unpredictability of human conduct should not be held under the State's responsibility, otherwise the burden on the authorities would be impossible or disproportionate. In other words, the general criterion of adequacy does not entail an absolute duty to achieve the result – to avoid harm to oneself –. It can be assumed that acting with fewer safeguards than assumed can be considered as a failure, but their error cannot be confounded with the underlying reasons that led one to make that decision[12].

In accordance with all these arguments, this article explores the State's positive obligations under Article 2 of the Convention, particularly in cases where psychiatric in-patients commit suicide. The article begins by introducing the concept of positive obligations and then focuses on the duties that arise from the Court's interpretation of Article 2. The main body of the article examines the obligations that arise in the context of mental health care and evaluates their nature, scope, and conditions for implementation. The article concludes with a summary of the key points discussed and applies the criteria of the European Court of Human Rights' case law, doctrine, and literature review.

II. POSITIVE OBLIGATIONS OF THE STATE FROM THE CONVENTION. OVERALL REMARKS

Legal reflections on the existence of positive obligations deriving from the Convention have been innumerable. As XENOS points out, the Convention was born with the 'essential object' of the free enjoyment of human rights, without interference by state authorities[13]. The wielder of public authority had a pessimistic view of the State, as a consequence of the disasters caused by the World Wars (1914-1918 and 1939-1945), the germ of the European Council and the text we are commenting on. In this way, the Convention was set up as the source of rights and fundamental freedoms that only gave rise to negative obligations for state authorities[14]. For instance, to refrain from interference with the exercise of the right to family life[15].

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[12] Sicilianos, L. (2014). "Preventing violations of the right to life: positive obligations under article of the ECHR". *Cyprus Human Rights Law Review*, 3(2), 117-129, p. 119.

[13] Xenos, D. (2011). *The positive obligations of the State under the European Convention of Human Rights*. Taylor & Francis Group. https://ebookcentral-proquest-com.bibliotecauned.idm.oclc.org/lib/unedbiblioteca-ebooks/detail.action?docID=743928, pp. 73 and 74.

[14] Sicilianos, L. (2014). "Preventing violations of the right to life: positive obligations under article of the ECHR" *op.cit.* pp. 117-118.

[15] See *X and Y v. the Netherlands* [1985] no. 8978/80.

The purpose of shaping the Convention as a living instrument to adapt the provisions in the light of current conditions left the Court room for interpretation, including State obligations. Thereupon, the Strasbourg Court began to derive positive obligations for Member States in the course of implementing the Convention.

One of the earliest cases where the doctrine of positive obligations was spawned was *Marckx v. Belgium*. The applicants complained about the breach of their right to respect for private and family life (Article 8 of the Convention) and sought responsibility to the State[16]. The Court concurs that the object of the Article is "essentially" to protect the individual against arbitrary interference by the public authorities. And whether so, within a set of strict conditions enumerated in paragraph 2. However, the Court's notes that the correct way to guarantee that fundamental right and make the "respect" for family life effective may compel the State to intervene. This means, for instance, to set up safeguards on this case to integrate the child in his family. This safeguard may consider to be domestic legal system applicable to family ties, so if the State fails to satisfy this requirement, the Article 8 would be considered violated. Hence, Article 8 does not only envisage the obligation of non-interference by the State, but also implies, in particular circumstances, positive behaviors[17].

Xenos analyses this case-law phenomenon by arguing that positive obligations emerge as a gateway to building a system of human rights protection in a given context from the activities of private parties[18]. What is intended to be concluded is that although the negative obligations remained in the foreground as primary obligations, positive obligations have been added to them and supplement them. Over the years, the case-law drastically expanded the doctrine of positive obligation of the most Convention's provisions and its Protocols[19]. Even the former European Commission was also very clear that Article 1 allowed it to interpret the Convention as imposing positive obligations on States Parties. Thus, in its Report in the Belgian National Police Union case, it pointed out that while it was true that the Convention guaranteed traditional freedoms in relation to the State as the holder of public power, it did not mean that the State could not be obliged to protect individuals by appropriate means against certain forms of interference.

To sum up, the dominant position's State become from the aggressor to the guarantor thanks of the dynamic (evolutionary) interpretation of the Convention. Since then, the positive obligations of the State implicit in the Convention to protect fundamental rights and freedoms, and to ensure their effective and full enjoyment in practice, have been recognized.

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[16] In its paragraph 1 proclaims that "*everyone has the right to respect for (…) his family life*".

[17] *Marckx v. Belgium* [1975] no. 6833/74, para. 31.

[18] Xenos, D. (2011). *The positive obligations of the State under the European Convention of Human Rights*, *op. cit*. p. 73.

[19] Morawska, E. H. (2019). "A dimensão preventiva da proteção do direito à vida no âmbito da Convenção Europeia dos Direitos do Homem". *Espaço Jurídico Journal of Law* [EJJL], 20(2), 233–250. https://doi.org/10.18593/ejjl.20213, pp. 234-236.

III. POSITIVE OBLIGATION FROM ARTICLE 2 PARAGRAPH 1 OF THE CONVENTION (I). GENERAL CONTEXT

Stated in the introduction, the present contribution focuses on the positive obligations under the right to life, recognized by Article 2 of the Convention. Analyzing this doctrine in the previous point, we must point out that case-law has also interpreted implicit duties on the State to protect the right to life of individuals, particularly under its first paragraph, defining their nature, scope, limitations and conditions to be arisen.

III.1. Nature and development

Article 2 of the Convention enshrines one of the most fundamental provisions of the democratic societies making up the Council of Europe, and thus to be protected[20]. It says:

> *"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;"*[21]

The first time this article was called upon by the Court was in 1995, *McCann and others v. the United Kingdom*. The context was as follows, a possible breach of Art. 2 for the death of three IRA members who were shouted at by UK soldiers while suspected of a terrorist attack in Gibraltar. Although this case is concerned with scrutiny of the care taken by the competent authorities of Member States in the conduct of law enforcement operations, at one point we find an allegation of a violation of the right to life by the State in failing to take the necessary measures to safeguard it. The problem is that while the Court accepted the complaint and declared a violation of Article 2 par. 1 by the UK, the issue was not explicitly endorsed on that occasion.

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[20] *McCann and others v. the United Kingdom* [1995] no. 18984/91, para. 37.

[21] Article 2, *European Convention on Human Rights*, Rome, 4 November 1950. https://echr.coe.int/Documents/Convention_ENG.pdf As background, it is appropriate to consider that the wording of Article 2 of the Convention and its preparatory work hint at an intention to legitimise the death penalty and to declare it compatible with the European system of protection of rights under certain conditions, since at the time of its adoption quite a number of Council of Europe States provided for the death penalty in their legal systems. This initial meaning of Art. 2 has obviously been losing its force due to the abolitionist evolution of most member states, a trend which, according to the Explanatory Memorandum itself, is the reason for Protocol No. 6 of 28 April 1983 concerning the abolition of the death penalty, which entered into force on 1 March 1985.

It was not until *Osman v. the UK* when the Court laid the foundation of this doctrine related to Article 2 of the Convention[22]. The fatal circumstances of the case were the death of Mr. Osman and the shooting of his son Ahmed by a former teacher of the young guy. The applicant alleged that despite their warnings to the authorities – both school staff and police officers – about the assailant's obsession with Ahmed, the State's passivity amounts to a breach of the obligation to protect the right to life of the individual, inherent in the right to life in Article 2 of the Convention[23].

In making the most of the occasion, the ECtHR's analysis laid down the principles of the theory of positive obligations in relation to Article 2 and close to the one it had used almost 20 years earlier in *Marckx v. Belgium* for Article 8. Firstly, that its paragraph 1 begins claiming the right of every person's life to be protected by law, and remarks this entails the State's obligation to refrain from the intentional and unlawful taking of it. That is, an explicit negative obligation. On the same way, paragraph 2 enounces the exceptions in which the intervention by the State may be legitimate justified. Furthermore, the Court reaffirms the object and purpose of the Convention, namely to protect individual human beings' life. Relating specifically to Article 2, the Court affirmed that practical and effective protection of life not only entails negative obligations but also duties not explicitly mentioned on the Convention. That is, the task to take appropriate steps to safeguard the lives of those within its jurisdiction[24].

Therefore, what it is worthy to highlight on this context is the recognition of the normative possibility to call for positive duties on States on the field of prevention in order to ensure the right to life being practical and effective[25]. From *McCann* to the nowadays, the Strasbourg Court has received numerous cases to hold contracting States liable for possible breaches of the right to life, arguing the doctrine of positive obligations. For instance, *Calvelli and Ciglio*[26] or *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*[27].

[22] Sicilianos, L. (2014). "Preventing violations of the right to life: positive obligations under article of the ECHR", *op. cit.* p. 118.

[23] Mowbray, A. (2004). *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights*, *op. cit.* p. 15.

[24] Registry of the Council of Europe. *Guide on Article 2 of the European Convention on Human Rights* updated on 30 April 2022. https://echr.coe.int/Documents/Guide_Art_2_ENG.pdf, pp. 8 and 9.

[25] Sicilianos, L. (2014). "Preventing violations of the right to life: positive obligations under article of the ECHR", *op. cit.* p. 118.

[26] *Calvelli and Ciglio v. Italy* [GC] [2002] no. 32967/96.

[27] *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC] [2014] no. 47848/08.

III.2. Scope

According to the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, the positive preventive obligations under Article 2 apply to any of the lives under its jurisdiction.

It entails the acts or omissions of the State's authorities. In reverse, the State could be held accountable for the applicability of Article 2 where the life is endangered by acts or omissions of the state authorities. The State responsibility is not engaged when by acts of individuals, but for wrongful act of one of the State's organs, no matter their functions neither their position[28]. There should be no confusion with the assertion that all negligence gives rise to accountability for failure to care for life. Specific and well-defined circumstances will come into play here, which will be discussed *infra*.

On the other hand, the responsibility arises when the life is at risk in relation to the activities of private persons. In this way, the life may be at risk for criminal acts of third-party like in *Osman;* or acts of themselves, like *Renolde.*

In addition, the ECtHR has found positive obligations in different contexts of any private or public activity. For instance, *M. Özel and Others v. Turkey*[29] in dangerous activities*; Lopes de Sousa v. Portugal*[30] in the context of healthcare; or the *Fernandes de Oliveira v. Portugal*[31] that deals with a context of medical care in State facilities[32].

IV. POSITIVE OBLIGATION FROM ARTICLE 2 PARAGRAPH 1 OF THE CONVENTION (II). SCOPE IN HEALTHCARE CONTEXT

Historically, the Grand Chamber made interesting assessments about the positive obligations of the State on the context of healthcare. The most relevant came from *Osman* judgment, where the Court identified the actions to be taken by the States Parties in order to comply with their positive obligations posed by Article 2[33]. It says that "*it is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by*

[28] Sicilianos, L. (2014). "Preventing violations of the right to life: positive obligations under article of the ECHR", o*p. cit.* p. 118.

[29] *M. Özel and Others v. Turkey* [2015] nos. 14350/05 and 2 others.

[30] *Lopes de Sousa v. Portugal* [GC] [2017] no. 56080/13.

[31] *Fernandes de Oliveira v. Portugal* [GC] [2019] no. 78103/14.

[32] Registry of the Council of Europe. *Guide on Article 2 of the European Convention on Human Rights* updated on 30 April 2022. https://echr.coe.int/Documents/Guide_Art_2_ENG.pdf, p. 8.

[33] Morawska, E. H. (2019). "A dimensão preventiva da proteção do direito à vida no âmbito da Convenção Europeia dos Direitos do Homem", *op.cit.* p. 237.

those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties"[34].

In simple terms, the paragraph is merely a clarification of the scope of State duties. On the one hand, the authorities would have (a) an obligation in the area of national law, also called, the duty to provide a regulatory framework; and (b) an obligation in the area of their implementation, or the obligation to take preventive operational measures.

IV.1. Obligation to take appropriate legal provisions

In its attempt to define the scope of the State's obligation of preventive protection, the Court in *Osman* stated its primary State's duty, i.e. 'to regulate'. In literal terms, it includes the act of '*putting in place effective (…)-law provisions'*[35]*,* in accordance with the circumstances of the case. In this way, the national legislator is the recipient of the mandate drawn from the Article 2 paragraph 1.

This normative justification is also accepted on the work of E. H. Morawska, who basing on the case-law, held the obligation to take appropriate legal provisions to prevent risk's on life primordial and superior[36]. For instance, in *Osman*'s case, which resulted in a homicide, was it understood such as the necessity to launch criminal-legal framework to "*deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions"*[37].

Concerning the context of health care, the EChtHR concreted the State's obligational scope in *Calvelli and Ciglio v. Italy* holding that, beforehand the positive 'preventive' obligation included the duty to make regulations compelling hospitals to adopt appropriate measures for the protection of patients' lives, no matter whether they would be private or publicly funded[38].

The Grand Chamber has recently clarified the scope of the normative duty in *Lopes de Sousa Fernandes v. Portugal* with the articulation of two principles. The starting point is that the obligation of the States to take appropriate legal provisions should not be understood in a narrow rather than a broader sense[39]. For this reason, this is said to encompass the obligation to create a legal framework for the establishment

[34] *Osman v. United Kingdom* [1998] no. 87/1997/871/1083, para. 118.

[35] Ídem.

[36] Morawska, E. H. (2019). "A dimensão preventiva da proteção do direito à vida no âmbito da Convenção Europeia dos Direitos do Homem", *op. cit*. p. 237.

[37] *Osman v. United Kingdom* [1998] no. 87/1997/871/1083, para. 115.

[38] *Calvelli and Ciglio v. Italy* [GC] [2002] no. 32967/96, para. 49.

[39] *Lopes de Sousa v. Portugal* [GC] [2017] no. 56080/13, para. 189.

of the machinery – be either criminal, health, or civil, etc. – and, on the other hand, to ensure a distinct framework for its materialization and operation in practice[40].

Regarding the second principle, the ECtHR noted that the proven existence of a breach by the State of its regulatory duties under the substantive limb of Article 2 calls for a concrete assessment of the alleged shortcomings. The relevant regulatory framework must have actually failed to ensure proper protection of a patient's life[41].

Turning this into the case of *Fernandes de Oliveira v. Portugal,* the applicant complained that the surveillance procedure was ineffective, as it failed to supervise his son sufficiently according to his mental condition. In response the State argued that the obligation to regulate only concerns whether there is a legal framework that provides the hospital with the necessary tools to protect its inpatients, based on *Calvelli and Ciglio's* case. As the Court points out in para. 120, the HSC operates two types of supervisory regime. On the one hand, the HSC has a general regime for the monitoring of its patients, and on the other hand, a special regime when emergency situations require available restraint measures. Both included a personally daytime schedule and presence verification after all meals and medication times by the staff[42]. The inpatient's circumstances did not require the adoption of a more restrictive regime than the one described above, as there was no real and immediate risk of suicide[43]. But even if this were the case, there is an applicable framework in force. Therefore, being the applicant's son in either of these two states – general or stricter monitoring –, it cannot be denied that the obligation to take legal provisions to address the victim needs of the case is correct and in place.

Concerning the question of whether there would be non-compliance with this obligation when there is proven negligence or deficiency on the part of an authority in charge of the procedure, it appears that the Court even in these cases chooses to grant a benefit to the State and denies liability. In *Lopes de Sousa*, the applicant's husband died after acquiring an infection in hospital. According to the allegations, the death was caused by carelessness medical treatment. After analyzing the case under the above principle, the Court concludes that the error of diagnosis on the part of a health professional in the treatment of a particular patient, like her husband, or the delay in performing the treatment are not sufficient on its own to hold a State accountable. That is to say, whether or not the medical negligence did occur, it had to be proved that the legal framework in the particular case meant denial of healthcare, which was not held[44].

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[40] Morawska, E. H. (2019). "A dimensão preventiva da proteção do direito à vida no âmbito da Convenção Europeia dos Direitos do Homem", *op.cit.* p. 237.

[41] *Lopes de Sousa v. Portugal* [GC] [2017] no. 56080/13, paras. 194, 195, 200-203.

[42] *Fernandes de Oliveira v. Portugal* [GC] [2019] no. 78103/14, para. 120.

[43] This question will be assessed properly further on. See the obligation to take preventive measures.

[44] *Lopes de Sousa v. Portugal* [GC] [2017] no. 56080/13, paras. 200-203.

Furthermore, the legal framework may be deficient. The applicant in *Lambert and Others v. France* brought a case before a judicial system for protecting the patient's life in the context of the withdrawal of life-sustaining treatment of a patient in vegetative state by his doctor. Upon her principal complaint about the lack of clarity and precision of the legislation that applied to the deceased, the *Conseil d'Étatel* issued a contrary report denying the violation of Article 2 of the Convention which was accepted by the Court[45].

On the same direction, the applicant in *Fernandes de Olivera* argued that there were no written guidelines in respect of restraint measures until 2011, and it was deficient. The Court points out that "*the lack of a written policy on the use of restraint measures is not determinative of its efficiency*"[46]; even so, a distinction between the duty to provide a regulatory framework and the quality of law requirements must be drawn. While the latter falls within the scope of the Articles 3, 5 and 8 of the Convention, the duty to regulate on health care context only entails making regulations compelling hospitals to adopt appropriate measures for the protection of patients' lives. Particularly to this, the regulatory framework renders effective to warrant Article 2.

Beyond the duty to put in place effective law for the prevention of risks to patients' lives, *Osman* spoke of a *"machinery for (…) sanctioning of breaches of such provisions'*[47]. The EChtHR translates this mandate in its evaluation of *Calvelli and Ciglio*'s case, by the requirement of an "*effective independent judicial system*"[48] to determine the cause of death of patients in the care and to seek accountability from those responsible persons.

In *Calvelli and Ciglio v. Italy*, the applicant gave birth a baby, who died shortly on the hospital due to serious respiratory and neurological post-asphyxia syndrome. The concrete complaint was about the impossibility to prosecute the doctor responsible for the delivery of their child because of the time-barred offence of homicide. The Court in question determined that the procedural shortcoming in led to delays in criminal proceedings. However, the applicants issued civil proceedings, accepting the settle with the hospital. According to Government's argument, while it could be said that the applicants denied themselves access to the best means, it was not a denial of an effective and independent judicial system – although civil one –[49].

A case to the contrary could be *Reynolds v. the United Kingdom,* where, the Court concluded there was an arguable claim of a breach under Article 2 in relation to Article 13 of the Convention because of the lack of civil proceedings available to the applicant to establish any liability and compensation as regards the applicant's son death[50].

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45 *Lambert and Others v. France* [GC] [2015] no. 46043/14, para. 160.
46 *Fernandes de Oliveira v. Portugal* [GC] [2019] no. 78103/14, para. 119.
47 *Osman v. United Kingdom* [1998] no. 87/1997/871/1083, para. 115.
48 *Calvelli and Ciglio v. Italy* [GC] [2002] no. 32967/96, para. 49.
49 *Calvelli and Ciglio v. Italy* [GC] [2002] no. 32967/96, paras. 45 and 55.
50 *Reynolds v. the United Kingdom* [2012] no. 2694/08, para. 68.

IV.2. Obligation to take preventive operational measures

The State's duty of protection of life needs the complementarity of a preventive function of the risk to which it may be subjected. In this sense, it can be considered as its horizontal dimension – while the vertical one would be the main one of protection[51]. The real sense of these words is based in *Osman* case. The Court concluded that it exists a functional obligation to take preventive operational measures with the state authorities as the recipients to protect an individual from a third party or, in particular circumstances, from himself.

Nevertheless, concerning its scope, is this obligation absolute or is it present at all times? The casuistic reality reveals that it only comes into play in well-defined circumstances. It is precisely in *Osman* that the Court formulates an assessment test, stating that there is a need to set whether "*the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk*"[52]. This sentence contains conditions, namely (a) actual or constructive knowledge of the authorities; (b) real and immediate risk; (c) failure to take appropriate and reasonable measures. Nevertheless, the obligation enshrines limitations, i.e. the autonomy of the patients and the tests of feasibility and proportionality in order to avoid a burden on the State.

The reality is that this degree of foresight sets a very high threshold for the Court's decisions, which is not easily met. Hence, it is most often concluded that Article 2 is not breached. Rarely, that was used to find responsible French Republic in *Renolde's* case for failure to provide the applicant's son with medical treatment corresponding to the seriousness of his condition, because despite the victim was suffering psychotic disorders capable of causing him to commit real and immediate risks of self-harm – as we will discuss further *infra* – the authorities agreed to place him under a punishment cell, in the maximum penalty. This aggravated the victim's paranoiac condition and resulted in his suicide[53].

On the contrary, the test in *Osman* declared no violation of Article 2 by the State, as it could not be demonstrated that the authorities could reasonably have been aware of the professor's intentions to shoot the victim[54], according to the evidences proposed and discussed below.

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[51] Morawska, E. H. (2019). "A dimensão preventiva da proteção do direito à vida no âmbito da Convenção Europeia dos Direitos do Homem", *op. cit.* p. 242.

[52] *Osman v. United Kingdom* [1998] no. 87/1997/871/1083, para. 116.

[53] *Renolde v. France* [2008] no. 5608/05, paras. 85-110.

[54] *Osman v. United Kingdom* [1998] no. 87/1997/871/1083, para. 121.

IV.2.a. Conditions

For the violation of the substantive limb of the Article 2, there must be a failure on the State Party to take all possible measures which should or may have been taken whenever there is a real and immediate risk to the life of the individual in the particular circumstances of the case.

(A) Authorities' knowledge of presence or constructive of real and immediate life's risk

As a preliminary point, it should be noted that the commented cases arise in a context of psychiatric inpatients in healthcare custody. The special nature of this particular group of cases has features. (1) Firstly, the 'vulnerability 'position of the victim; (2) Secondly, a 'risk' emanated from the victim himself or herself. Both are complementary; therefore, the case requires to comment them jointly.

As for the vulnerable persons, the Court has defined them as those individuals whose particular situation requires a heightened standard of vigilance from the State to protect their right to life from their own actions. Regarding its scope, the Court appoints those within their exclusive control[55], under prison, in a hospital, a nursing home, conscripts and contractual military servicemen, psychiatric institution; that for its mental condition posed a risk to themselves[56]. The Court reiterates so on several cases.

For the protection of prisoners, *Keenan v. the United Kingdom*, involved a case of suicide by asphyxiation while the victim was serving a prison sentence. The Court found that Mark Keenan was in a vulnerable position since it suffered mental issues such as paranoid schizophrenia, thus the authorities were under a duty to protect the person's special needs resulting from his or her disability. It was agreed with the applicant's submission that when "*vulnerable persons, such as children or mentally disturbed individuals*"[57] are concerned, they should demonstrate special protection. Also, in *Renolde v. France*, the late applicant's brother was considered in a vulnerable condition as being treated for his psychiatric condition because of several paranoid traits[58]. Both *Keenan* and *Renolde*'s victims ended up killing themselves.

Likewise, in the context of institutionalized psychiatric patients, *Hiller v. Austria* is the case of the applicant's son that was hospitalized after suffering from an episode of paranoid schizophrenia and died after jumping in front of a subway train.

[55] *Renolde v. France* [2008] no. 5608/05, para. 83.

[56] Registry of the Council of Europe. *Guide on Article 2 of the European Convention on Human Rights* updated on 30 April 2022. https://echr.coe.int/Documents/Guide_Art_2_ENG.pdf, p. 8.

[57] *Keenan v. the United Kingdom* [2001] no. 27229/95, para. 85.

[58] *Renolde v. France* [2008] no. 5608/05, para. 83.

Applying the principle stated in *Keenan*, the Court agreed on that a psychiatric patient is particularly vulnerable and must be kept under special protection[59].

Other than case-law, the "protection condition" of people with disabilities has been also confirmed by the Committee of Ministers of the Council of Europe in 2004. Their Rec (2004)10 concerning the protection of human rights and the dignity of persons with mental disorders said that "*Member States should ensure that there are mechanisms to protect vulnerable persons with mental disorders*"[60] therefore, configuring people with mental disabilities as a target to be taken care.

Whether the risk was such as to require State intervention is another matter depending on certain well-defined circumstances at the time of the incident, meaning to be (1) real; (2) immediate, present and continuing at the time of the alleged violation; if its immediacy subsides before the expectation to take precautions arises[61], the necessary causal link may find wanting; and (3) a risk to human's life, not just to its limb. The risk of injury alone would not suffice.

The ECtHR has used a number of factors discussed in the case-law to determine the feasibility and immediacy of the risk. Among them, it is worthy to highlight the fact that the individual at risk had an history of severe mental health problems[62] or had expressed thoughts, threats or even attempts to commit suicide or self-harm previously[63]. Nonetheless, the mere presence of vulnerable people showing an history of psychiatric problems, suffering a gravity condition, with proven suicidal history or exhibiting irresponsible behavior should not be taken for granted that the risk is real and immediate. Indeed, in most cases, the reality of the risk is evident, but not its immediacy.

In *Keenan*, the applicant's son – Mark Keenan – was a prisoner that committed suicide while placed in a segregate environment as a discipline problem. The applicant submitted that the authorities failed to prevent his son's right to life since they knew he was subject to a real and immediate risk of self-harm. Both the diagnosis of personality disorder and psychosis and his behavior prior to the fatal event should have alerted the authorities to the real risk of self-harm. Among others, the episodes exhibiting their suicidal tendencies, aggressive outbursts, refusals to take his medication and the letter written by him to his doctor right before his death, expressing desperation.

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[59] *Hiller v. Austria* [2016] no. 1967/14, para. 48.

[60] Article 7.1. Recommendation Rec (2004)10 of the Committee of Ministers of the Council of Europe to Member States concerning the protection of the human rights and dignity of persons with mental disorder, European Journal of Health Law, 2004 December; 11(4), 407-425.

[61] Registry of the Council of Europe. *Guide on Article 2 of the European Convention on Human Rights* updated on 30 April 2022. https://echr.coe.int/Documents/Guide_Art_2_ENG.pdf, p. 12.

[62] Reached at *De Donder and De Clippel v. Belgium* [2011] no. 8595/06; *Volk v. Slovenia* [2012] no. 62120/09.

[63] Reached at *Ketreb v. France* [2012] no. 38447/09; *Çoşelav v. Turkey* [2012] no. 1413/07.

Basing on those events, the Court concluded the risk was real. The question lies in the immediacy of the risk of suicide at the time of the events. Here, the Court points out that although the condition of mental disorder may satisfy the requirement of real risk, it cannot on its own meet the immediacy requirement as well, for the condition varies over time. In the *Keenan* case, the evidences found moments of lucidity in the victim which deny the presumption of immediate risk. He did not show any disturbed conduct in the last 8 days; consequentially, there was no reason to alert the authorities on the day of his death[64]. The same applies in *Hiller*, the victim was placed in the psychiatric unit of Viennese hospital as a result of an acute episode of paranoid schizophrenia. Two months later, he jumped in a subway train like occurred in *Fernandes de Oliveira*. Nevertheless, the Court dismissed the Article 2 infringement for lack of real and immediate risk since he had neither expressed thoughts of suicide before, nor had he ever shown such behaviour. His behaviour, on the contrary, was normal and he was taking his medicine[65].

Both cases pointed out the possibility of occurrence of accidental and unpredictable circumstances, a limit of State's obligation (see the next point) as may be the unpredictability of human behavior. This means that the State must not be held accountable for events that it cannot foresee, such as human suicide, where no real and immediate risk has been demonstrated[66].

This interpretation of immediacy and foreseeability of *Keenan*'s suicide might be discussed. Despite he did not explicitly express his intention to commit suicide on that day or on previous days, the time span taken to measure the immediacy is not enough. Meaning that 8 days are not enough to consider a paranoid inpatient free of self-arm will, even less when he managed to escape twice before the fatal event, voiced such thoughts and showed anxiety about access to his unsatisfactory environment. The casual link between the punishment and the reasons to commit suicide are more than questionable.

This controversy does not apply, for instance, to cases like *Fernandes de Oliveira* where it is clear that the risk was real although not immediate. Despite of the fact that A.J. had a long history of mental illneses, such us borderline personality disorder, and he attempted to commit suicide once, it is that almost 30 days elapsed between the only corroborated suicide attempt and the fatal event. During this time, the inpatient's behavior was not at all reprehensible, attending meals, responding to treatment, taking his medication voluntarily and returning from leave from the center at the scheduled times and days[67]. Thus, the conclusion that all human behavior cannot be foreseen without immediate indications would be correct.

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[64] *Keenan v. the United Kingdom* [2001] no. 27229/95, paras. 95-98.

[65] *Hiller v. Austria* [2016] no. 1967/14, para. 53.

[66] Morawska, E. H. (2019). "A dimensão preventiva da proteção do direito à vida no âmbito da Convenção Europeia dos Direitos do Homem", *op. cit.* pp. 242 and 243.

[67] *Fernandes de Oliveira v. Portugal* [GC] [2019] no. 78103/14, para. 131.

Those assessment are far from *Renolde*'s case, the one accepted by the Court to have committed a breach of Article 2 because of the failure to take preventive measures when there was a real and immediate risk on Joselito Renolde. He was serving a sentence when he committed suicide. The applicants argued that the victim's position took in the early days before his death was enough to meet the conditions of prevention of his life. The Court supports this claim with the presence of the guards when he attempted to take his own life by cutting off his arms just eighteen days before the death, he told them how he could hear voices, and he account one of them. It is clear enough from the doctor's reports that the suicide attempt was linked with their disorders and the risk was real and immediate[68].

(B) Authorities' failure to take reasonable measures

Once the existence of a real and immediate risk is stated, the following condition relates to the failure of state authorities to take appropriate measures to avoid or minimize the risk. In other words, there must exist a causal link between the activity of the State and the loss of life to held it accountable[69].

Consideration must be made to the fact that it is not suggested that the respondent State intentionally sought to deprive the individuals of their life. The Court interpreted it explicitly in the case of *L. C. B v. the United Kingdom.* The applicant, born with a leukemia diagnosis, sought responsibility from State for the failure to advise her parents of the health risks to future children since her father was involved in nuclear tests with high incidence of cancers before her birth. The Court clarified that the question to determine is not whether the State purposely put his father at risk to his health and that of his future children, but rather to determine whether the State did all that could have been required of it to prevent the applicant's life from being avoidably put at risk[70] [71].

This must be assessed according to the circumstances of the case. Taking *Renolde*'s case as example, the prison authorities failed to take reasonable measures. Though Joselito suffered suicide attempts, there was never a discussion on the authorities of putting him into a psychiatric institution. On the contrary, they continued to administer him with the same medication and was moved to a confinement cell as a punishment for his behavior. During his stay there, the guards observe the obvious detriment to their mental health, suffering constant hallucinations and attempting to assault them. It might be expected that the authorities agreed on a special regiment according to his acute psychosis. Nevertheless, they meted out the harshest

[68] *Renolde v. France* [2008] no. 5608/05, paras. 85-89.

[69] Sicilianos, L. (2014). "Preventing violations of the right to life: positive obligations under article of the ECHR", *op.cit*. p. 119.

[70] *L. C. B v. the United Kingdom* [1998] no. 14/1997/798/1001, paras. 36-41.

[71] Mowbray, A. (2004). *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights*, *op.cit*. pp. 22 and 23.

punishment. Taking into account the unpredictability of human's behavior, and the impossibility to know exactly which where the reasons that posed him to kill himself, there is a casual link between the measures taken by the State to avoid the risk– punishment cell – and the fatal event. There was a violation of Article 2 of the Convention[72].

IV.2.b. Limitations

In broad terms, the State is always obliged to protect the right to life of persons under its jurisdiction; although not all deaths could be avoided, or could the State be responsible for those which did occur. The Court has repeatedly underlined that the scope of them *"must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities"*[73].

In the assessment of those cases where there are suicides of vulnerable people in custody on State's institutions, this limitation has been interpreted in two senses. Firstly, that the positive obligation must not undermine the general principles of mental health policy of inpatient's autonomy and the provision of care in the least restrictive environment possible. Secondly, that the number of unpredictable reasons to commit suicide.

(1) Universal ethical principles for the protection of persons with mental disorders.

As enshrined in principle 9 of United Nations General Assembly Resolution A/RES/46/119 of 17 December 1991, "*every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs*"[74] in order to preserve and enhance their personal autonomy.

The ECtHR has mentioned these laws on *Hiller v. Austria* to point that the obligation of authorities to measures in order to diminish the opportunities for self-harm of their patients could not infringe their rights and freedoms, even less their personal autonomy[75]. The issue is also addressed in *Fernandes de Oliveira's* case by the applicant's complaints about the deficiency of the monitoring, treatment and emergency procedure. For the surveillance procedure, the HSC personalized a

[72] *Renolde v. France* [2008] no. 5608/05, paras. 85-89.

[73] *Osman v. United Kingdom* [1998] no. 87/1997/871/1083, para. 116.

[74] Article 9. Resolution 46/119 of the United Nations General Assembly "The protection of persons with mental illness and the improvement of mental health care" A/RES/67/97 (17 December 1991), retrieved from Resolution 46/119 of the United Nations General Assembly "The protection of persons with mental illness and the improvement of mental health care" A/RES/67/97 (17 December 1991), retrieved from https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/582/07/img/NR058207.pdf?OpenElement

[75] *Hiller v. Austria* [2016] no. 1967/14, para. 54.

daily schedule and checked the patient's presence after all meals and medication times. Whether the inpatients needed a restrictive regime, they receive more medical attention and their presence was verified more often both inside and outside the building[7677].

The alleged lack of surveillance regime capable of monitoring his presence on a permanent basis, as alleged by the applicant, is answered by the Court in the same sense as *Hiller*. It states that, above all, the measures shall not be an intrusive treatment but appropriate to human dignity and human freedom. The HSC had two regimes – general and strict – to address the patient according to his or her needs. Depending on where the patient was, the restrictive measures were more or less restrictive. However, in no case could such restrictive measures be approved that the mental illnesses patient's freedom – confinement regime – and/or privacy – monitoring constantly – were totally deprived – simply because they often present a higher risk of suicide. Even when "*the suicidal tendencies were present in the majority of patients with psychiatric illnesses*"[78], this approach would constitute a violation of their rights to liberty and security of Article 5 of the Convention and particularly of Article 14 of the Convention on the Rights of Persons with Disabilities, hereinafter CRPD, that states that persons with disabilities shall never be deprived of their liberty because of the existence of a disability[79].

The same applies for the alleged lack of security in the building, leaving patients in an open regime to walk around or leave the building. It is specifically guaranteed on the Recommendation Rec (2004)10 of the Committee of Ministers concerning persons with mental disorders that the authorities shall provide an environment such as for promotion of their integration in the community where the principle of least restrictive environment would be in accordance with the inpatient's health needs and the other's safety protection (Articles 8 and 9)[80].

Since there were no signs of suicide in the victim's behavior, like in *Hiller*, the Court noted that it would be disproportionate to hold the patient there and would not facilitate his reintegration into society. Furthermore, it is specified on the guidelines of implementation of Article 14 CRPD that persons with mental disabilities are frequently considered dangerous to themselves and others, but their liberty

[76] The Court does not consider the reasonableness of the means because it has not been demonstrated that the risk of suicide was real and imminent. However, it points to some assertions that merit further consideration.

[77] *Fernandes de Oliveira v. Portugal* [GC] [2019] no. 78103/14, paras. 49-54.

[78] *Fernandes de Oliveira v. Portugal* [GC] [2019] no. 78103/14, para. 95.

[79] Article 14. *Convention on the Rights of Persons with Disabilities*, New York, 24 January 2007, 2515 U.N.T.S. 3. http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf

[80] Recommendation Rec (2004)10 of the Committee of Ministers of the Council of Europe to Member States concerning the protection of the human rights and dignity of persons with mental disorder, European Journal of Health Law, 2004 December; 11(4), 407-425.

cannot be deprived simply because of an alleged need of care or health diagnosis. This would be arbitrariness (point G)[81].

In conclusion, the approach adopted by the Court in these cases leads us to the conclusion that the regimes established must be appropriate with a view to respecting the right to privacy and dignity of in-patients as well as the principle of the least restrictive environment.

(2) Unpredictability of human behaviour

The fact that the state authorities have a duty to prevent the risk of self-harm does neither include the unreasonable/overstated duty to foresee all circumstances that may befall the patient's will. That is, the unpredictability of human conduct when there is no likelihood of suicide[82]. For instance, in *Hiller* case, the judge Costa announces his concurring opinion with the fact that the right to life was not violated by the State as although the risk of committing suicide was known, the patient was unpredictable. And it was not possible nor reasonable for the authorities to be constantly observing him[83].

The *Osman* ruling clarifies that such obligations are obligations of means, i.e. the state must use all means necessary to prevent the violation of the right to life. But the extent or presence of this will depend on the circumstances of the case since they must deal with several factors beyond the State's reach[84].

V. CONCLUSIONS

The doctrine of positive obligations implicitly in the Convention works from the assurance of making the protection of fundamental rights and freedoms effective. From *Marckx v. Belgium* to the present, the ECtHR has relied on a dynamic interpretation of the Convention, deriving positive obligations from numerous provisions.

In this context, the relevance of the positive obligations under Art. 2 of the Convention discussed lies in the criterion used by the Grand Chamber to resolve *Osman v. United Kingdom*. Relating to the right to life, the Court remarked that the State had also a duty to take appropriate steps to safeguard the lives of those within its jurisdiction namely (1) the duty to take appropriate legal provisions; and (2) the duty to take preventive measures. Nevertheless, the standards of protection are raised when the life of an inmate with mental health problems in a state facility is at

[81] *Fernandes de Oliveira v. Portugal* [GC] [2019] no. 78103/14, para. 72.

[82] Morawska, E. H. (2019). "A dimensão preventiva da proteção do direito à vida no âmbito da Convenção Europeia dos Direitos do Homem", *op. cit.* p. 242.

[83] *Hiller v. Austria* [2016] no. 1967/14, para. 53.

[84] Sicilianos, L. (2014). "Preventing violations of the right to life: positive obligations under article of the ECHR", *op. cit*. p. 120.

stake. In such cases, the person is said to be in a situation of vulnerability because of their mental state and the risk they pose to themselves.

Regarding the obligation to regulate, it is a direct mandate for hospitals to provide for a legal regime appropriate to the inpatient's circumstances for the protection of the inpatient's life. Hence, the debate is whether there is a regulatory framework in place and, if so, whether the procedure had operated to the patient's detriment so as to not protecting the inpatient's life.

The concrete assessment of the circumstances will take into account the presence of different measures to ensure the protection of the individual; and not the quality of the legislation for which other surrounding articles are reserved – *Calvelli and Ciglio* –; and that the applicant had an independent and effective judicial system to determine the cause and responsibility for the death of the patient, albeit in civil proceedings.

The concerns about the action to take preventive measures in order to avoid the risk of harm to life are deeper, as their very existence and scope depend on the circumstances of each case. To assess the duty, the Court must evaluate the case under the *Osman*'s test, that is, proving that (1) the authorities knew or ought to have known at the time of the event, that there was a real and immediate risk to the life of an identified individual from a third party or from himself/herself; and even so (2) they failed to take measures to avoid the risk within the scope of their powers; (3) without posing an unreasonably or disproportionate burden on them. Everything well proven, the contracting State becomes responsible for failing on its duty to protect life, breaching Art. 2 of the Convention.

Concerning the knowledge of the risk, the point is whether the risk was predictable or foreseeable because of its reality and immediacy. In line with *Keenan*, in cases of self-harm or suicide in persons vulnerable because of their mental condition, who show a history of severe psychiatric problems or a history of self-harm, the reality of the risk is often proven. However, this trend is not observed on the case-law with the immediacy test. Holding that the variability of risk can change, the Court relies on facts such as the 'normality of the patient's behavior' on that day, the taking of medication, or the lack of hallucinations on the same day. The subject of criticism would be the fact that they rule out immediacy even in a short period of time between an episode of hysteria and suicide (such as 8 or 20 days). It is not enough if it is not accompanied by other facts as in *Renolde* that despite the fact that the suicide attempt took place 18 days earlier, the prisoner showed abnormal and hallucinatory behavior during his entire stay in the cell.

Once these conditions have been met, the principal debate is whether the authorities did whatever was within their power to avoid risk. In other words, the State would be exonerated of responsibility whenever the burden to avoid the risk is disproportionate or impossible.

During its case interpretation where inpatients with mental illnesses killed themselves, the Strasbourg Court remarks on the one hand, that the judgement

of 'reasonableness' of the measures must be measured against the protection of the individual's personal autonomy. For instance, continuous supervision or institutionalization of an individual with mental problems would run counter to his or her right to privacy protected by the CDRP, even more so when no real and evident risk to do so has been proven. Furthermore, it shall consider the international policy of psychiatric institutions, which seeks a regime of reintegration into society that is as non-restrictive as possible under the circumstances. In addition, the State must not bear liable for the unpredictability of human behavior.

In any event, one could say the recognition of positive obligations that allows the State to intervene in the protection of the right to life is a step forward for the protection of human rights. However, we shall be aware that it is not an obligation of result rather than of providing the necessary means for this protection, either legal or through preventive actions.

Particularly in the context of health care for self-harm of vulnerable people, the criterion set out by the Court in *Osman* narrows considerably the apparently infinite scope of these obligations. The State is not obliged to prevent the risk if the circumstances of the case do not reveal knowledge, reality, immediacy, proportionality, reasonableness and possibility. These assessments are based on case law and not on a common legislation proposing criteria for all future cases. Perhaps it would be useful to establish an explanatory framework beyond the criteria mentioned in *Osman*, in order to avoid controversies between cases of similar content, although we would be closing the wide range of human conduct that can lead to suicide and depriving the Court of its power to interpret all the circumstances prior to the fatal act.

Título

Teoría de las obligaciones positivas del Estado en virtud del artículo 2.1 de la Convención para proteger la vida de las personas con trastornos mentales en instituciones psiquiátricas estatales. Análisis de la jurisprudencia del TEDH.

Sumario:

TO DE APLICACIÓN EN EL CONTEXTO SANITARIO. IV.1. Obligación de adoptar las disposiciones legales adecuadas. IV.2. Obligación de adoptar medidas operativas preventivas. IV.2.a. Condiciones. IV.2.b. Limitaciones. V. CONCLUSIONES.

Abstract:

The interpretation of the European Convention on Human Rights has led to the development of the theory of positive State obligations arising from Article 2, which aims to protect the lives of individuals. While these obligations may arise in any context, they are particularly relevant in the case of mentally disordered persons in state-run psychiatric institutions, where patients may pose a risk to themselves. When such an act takes place, even more when the fatal event of suicide is reached, State responsibility comes into play. However, the European Court of Human Rights has emphasized that a disproportionate duty of prevention should not be imposed on states, but rather that the duty to protect patients' lives should be in line with the reasonable circumstances of each case. To determine whether a violation of the right to life has occurred and whether the authorities bear responsibility, the Court considers two factors. Firstly, it examines whether the psychiatric institution had established a legislative framework to protect patients' lives. Secondly, whether the case would pass the *Osman*'s test, proving that the authorities knew or ought to have known that there was a real and immediate risk of an attempt on their own life, and yet failed to take adequate measures. Nonetheless, based on case law, it appears that state responsibility is limited in scope, as the high criteria set by the Court are not often exceeded. The circumstances surrounding the cases discussed in this article will demonstrate this.

Resumen:

La interpretación del Convenio Europeo de Derechos Humanos ha llevado al desarrollo de la teoría de las obligaciones positivas del Estado derivadas del artículo 2, cuyo cometido es proteger la vida de las personas. Aunque estas obligaciones pueden surgir en cualquier contexto, son especialmente pertinentes en el caso de las personas con trastornos mentales internadas en instituciones psiquiátricas estatales, donde los pacientes pueden suponer un riesgo para sí mismos. Cuando se produce un acto de este tipo, más aún cuando se llega al fatal suceso del suicidio, entra en juego la responsabilidad del Estado. Sin embargo, el Tribunal Europeo de Derechos Humanos ha subrayado que no debe imponerse a los Estados un deber de prevención desproporcionado, sino que la obligación de proteger la vida de los pacientes debe ajustarse a las circunstancias razonables de cada caso. Para determinar si se ha producido una violación del derecho a la vida y si las autoridades son responsables, el Tribunal considera dos factores. En primer lugar, examina si la institución psiquiátrica había establecido un marco legislativo para proteger la vida de los pacientes. En segundo lugar, si el

caso supera la prueba de *Osman*, demostrando que las autoridades sabían o deberían haber sabido que existía un riesgo real e inmediato de atentado contra la vida y, aun así, no adoptaron las medidas adecuadas. No obstante, según la jurisprudencia, parece que la responsabilidad del Estado tiene un alcance limitado, ya que no se suelen superar los elevados criterios establecidos por el Tribunal. Las circunstancias que rodean los casos analizados en este artículo así lo demuestran.

Key words:

Positive obligation; psychiatric care; right to life; risk; self-harm; suicide.

Palabras clave:

Obligación positiva; atención psiquiátrica; derecho a la vida; riesgo; autolesión; suicidio.