



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

DECISION

**Request for an advisory opinion under Article 29 of the Convention for
the Protection of Human Rights and Dignity of the Human Being with
regard to the Application of Biology and Medicine: Convention on
Human Rights and Biomedicine**

STRASBOURG

15 September 2021

REQUEST FOR INTERPRETATION OF THE OVIEDO CONVENTION

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Robert Spano, *President*,
Jon Fridrik Kjølbro,
Ksenija Turković,
Paul Lemmens,
Siofra O’Leary,
Yonko Grozev,
Carlo Ranzoni,
Armen Harutyunyan,
Gabriele Kucsko-Stadlmayer,
Alena Poláčková,
Marko Bošnjak,
Tim Eicke,
Jovan Ilievski,
Lado Chanturia,
Maria Elósegui,
Raffaele Sabato,
Lorraine Schembri Orland, *judges*,
and Johan Callewaert, *Deputy Grand Chamber Registrar*,
Having deliberated in private on 10 February and 9 June 2021,
Delivers the following decision, which was adopted on the latter date:

PROCEDURE

1. By letter of 3 December 2019, the Chair of the Council of Europe’s Committee on Bioethics (“the DH-BIO”) informed the President of the European Court of Human Rights (“the Court”) of that Committee’s decision, taken in its composition restricted to the representatives of the Parties to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (“the Oviedo Convention”), to seek an advisory opinion from the Court pursuant to the procedure laid down in Article 29 of that Convention. The request was worded as follows:

“In accordance with Article 29 of the Convention on Human Rights and Biomedicine (ETS no. 164, “Oviedo Convention”), the Committee on Bioethics, in its composition restricted to the representatives of the Parties to the Oviedo Convention, requests the European Court of Human Rights to give an advisory opinion on the following legal questions concerning the interpretation of the Oviedo Convention, having regard to the European Convention on Human Rights, the relevant case law of the European Court of Human Rights, and the Oviedo Convention:

1) In light of the Oviedo Convention’s objective “to guarantee everyone, without discrimination, respect for their integrity” (Article 1 Oviedo Convention), which “protective conditions” referred to in Article 7 of the Oviedo Convention does a Member State need to regulate to meet minimum requirements of protection?

2) In case of treatment of a mental disorder to be given without the consent of the person concerned and with the aim of protecting others from serious harm (which is not covered by Article 7 but falls within the remit of Article 26(1) of the Oviedo Convention), should the same protective conditions apply as those referred to in question 1?”

2. The DH-BIO provided the following explanation for its request:

“Both questions aim at clarifying certain aspects of the legal interpretation of Article 7 of the Oviedo Convention, with a view to informing the current and future work of the DH-BIO in the area.

Question 1: Has the aim of achieving clarity, based on the Court’s body of relevant case-law, regarding the requirements that the protective conditions referred to in Article 7 have to comply with in order to effectively safeguard the concerned person’s human rights and to protect his/her integrity.

Question 2: Article 7 of the Oviedo Convention expressly limits involuntary treatment of a person with mental disorder to cases where such treatment is necessary to prevent serious harm to that person’s own health. Thus, Article 7 does not provide for involuntary treatment where such treatment may be necessary to prevent serious harm to others.

According to para. 151 of the Explanatory report to the Oviedo Convention, “A person who may, due to his or her mental disorder, be a possible source of serious harm to others may, according to the law, be subjected to a measure of confinement or treatment without his or her consent. Here, in addition to the cases contemplated in Article 7, the restriction may be applicable in order to protect other people’s rights and freedom.”

Question 2 aims at clarifying the protective conditions applicable when involuntary treatment is exceptionally allowed in order to protect others from serious harm, as compared to the protective conditions referred to in Article 7.”

3. In the absence of rules specifically governing proceedings of this nature, the President decided that Chapter IX of the Rules of Court should be applied *per analogiam*. By letter of 23 June 2020, the Registrar informed the Contracting Parties to the European Convention on Human Rights (“the Convention”) of the possibility of making written submissions on the request (Rule 84 § 2). The Contracting Parties were invited to address the question of the Court’s jurisdiction, to give their comments on the request of the DH-BIO, and to provide information about relevant domestic law and practice, indicating notably whether a person suffering from a serious mental disorder could be subjected to treatment without their consent aimed at protecting others from serious harm, and if so whether this found a basis in Article 26 § 1 of the Oviedo Convention.

4. Submissions were received from the Governments of Albania, Andorra, Armenia, Azerbaijan, Cyprus, the Czech Republic, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, Slovenia, Switzerland, Turkey and Ukraine. These submissions were transmitted to the DH-BIO and to all of the Contracting Parties (Rule 85 § 2, *per analogiam*).

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5. The President granted leave to the following civil society organisations to intervene in the proceedings: Validity; the International Disability Alliance, the European Disability Forum, Inclusion Europe, Autism Europe and Mental Health Europe (jointly); and the Center for the Human Rights of Users and Survivors of Psychiatry. Their written comments were transmitted to the DH-BIO and to all of the Contracting Parties. The intervening organisations also received copies of the Contracting Parties' submissions (Rule 44 §§ 3-6, *per analogiam*).

6. The request was allocated to the Grand Chamber of the Court. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 of the Convention and Rule 24, *mutatis mutandis*.

I BACKGROUND TO THE REQUEST

A. The Oviedo Convention and its drafting history

7. The Oviedo Convention, opened for signature on 4 April 1997, was drafted with the intention of providing a common framework for the protection of human rights and human dignity in both longstanding and developing areas concerning the application of biology and medicine. As is clear from its text, particularly its title, its preamble and its purpose and object as stated in its Article 1, there is much in common between the Oviedo Convention and the Convention. In this regard the Explanatory Report to the Oviedo Convention states (at paragraph 9):

“The two Conventions share not only the same underlying approach but also many ethical principles and legal concepts. Indeed, this Convention elaborates some of the principles enshrined in the European Convention for the Protection of Human Rights.”

8. The Oviedo Convention entered into force on 1 December 1999, following the requisite number of ratifications (five, all of which were member States of the Council of Europe – Article 33 § 3). At the date of adoption of the present decision, the following 29 States were party to the Oviedo Convention: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Iceland, Latvia, Lithuania, Montenegro, North Macedonia, Norway, Portugal, the Republic of Moldova, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Switzerland and Turkey. The non-member States of the Council of Europe that participated in the drafting of the Oviedo Convention and also the European Union may ratify it (Article 33 § 1), as may any other third State in accordance with the procedure laid down in Article 34. To date, no such State has done so.

9. Article 29 of the Oviedo Convention provides:

“Article 29 – Interpretation of the Convention

The European Court of Human Rights may give, without direct reference to any specific proceedings pending in a court, advisory opinions on legal questions concerning the interpretation of the present Convention at the request of:

- the Government of a Party, after having informed the other Parties;
- the Committee set up by Article 32, with membership restricted to the Representatives of the Parties to this Convention, by a decision adopted by a two-thirds majority of votes cast.”

10. Article 31 of the Oviedo Convention provides, as relevant:

“Article 31 – Protocols

Protocols may be concluded in pursuance of Article 32, with a view to developing, in specific fields, the principles contained in this Convention.

...”

11. Article 32 of the Oviedo Convention provides, as relevant:

“Article 32 – Amendments to the Convention

1 The tasks assigned to "the Committee" in the present article and in Article 29 shall be carried out by the Steering Committee on Bioethics (CDBI), or by any other committee designated to do so by the Committee of Ministers.

2 Without prejudice to the specific provisions of Article 29, each member State of the Council of Europe, as well as each Party to the present Convention which is not a member of the Council of Europe, may be represented and have one vote in the Committee when the Committee carries out the tasks assigned to it by the present Convention.

...”

Following the reorganisation of intergovernmental bodies at the Council of Europe, the abovementioned Steering Committee on Bioethics was replaced, as from 1 January 2012, by the DH-BIO, which since that date has been the designated committee within the meaning of Article 32 § 1 of the Oviedo Convention.

12. As the present request represents the first use of the Article 29 procedure, the Court finds it relevant to refer to the drafting history of this provision.

13. The *travaux préparatoires* (published by the Council of Europe with the reference CDBI/INF (2000) 1) indicate that the idea of conferring on the Court a role in relation to what was to become the Oviedo Convention was initially discussed with representatives of the Court, among others, in mid-1994. In that initial discussion, the representatives of the Court took a favourable view of a possible interpretative role for the Court (op. cit., p. 118). In 1995, the Parliamentary Assembly of the Council of Europe adopted Opinion 184 on the draft bioethics convention in which it proposed the creation of “a monitoring body in connection with the European Court of Human Rights”, tasked with observing the application of the new convention and also its interpretation. The drafters of the convention prepared the following draft provision (then Article 28 of the draft convention):

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"Parties to this Convention member States of the Council of Europe [and the European Community] may declare at any time that they accept the jurisdiction of the European Court of Human Rights to give a ruling on the interpretation of [certain provisions of] the present Convention at the request of:

- the Government of a Party [or of the European Commission if the Community is a Party]
- any court or tribunal of a Party for a preliminary ruling
- the Committee of Ministers of the Council of Europe."

14. The Court responded to this proposal with an opinion of 6 November 1995 (Cour (95) 413). It generally welcomed the draft, observing that "[t]he object and purpose of this convention is wholly in keeping with the Convention, whose philosophy and some of whose legal concepts it shares."

It continued:

"Several of the draft convention's provisions, and notably the concepts it shares with the Human Rights Convention, are particularly open to divergent interpretations. It is therefore understandable that the drafters should have wished to establish a system capable of providing a uniform interpretation of those provisions that would be regarded as authoritative by all the Contracting States. Entrusting this role to the European Court of Human Rights is a means of ensuring that this goal is attained and at the same time of avoiding divergencies in the understanding and interpretation of concepts that are common to the bioethics convention and the Convention on Human Rights."

The Court stated that it was in favour of the principle of assuming an interpretative function in this field but considered that the proposal for a system of preliminary rulings was not appropriate. It specified that there should be no link between a request for interpretation and any specific case pending before a national court; a provision to this effect "would appreciably reduce the risk of an interpretation that might hamper the Court at a later stage if it was called upon to rule under the Human Rights Convention on the facts of the case that had prompted the request ...".

15. Instead of the phrasing proposed ("to give a ruling on an interpretation of [certain provisions of] the present Convention"), the Court suggested a wording similar to that used in Article 1 of Protocol No. 2 to the Convention (now Article 47 of the Convention): "without direct reference to any specific proceedings pending in the national courts ... advisory opinions on legal questions concerning the interpretation of [certain provisions of] the present Convention". This formulation was accepted by the drafters, although without the words within square brackets, it being agreed that as the procedure would be limited to legal questions, it should be possible to allow consultation on any legal question of relevance to the Convention. Certain other changes were made to the text on which the Court was consulted (see CDBI/INF (2000) 1, pp. 119-120) but these are not significant for present purposes. The final wording of the text was adopted by a large majority of the delegates (25 votes in favour, 1 against and 8 abstentions). The *travaux* do not indicate the reason for the vote against or the abstentions.

16. Article 7 of the Oviedo Convention, which is the subject of the first question posed, appears in Chapter II of the treaty, which deals with consent. That Chapter first lays down a general rule on consent as follows:

“Article 5 – General rule

An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.

This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.

The person concerned may freely withdraw consent at any time.”

Article 7 establishes an exception to the above general rule. It provides:

“Article 7 – Protection of persons who have a mental disorder

Subject to protective conditions prescribed by law, including supervisory, control and appeal procedures, a person who has a mental disorder of a serious nature may be subjected, without his or her consent, to an intervention aimed at treating his or her mental disorder only where, without such treatment, serious harm is likely to result to his or her health.”

17. The drafting history of this provision, as relevant to the question posed, can be summarised as follows. The *travaux préparatoires* (see CDBI/INF (2000) 1, pp. 38-41) indicate the drafters’ intention to make provision for the problem of patients suffering from a mental illness who were required to undergo compulsory treatment for that illness. The provision would enable doctors to disregard a person’s refusal to undergo the intervention in question, but only in relation to the treatment of the particular disorder when there was a serious risk to health, and on the basis of respect for the protective conditions defined by national law. A proposal was made in the discussions that the text specifically envisage the involvement of a court ordering diagnosis or treatment, and that the protective conditions include monitoring and appeal procedures. The idea of referring to court intervention was not accepted. It was further suggested that consideration be given to Committee of Ministers Recommendation No. R (83) 2 concerning the legal protection of persons suffering from a mental disorder placed as involuntary patients. This text, which at the time of drafting the Oviedo Convention represented the current Council of Europe standard in the matter, contains a set of rules laying down safeguards that States were recommended to follow. Mention is made of this Recommendation, along with certain relevant texts from other sources, in paragraph 55 of the Explanatory Report to the Oviedo Convention. In the course of the discussion, doubt was expressed at one stage about the added value of Article 7 of this convention. This view was not accepted by the majority of delegates, who regarded the provision as necessary in that the number of cases in which the disorder could be treated without the person’s consent was limited by the subjection of treatment to precise conditions. It would protect both the health of the individual as well as their autonomy. The wording finally retained of

“protective conditions prescribed by law, including supervisory, control and appeal procedures” emerged at a meeting held in September 1995. Subsequently, the suggestion of some delegates that the provision be removed pending progress with other work that was then being done by the Council of Europe on psychiatry and human rights was not accepted, the large majority of delegates taking the view that it was necessary for this provision to appear in the convention. Article 7 was adopted as a part of the final text of the Oviedo Convention by the Committee of Ministers on 19 November 1996.

18. The Explanatory Report to the Oviedo Convention states, as relevant for present purposes:

“54. ... The article is concerned only with the risk to the patient’s own health, whereas Article 26 of the Convention permits patients to be treated against their will in order to protect other people’s rights and freedoms (for example, in the event of violent behaviour). On the one hand, therefore, the article protects the person’s health (in so far as treatment of the mental disorder without consent is allowed when failure to administer the treatment would seriously harm the person’s health), and on the other hand it protects their autonomy (since treatment without consent is prohibited when failure to administer the treatment represents no serious risk to the person’s health).

55. The last condition is that the protective conditions laid down in national law must be observed. The article specifies that these conditions must include appropriate supervisory, control and appeal procedures, such as mediation by a judicial authority. This requirement is understandable in view of the fact that it will be possible for an intervention to be carried out on a person who has not consented to it; it is therefore necessary to provide an arrangement for adequately protecting the rights of that person. In this connection, Recommendation No. R (83) 2 of the Committee of Ministers of the Council of Europe concerning the legal protection of persons suffering from mental disorder placed as involuntary patients establishes a number of principles which must be respected during psychiatric treatment and placement. The Hawaii Declaration of the World Psychiatric Association of 10 July 1983 and its revised versions and the Madrid Declaration of 25 August 1996, as well as Parliamentary Assembly Recommendation 1235 (1994) on psychiatry and human rights, should also be mentioned.”

19. Article 26 of the Oviedo Convention provides:

“Article 26 – Restrictions on the exercise of the rights

1. No restrictions shall be placed on the exercise of the rights and protective provisions contained in this Convention other than such as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the prevention of crime, for the protection of public health or for the protection of the rights and freedoms of others.

2. The restrictions contemplated in the preceding paragraph may not be placed on Articles 11, 13, 14, 16, 17, 19, 20 and 21.”

20. The drafting history of this provision, as recorded in CDBI/INF (2000) 1, charts the discussions that took place over the choice of grounds permitting States to apply restrictions. The drafters took as their point of departure the terminology used in the Convention, and in particular Article 8, in order to show the links between the two texts. During the process, representatives of the Convention organs gave their advice on the relevance and suitability of

the various grounds mentioned in Article 8, leading the drafters to agree on the narrower list that now appears in Article 26. The drafting history also explains that it was considered preferable to have a general provision permitting the restriction of rights, with specified exceptions, instead of providing for this on an article-by article basis.

21. Regarding this provision, the Explanatory Report to the Oviedo Convention states, as relevant for present purposes:

“148. This article lists the only possible exceptions to the rights and protective provisions contained in all the provisions of the Convention, without prejudice to any specific restrictions which this or that Article may involve.

...

151. A person who may, due to his or her mental disorder, be a possible source of serious harm to others may, according to the law, be subjected to a measure of confinement or treatment without his or her consent. Here, in addition to the cases contemplated in Article 7, the restriction may be applicable in order to protect other people’s rights and freedom.

...

155. The protection of the patient’s health is not mentioned in this paragraph as one of the factors justifying an exception to the provisions of the Convention as a whole. In order to clarify its scope, it seemed preferable to define this exception in each of the provisions expressly alluding to it. Article 7, for example, specifies the conditions on which individuals suffering from mental disorders may, without their consent, be given treatment if their health might seriously suffer otherwise.

...”

22. Article 27 of the Oviedo Convention provides:

“Article 27 – Wider protection

None of the provisions of this Convention shall be interpreted as limiting or otherwise affecting the possibility for a Party to grant a wider measure of protection with regard to the application of biology and medicine than is stipulated in this Convention.”

B. Other relevant Council of Europe texts

23. In 2004 the Committee of Ministers adopted Recommendation No. REC(2004)10 to member States concerning the protection of the human rights and dignity of persons with mental disorder. Chapter III of the Recommendation concerns involuntary placement in psychiatric facilities, and involuntary treatment, for mental disorder. It sets out a series of criteria, standards and rights that States should respect in such situations. Of relevance for present purposes is the second criterion that appears under Article 17.1:

“A person may be subject to involuntary placement only if all the following conditions are met:

...

ii. the person’s condition represents a significant risk of serious harm to his or her health or to other persons.

...”

The same criterion is specified in Article 18, which concerns involuntary treatment.

C. The draft Additional Protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment

24. Article 31 of the Oviedo Convention envisages the elaboration of Protocols “with a view to developing, in specific fields, the principles contained in this Convention” (see paragraph 10 above). As stated in its Explanatory Report, the Oviedo Convention sets out only the most important principles. Additional standards and more detailed questions should be dealt with via Protocols (see paragraph 7 of the Explanatory Report). To date, three Additional Protocols have been concluded, concerning transplantation of organs and tissue of human origin¹, biomedical research², and genetic testing for health purposes³.

25. In 2018, a draft Additional Protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment was published (see DH-BIO/INF (2018) 7, dated 4 June 2018), followed by its draft explanatory report (see DH-BIO/INF (2018) 8, dated 15 June 2018). Its purpose, as stated in its penultimate preambular provision, is to clarify the standards of protection applicable to the use of involuntary placement and involuntary treatment. The object of the draft instrument, stated in its Article 1, is that the Parties “protect the dignity and identity of persons with mental disorder and guarantee, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to involuntary placement and involuntary treatment”.

26. As further explained in the draft explanatory report, the aim is “to specify and develop the standards of human rights protection applicable to the use of involuntary measures, based, in particular, on the case-law of the European Court of Human Rights, in a legally binding instrument” (paragraph 1). The draft Additional Protocol intends to “complement and extend” the provisions of the Oviedo Convention (paragraph 4).

27. The draft Additional Protocol draws on the content of Committee of Ministers Recommendation No. REC(2004)10 (mentioned in its sixth preambular paragraph; see at paragraph 23 above).

¹ Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, CETS No. 186, Strasbourg, 24.I.2002.

² Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research, CETS No. 195, Strasbourg, 25.I.2005.

³ Additional Protocol to the Convention on Human Rights and Biomedicine concerning Genetic Testing for Health Purposes, CETS No. 203, Strasbourg, 27.XI.2008.

28. The draft Additional Protocol has met with opposition from various quarters and has been strongly criticised as incompatible with the obligations flowing from the UN Convention on the Rights of Persons with Disabilities. Opposition to it has come from, among others, the Parliamentary Assembly of the Council of Europe, the Council of Europe Commissioner for Human Rights, the Committee on the Rights of Persons with Disabilities of the United Nations, and from civil society.

II DECISION OF THE COURT

29. This being the first occasion on which use is made of the procedure provided for in Article 29 of the Oviedo Convention, the Court considers it appropriate to first consider, in general terms, the question of its jurisdiction in relation to that instrument. It will then clarify the nature, scope and limits of that jurisdiction, and in light of that rule on its competence in respect of the present request.

A. Relevant legal framework

30. In addition to Article 29 of the Oviedo Convention (set out at paragraph 9 above), it is necessary to have regard to the following provisions of the European Convention on Human Rights.

31. Article 19 of the Convention establishes the Court, and defines its function thus:

“To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights ...”

32. The jurisdiction of the Court under the Convention is set by Article 32 in the following terms:

“1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.”

33. Article 47 of the Convention provides, as relevant:

“1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

...”

34. The Court's jurisdiction in this respect is defined by Article 48, which provides:

“The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.”

35. As explained above, when consulted during the process of drafting the Oviedo Convention about its potential role under that instrument, the Court suggested that it be modelled on its existing advisory jurisdiction, at that time conferred by Protocol No. 2 to the Convention in terms essentially identical to those of the current Article 47 § 1 (see paragraph 15 above).

36. In addition to the above types of jurisdiction that are set out in the Convention, the Court also has advisory jurisdiction by virtue of Protocol No. 16, which States may choose to accept and whose provisions are regarded as additional articles to the Convention. This advisory jurisdiction, which came into being on 1 August 2018, concerns questions of principle posed by highest courts and tribunals relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto (Article 1 § 1 of this Protocol). The objective pursued by this Protocol is to enhance the interaction, notably in the form of judicial dialogue, between the Court and national authorities, thereby reinforcing implementation of the Convention in accordance with the principle of subsidiarity. The limits of this exercise are expressly set by the Protocol, particularly that an advisory opinion can only be sought in the context of a case pending before the requesting court, which must provide the Court with the relevant legal and factual background of that case (Article 1 §§ 2 and 3 of this Protocol). The Court has confirmed that its advisory opinions delivered under this Protocol must be confined to points that are directly connected to the proceedings pending at domestic level (see *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, P16-2018-001, § 26, 10 April 2019, and *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law*, P16-2019-001, §§ 44 and 47, 29 May 2020). In this context, the Court has held that it cannot deal with questions of Convention law that are abstract and general in nature (*ibid.*, § 55).

B. Observations received from Governments regarding the Court's jurisdiction and competence

37. The argument that, as a matter of principle, the Court does not have jurisdiction to interpret the Oviedo Convention was made by the Governments of Andorra, Azerbaijan, Poland, Russia and Turkey (the last of these being a Party to the Oviedo Convention). The position taken was that

the Court's jurisdiction is governed exclusively by the Convention and is therefore restricted, *ratione materiae*, to the Convention and the Protocols thereto. For it to be granted any further jurisdiction, an amendment of the Convention or a new Protocol thereto would be required. It could not be done by a separate treaty, even one as closely connected, in terms of purpose and substance, as the Oviedo Convention. Moreover, the only body permitted to seek an advisory opinion from the Court is the Committee of Ministers. Reference was made in this context to Article 34 of the Vienna Convention on the Law of Treaties ("the Vienna Convention"), which lays down the general rule that a treaty does not create either obligations or rights for a third State without its consent. Accordingly, any perceived normative gaps should be filled by means of an amending or additional protocol, not by interpretation. It was further argued that although it purported to confer advisory jurisdiction on the Court, the Oviedo Convention failed to specify the procedure to be followed, a deficiency that could not be made good by adapting the Rules of Court. The relevant procedural modalities should have been laid down in the Oviedo Convention, so that they would have the express agreement of States.

38. A greater number of intervening Governments accepted that the Court does indeed, in principle, have jurisdiction in relation to the Oviedo Convention. This was the position of the Governments of the Czech Republic, Estonia, Finland, France, Italy, Latvia, Luxembourg, the Netherlands, Norway, Portugal, Romania and Ukraine (8 of these 12 States being Parties to the Oviedo Convention). The Government of Lithuania considered that the issue was a matter for the Court's discretion. The submissions made can be summarised as follows. It was argued that the relevant provisions of the Convention, cited above, should be seen as regulating the Court's jurisdiction only in relation to the Convention itself and the Protocols thereto. They did not exclude the conferral of a distinct function on the Court by another treaty concluded within the Council of Europe, in particular one as closely related to the Convention as the Oviedo Convention, which the Court itself had already referred to in a number of judgments. Article 29 clearly expressed the drafters' intention to entrust the task of interpreting the Oviedo Convention to the Court, for good reasons that were readily apparent from the drafting history of that provision. The Court itself had been favourable to assuming such a function. The Parliamentary Assembly had also wished in 1995 to see a role for the Court. Indeed, during the negotiation of the Oviedo Convention there had been widespread support for its Article 29. The adoption of the final text by the Committee of Ministers was a clear indication that Council of Europe member States as a whole, i.e. all of the Contracting Parties to the Convention, accepted this additional function for the Court. By ratifying the Oviedo Convention, 29 Council of Europe member States had formally accepted the Court's interpretative jurisdiction under Article 29 of that treaty, and this was without effect on the position of the remainder of the Contracting Parties to the Convention. Nor did it affect the provisions of the Convention,

the Court not having been granted any contentious jurisdiction under the Oviedo Convention. The argument was made that Article 29 should be seen as a relevant rule of international law within the meaning of Article 31 § 3 (c) of the Vienna Convention. It was further submitted that the relationship between the two conventions in this respect was governed by Article 30 of the Vienna Convention, on the application of successive treaties relating to the same subject-matter, given the close substantive connection between them. Therefore, the strict limits applied to the Court's advisory jurisdiction under Article 47 of the Convention, clearly justified in that particular context, should not be read into Article 29 of the Oviedo Convention. Otherwise, the clear intention of the drafters of the latter treaty would be ignored, and the effectiveness of Article 29 would be undermined.

39. Eight Governments made reference to the limitation laid down in Article 47 § 2 of the Convention on the scope of the Court's competence. It was argued by some that the questions posed by the DH-BIO were incompatible with this restriction, since they concerned matters that had already arisen often before the Court in the context of contentious proceedings, and were likely to continue to do so. For this reason, the Court should conclude that it lacked the competence to accept the request, as the limitation in Article 47 § 2 must be respected in the present context as well (position of the Governments of Armenia, Greece, Poland and Turkey). Others considered that the request should not be automatically rejected for this reason. Rather, the Court should ensure that its reply was formulated in such a way as not to interfere with its functions under the Convention (position of the Governments of the Czech Republic, Italy, Norway and Ukraine).

C. Observations received from the intervening organisations regarding the Court's jurisdiction and competence

40. One of the intervening organisations, Validity, addressed the issue of the Court's competence. It considered that the Court should apply Article 47 of the Convention, by analogy or even directly. On this basis, the request should be considered as falling outside the Court's competence, since it was not compatible with either of the conditions laid down in Article 47 § 2, as it related to the scope and content of a series of Articles of the Convention and also related to questions which the Court had already examined in numerous cases, and would have frequent occasion to do so again in future. Thus, any opinion provided by the Court would prejudice its later consideration of cases raising such questions under Article 34 of the Convention.

D. The Court's assessment

1. *The Court's jurisdiction under Article 29 of the Oviedo Convention*

41. Article 29 of the Oviedo Convention seeks to grant the Court jurisdiction to interpret that instrument. It is not unprecedented for an international court to have, alongside its contentious jurisdiction, a wide advisory function extending beyond its principal treaty. The examples of the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights may be given here. The advisory jurisdiction of each court extends beyond the principal human rights treaty in the respective system, taking in certain other human rights instruments. In contrast with the Court, though, such jurisdiction is expressly provided for in their constitutive instruments (Article 64 of the American Convention on Human Rights; Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights).

42. The Court's constitutive instrument is the Convention, which determines its function and its jurisdiction through Articles 19, 32, and 47 (see also *Decision on the competence of the Court to give an advisory opinion*, 2 June 2004, § 26). The Convention is silent regarding any jurisdiction for the Court outside of the Convention system. It has been argued by some of the Governments intervening in these proceedings that the abovementioned provisions of the Convention form the sole and exclusive basis for the jurisdiction of the Court, ruling out any other function under any other treaty, unless expressly provided for via an amendment of the Convention or a new Protocol thereto. The Court does not share this view. For while it is indisputable that, in relation to the Convention and the Protocols thereto, the Court's jurisdiction is governed by the abovementioned provisions, these do not expressly preclude, nor is it necessary to interpret them as completely precluding, the granting of jurisdiction to the Court by and in relation to another, closely-related human rights treaty concluded within the framework of the Council of Europe. This position is also taken by the majority of those intervening Governments that addressed the issue. As the Court has often stated, the Convention cannot be interpreted in a vacuum (see, among many others, *S.M. v. Croatia* [GC], no. 60561/14, § 287, 25 June 2020). In keeping with its longstanding practice, which reflects the rule laid down in Article 31 § 3(c) of the Vienna Convention, in interpreting the Convention it must take into account any relevant rules of international law applicable in relations between the parties, in this context the provisions of Article 29 of the Oviedo Convention. While this interpretative principle has mostly been applied to the substantive provisions of the Convention, the Court considers that it is not without relevance to other types of provision, including the provisions on the jurisdiction of the Court. Furthermore, it attaches significance to the fact that although the Oviedo Convention has not been ratified by all 47 Contracting Parties to the Convention, as a Council of

Europe treaty it received the approval of the Committee of Ministers, which adopted the text on 19 November 1996.

43. Moreover, as emerges from the drafting history of Article 29, there was a common understanding among the relevant institutions that the intended advisory role for the Court was both legitimate and justified (see paragraph 13 above).

44. The Court itself was receptive to this in its 1995 opinion on the draft version of the Oviedo Convention (see paragraph 14 above), in which it underlined the significant degree of common ground between this instrument and the Convention. The Oviedo Convention numbers among the human rights treaties concluded within the framework of the Council of Europe, pursuing the Council's statutory aim of achieving greater unity between the member States through the maintenance and further realisation of human rights and fundamental freedoms. It was considered at that time that because of the shared concepts between the two instruments an interpretative function for the Court in relation to the Oviedo Convention could promote a uniform interpretation of these concepts and avoid divergent interpretations of them under each convention.

45. As to the argument advanced by one Government with reference to the absence from the Rules of Court of specific procedural rules governing the present procedure (see paragraph 37 above), the Court observes that this is not determinative of the question of its jurisdiction under Article 29 of the Oviedo Convention. Nor does it pose any particular difficulty; given the silence of the Oviedo Convention in this respect, it is for the Court to regulate the procedure, by analogy with Article 25(d) of the Convention, which confers rule-making power on the Court alone.

46. To conclude on this first issue, in view of the absence of conflict between the relevant provisions of both legal instruments, and also of the agreement of the Contracting States as expressed by the Committee of Ministers when adopting the Oviedo Convention, the Court considers that the Convention does not preclude the granting of jurisdiction to it by the Oviedo Convention. Accordingly, the Court recognises that it has jurisdiction to give advisory opinions under Article 29 of the Oviedo Convention. It will now determine the nature, the scope and the limits of that jurisdiction, both as regards the Oviedo Convention itself as well as relative to its jurisdiction under the Convention.

2. The nature, scope and the limits of the Court's advisory jurisdiction under Article 29 of the Oviedo Convention

47. Article 29 of the Oviedo Convention provides that the Court may give advisory opinions on "legal questions" that concern the "interpretation" of the "present Convention". It is necessary to establish the meaning of these terms in the context in which they are used. In this respect, the Court finds it appropriate to refer once again to the drafting history of this provision. As

noted above (see paragraph 15), the terminology of Article 29 can be clearly traced to the opinion given by the Court in 1995, in which it expressly drew on the wording of what is now Article 47 § 1 of the Convention. Consequently, the meaning of the terms used should be the same in both contexts.

48. The Court has already had occasion to clarify the nature of its advisory jurisdiction under the Convention, observing that, with reference to the relevant *travaux préparatoires*, the use of the adjective “legal” in Article 47 § 1 denotes the intention of the drafters to rule out any jurisdiction on the Court’s part regarding matters of policy (see the advisory opinion on *Certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights* [GC], §§ 19 and 36, 12 February 2008). This point is further developed in the Explanatory Report to Protocol No. 2, according to which the term “legal questions” rules out questions which would go beyond the mere interpretation of the text and tend by additions, improvements or corrections to modify its substance (see paragraph 6 of the Explanatory Report). In light of the provenance of Article 29 of the Oviedo Convention, the Court considers that a request under that provision is subject to a similar limitation. Any questions posed under this provision must therefore be of a “legal” nature.

49. With reference to the other terms used in Article 29 – “interpretation”, “present Convention” – the Court would further clarify its methodological approach by noting that this procedure entails an exercise in treaty interpretation, applying the methods set out in Articles 31-33 of the Vienna Convention. These same provisions have long guided the Court in its elucidation of the meaning of the Convention through the exercise of its contentious jurisdiction (see, among many others, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, §§ 118-125, 8 November 2016). However, the Court has in addition continuously emphasised the Convention’s special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see, among many others, *Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161, and also *Slovenia v. Croatia* (dec.) [GC], no. 54155/16, §§60 and 67, 18 November 2020). Indeed, it has underlined the unique character of the Convention as a constitutional instrument of European public order in the field of human rights (see, among others, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 156, ECHR 2005-VI). This leads the Court to treat the Convention, over the interpretation and application of which Article 32 grants it full jurisdiction, as a living instrument to be interpreted in the light of present-day conditions (see, among many others, *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 73, 24 January 2017). The Court underlines that this particular interpretative approach, which is integral to its contentious jurisdiction, must be regarded as specific to the Convention and the Protocols thereto. There is no similar basis in Article 29 to take the same approach, which was already well known at the time the Oviedo Convention

was drafted, in relation to the interpretation of that instrument. Rather, it is the “present Convention” that the Court may be requested to interpret. The Court observes here that, compared to the Convention, the Oviedo Convention represents a different normative model, being a framework instrument setting out the most important principles, to be developed further with respect to specific fields through protocols (see Article 31 of the Oviedo Convention at paragraph 10 above).

50. The Court considers it appropriate to clarify on this occasion the relationship between its advisory jurisdiction under the Oviedo Convention and its jurisdiction – contentious and advisory – under the Convention. It points out, firstly, that in the Convention the relationship between the Court’s contentious and advisory jurisdictions is regulated by Article 47 § 2, which significantly limits the latter with respect to the former in two related ways. Thus, an advisory opinion cannot concern the content or scope of the rights and freedoms set forth in Section I of the Convention (Articles 2-18) and the Protocols thereto. Nor can it concern any other question that the Court or the Committee of Ministers might have to consider in the context of possible proceedings under the Convention.

51. Regarding the second limitation, the Court has clarified its purpose as follows:

“The Court considers that the purpose of the provisions excluding its advisory jurisdiction is to avoid the potential situation in which the Court adopts in an advisory opinion a position which might prejudice its later examination of an application brought under Articles 33 or 34 of the Convention and that it is irrelevant that such an application has not and may never be lodged. In this connection, it again refers to the *travaux préparatoires*, in which it was stated that it was necessary “to ensure that the Court shall never be placed in the difficult position of being required, as the result of a request for its opinion, to make a direct or indirect pronouncement on a legal point with which it might subsequently have to deal as a main consideration in some case brought before it” (see CM(61)91). The Court considers therefore that it suffices to exclude its advisory jurisdiction that the legal question submitted to it is one which it might be called upon to address in the future in the exercise of its primary judicial function, that is in the examination of the admissibility or merits of a concrete case” (*Decision on the competence of the Court to give an advisory opinion*, 2 June 2004, § 33).

52. This purpose of Article 47 § 2 is formulated in very general terms and also reflected in the drafting history of the Oviedo Convention. As described above (see paragraph 14), the initial proposal put to the Court envisaged a preliminary reference procedure. The Court disagreed with this idea. It explained in its opinion on the draft text that such a role under the (future) Oviedo Convention could have an influence on the exercise of its contentious jurisdiction under the Convention. The Court could be hampered in its consideration of a case in relation to which it had already delivered a preliminary ruling at the request of the domestic court seized of the matter. That feature was subsequently omitted. The drafters also specified in the text of the future Article 29 that a request for an advisory opinion must be without direct reference to any specific proceedings pending in a court. This too was

at the suggestion of the Court, rooted in the concern to reduce the risk of an interpretation that might hamper it at a later stage if the request originated in domestic proceedings that subsequently led to an application under the Convention. With a purely advisory function, responding to legal questions of interpretation, this pitfall would be avoided. That concern remains pertinent. The Court therefore underlines that its advisory jurisdiction under the Oviedo Convention must operate harmoniously with its jurisdiction under the Convention, above all with its contentious jurisdiction, for that is its pre-eminent function and must be carefully preserved.

53. The advisory jurisdiction that was subsequently conferred on the Court by Protocol No. 16 (see paragraph 36 above) is to be clearly distinguished from that granted by the Oviedo Convention. Apart from the obvious formal difference – Protocol No. 16 being part of the set of international treaties that make up the Convention system –, the procedure introduced by the Protocol serves the purpose of reinforcing the implementation of the Convention in concrete cases pending before national courts, having regard to their specific factual and legal circumstances, thereby enhancing the implementation of the principle of subsidiarity which is now expressly set forth in the Preamble to the Convention. Given this fundamental difference with the two other bases of the Court’s advisory jurisdiction, Article 47 of the Convention and Article 29 of the Oviedo Convention, the limits which apply to the latter and which are designed to preserve the judicial function of the Court cannot apply in the same way to the Court’s jurisdiction under Protocol No. 16.

54. Having affirmed that the relevant provisions of the Convention do not completely preclude the conferral of a judicial function on the Court in relation to other human rights treaties concluded within the framework of the Council of Europe, this is subject to the proviso that its jurisdiction under its constitutive instrument remains unaffected. Without needing to take a conclusive stance on certain arguments advanced before it based on the Vienna Convention, the Court emphasises that it cannot operate the procedure provided for in Article 29 of the Oviedo Convention in a manner incompatible with the purpose of Article 47 § 2 of the Convention (also reflected in the drafting history of Article 29), which is to preserve its primary judicial function as an international court administering justice under the Convention.

3. The Court’s competence in respect of the present request

55. Having affirmed its advisory jurisdiction, in general, under Article 29 of the Oviedo Convention, and clarified its nature, scope and the necessary limits to it, the Court now turns to determine whether it has competence to accept the request at hand, considering in turn the questions put to it.

56. To begin with, the Court observes that the request has been submitted by the designated committee within the meaning of Article 32 of the Oviedo Convention, the DH-BIO. According to the information provided, the request

was adopted by the DH-BIO in its composition restricted to representatives of the Parties to the Oviedo Convention. In the absence of any mention of votes being cast to adopt the request, the Court will presume that the requisite majority (two-thirds of votes cast) was attained.

57. In keeping with Article 29, the request makes no direct reference to any specific proceedings pending in a court.

58. It remains to be determined whether the request respects the nature, scope and limits of the Court's advisory jurisdiction. The Court observes that Article 29 of the Oviedo Convention does not make it a requirement that requests for advisory opinions be accompanied by reasons or explanations. However, in order for the Court to be in a position to satisfy itself that it is indeed competent to accept a request, it needs to consider not only its wording and explanation, but also the background and context of the request.

59. In this respect, the Court notes the wording of the first question ("... which 'protective conditions' does a Member State need to regulate ...") and the general explanation provided by the DH-BIO that its aim is to obtain clarification "of certain aspects of the legal interpretation of Article 7 of the Oviedo Convention, with a view to informing [its] current and future work in the area". While the request does not refer to the international discussion that has taken place in relation to the draft Additional Protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment, that is a matter of public record.

(a) Observations received from Governments

60. As already noted above (see paragraph 39) some Governments considered that the nature of the questions posed was such that the Court was not competent to answer them, by virtue of Article 47 § 2 of the Convention. Some other Governments provided, in relation to the first question, various suggestions as to what "protective conditions" should be regulated by the States Party to the Oviedo Convention. The Czech Government identified a number of general principles that should be taken into account, such as those of necessity, proportionality, taking an individualised approach, and having recourse to involuntary interventions only as a last resort. They then suggested a series of safeguards that should be provided for in domestic law, inspired by relevant international texts, notably Committee of Ministers Recommendation No. REC(2004)10, and the draft Additional Protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment. The Governments of Estonia, Latvia and Poland (the latter only in the event that the Court recognised jurisdiction as such under Article 29 of the Oviedo Convention) considered that the Court's reply should refer to its pertinent case-law under the relevant provisions of the Convention, particularly Articles 3, 5 and 8, these being directly relevant to the subject-matter at hand.

They derived a series of protective conditions from a number of judgments delivered by the Court. The Government of the Netherlands put forward a series of aspects that it considered important for domestic legislation to include, adding that national law should also leave room for the exercise of professional judgment in each individual case. The Government of Portugal observed that Article 7 of the Oviedo Convention leaves it to each Party to determine in detail the protective conditions that will apply where a person is subject to an intervention without their consent. The States therefore had a certain margin of appreciation in the matter. However, it considered that the guidelines set out in Committee of Ministers Recommendation No. REC(2004)10 took on particular importance in this context, notably Articles 21-25 of that instrument.

61. Regarding the second question, most of the intervening Governments indicated that their domestic law provided for involuntary interventions in relation to persons suffering from a mental disorder where this was necessary to protect others from serious harm. Generally, such interventions were governed by the same provisions, and were subject to the same protective conditions as interventions aimed at protecting the persons concerned from causing harm to themselves. It would be very difficult in reality to try to differentiate between the two bases for involuntary intervention, given that many pathologies posed a risk to the person concerned and to third parties alike. The Government of the Netherlands observed that where the aim was the protection of others, additional conditions may be necessary, giving the example of the duty on medical staff to consult with the relevant local authority and the prosecution service before terminating involuntary treatment that was ordered on this basis. The Swiss Government clarified that under domestic law the protection of third parties was a factor to be taken into account when assessing whether to arrange for the involuntary treatment of a person, but it was not in itself a decisive consideration. Several of the Governments stated the view that Article 26 of the Oviedo Convention permitted such interventions, and that the same “protective conditions” referred to in Article 7 should also apply in such circumstances. There was no basis to consider that Article 26 contemplated different standards or safeguards. The Government of Portugal submitted that the fact that the two bases for intervention were regulated by different provisions reflected a well-known legislative technique, the broader provision covering other, unspecified situations that justified taking the same action. The two provisions should be interpreted in a concerted manner.

(b) Observations received from the intervening organisations

62. The common theme of the three interventions received was that Articles 7 and 26 of the Oviedo Convention were not compatible with relevant contemporary norms as laid down in the Convention on the Rights of Persons with a Disability (CRPD). The very notion of imposing treatment

without consent was contrary to the CRPD, which had shifted the paradigm for the protection of the human rights of persons suffering mental illness or psychosocial disabilities. As established by the UN Committee on the Rights of Persons with a Disability, such a practice went against the principles of dignity, non-discrimination and the liberty and security of the person, and violated a series of CRPD provisions, in particular Article 14 of that instrument. That Committee consistently urged States to cease such practices and to repeal the laws permitting them. That position had been widely accepted within the broader UN human rights system, and also by the World Health Organisation, which had revised its relevant policies so as to reflect it. The intervenors pointed to the fact that all of the Parties to the Oviedo Convention had ratified the CRPD, as had all but one of the 47 Contracting States to the Convention.

63. Several submissions were made about how the Court should respond to the request of the DH-BIO. It was argued that Article 53 of the Convention was relevant. This provision ensured that the Convention cannot serve as a reason to reduce the degree of human rights protection afforded by domestic law or other international agreements. Accordingly, the Court could not interpret the Convention in a manner at variance with the CRPD; the effect should be the same in relation to the Oviedo Convention. It was further submitted that the CRPD should be regarded as the *lex specialis* in this particular area. Therefore, to the extent that there was any conflict between this instrument, on the one hand, and the Convention and the Oviedo Convention on the other, the relevant provisions of the latter instruments should be disapplied, or at least interpreted in light of the *lex specialis*. It was also argued that the CRPD should be recognised as a “successive treaty” within the meaning of Article 30 of the Vienna Convention, and so Article 7 of the Oviedo Convention should be regarded as applying only to the extent that it could be interpreted compatibly with the corresponding provisions of the CRPD. The Court should in any event strive for a harmonious interpretation between the corresponding provisions of the Convention, the Oviedo Convention and the CRPD. Since the Court treated the Convention as a living instrument, interpreting it in light of the relevant rules of international law applicable among the Contracting States, and since it also had regard to the consensus emerging from specialised instruments, it should both align its interpretation of the relevant Articles of the Convention with the higher standard set by CRPD in this field, and then interpret the related provisions of the Oviedo Convention in like manner. It should seek to avoid, to the greatest extent possible, any conflict between these concurrently applicable international treaties, and to reflect the growing consensus in national law and policy about the unacceptability of involuntary treatment. The Oviedo Convention itself offered a pathway to resolving its conflict with contemporary standards. By relying on its Article 27, which allows for wider protection, and also on the fundamental principles referred to in Articles 1

and 5, it would be possible to conclude that Article 7 should now be regarded as having no effect.

(c) The Court’s assessment

(i) *Question 1*

64. The first question posed by the DH-BIO asks the Court to interpret the term “protective conditions”, as used in Article 7 of the Oviedo Convention, so as to specify the minimum requirements of protection that the Parties need to regulate under this provision, and to do so in light of the objective of that treaty as stated in its Article 1. The Court is also invited to have regard to the Convention and to the relevant case-law in giving the advisory opinion requested. The DH-BIO has explained that the aim of the first question is to achieve clarity, based on the relevant case-law of the Court, about the conditions that must be complied with in order to effectively safeguard the person’s human rights and protect their integrity, with a view to informing the committee’s current and future work in the area.

65. In the Court’s opinion, however, the “protective conditions” that member States “need to regulate to meet the minimum requirements of protection” under Article 7 of the Oviedo Convention cannot be further specified by a process of abstract judicial interpretation. For it is clear that this provision reflects the deliberate choice of the drafters to leave it to the Parties to determine, in further and fuller detail, the protective conditions applying in their domestic law in this context. In this respect, Article 7 stands in contrast to other, more detailed provisions of the same treaty, for example Articles 16, 17 and 20. The drafters were evidently mindful of relevant, specific standards that existed at that time, and that are acknowledged in the Explanatory Report, in particular the standards set by the Committee of Ministers in non-binding form (see paragraph 55 of the Explanatory Report, set out above at paragraph 18). Yet they refrained from incorporating them in the treaty (see the drafting history of this provision, summarised above at paragraph 17).

66. The wider context of the treaty, or its object and purpose, do not lead to an interpretation of Article 7 in the sense requested. The fundamental theme of the Oviedo Convention is the protection of the dignity and human rights of the human being, reflected in its full title, its preamble and its General provisions, in particular Articles 1 and 2. While this implies regulating with great care the circumstances and conditions in which an exception may be made to the general rule of consent to interventions in the health field set out in Article 5, and there were many suggestions inspired by existing national and international standards from the intervening Governments which addressed this point, Article 7 leaves a degree of latitude to the States Parties. In the Court’s view, that cannot be restricted by an interpretation of that provision by the Court in the sense requested. As

clarified above (at paragraph 47), the jurisdiction of the Court in this context is an interpretative one. Its advisory opinions may only relate to “legal questions concerning the interpretation of the present Convention”, to the exclusion of matters of policy and of questions which would go beyond the mere interpretation of the text and tend by additions, improvements or corrections to modify its substance.

67. This is also in keeping with the Oviedo Convention’s general approach concerning the further development of its standards in specific fields. The Oviedo Convention is a framework treaty setting out the most important human rights and principles in the area of biomedicine, to be further elaborated and specified through additional protocols (Article 31 of the Oviedo Convention; see paragraphs 10 and 49 above). This is, by its very nature, a legislative exercise, rooted in policymaking at the international level, aiming at the adoption of new international legal standards. In relation to non-consensual interventions for the purpose of treating persons with a mental disorder, that process is, the Court understands, ongoing.

68. While the DH-BIO intimated that the Court should have regard to the Convention and to the relevant case-law, as has been explained above (at paragraphs 50-52) the Court’s advisory jurisdiction under the Oviedo Convention must operate in harmony with and preserve its jurisdiction under the Convention, the limits of which are not disapplied in the present context. Accordingly, the Court should not, as part of this exercise, interpret any substantive provisions or jurisprudential principles of the Convention. Even though this procedure concerns the Oviedo Convention, and the Court’s opinions under Article 29 are advisory, i.e. non-binding, a reply in such terms would still be an authoritative judicial pronouncement focused at least as much on the Convention itself as on the Oviedo Convention. The Court cannot take such an approach, which has the potential to hamper its pre-eminent contentious jurisdiction under the Convention. It follows *a fortiori* that the Court cannot, as suggested by the intervening organisations, treat the present request for an advisory opinion as an opportunity for it to modify its interpretation of certain provisions of the Convention for the sake of aligning it with the CRPD, and then interpret Article 7 of the Oviedo Convention in like manner.

69. The Court would nevertheless make the following observation, given the common ground between the two treaties that is particularly evident in the area that is the subject matter of the DH-BIO’s request. Despite the distinct character of the Oviedo Convention, the requirements for States under its Article 7 will in practice be concurrent with those under the Convention, it being recalled that at present all of the States having ratified the former are also bound by the latter. Accordingly, the safeguards in domestic law that correspond to the “protective conditions” of Article 7 of the Oviedo Convention need to be such as to satisfy, at the very least, the requirements of the relevant provisions of the Convention, as developed by the Court through its case-law. In relation to the treatment of mental disorder,

that case-law is extensive. Moreover, it is characterised by the Court’s dynamic approach to interpreting the Convention, which in this field is guided *inter alia* by evolving legal and medical standards, national and international. Therefore, the competent domestic authorities should ensure that, as a minimum, national law is and remains fully consistent with the relevant standards under the Convention, including those that impose positive obligations on States.

70. For the reasons set out above, neither the establishment of the minimum requirements for “regulation” under Article 7 of the Oviedo Convention (Question 1), nor “achieving clarity” regarding such requirements based on the Court’s judgments and decisions concerning involuntary interventions in relation to persons with a mental disorder (see the explanation to Question 1) can be the subject of an advisory opinion requested under Article 29 of that instrument. Question 1 is therefore not within the competence of the Court.

(ii) *Question 2*

71. As for question 2, which follows on from the first and is closely related to it, the Court likewise considers that it is not within its competence to answer it.

FOR THESE REASONS, THE COURT, BY A MAJORITY,

Decides that the request for an advisory opinion under Article 29 of the Oviedo Convention is not within its competence.

Done in English and in French and notified in writing on 15 September 2021.

Johan Callewaert
Deputy to the Registrar

Robert Spano
President

In accordance with Rule 88 § 2 of the Rules of Court (*per analogiam*), the separate opinion of Judges Lemmens, Grozev, Eicke and Schembri Orland is annexed to this decision.

R.S.O.
J.C.

JOINT DISSENTING OPINION OF JUDGES LEMMENS,
GROZEV, EICKE AND SCHEMBRI ORLAND

1. To our regret, we are unable to agree with the majority’s conclusion that the request for an advisory opinion is not within the Court’s competence.

In our opinion, not only does the Court have jurisdiction to give advisory opinions under Article 29 of the Oviedo Convention – as acknowledged by the majority – but there is also nothing in the two questions referred to the Court that make them inadmissible for consideration by the Court.

I. THE COURT’S JURISDICTION UNDER ARTICLE 29 OF THE
OVIEDO CONVENTION

2. While we come to the same conclusion as the majority with respect to the Court’s advisory jurisdiction under the Oviedo Convention, we do so with much less hesitation.

The majority test the Court’s jurisdiction under the Oviedo Convention against the Court’s so-called “primary judicial function” under the European Convention on Human Rights (“the Convention”). We think the Oviedo Convention should be interpreted more autonomously. The Oviedo Convention is not a mere “annex” to the Convention. It is a separate instrument, with its own internal logic. It is true that there are substantial links with the Convention and that the Court is included within the institutional machinery of the Oviedo Convention, but that does not place the Oviedo Convention hierarchically under the Convention. In our opinion, the Oviedo Convention’s provisions are not subject to limitations that follow from the specific logic inherent in the Convention.

3. Article 29 of the Oviedo Convention gives the Court jurisdiction to give “advisory opinions on legal questions concerning the interpretation” of that Convention, at the request of the Government of a Party or a designated committee, which is now the Council of Europe’s Committee on Ethics (“the DH-BIO”).

The text of that provision is in our opinion very clear. Article 29 sets no limits to the Court’s jurisdiction. In particular, there are no limitations of the kind provided for in Article 47 § 2 of the Convention with respect to “advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto”, at the request of the Committee of Ministers. Article 47 § 2 provides that “such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention”. This is perfectly understandable in the context of the Convention: the drafters of Protocol No. 2 (Article 47) wanted

to avoid the Court giving an interpretation of a provision of the same treaty that the Court or the Committee of Ministers might have to consider in contentious proceedings. No such overlap is possible between the advisory proceedings under the Oviedo Convention and the contentious proceedings under the Convention. The object in the two types of proceedings is, at least formally, totally different. It is in our opinion only logical that Article 29 of the Oviedo Convention does not contain limitations like those in Article 47 § 2 of the Convention.

4. The majority nevertheless read into Article 29 of the Oviedo Convention the same exceptions as those set out in Article 47 § 2 (see paragraphs 50-52 and 54 of the decision). Regrettably, we disagree.

We do not think that the text of Article 29 allows for such an interpretation (see paragraph 3 above). Moreover, in our opinion, such an interpretation is difficult to reconcile with the object and purpose of Article 29. Indeed, as is stated in the explanatory report to the Oviedo Convention, the Oviedo Convention and the Convention “share not only the same underlying approach but also many ethical principles and legal concepts” (paragraph 9 of the report). Granting advisory jurisdiction to the Court, which was set up to ensure compliance with the Convention, is obviously intended to “promote a uniform interpretation of [the shared] concepts and avoid divergent interpretations of them under each convention” (see paragraph 44 of the present decision). Such an aim calls for a wide jurisdiction of the Court under the Oviedo Convention, not for limitations to that jurisdiction. A uniform interpretation can hardly be promoted, and divergent interpretations can hardly be avoided, if the Court is not able to examine issues that might also come up in contentious proceedings under the Convention.

5. The majority draw an argument from the *travaux préparatoires* of the Oviedo Convention, and in particular from the Court’s opinion of 6 November 1995 on a draft of the Oviedo Convention (Cour (95) 413; see paragraphs 14-15 and 44 of the present decision). We have a somewhat different understanding of the preparatory work.

First of all, the overall message of the Court was one of welcoming the provision that would become Article 29 of the Oviedo Convention. The Court found understandable the wish of the drafters “to establish a system capable of providing a uniform interpretation of those provisions that would be regarded as authoritative by all the Contracting States”, and agreed that this goal could be achieved by entrusting that role to the Court (paragraph 3 of the Court’s opinion, quoted in paragraph 14 of the present decision). It explicitly stated that it was “in favour of the principle of assuming an interpretative jurisdiction in this field” (paragraph 5 of the Court’s opinion; see paragraph 14 of the present decision).

Second, it is true that the Court made a reservation relating to its contentious jurisdiction under the Convention. That reservation should, however, be read in its proper context. The Court’s concern related to the draft provision that allowed for preliminary rulings at the request of domestic

courts, since there was a risk that its advisory opinion in a case pending before the national court “could hamper the Court if at a later stage it had to rule under, for instance, Articles 2, 8 and 14 of the Human Rights Convention on the facts of the case that had led the national court to request the interpretation of a provision of the bioethics convention” (see paragraph 5 of the Court’s opinion). This concern was fully met by the drafters of the Oviedo Convention: the possibility for a national court to submit a request to the Court for a preliminary ruling was completely removed from Article 29 of the Oviedo Convention. Moreover, following another suggestion by the Court (see paragraph 5 of the Court’s opinion), the drafters of the Oviedo Convention inserted the proviso that a request for an advisory opinion (either by a Government or by the committee that is currently the DH-BIO) could not contain a “direct reference to any specific proceedings pending in a court”.

If any conclusions can be drawn from the *travaux préparatoires*, they point in our opinion, on the one hand, to the fact that it was the intention of the drafters, supported by the Court, to grant the Court a wide advisory jurisdiction under the Oviedo Convention, and on the other hand, to the fact that any possible risks of overlap between a request for an advisory opinion under the Oviedo Convention and a subsequent application under the Convention have been removed in Article 29.

II. THE ADMISSIBILITY OF THE PRESENT REQUEST

6. It is on the basis of a broad understanding of the Court’s advisory jurisdiction under Article 29 of the Oviedo Convention that we now turn to the issue whether the present request satisfies the requirements of that provision. We consider this to be an issue relating to the admissibility of the request and the questions forming the subject of it.

7. A request made under Article 29 of the Oviedo Convention is admissible if it has been submitted by the Government of a Contracting Party or the DH-BIO, if it does not directly refer to any specific proceedings pending in a court, and if it relates to “legal questions concerning the interpretation of the present Convention”. In the present case, the first two conditions are fulfilled, as is also acknowledged by the majority (see paragraphs 56-57 of the decision). The difficulty lies with the third condition.

8. In so far as Article 29 requires that the questions put before the Court be of a “legal” nature, we agree with the majority that this excludes questions “regarding matters of policy” (see paragraph 48 of the decision). The Court is a judicial body capable of dealing with legal questions, not a body vested with the power to make decisions on matters of political choice.

However, we do not consider that Article 29 rules out requests for an opinion on a legal question merely because the Court’s answer to the question could be a source of interpretation for a possible future draft protocol to the Oviedo Convention. In our opinion, the fact that the DH-BIO explains that it

has submitted two questions to the Court “with a view to informing the current and future work of the DH-BIO in the area” (see paragraph 2 of the present decision), which may be understood as a reference to its internal discussions on an additional protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment (see paragraphs 24-28 and 59 of the decision), should have no bearing on the admissibility of the request. It is the subject of the request that counts, not the aim with which an opinion is sought.

9. In so far as Article 29 further requires that the questions must concern “the interpretation of the present Convention”, we do not consider that the “interpretation” which may be requested from the Court must necessarily be limited to the Oviedo Convention as it was understood in 1997, while any further development of the principles contained in the Oviedo Convention should be the exclusive result of additional protocols adopted by the Contracting Parties to the Oviedo Convention pursuant to Article 31 of the Oviedo Convention (see paragraph 49 of the decision).

We note that the majority categorically reject the idea of the Oviedo Convention as a “living instrument” (ibid.). We think that this issue needs further reflection, and that things may not be that clear. Yes, the drafters of the Oviedo Convention opted for further *development* of the general principles through specific protocols; but these protocols are also intended to *clarify* the meaning of these principles, which are “valid for all applications of biology and medicine in human beings” (see explanatory report, § 167), in specific fields.

In any event, the fact that the Oviedo Convention provides for the possibility of *development* of its principles through additional protocols concerning specific fields does not, in our opinion, preclude an *interpretation* of the meaning of the provisions of the Oviedo Convention itself, even with a view to the application of these principles in a specific field.

10. With respect to the specific questions put before the Court, we are of the opinion that they seek clarification of what are certain minimum requirements flowing from Articles 7 and 26 of the Oviedo Convention in the specific area of treatment of a mental disorder. The DH-BIO invites the Court to have regard in its opinion to the Convention, its case-law and the Oviedo Convention.

Such questions relate to the interpretation of the Oviedo Convention, not to any policy to be adopted by the competent authorities. The fact that the Court’s opinion may contain elements that could assist the DH-BIO in its further examination of the draft additional protocol on involuntary placement and involuntary treatment of persons with mental disorder does not change our conclusion.

We therefore conclude that both questions satisfy the requirements of Article 29 of the Oviedo Convention and that the request should have been declared admissible.

III. THE ABSENCE OF A RESPONSE TO THE QUESTIONS REFERRED TO THE COURT

11. We regret that, as a result of their conclusion with respect to the competence of the Court, the majority do not enter into a discussion on the merits of the two questions raised by the DH-BIO. These are important questions, and we believe that the Court could have given a meaningful answer.

It is the view of the majority that the Court should not become involved in a field which is largely left to other actors under the Oviedo Convention. While we disagree with that view, we acknowledge that we are only a minority among the judges of the Grand Chamber. In these circumstances, we do not think that it would be appropriate for us to claim that we can provide answers, where these have not been the subject of substantive collegial deliberations.

12. We note that the majority, in a sort of *obiter dictum*, make a general observation on the substantive issues raised by the first question, relating to Article 7 of the Oviedo Convention (see paragraph 69 of the decision). We agree that the safeguards in domestic law that correspond to the “protective conditions” of Article 7 “need to be such as to satisfy, at the very least, the requirements of the relevant provisions of the Convention, as developed by the Court through its case-law”. We also agree with the reference to the “Court’s dynamic approach to interpreting the Convention, which in this field is guided *inter alia* by evolving legal and medical standards, national and international”.

We would have preferred the Court to go further in its analysis, on the basis of these starting points. We regret that we cannot do more.