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The ECtHR's Decision to Dismiss the First Request Submitted Under Article 29 of the Convention on Human Rights and Biomedicine

Putting Its Sleeping Advisory Competence Back in the Attic

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Abstract

The present article is aimed at critically assessing the ECtHR's decision to dismiss the first request submitted under Article 29 of the Convention on Human Rights and Biomedicine ("Oviedo Convention") by the Council of Europe's Committee on Bioethics, for the purpose of clarifying certain aspects of the interpretation of Article 7 of the Oviedo Convention. While the ECtHR ultimately decided not to render the advisory opinion on the grounds that it would be outside its competence, the decision is of interest because it nonetheless was an occasion for the Court to assert in general terms its jurisdiction under Article 29 of the Oviedo Convention and to define the contours of its advisory competence. Yet, it will be argued that the Court's reasoning is rather unconvincing, if not mistaken, and that it ultimately results in an unclear definition of the boundaries of its jurisdiction. The lack of clarity is further exacerbated by the fact that the Court seems to have treated as questions of competence some issues that most likely would have had to be addressed within the framework of propriety. This aspect will appear rather distinctly if one compares the ECtHR's approach to the solutions adopted by other international courts and tribunals. This comparison will also be useful in order to suggest an alternative path that the Court could have followed, and which would have not only represented a more correct and coherent reasoning but also avoided the likely outcome of its decision, that is putting its advisory competence under the Oviedo Convention back in the attic.

Keywords

European Court of Human Rights – international courts and tribunals – advisory competence – Oviedo Convention – judicial propriety

1 Introductory Remarks

With its Decision delivered on 15 September 2021, the European Court of Human Rights (“ECtHR”) declined the request for an advisory opinion submitted by the Council of Europe’s Committee on Bioethics 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 (“Oviedo Convention”).¹ It stated that the request was outside its competence.²

Article 29 of the Oviedo Convention provides for the competence of the Court to give advisory opinions at the request of a Party or of the Committee on Bioethics on legal questions concerning the interpretation of the Oviedo Convention that do not directly relate to any specific proceedings pending before a court.³ That competence had never been triggered so far. Therefore, the request, aimed at clarifying certain aspects of the interpretation of Article 7 of the Oviedo Convention (Protection of persons who have a mental disorder), represented the first – and possibly last – time for the Court to exercise its advisory competence under the Oviedo Convention. Thus, the ECtHR’s decision also constituted the occasion for the Court to clarify, from a more general perspective, that it has jurisdiction under Article 29 of the Oviedo Convention and to define its scope and limits.

1 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, ETS No. 164, Oviedo, 4 April 1997, entered into force 1 December 1999.

2 *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*, Decision of 15 September 2021, available at: <www.hudoc.echr.coe.int> (hereinafter “Decision under Article 29 of the Oviedo Convention”).

3 According to Art. 29 of the Oviedo Convention, while the Government of a Party may request an advisory opinion “after having informed the other Parties”, the “Committee set up by Article 32” – the then Steering Committee on Bioethics, later transformed into the Committee on Bioethics – may do so by a decision adopted by a two-thirds majority of votes cast, with membership restricted to the Representatives of the Parties to the Oviedo Convention.

Yet, both the way in which the Court has defined its jurisdiction and has reached its conclusions in the specific case have been called into question by four Judges in a dissenting opinion appended to the decision, where they have put forward an alternative view of the Court's advisory competence provided for in the Oviedo Convention.⁴

Against this background, the present article is aimed at critically assessing the positions that have come up on the Court's advisory competence. To that end, after briefly dealing with the aspects relating to the Court's assertion of its jurisdiction under Article 29 of the Oviedo Convention (Section 2), it will mainly dwell on the issues concerning the delimitation of such advisory competence. It will be argued that the Court's reasoning is rather unconvincing, if not mistaken, and that it ultimately results in an unclear definition of the boundaries of its jurisdiction (Section 3). The lack of clarity is further exacerbated by the fact that the Court seems to have treated as questions of competence some issues that most likely would have had to be addressed within the framework of propriety. This aspect will appear rather distinctly if one compares the ECtHR's approach to the solutions adopted by other international courts and tribunals (Section 4). This comparison will also be useful in order to suggest an alternative path that the Court could have followed, and which would have not only represented a more correct and coherent reasoning but also avoided the likely outcome of its decision, that is putting its advisory competence under the Oviedo Convention back in the attic (Section 5).

2 The Court's Assertion of its Jurisdiction Under Article 29 of the Oviedo Convention

The first part of the decision is devoted to the considerations concerning the legal foundation of the advisory competence enshrined in Article 29 of the Oviedo Convention. Said competence represents a *unicum* in the Council of Europe landscape,⁵ and is rather peculiar, since it is not conferred on the Court

4 Decision under Article 29 the Oviedo Convention, *cit. supra* note 2, p. 25 ff., Joint Dissenting Opinion of Judges Lemmens, Grozev, Eicke and Schembri Orland (hereinafter also "Dissenting Opinion").

5 If seen under an historical and systemic perspective, Art. 29 of the Oviedo Convention is rather exceptional, since the Committee of Ministers – therefore, the Member States of the Council of Europe – have always refused the possibility of introducing an advisory competence allowing the ECtHR to interpret other treaties concluded within the Council of Europe (for further details on the origin and evolution of the advisory jurisdiction of the ECtHR, see ASTA, *La funzione consultiva delle Corti regionali dei diritti umani*, Napoli,

by its constitutive instrument (i.e., the European Convention on Human Rights – “ECHR”) or by any additional treaty or protocol thereto but is provided for in a treaty external to the conventional system, yet adopted within the context of the Council of Europe.

In fact, the circumstance that the Oviedo Convention was adopted in such a framework is one of the elements upon which the Court has claimed its jurisdiction. In its reasoning, it has attached special importance to the fact that the ECHR does not preclude, either explicitly or implicitly, the possibility for a “closely-related human rights treaty concluded within the framework of the Council of Europe” to grant the ECtHR jurisdiction upon itself.⁶ In order to corroborate its findings, the Court has made reference, in a rather innovative fashion, to the so-called “vacuum doctrine”, according to which, in interpreting the ECHR, it must take into account any relevant rules of international law applicable in the relations between the parties. While, in fact, this doctrine has been constantly referred to in the context of the interpretation of substantive provisions, on this occasion the ECtHR has stated that “it is not without relevance” to the provisions on the jurisdiction of the Court, namely Articles 19, 32, and 47.⁷ In this connection, it has therefore taken into account Article 29 of the Oviedo Convention.⁸

Yet, on this aspect the Court’s reasoning is not straightforward. In particular, it is not entirely clear how the Court has applied the vacuum doctrine. It is here submitted that the reference to said doctrine has merely served to acknowledge the possibility that a source external to the conventional system grants jurisdiction to the ECtHR. On the other hand, its possible application so as to expand *per se* the ECtHR’s jurisdiction is not persuasive. Above all, the fact that, as the Court itself recalled, the Oviedo Convention is not in force among

2019, p. 198 ff.). In particular, the model represented by the advisory competence under the Oviedo Convention was not transposed in the Framework Convention for the Protection of National Minorities, although repeatedly proposed (see *Draft Additional Protocol to the Framework Convention for the Protection of National Minorities (on the Interpretation of the Convention)*, Proposal by the Italian Chair, CM(2000)133, 29 September 2000, and the Recommendation 1492(2001) of the Parliamentary Assembly of the Council of Europe, *Rights of National Minorities*, 23 January 2001, para. 12.10, both available at: <www.coe.int>).

6 Decision under Article 29 the Oviedo Convention, *cit. supra* note 2, para. 42. Still, the positions of the participants in the proceedings were rather divided on the issue of jurisdiction. In particular, some States (Andorra, Azerbaijan, Poland, Russia and Turkey) argued that the Court’s jurisdiction is governed exclusively by the ECHR and therefore an amendment of the latter or a further Protocol would be required for it to be granted any further jurisdiction (*ibid.*, para. 37).

7 *Ibid.*, para. 42. Therefore, the Court seems to consider that Article 47 ECHR not only provides itself with an advisory competence but much broadly regulates its advisory jurisdiction.

8 *Ibid.*

all the parties to the ECHR, is particularly problematic.⁹ Even admitting, in fact, that such a Convention might represent a suitable basis to grant jurisdiction to the Court, it is here submitted that in any case the consent of all the parties to the ECtHR's constitutive instrument is still necessary in order to confer a further competence on the Court or to broaden an existing one. This is due to the fact that the Court is a permanent tribunal exercising its role within an institutional context.¹⁰

Moreover, a further question concerns the *form* of the said consent. In this regard, it is submitted that, although preferably accorded through an amendment of the ECtHR's constitutive instrument or a further treaty or protocol expressly providing for an extension of the Court's jurisdiction, the consent could also be given implicitly or *per facta concludentia*.¹¹ It would seem that the Court shares that view, since it has placed significant emphasis on the procedure for the adoption of the Oviedo Convention.¹² In this connection, it is interesting to note that, in order to claim its jurisdiction, the Court stressed that, although the Oviedo Convention has not been ratified by all the Contracting Parties to the ECHR, it had received the approval of the Committee of Ministers through the adoption of its text on 19 November 1996.¹³

9 In any case, it has to be recalled that the Court has applied the vacuum doctrine regardless of the fact that the external provisions were applicable between all the parties to the ECHR. On the point, see SALERNO, *Diritto internazionale. Principi e norme*, 5th ed., Milano, 2019, p. 207.

10 For a similar position, expressed in the context of its critical stance towards the advisory jurisdiction of the International Tribunal of the Law of the Sea, see MAROTTI, "Sulla funzione consultiva del Tribunale internazionale del diritto del mare", *Rivista di diritto internazionale*, 2015, p. 1171 ff., pp. 1180–1182.

11 This stance was already expressed in ASTA, *cit. supra* note 5, p. 228. Yet, some authors have also stressed the weakness of the legal basis of the ECtHR's advisory competence. For instance, GITTI, "La Corte europea dei diritti umani e la Convenzione sulla biomedicina", *Rivista internazionale dei diritti dell'uomo*, 1998, p. 719 ff., pp. 723–724 and 731, argues that (also) in view of the fact that the Oviedo Convention is open to States not Members of the Council of Europe, it would be appropriate to ensure that the advisory competence has a more solid legal basis, for instance through an additional protocol to the Oviedo Convention.

12 Decision under Article 29 the Oviedo Convention, *cit. supra* note 2, paras. 42 and 46.

13 *Ibid.* In this connection, it is interesting to note that, according to the Council of Europe's official documents, no objections were raised within the Committee of Ministers against the advisory competence of the Court. Besides, the ECtHR has attached significance also to the common understanding existing among the relevant institutions throughout the procedure for the adoption of the Oviedo Convention over the fact that its advisory competence was both "legitimate and justified", a view that the Court itself shared (*ibid.*, paras. 43–44).

Yet, one could argue that the process leading to the adoption of the Oviedo Convention is relevant well beyond the issue of consent to jurisdiction. From the assessment of the relevant documents, it seems possible to detect some elements that shed light on the type of competence granted to the ECtHR. The drafting history of Article 29 of the Oviedo Convention testifies to a significant evolution in its nature: while from the very beginning there was sufficient agreement over the attribution of an “interpretative” role to the ECtHR,¹⁴ less settled was the issue of how the said role had to be exercised. The first draft of the pertinent provision referred generically to the possibility for the Court to give a ruling – even a preliminary one – on the interpretation of the Oviedo Convention.¹⁵ In this regard, the ECtHR played a crucial role through the opinion delivered on 7 November 1995 on the then Article 28 of the Draft Bioethics Convention. In fact, the text proposed by the Court represented the basis for the Steering Committee on Bioethics’ discussion and ultimately for the adoption of the final version of Article 29.¹⁶ In particular, the Committee agreed on the fact that the competence would be “purely advisory”.¹⁷

The latter aspect was emphasised by the Court in its 1995 opinion,¹⁸ where it also rejected the idea of a preliminary ruling procedure, especially at the request of national courts.¹⁹ In this connection, the Court therefore made reference to its “original” advisory competence, at that time still provided for in Protocol No. 2 to the ECHR, suggesting that the new provision should have “a wording similar to that of Article 1” of the latter.²⁰ Therefore, in its 1995 opinion

14 See the Document prepared by the Secretariat of the Steering Committee on Bioethics gathering the preparatory work to the Oviedo Convention, CDBI/INF(2000)1, 28 June 2000, available at: <www.coe.int>, pp. 118–120 (hereinafter “Preparatory Work”).

15 See Draft Art. 28, reproduced in the Opinion of the European Court of Human Rights adopted on 7 November 1995, Cour (95)413 (courtesy of the Council of Europe archives – hereinafter also “1995 opinion”).

16 See Preparatory Work, *cit. supra* note 14, p. 118.

17 *Ibid.*, p. 119.

18 In particular, the Court stressed that “[i]n any event, [it] should give advisory opinions rather than judgments” (1995 opinion, *cit. supra* note 15, p. 4).

19 Conversely, the Court has admitted that it would have been prepared “to accept requests for preliminary rulings from the Government of a Contracting State of the bioethics Convention, from the [European Community] Commission if the Community accedes to that Convention and from the Committee of Ministers of the Council of Europe”. The difference was explained by the Court *inter alia* in light of the fact that in such a case the risk of a massive influx of requests would be avoided for they “would no doubt seek preliminary rulings from it only in relation to cases that raise a serious problem of interpretation of the bioethics convention” (*ibid.*, p. 3).

20 More precisely, the Court suggested “replacing the words ‘to give a ruling on the interpretation of [certain provisions of] the present Convention’ with a wording similar to that of Article 1 of Protocol No. 2 to the Convention on Human Rights” (*ibid.*, p. 4).

the Court seems to have focused on the nature of the competence granted and of the rulings given rather than on the need to transpose the limitations characterising its “original” advisory competence. Besides, it acknowledged the usefulness of a system capable of providing a uniform interpretation of the concepts that are common to the Oviedo Convention and the ECHR, which are also “particularly open to diverging interpretations”.²¹

It is submitted that those remarks are relevant in order to better evaluate the assessment that the ECtHR made of the scope and limits of its advisory competence under Article 29 of the Oviedo Convention, which has ultimately led it to reject the request submitted by the Committee on Bioethics. In fact, the Court based its reasoning also on – its interpretation of – the drafting history of the Oviedo Convention.

3 The Shortcomings in the Court’s Delimitation of its Advisory Competence

3.1 *The Uncertain Relevance Attributed to the Alleged Peculiar Normative Character of the Oviedo Convention*

As regards the definition of the contours of its advisory competence, the Court focused in the first place on clarifying the terminology used in Article 29, which in its view could be “clearly traced” back to its 1995 opinion, where it “expressly drew” on the wording of the current Article 47(1) ECHR.²² Thus, it argued that also the meaning attached to the terms used in both contexts should coincide.²³ Therefore, the same significance has been attributed to the expression “legal questions”, regarding which Article 29 of the Oviedo Convention allows the Court to give advisory opinions.²⁴ In particular, drawing on the Explanatory Report to ECHR Protocol No. 2, the Court ruled out matters of policy and “questions which would go beyond the mere interpretation of the text and tend by additions, improvements or corrections to modify its substance”.²⁵

21 *Ibid.*, p. 2. See also the Decision under Article 29 of the Oviedo Convention, *cit. supra* note 2, para. 44.

22 *Ibid.*, para. 47.

23 *Ibid.*

24 *Ibid.*, para. 48. The Court has stressed the use of the term “legal”, which in its view would denote “the intention of the drafters to rule out any jurisdiction on the Court’s part regarding matters of policy” (*ibid.*).

25 *Ibid.*, paras. 48 and 66. In particular, “[i]n light of the provenance of Article 29 of the Oviedo Convention, the Court [considered] that a request under that provision is subject to a similar limitation”.

Nevertheless, the Court reached a peculiar conclusion as to the way in which another expression has to be understood, that is that advisory opinions shall concern the “interpretation of the [Oviedo] Convention”. Yet, this was not due to a different meaning of the terms *per se*, but rather to the alleged different nature of the Oviedo Convention compared to the ECHR. While the Court has constantly emphasised the latter’s special character as a living instrument, subject to a particular – and specific – interpretative approach, the Oviedo Convention is said instead to represent a “different normative model”, insofar as it is a framework treaty setting out the most important principles in the field of biomedicine to be further developed through protocols.²⁶

This classification of the Oviedo Convention *contributed* to the decision of the Court to exclude the possibility for it to interpret the expression “protective conditions”, as used in Article 7 of the Oviedo Convention in order to specify which conditions State parties need to regulate to meet the minimum requirements of protection of persons who have a mental disorder. In fact, it represented one of the main arguments that the Court used in order not to deliver the opinion. In that connection, the Court also emphasised that the process leading to the possible adoption of an additional protocol concerning the protection of human rights of persons with regard to involuntary placement and involuntary treatment was in fact ongoing and more consistent with the “general approach” characterising the Oviedo Convention.²⁷ On the latter point, the dissenting judges have nonetheless objected that the fact that the Oviedo Convention provides for the possibility of development of its norms through additional protocols would not preclude *ipso facto* an interpretation of the meaning of its provisions.²⁸

Yet, it is submitted that the conclusions that the Court reached were not only the result of the alleged peculiar character of the Oviedo Convention, but they were also due to the specificity of the provision at stake. In fact, the ECtHR observed that Article 7 of the Oviedo Convention could not be further specified by a process of “abstract judicial interpretation”, since it leaves a “degree of latitude” to the States Parties, that in the Court’s view cannot be restricted by an interpretation in the sense requested by the Committee on Bioethics.²⁹ In this

26 *Ibid.*, paras. 49 and 67 (though in the latter paragraph the Court referred to the fact that the said principles are to be further “elaborated and specified” through additional protocols). Yet, the dissenting Judges expressed some doubts on this classification of the nature of the Oviedo Convention as a distinct normative model (Dissenting Opinion, *cit. supra* note 4, para. 9).

27 Decision under Article 29 the Oviedo Convention, *cit. supra* note 2, para. 67.

28 See Dissenting Opinion, *cit. supra* note 4, para. 9.

29 Decision under Article 29 the Oviedo Convention, *cit. supra* note 2, para. 66. As the Court has stressed, Art. 7 “reflects the deliberate choice of the drafters to leave it to the Parties

connection, the Court has also noted that Article 7 of the Oviedo Convention stands in contrast to other, more detailed provisions of the same treaty, such as Articles 16, 17 and 20.³⁰ Therefore, the Court has seemingly acknowledged, at least implicitly, a certain leeway for the interpretation of other provisions of the Oviedo Convention.

3.2 *The Flaws in the Court's Reasoning Concerning the Possible Extension of the Limitations Provided for in Article 47(2) ECHR to its Advisory Jurisdiction Under the Oviedo Convention*

However, in a future perspective, the aspects of the Court's decision which are most problematic arise out of the considerations on the limits characterising the advisory competence under the Oviedo Convention. In this connection, the Court stressed the need for the latter to "operate harmoniously" with its jurisdiction under the ECHR, and particularly with its contentious jurisdiction, the latter being "its preeminent function and must be carefully preserved".³¹ In its effort to clarify those aspects, the ECtHR stated that the *purpose* of Article 47(2) ECHR, which regulates the relationships between the Court's contentious and advisory jurisdictions, is reflected also in the drafting history of the Oviedo Convention.³² Still, apart from the possible doubts on the correctness of the latter statement, one may especially wonder what it actually entails, in particular in terms of limitations on the Court's jurisdiction. In fact, contrary to what the dissenting Judges have maintained and criticised, arguably it is not entirely clear from the ECtHR's decision whether the fact that the Court has recognised the similarity in the purpose of the relevant texts also entails the extension of the limitations provided for in Article 47(2) ECHR to its advisory jurisdiction under the Oviedo Convention.³³

to determine, in further and fuller detail, the protective conditions applying in their domestic law" (*ibid.*, para. 65).

³⁰ *Ibid.*

³¹ *Ibid.*, para. 52.

³² *Ibid.*

³³ Conversely, the dissenting Judges held that "[t]he majority [...] read into Article 29 of the Oviedo Convention the same exceptions as those set out in Article 47 § 2" (see Dissenting Opinion, *cit. supra* note 4, para. 4). As those Judges claimed, such a position "is difficult to reconcile with the object and purpose of Article 29. [...] 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 [ECHR]" (*ibid.*). In literature, this position seems to be also shared by BURGORGUE-LARSEN, "All for this? When the European Court of Human Rights is Seized by Legal Chill", EU Law Live, 19 November 2021, p. 2 ff., p. 7, available at: <www.eulawlive.com>, who argued that the Court "transposed, no more and no less, the limitations of Article 47(2) ECHR to Article 29 of the Oviedo Convention", and VIMERCATI, "Prime riflessioni a margine della

On the one hand, in defining the purpose of Article 47(2) ECHR, the Court quoted *in extenso* the passages of the decision adopted in 2004, where it focused on the content of the two limitations therein contained, that is that an advisory opinion cannot concern the content or scope of the rights and freedoms set forth in the ECHR and the Protocols thereto nor any other question that the Court or the Committee of Ministers might have to consider in the context of possible proceedings under the Convention.³⁴ The ECtHR's reasoning could therefore suggest that the Court extended those limitations to its advisory competence under the Oviedo Convention.

On the other hand, a series of elements would rather point to the opposite direction. In another passage of the decision, the Court generically described the purpose of Article 47(2) ECHR as "to preserve its primary judicial function as an international court administering justice under the Convention".³⁵ Besides, it also recalled and juxtaposed the specific aim of the limitations provided for in both Article 47(2) ECHR and Article 29 of the Oviedo Convention as apparent from the latter's preparatory work. From the juxtaposition, their purpose proves to be rather different.

In particular, the ECtHR has stressed the fact that the provisions limiting its "original" advisory jurisdiction are intended to avoid the potential situation whereby the Court in an advisory opinion adopts a position that might prejudice its later examination of an application brought under the ECHR "and that it is irrelevant that such an application has not and may never be lodged".³⁶ In other words, in the Court's view, the limitations are aimed at safeguarding in a general way, that is both *in abstracto* and *in concreto*, its primary judicial function consisting of contentious jurisdiction.³⁷

On the contrary, from the examination of the relevant passages of the Court's 1995 opinion on Draft Article 29 of the Oviedo Convention, it would

decisione del 15 settembre 2021 sulla competenza consultiva della Corte EDU ai sensi dell'art. 29 Convenzione di Oviedo", Osservatorio costituzionale, 2021, p. 523 ff., p. 536.

34 Decision under Article 29 the Oviedo Convention, *cit. supra* note 2, para. 51.

35 *Ibid.*, para. 54.

36 *Decision on the Competence of the Court to Give an Advisory Opinion*, 2 June 2004, para. 33. As the Court has observed, "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" (*ibid.*).

37 Besides, it is also interesting to note that in its 2004 Decision the Court emphasised the wording of Art. 47(2) and the related *travaux préparatoires* in order to define the scope of the limitations in the said manner. In particular, the Court's reasoning was aimed at refuting the position of some Governments that had submitted written comments during the proceedings, according to which the ECtHR would have not been precluded from giving an advisory opinion as long as the request was not related to any specific application pending before it (*ibid.*).

rather seem that the ECtHR expressed the need to exclude the possibility – or, at least, reduce the risk – that a preliminary ruling could hamper *in concreto* its activity if at a later stage it would have to rule on the facts of the case that had led the national court to request the interpretation of a provision of the Oviedo Convention.³⁸ As the dissenting Judges have argued, those concerns were fully satisfied by the drafters of the Bioethics Convention, since the possibility for national courts to request preliminary rulings was ruled out and a further condition was included to the effect that a request for an advisory opinion could not contain a direct reference to any specific proceedings pending in a court.³⁹

Besides, the exclusion of the extension of the limitations of Article 47(2) ECHR could also result from an *a contrario* reasoning. Since the Court has traced the origin of Article 29 of the Oviedo Convention back to the present Article 47(1) ECHR,⁴⁰ the fact that the former does not provide for the limitations contained in Article 47(2) ECHR could imply the specific intention of the drafters of the Oviedo Convention not to introduce those limitations. After all, the Court has repeatedly emphasised the intention of the drafters of both the ECHR and the Oviedo Convention.⁴¹

Furthermore, it is also difficult to understand the exact content of the limits that the Court recognised and applied. In fact, it has confined itself to differentiating the advisory jurisdiction under Article 29 of the Oviedo Convention from the one granted by Protocol No. 16 to the ECHR and to arguing that the limits applying to the former “cannot apply in the same way” to the latter, yet without defining them explicitly.⁴²

³⁸ Decision under Article 29 the Oviedo Convention, *cit. supra* note 2, paras. 14 and 52.

³⁹ See Dissenting Opinion, *cit. supra* note 4, para. 5. Actually, it could also be argued that these remarks would not only lead to exclude the application to the exercise of the advisory competence provided for in the Oviedo Convention of the limitations laid down in Art. 47(2) ECHR, but also of *any* other limitations not expressly enshrined in the relevant provision.

⁴⁰ See *supra*, note 22 and the relevant text.

⁴¹ See *supra*, notes 24 and 29.

⁴² Decision under Article 29 the Oviedo Convention, *cit. supra* note 2, para. 53. Actually, it has to be noted that, as the Court itself has stressed in a passage of its decision, the limits of its jurisdiction under Protocol No. 16 “are expressly set by the Protocol” (*ibid.*, para. 36). At the same time, it could be argued that by way of interpretation the Court has somehow widened the scope of the *ratione materiae* limitations provided for in Art. 1(2)(3) of the Protocol, particularly that an advisory opinion can only be sought in the context of a case pending before the requesting court or tribunal. In this regard, the Court has consistently held that its advisory opinions “must be confined to points that are directly connected to the proceedings pending at domestic level” (for instance, 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*, 10 April 2019, para. 26). The ECtHR’s position has been variously

The sense of uncertainty is further fuelled by the language used by the ECtHR. In particular, the Court has rejected the request made by the Committee on Bioethics, which *inter alia* suggested that it had regard to the ECHR and to the relevant case law so as to formulate its answer, observing that its advisory jurisdiction under the Oviedo Convention must operate in harmony with its jurisdiction under the ECHR, “the limits of which are not disappplied in the present context”.⁴³ From the latter reasoning, the Court has drawn the consequence that it “*should not*, as part of this exercise, interpret any substantive provisions or jurisprudential principles of the Convention”.⁴⁴ The verb used by the Court would exclude the recognition of a proper limit to its competence. Yet, the Court seems to have based its refusal to issue the advisory opinion for a lack of competence also on such a ground.⁴⁵

In short, while the aim of the Court was to clarify the boundaries of its jurisdiction under the Oviedo Convention, its reasoning ultimately contributed to muddying the waters.

4 Questions of Competence or Propriety? Some Reflections on the Court's Reasoning in Light of the Experience of Other International Courts

Furthermore, the confusion stems also from the fact that the Court seems to have indistinctly examined all questions in the context of the assessment of its competence. Instead, some of those aspects could have more properly

criticised (among others, see LAVRYSEN, “The Mountain Gave Birth to a Mouse: The First Advisory Opinion Under Protocol No. 16”, *Strasbourg Observers*, 24 April 2019, available at: <www.strasbourgobservers.com>; NINO, “La competenza consultiva della Corte europea dei diritti umani alla luce dei pareri adottati in base al Protocollo n. 16 della CEDU: bilanci e prospettive”, *Ordine internazionale e diritti umani*, 2021, p. 322 ff., pp. 339–340).

43 Decision under Article 29 the Oviedo Convention, *cit. supra* note 2, para. 68.

44 *Ibid.* (emphasis added). In the French version: “le Cour ne saurait, dans le cadre de cet exercice, interpréter des clauses normatives ou principes jurisprudentiels de la Convention”.

45 *Ibid.*, para. 70. *Inter alia*, the Court has excluded that “‘achieving clarity’ regarding [the minimum requirements under Article 7 of the Oviedo Convention] based on the Court’s judgments and decisions concerning involuntary interventions in relation to persons with a mental disorder [...] can be the subject of an advisory opinion” (*ibid.*). Furthermore, the Court has observed that a reply in the terms proposed by the Committee on Bioethics “would [...] be an authoritative judicial pronouncement focused at least as much on the [ECHR] as on the Oviedo Convention”, and that it cannot take such an approach, for it has “the potential to hamper its pre-eminent contentious jurisdiction under the Convention” (*ibid.*, para. 68).

been dealt with as questions of propriety, that is among those considerations which could lead an international court to refuse to give the advisory opinion requested despite having the competence.⁴⁶ In fact, international courts and tribunals have regularly referred to – and even resorted to – their alleged discretionary power to decline a request for an advisory opinion, which seems to represent a flexible tool so as to accommodate different judicial needs.⁴⁷

In this regard, the International Court of Justice (“ICJ”) has for instance considered the discretionary power as a means to safeguard its judicial function,⁴⁸ while remaining somewhat generic in identifying the – compelling – reasons that would lead it to refuse to render an advisory opinion.⁴⁹ Differently, the Inter-American Court of Human Rights (“IACtHR”) has been more detailed throughout its case law. In particular, the IACtHR has listed among the possible

46 Still, it is not unusual to detect a certain confusion in the way in which international courts deal with questions of competence – of admissibility – and of propriety, which is mainly to be attributed to the uncertain contours of those notions in the context of advisory jurisdiction. In this sense, with regard to the ICJ, see extensively RADICATI DI BRÒZOLO, “Sulle questioni preliminari nella procedura consultiva davanti alla Corte internazionale di giustizia”, *Rivista di diritto internazionale*, 1976, p. 677 ff. For instance, as observed by PAPA, “Evitare di pronunciarsi? Questioni di giurisdizione e *propriety* nell’ottica delle relazioni istituzionali tra gli organi delle Nazioni Unite”, in GRADONI and MILANO (eds.), *Il parere della Corte internazionale di giustizia sulla dichiarazione di indipendenza del Kosovo. Un’analisi critica*, Padova, 2011, p. 9 ff., p. 14, note 16, a certain confusion between competence and propriety also characterised the proceedings which lead the ICJ to give its advisory opinion on the Declaration of independence of Kosovo. For an example from the IACtHR’s advisory case law, see ASTA, *cit. supra* note 5, p. 112, note 124, and the relevant text.

47 In literature, the said discretionary power has been defined as a characteristic feature of the advisory jurisdiction of international courts and tribunals, which is crucial so as to safeguard their effectiveness (in this sense, see RUNAVOT, *La compétence consultative des juridictions internationales. Reflet des vicissitudes de la fonction judiciaire internationale*, Paris, 2010, p. 159 ff.). In some cases, this power has been expressly acknowledged in the pertinent provisions, while in some others claimed by the courts in their case law. In addition to the examples which will be discussed hereinafter, suffice it to recall that a discretionary power has also been claimed, for instance, by the Tribunal for the Law of the Sea and by the African Court of Human and Peoples’ Rights.

48 By way of example, the ICJ has recently acknowledged that “[t]he discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court’s judicial function as the principal judicial organ of the United Nations”: *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports, 2019, p. 95 ff., p. 113, para. 64 (hereinafter “*Chagos Opinion*”).

49 Besides, the difficulty in identifying *in concreto* the scope of the compelling reasons identified by the ICJ is also due to the fact that, as widely known, the latter has never resorted to its discretionary power so as to refuse to give an advisory opinion. On those aspects, see ASTA, *cit. supra* note 5, p. 57 ff.

reasons leading it to refuse to give the advisory opinion requested the fact that the latter is likely to undermine its contentious jurisdiction or, more generally, to weaken or alter the system established by the American Convention of Human Rights (“ACHR”) in a manner that would impair the rights of potential victims of human rights violations.⁵⁰ In this connection, the IACtHR has also focused on a series of circumstances that could hamper the proper functioning of the conventional system, such as the advisory request being a disguised contentious case,⁵¹ or the fact that the same question is also pending before the Inter-American Commission of Human Rights.⁵²

As far as the ECtHR is concerned, it could have therefore explicitly differentiated between questions of competence and propriety, including among the latter the considerations regarding the possibility – or better, the refusal – to interpret any substantive provisions or jurisprudential principles of the ECHR. Besides, said approach would have also been consistent with – and at the same time bestowed more coherence to – the Court’s reasoning. In fact, the ECtHR underpinned its view on the possible interpretation of the ECHR through its advisory competence under the Oviedo Convention arguing that it would have “the potential to hamper its preeminent contentious jurisdiction” under the ECHR.⁵³

But the Court could have also followed a somehow different path. Instead of rejecting *in general* the possibility to interpret the ECHR and the related case

50 “Otros tratados” objeto de la función consultiva de la Corte (Art. 64 Convención Americana sobre Derechos Humanos), Advisory Opinion OC-1/82, 24 September 1982, Series A, para. 31. Actually, the Court later seemed to place more emphasis on the need to safeguard the proper functioning of the conventional system rather than its contentious jurisdiction *per se* (*El derecho a la información sobre la asistencia consular en el marco de las garantías del debido proceso legal*, Advisory Opinion OC-16/99, 1 October 1999, Series A, para. 44).

51 According to the Court, such a situation could negatively affect the position of individuals whose rights have potentially been violated, since “contentious proceedings provide, by definition, a venue where matters can be discussed and confronted in a much more direct way than in advisory proceedings” (see *Compatibilidad de un proyecto de ley con el artículo 8.2.h de la Convención Americana sobre Derechos Humanos*, Advisory Opinion OC-12/91, 6 December 1991, Series A, para. 28). For further discussion on those aspects, see ASTA, *cit. supra* note 5, p. 114.

52 At the same time, it should be noted that the Court has not considered sufficient, so as to refuse to give the advisory opinion requested, the mere fact that on such a question a matter is pending before the Inter-American Commission, rather giving a decisive weight to the need to safeguard the functioning of the conventional system of protection (*Ciertas atribuciones de la Comisión Interamericana de Derechos Humanos* (Arts. 41, 42, 44, 46, 47, 50 y 51 de la Convención Americana sobre Derechos Humanos), Advisory Opinion OC-13/93, 16 July 1993, Series A, para. 19). For further discussion on those aspects, see ASTA, *cit. supra* note 5, pp. 114–116.

53 Decision under Article 29 the Oviedo Convention, *cit. supra* note 2, para. 68.

law, as it could be arguably inferred from its decision,⁵⁴ the ECtHR could have excluded it, or more broadly could have dismissed the request, *in the specific case*, for instance because of the reason behind it or in light of the context in which it had been made. In this connection, the Court noted that the aim of the Committee on Bioethics was to obtain clarification on the interpretation of Article 7 of the Oviedo Convention, with a view to informing its current and future work in the field.⁵⁵ Besides, it also referred to the intense international discussion that has taken – and is still taking – 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,⁵⁶ which has been the subject of negotiations since 2013 within the Committee on Bioethics.⁵⁷

Differently from the Court's view, which has stated that it had to consider the background and context of the request in order to make sure that it was competent to accept it,⁵⁸ those aspects could have rather been possibly assessed among the questions of propriety. Not only would the abovementioned approach have been more consistent with the purpose of its advisory competence under the Oviedo Convention, aimed *inter alia* at fostering the uniform interpretation between the latter and the ECHR,⁵⁹ but it could have also found some support in the case law of international courts and tribunals. Under certain circumstances, the latter have attached importance to either the reason behind the request or the relevant context as a hint of a possible distortion on the use of their advisory jurisdiction. For instance, the ICJ has acknowledged the existence of a compelling reason for it to decline to give an advisory opinion when it would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.⁶⁰ In this connection, the ICJ therefore paid attention to the purpose of the request so as to exclude such a case.⁶¹

54 This seems to be the logical consequence stemming from the Court's reasoning, notwithstanding the lexical uncertainties which characterise it (see *supra*, Section 3.2).

55 Decision under Article 29 the Oviedo Convention, *cit. supra* note 2, para. 59.

56 *Ibid.*, paras. 59 and 67 ("a legislative process which is still ongoing").

57 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 finally published. On those aspects, see, among others, VIMERCATI, *cit. supra* note 33, pp. 529–530.

58 Decision under Article 29 the Oviedo Convention, *cit. supra* note 2, para. 58.

59 See *supra*, note 21 and the relevant text.

60 See *Chagos* Opinion, *cit. supra* note 48, p. 117, para. 85.

61 Most recently, in the *Chagos* Opinion, *cit. supra* note 48, the Court noted that "[t]he General Assembly [had] not sought the Court's opinion to resolve a territorial dispute between two States. Rather, the purpose of the request [was] for the General Assembly

As for the IACtHR, the latter refused to give an advisory opinion on the compatibility of a Costa Rican proposed law with the ACHR and other human rights treaties, *inter alia* emphasizing that, on the question submitted to it, the Costa Rican *Sala Constitucional* had previously ruled, although only the operative part of the decision was known at the time the request was made.⁶² As the IACtHR recalled on that occasion, it had already noted that in cases where the request refers to the compatibility of legislative proposals instead of a law already in force, it has to exercise great care “to ensure that its advisory jurisdiction is not resorted to in order to affect the outcome of the domestic legislative process for narrow partisan political ends”, so as to avoid “becoming embroiled in domestic political squabbles, which could affect the role which the [ACHR] assigns to it”.⁶³

In a similar way, had the ECtHR decided to decline to give the advisory opinion on grounds of propriety,⁶⁴ it could have therefore maintained that a response to the request submitted by the Committee on Bioethics had the potential to undermine its judicial role or distort the purpose of the advisory procedure. In particular, this view could have been espoused on the basis of either the fact that answering the relevant questions would have had the effect of turning its interpretative role into a normative one,⁶⁵ possibility *a fortiori* expressly excluded by the drafters of the Oviedo Convention with regard to Article 7 of the latter,⁶⁶ or in light of the specific circumstances of the case, revolving around a politically sensitive question on which the positions of the relevant actors differ significantly. As is widely known, the possible adoption of an Additional Protocol to the Oviedo Convention concerning the protection of human rights and dignity of persons with mental disorder with regard

to receive the Court's assistance so that it may be guided in the discharge of its functions relating to the decolonization of Mauritius. The Court has emphasised that it may be in the interest of the General Assembly to seek an advisory opinion which it deems of assistance in carrying out its functions in regard to decolonization". Yet, it is not possible to define the exact weight that the Court attributed to the purpose of the requesting organ, since the pertinent case law is rather fragmented and not always – deemed – consistent. For further references, see ASTA, *cit. supra* note 5, p. 66, note 123.

62 *Solicitud de opinión consultiva presentada por la República de Costa Rica*, Resolution of 10 May 2005, para. 12.

63 *Propuesta de Modificación a la Constitución Política de Costa Rica relacionada con la naturalización*, Advisory Opinion OC-4/84, 19 January 1984, Series A, para. 30.

64 For instance, BURGORGUE-LARSEN, *cit. supra* note 33, pp. 7–8, suggests that the Court could have taken a different approach, based on Art. 53 ECHR, and therefore declare itself competent to answer the advisory request.

65 For a similar position, see VIMERCATI, *cit. supra* note 33, p. 541.

66 See *supra*, note 29 and the pertinent text.

to involuntary placement and involuntary treatment has been the subject of harsh critiques coming from both non-governmental organizations and institutional actors.⁶⁷

5 Concluding Observations. Putting the Sleeping Advisory Competence Back in the Attic

Confining the refusal to interpret the ECHR to the specific case at hand would have also represented a way for the Court to avoid the likely effect stemming from its decision, that of pre-empting its advisory competence under the Oviedo Convention.

First of all, this would seem to be the outcome were the Court to decide to apply the limitations set forth in Article 47(2) ECHR.⁶⁸ In fact, since the ECtHR appears to have attributed – at least – a possible interpretative role to the Oviedo Convention when dealing with issues related to biomedicine under the ECHR,⁶⁹ there exists at least the *possibility* that an advisory opinion issued under Article 29 of the Oviedo Convention on the interpretation of substantial provisions of the latter impinges upon a question that the Court might consider in the context of an application brought under the ECHR. Therefore, a residual possibility for the Court to issue an advisory opinion would be limited at most to issues arising in the context of the interpretation of the provisions of the

67 By way of example, see the Recommendation 2091 (2016) of the Parliamentary Assembly of the Council of Europe, *The Case against a Council of Europe Legal Instrument on Involuntary Measures in Psychiatry*, adopted on 22 April 2016, or the Open Letter adopted in June 2021 by the Committee on the Rights of Persons with Disabilities and the Special Rapporteur on the Rights of Persons with Disabilities, available at: <www.ohchr.org>. Actually, the non-governmental organizations which participated in the advisory proceedings even questioned the very compatibility of Arts. 7 and 26 of the Oviedo Convention with the Convention on the Rights of Persons with Disability (see Decision under Article 29 the Oviedo Convention, *cit. supra* note 2, para. 62).

68 In this connection, BURGORGUE-LARSEN, *cit. supra* note 33, p. 8, argues the ECtHR has transformed the advisory competence of Art. 29 of the Oviedo Convention “into a ‘stillborn’ consultative procedure”, since “[t]he constraints it imposed are such that the Bioethics Committee, like the States, will hardly be inclined to initiate a new consultative referral”.

69 On the other hand, the Court has not been consistent in the way in which it referred to the Oviedo Convention in its case law. On the issue, and for an in-depth assessment of the pertinent case law, see SEATZU and FANNI, “The Experience of the European Court of Human Rights with the European Convention on Human Rights and Biomedicine”, *Utrecht Journal of International and European Law*, 2015, p. 5 ff.

Oviedo Convention dealing with procedural issues,⁷⁰ such as those concerning final clauses or Article 32, which assigns to the Committee on Bioethics some tasks with regard to the amendment of the Convention itself.

But the atrophy of the advisory competence would also appear to be in practice the plausible consequence, were the Court to exclude 'merely' the possibility to interpret the ECHR and its related case law, as it would seem.⁷¹ In fact, in light of the close connection existing between the ECHR and the Oviedo Convention,⁷² many of the possible interpretative questions that may arise would be linked, to a varying degree, to the ECHR.

Indeed, the Court could well decide to limit its answer to the aspect related to the Oviedo Convention, perhaps even through the reformulation of the questions put to it.⁷³ Yet, such an approach would partly deprive the advisory

⁷⁰ As known, the Explanatory Report to the then ECHR Protocol No. 2 confined to procedural issues the ECtHR's advisory competence and on such type of questions the latter has in fact been exercised, leading to the adoption of two advisory opinions (for further discussion, see ASTA, *cit. supra* note 5, p. 210 ff.).

⁷¹ See *supra*, Section 3.2.

⁷² The Explanatory Report to the Oviedo Convention states that the latter "elaborates some of the principles enshrined in the ECHR" (at para. 9). As is known, the doctrine is nonetheless divided on the relationship existing between the ECHR and the Oviedo Convention: while some authors emphasize, to a different degree, the complementarity of the two texts, others stress the need to maintain them separate. On those aspects, see generally PAVONE, *La Convenzione europea sulla biomedicina*, Milano, 2009, p. 87 ff.; DI STASI and PALLADINO, "Advance Health Care Directives under European Law and European Biolaw. Charter of Fundamental Rights of the European Union, European Convention for the Protection of Human Rights and Fundamental Freedoms and Oviedo Convention", in NEGRI et al. (eds.), *Advance Care Decision Making in Germany and Italy*, Berlin-Heidelberg, 2013, p. 39 ff., p. 58 ff.; SEATZU and FANNI, *cit. supra* note 69, pp. 7–9.

⁷³ As is known, international courts and tribunals have constantly reframed the questions submitted to them, making use of a power which seems to have been understood as an inherent one. See for instance IACtHR, *La institución del asilo y su reconocimiento como derecho humano en el Sistema Interamericano de Protección (interpretación y alcance de los artículos 5, 22.7 y 22.8, en relación con el artículo 1.1 de la Convención Americana sobre Derechos Humanos)*, Advisory Opinion OC-25/18, 30 May 2018, Series A, para. 55. As for the ICJ, its case law has been interpreted in this sense by BONAFÉ, "Il potere della Corte internazionale di giustizia di riformulare la domanda di parere consultivo", in GRADONI and MILANO (eds.), *cit. supra* note 46, p. 31 ff., p. 39. Yet, the limits of such a power are somehow uncertain. While the ICJ has reformulated the request so as to identify the "true legal question" (see, for instance, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, ICJ Reports, 1980, p. 73 ff., p. 85, para. 35, and, for a thorough examination of the relevant case law, see again BONAFÉ, *cit. supra* in this note, p. 40 ff.), the IACtHR has used its power in a rather flexible way (on those aspects, see ASTA, *cit. supra* note 5, p. 119 ff.). In any case, as an inherent power, its exercise should nonetheless be limited to what is necessary in order to safeguard the integrity of a court's judicial function (on the issue, see generally GAETA, "The Inherent

competence of its purpose, namely of the possibility to promote the uniform interpretation of shared concepts. Instead, an effective advisory competence would represent – at least, in theory – a useful tool,⁷⁴ in light of the sensitivity of the questions tackled by the Oviedo Convention and of its present and perspective relevance both at international and at domestic level,⁷⁵ *a fortiori* in the absence of a fully-fledged monitoring mechanism.⁷⁶ After all, it could also be maintained that the very rationale behind precluding the Court from interpreting the ECHR in the exercise of its advisory jurisdiction lost much of its sense following the adoption of ECHR Protocol No. 16, which was approved by all the Member States of the Council of Europe.⁷⁷

In any case, the ECtHR's approach is somehow paradoxical as well. By reason of the fact that the parties to the ECHR materially coincide with those to

Powers of International Courts and Tribunals”, in VOHRAH et al. (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, Den Haag, 2003, p. 353 ff.; PALOMBINO, “Il potere inerente di riesame dei tribunali internazionali: in margine al caso *Celibici*”, *La Comunità Internazionale*, 2004, p. 707 ff.; BROWN, “Inherent Powers in International Adjudication”, in ROMANO, ALTER and SHANY (eds.), *The Oxford Handbook of International Adjudication*, Oxford, 2013, p. 828 ff.).

74 In literature, such an advisory competence has been viewed in a positive light, among others, by BENVENUTI, “Artt. 47, 48 e 49”, in BARTOLE, CONFORTI and RAIMONDI (eds.), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2001, p. 695 ff., p. 698. Of course, one should not forget the absence so far of any case law deriving from the exercise of the advisory competence provided for in the Oviedo Convention, which could possibly be attributed *inter alia* to the many uncertainties surrounding the competence itself. The ambivalent essence of the advisory competence is stressed also by VIMERCATI, *cit. supra* note 33, p. 531, who also observes that not even the reminder of the ECtHR in the case *Vo v. France* in 2004 had any effect on the inactivity of the advisory procedure under the Oviedo Convention.

75 See recently, ECtHR, *Vavříčka and Others v. the Czech Republic*, Applications Nos. 47621/13 and 5 others, Judgment of 8 April 2021. The Oviedo Convention has been an interpretative support for domestic courts even when it is not in force at the domestic level, as in the case of Italy. Indeed, Italy has both ratified and given execution to the Convention but has not yet deposited the instrument of ratification with the General Secretariat of the Council of Europe. On those aspects, see PALOMBINO, “La rilevanza della Convenzione di Oviedo secondo il giudice italiano”, *Giurisprudenza costituzionale*, 2011, p. 4811 ff.; ID., *Introduzione al diritto internazionale*, 2nd ed., Bari, 2021, p. 198 ff., who stresses that the Oviedo Convention has been used both in order to confirm a constitutionally oriented legislative interpretation and so as to formulate a general principle of domestic law.

76 Art. 30 of the Oviedo Convention only gives the Secretary General of the Council of Europe the power to ask State parties for explanations on the manner in which their domestic law ensures the effective implementation of any of the provisions of the Convention.

77 For a similar position, see FERRERES COMELLA, “The European Court of Human Rights' Advisory Opinion on the Oviedo Convention: Some Disharmonies in the Court's Architecture”, *EU Law Live*, 19 November 2021, p. 11 ff., pp. 12–13.

the Oviedo Convention, the Court observed that in practice the safeguards in domestic law corresponding to the “protective conditions” of Article 7 of the Oviedo Convention need to be such as to satisfy, at the very least, the ECHR standards.⁷⁸ In other words, in a sort of *obiter dictum*, the Court expressed some observations which quite paradoxically seem to go beyond its competence under Article 29 of the Oviedo Convention.

⁷⁸ Decision under Article 29 the Oviedo Convention, *cit. supra* note 2, para. 69.