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The Oviedo Convention in the case-law of the European Court of Human Rights

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In this talk I explore the interrelation between the Oviedo Convention on Human Rights and Biomedicine and the European Convention on Human Rights. The starting point of the analysis is to highlight the difference between the two treaties regarding their enforceability. An attempt is then made to identify which of the rights safeguarded in the European Convention of Human Rights involve issues raised in the Oviedo Convention. Admittedly, the most commonly referred to provision in the case-law of the Strasbourg Court is Article 8 of the European Convention of Human Rights (right to respect for private and family life), under the ambit of which the issues of consent, private life and right to information as well as the human genome are dealt with. In addition, the talk addresses other issues within the scope of the Oviedo Convention, which have been raised under Articles 2, 3, 5 and 10 in the Strasbourg case-law. In the final analysis, one is tempted to consider whether the outcome of such an interrelation between the two Conventions is satisfactory.

Introductory remarks

I will approach the topic in a dialectical manner by asking questions and proposing answers. I must point out that I am of course speaking personally and not on behalf of the European Court of Human Rights (which I will refer to as the "Court"), of which I am a Judge.

The title of my topic implies that at least to some extent the Oviedo Convention on Human Rights and Biomedicine of 4 April 1997, including of course its four additional Protocols, is somehow interrelated with the European Convention on Human Rights (to be referred to as the "European Convention").

Let me first give some figures regarding the number of ratifications. The Oviedo Convention has been ratified by 29 out of the 47 member States of the Council of Europe (which are all States parties to the European Convention). Its Additional Protocol on Prohibition of Cloning Human Beings (Paris, 12/1/1998) has

been ratified by 24 member States, its Additional Protocol on Transplantation of Organs and Tissues of Human Origin (Strasbourg, 24/01/2002) by 15 member States, its Additional Protocol on Biomedical Research (Strasbourg, 25/01/2005) by 11 member States, and lastly its Additional Protocol on Genetic Testing for Heath Purposes (Strasbourg 27/11/2008) by 6 member States.

What makes the two Conventions interrelated?

This is, of course, the first question to be asked in examining the topic and the following reasons can be given in reply:

1. Both Conventions are Council of Europe Conventions based on the same European values, such as democracy, the rule of law and equality.
2. In addition, both are part of international law and should not be interpreted in a vacuum but be considered as part of a wider legal system. They must be read one with the other in a harmonious and coherent way. Such an interpretation would be in accordance with the case-law of the Court and Article 31 § 3(c) of the Vienna Convention on the Law of Treaties (to be referred to as the "Vienna Convention"), which provides that, together with the context of a treaty, any relevant rules of international law applicable in the relations between the parties shall be taken into account.
3. The Court, which is the Council of Europe organ responsible for interpreting and applying the European Convention provisions (see Article 32 thereof) is also responsible for giving advisory opinions on legal questions concerning the interpretation of the Oviedo Convention (see Article 29 of that Convention). This confirms the strong link between the two instruments.
4. The Oviedo Convention provisions, though dealing with what we may consider as third (or fourth) generation human rights (after civil and political rights and freedoms and social and economic rights), protecting human rights in the biomedical sector, may elucidate different aspects of certain European Convention rights in fields in which science has made some progress and where human dignity has a central focus. In paragraph 9 of the Explanatory Report to the Oviedo Convention, the strong relationship between the two Conventions is clarified as follows:

> "The two Conventions share not only the same underlying approach but also many ethical principles and legal concepts. Indeed, [the Oviedo Convention] elaborates some of the principles enshrined in [the European Convention]."

5. A possible evolution or expansion of European Convention rights through the provisions of the Oviedo Convention can quite naturally be accomplished; in many cases the Court has interpreted the European Convention as being a living instrument and has given a practical and effective interpretation to its provisions. The wider the European consensus on a topic, the more it helps European Convention norms to evolve and address social changes.

6. The widening of European Convention rights can also be rendered easier since, as stated in its Preamble and repeated in the Preamble to the Oviedo Convention and in the Preambles to three of the four additional Protocols to the Oviedo Convention (all of them except the one on the prohibition of cloning), "the aim of the Council of Europe is the achievement of a greater unity between its members and ... one of the methods by which the aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms".

7. The Oviedo Convention may strengthen the safeguards of European Convention rights in the fields of medicine and biology, in view of the new risks deriving from the progress of science and the possible misuse of scientific development.

8. Human dignity brings the two Conventions closer. The Oviedo Convention is expressly grounded on human dignity. Though there is no express reference to human dignity except in the preamble to Protocol 13 to the European Convention concerning the abolition of the death penalty in all circumstances, nevertheless, human dignity is inherent in every European Convention right. The Grand Chamber in **Christine Goodwin v. the United Kingdom** [GC], no. 28957/95, 11/7/02, and many other cases, has held that respect for human dignity and human freedom is the very essence of the European Convention (see paragraph 90). Human dignity is used by the Court as a means of interpreting its provisions. Thus the notion of human dignity could be used to blend harmoniously the corresponding rights in the two Conventions. Article 2 of the Oviedo Convention, which provides that "the interest and welfare of the human beings shall prevail over the sole interest of society or science" offers an extremely important interpretative rule which the Court may also use where there is a doubt as to whether a restriction on a right should be applied or not.

9. In view of the above, it can rightly be argued that, though independent, one convention may complement the other to a certain extent.

Do the two Conventions differ regarding their enforceability?

The answer must be in the affirmative.

Unlike the European Convention, where the Court has jurisdiction to interpret and apply the Convention provisions (see Article 32) and the Committee of Ministers is responsible for supervising the execution of the judgments of the Court (see Article 46 of the European Convention), the Oviedo Convention does not provide for a judicial body to sanction the violation of its provisions. Under the Oviedo Convention, the Court only gives advisory opinions without direct reference to any specific proceedings in the Court and the request must not come from an individual but from the Government of a Party, after having informed the other Parties or the Steering Committee on Bioethics. As stated in paragraph 165 of the Explanatory Report to the Oviedo Convention,

> "This Convention does not give individuals a right to bring proceedings before the European Court of Human Rights. However, facts which are an infringement of the rights contained in this Convention may be considered in proceedings under the European Convention of Human Rights, if they also constitute a violation of one of the rights contained in the latter Convention."

It should be clarified that under Article 32 of the European Convention, the Court does not have jurisdiction to apply any instrument other than the European Convention, so it cannot apply the provisions of the Oviedo Convention, with the consequence that no issue of execution of judgments or supervision thereof by the Committee of Ministers arises. In this connection, it should be emphasised that under Article 35 of the Vienna Convention the imposition on States of duties that they have not expressly and voluntarily accepted is prohibited. It is somewhat paradoxical, however, that the Court is able to interpret the provisions of the Oviedo Convention but not to apply and implement them.

Despite that, the provisions of the Oviedo Convention can be enforced by the domestic legislation of each Party, and in this connection Article 1 of the Oviedo Convention provides the following:

> "Each Party shall take in its internal law the necessary measures to give effect to the provisions of this Convention".

So long as this is done by the legislation of a Party, its courts will be primarily responsible for ensuring compliance with the Oviedo Convention.

Which European Convention rights can most often involve Oviedo Convention issues?

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Undoubtedly, Article 8 of the European Convention, dealing with the right to respect for private and family life, is the Article which will most often involve such sensitive issues. Next may come Articles 2, 3, 5, 10 and 14 of the European Convention, dealing respectively with the right to life, right to be free from torture or inhuman or degrading treatment, right to liberty, freedom of expression and prohibition of discrimination. An extensive Research Report entitled "Bioethics and the case-law of the Court", has been prepared by the Court and its 2016 edition is available on its website. The Report includes examples of cases classified by topic in which bioethical issues have been raised. It also includes examples of cases where the Oviedo Convention has been cited. There are many cases which need to be discussed but given the time constraints, I will try to be quite selective and brief.

Which Oviedo Convention issues have been raised under Article 8 of the European Convention in the case-law of the Court?

(i) Consent

The first issue raised under Article 8 is **the consent issue,** which in the Oviedo Convention is dealt with in Chapter II, Articles 5-9. Under Article 5 § 1 of the Oviedo Convention "[a]n intervention in the health field may only be carried out after the person concerned has given free and informed consent to it." Articles 6 and 7 of the Oviedo Convention make provision for protection of persons not able to consent and persons who have a mental disorder, respectively.

In **Glass v. the United Kingdom**, no. 61827/00, 6/3/04, the Court held that an unauthorised medical treatment of the applicants' severely mentally and psychologically disabled son without court authorisation violated Article 8 of the European Convention. The relevant Oviedo Convention provisions are quoted in the section dealing with the related international material. At paragraph 75 of its judgment the Court very importantly remarked:

> "It [the Court] would add that it does not consider that the regulatory framework in place in the United Kingdom is in any way inconsistent with the standards laid down in the Council of Europe's Convention on Human Rights and Biomedicine in the area of consent …; nor does it accept the view that the many sources from which the rules, regulations and standards are derived only contribute to unpredictability and an excess of discretion in this area at the level of application."

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In **Evans v. the United Kingdom** [GC] no. 6339/05, 10 April 2007, the Grand Chamber held that the impossibility for the applicant to have IVF treatment due to the withdrawal of her ex-partner's consent to implant the embryos created jointly by them had not amounted to a violation of Article 8 or of Articles 2 and 14 of the European Convention. In this case, as in the previous case, the Oviedo Convention provisions are quoted in the section dealing with the relevant international material. The Court, taking into account the lack of any European consensus on the issue, held that the respondent State had not transgressed its margin of appreciation in deciding that the applicant's right to respect for the decision to become a parent in the genetic sense should not be accorded greater weight than her former partner's right to respect for his decision not to have a genetically related child with her. The Court also said that it did not consider that the regulatory framework in place in the United Kingdom was in any way inconsistent with the standards laid down in the Oviedo Convention in the area of consent.

In **Juhnke v. Turkey,** no. 52515/99, 13/5/08, the Court held that the gynaecological examination which had been imposed on the applicant during police custody without her free and informed consent had not been shown to have been "in accordance with the law" or to have been "necessary in a democratic society", as is provided in Article 8 § 2 of the European Convention, so there had accordingly been a violation of the applicant's rights under Article 8 of the European Convention. Article 5 of the Oviedo Convention is quoted in the section dealing with the relevant international material but no further mention or discussion is made, as is the common practice of the Court.

In **M.A.K. and R.K. v. the United Kingdom**, nos. 45901/05 and 40146/06, 23/3/10, the Court held that the medical examination of a nine-year old girl without her parent's consent had violated Article 8 of the European Convention. The relevant Oviedo Convention provisions are quoted in the section dealing with the international material. The Court said that (see paragraph 77) "[w]here the patient is a minor, the person with appropriate authorisation is the person with parental responsibility" and it added by referring to **Glass** that: "This fully accords with the Council of Europe's Convention on Human Rights and Biomedicine". This remark is important for our study of the interrelation between the two Conventions.

In **V. C. v. Slovakia**, no. 18968/07, 8/11/11, the Court held that the sterilisation of a Roma woman during the delivery of her second child without her informed consent had violated Article 8 of the European Convention. The relevant

Oviedo Convention provisions are quoted in the section dealing with the international material and more specifically the Council of Europe documents. In assessing the facts, the Court held that the applicant's sterilisation should be considered in the light of the requirement to respect a person's dignity and integrity embodied in Article 1 of the Oviedo Convention, ratified by Slovakia. Again, one can see how the Oviedo Convention was employed in interpreting Article 8 of the European Convention in the light of the above-mentioned requirement.

(ii) Private life and right to information

The second issue raised under Article 8 is **private life and the right to information** which in the Oviedo Convention is dealt with in Chapter III under Article 10, of which paragraph 1 reads "[e]veryone has the right to respect for private life in relation to information about his or her health".

In **Parrillo v. Italy** [GC], no. 46470/11, 27/08/15, the Grand Chamber held that preventing a woman from donating embryos to scientific research after her partner's death did not violate Article 8 of the European Convention. The application was based also on Article 1 of Protocol No. 1 to the European Convention but the Court declared it incompatible ratione materiae, given that human embryos cannot be reduced to "possessions" within the meaning of that provision. The Court quoted Articles 2 and 18 of the Oviedo Convention. Article 18 §§ 1 and 2 respectively provide that "where the law allows research on embryos in vitro it shall ensure adequate protection of the embryo" and that "the creation of embryos for research purposes is prohibited". That was the first time the Court had had to decide whether the notion of "private" life included the right to make use of embryos obtained from IVF treatment by donating them to scientific research. The "family life" aspect of Article 8 was not at issue here, since the applicant did not want to start a family and have the embryos in question implanted. The Court referred also in its judgment to Article 27 of the Oviedo Convention, which provides that none of its provisions should be interpreted as limiting the possibility for a Party to grant a wider measure of protection with regard to the application of biology and medicine. In concluding, the Court held that the respondent State had not overstepped the wide margin of appreciation enjoyed by it in the present case and that the ban in question was "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention, linked to the aim of protecting morals and the rights and freedoms of others. This case is a good example where the right to private life was extended to

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include the ability to exercise a conscious and considered choice regarding the fate of the embryos in question and also where the second paragraph of Article 8 of the European Convention, dealing with restrictions, was applied. Article 26 § 1 of the Oviedo Convention also provides for restrictions on the exercise of rights and is drafted on the model of Article 8 § 2 of the European Convention but though it makes reference to the "rights and freedoms of others" it does not refer also to "morals" as a legitimate aim for a restriction of a right.

In another Grand Chamber case, namely **S.H. and Others v. Austria**, [GC] no. 57813/00, 3/11/11, the Court held that the prohibition by Austrian law of heterologous artificial procreation techniques for in vitro fertilisation had not violated Article 8 of the European Convention. The Court said in particular that its task was not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating matters of artificial procreation. It concluded that neither in respect of the prohibition of ovum donation for the purposes of artificial procreation nor in respect of the prohibition of sperm donation for in vitro fertilisation had the Austrian legislature exceeded the margin of appreciation afforded to it. The only reference made by the Court to the Oviedo Convention was just to say that that Convention did not deal with the question of donation of gametes, but prohibited the use of medically assisted reproduction techniques to choose the sex of a child (Article 14 is quoted). It is important to mention one of the concluding remarks of the Court:

> "The Court also notes that the Austrian Constitutional Court, when finding that the legislature had complied with the principle of proportionality under Article 8 § 2 of the Convention, added that the principle adopted by the legislature to permit homologous methods of artificial procreation as a rule and insemination using donor sperm as an exception reflected the then current state of medical science and the consensus in society. This, however, did not mean that these criteria would not be subject to developments which the legislature would have to take into account in the future." (paragraph 117).

In a number of cases concerning subject matter that falls within the Oviedo Convention the Court has, however, refrained from referring to it at all.

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In **I. v. Finland**, no. 20511/03, 17/7/08, the Court held that the domestic authorities' failure to protect, at the relevant time, the applicant's health records against unauthorised access violated Article 8 of the European Convention. In this case no mention was made of the Oviedo Convention. At the material time the Oviedo Convention had been signed but not ratified by Finland.

In **Armonienè v. Lithuania**, no. 36919/02, 25/11/08 and **Biriuk v. Lithuania**, no. 23373/03, 25/11/2008, the Court held that there had been a violation of Article 8 of the European Convention concerning the low ceiling imposed on damages awarded to the applicants on account of a serious breach of their privacy by a national newspaper which made public their health data. Again, in this case no mention was made of the Oviedo Convention and unfortunately this was not done despite the fact that the Oviedo Convention had been ratified by Lithuania and was in force there at the material time.

In **Paradiso and Campanelli v. Italy**, [GC] no. 25358/12, 24/01/17, the Grand Chamber by eleven votes to six, held that the permanent removal from the custody of the applicants of a child who was born abroad through surrogacy in violation of the national law and which turned out to be genetically related to neither of them, did not violate Article 8 of the European Convention. The Court held that the "the public interests at stake weigh heavily in the balance, while comparatively less weight is to be attached to the applicants' interest in their personal development by continuing their relationship with the child" (paragraph 215). The Court did not refer to the Oviedo Convention probably because this Convention does not deal with surrogacy motherhood and also because Italy had not ratified it. However, the Court quoted principle 15 on "Surrogate Motherhood" of the Council of Europe Ad Hoc Committee of Experts on Progress in the Biomedical Sciences which considers agreements for surrogate motherhood, unenforceable prohibiting doctors from using techniques leading to such a method of artificial procreation.

In **Dickson v. the United Kingdom**, [GC], no 44362, 4/12/07, which concerned the refusal to provide the applicants – a prisoner and his wife – with facilities for artificial insemination, the Court found that Article 8 was applicable in that the refusal of artificial insemination facilities at issue concerned their private and family lives which notions incorporate the right to respect for their decision to become genetic parents. In particular the Court found that "the absence of such an assessment as regards a matter of significant importance for the applicants must be

seen as falling outside any acceptable margin of appreciation so that a fair balance was not struck between the competing public and private interests involved. There has, accordingly, been a violation of Article 8 of the [European] Convention" (see paragraph 85). Though no reference was made at all to the Oviedo Convention, the case is important because it shows that the margin of appreciation of the respondent State cannot be exercise so lightly in a such an important issue of bioethics.

In **Marper v. the United Kingdom**, [GC], nos. 30562/04 and 30566/04, 4/12/08, the Grand Chamber held that the retention of fingerprints of DNA samples for longer than was necessary to achieve the detection of a criminal offence, was contrary to Article 8 of the European Convention. No mention was made of the Oviedo Convention. It is to be noted that United Kingdom and Ireland have not ratified or even signed the Oviedo Convention.

In **Phinikaridou v. Cyprus,** no. 23890/02, 20/12/07, the Court held that even having regard to the margin of appreciation left to the State, the application of a rigid and inflexible time-limit for the exercise of paternity proceedings, regardless of the circumstances of an individual case and, in particular, the knowledge of the facts concerning paternity, impairs the very essence of the right to respect for one's private life under Article 8 of the European Convention. Again no reference was made to the Oviedo Convention.

(iii) Human genome

A third issue raised under Article 8 regarding the **human genome** comes under Chapter IV of the Oviedo Convention and especially its Article 12, dealing with predictive genetic tests which may be performed for health purposes.

In **Costa and Pavan v. Italy**, no. 54270/10, 28/8/12, the Court held that the blanket ban by the Italian authorities on preimplantation genetic diagnosis (PGD), while at the same time allowing the subsequent abortion of the foetus that was affected by a genetic disease, was disproportionate and violated Article 8 of the European Convention. In this case the Court, when dealing with the relevant European law, referred not only to Article 12 of the Oviedo Convention but also to paragraph 83 of the Explanatory Report thereto. In its judgment (see paragraph 55) the Court reiterates that the notion of "private life" within the meaning of Article 8 is a broad concept which includes, among other things, the right of self-determination and the right to respect for the decision to become or not to become a parent. It also

held (see paragraph 56) that Article 8 protected the right to respect for the decision to become genetic parents and applied to heterologous insemination techniques for in vitro fertilisation. What is more relevant for the case, the Court decided (see paragraph 57) that the applicants' desire to conceive a child unaffected by the genetic disease of which they were healthy carriers and to use assisted reproduction technology (ART) and PGD to this end "attracts the protection of Article 8, as this choice is a form of expression of their private and family life". This judgment is one of the clear examples where the Court widens the scope of Article 8 of the European Convention under the influence of the Oviedo Convention despite the fact that it said (see paragraph 23) that the latter Convention had not been ratified by the Italian Government.

Which Oviedo Convention issues have been raised under Article 2 of the European Convention in the case-law of the Court?

In **Vo v. France**, no. 53924/00, 8/7/04, an involuntary abortion had resulted from medical negligence. Criminal proceedings for two possible offences were brought against the doctor. However, they were unsuccessful, because one offence did not apply to the 20-21-week-old foetus and an amnesty applied to the other. The applicant complained of the authorities' refusal to classify the taking of her unborn child's life as unintentional homicide. She argued that the absence of criminal legislation to prevent and punish such an act breached Article 2 of the European Convention.

The Court in its judgment referred to all relevant provisions of the Oviedo Convention and its Additional Protocols under the title "European Law", including Articles 1, 2 and 18 of the Oviedo Convention dealing with the purpose of that Convention, the primacy of the human being and the research on embryos in vitro, respectively.

The Court observed (see paragraph 84) that "at European level", "there is no consensus on the nature and status of the embryo and/or foetus …. although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation." It also remarked that the Oviedo Convention and its Additional Protocol on Biomedical Research were careful not to give a definition of the term "everyone", and that the explanatory report indicated that, in the absence of unanimous agreement on the definition, the member States

had decided to allow domestic law to provide clarification for the purposes of the application of that Convention. The Court also said that it was worth noting that it might be requested under Article 29 of the Oviedo Convention to give advisory opinions on the interpretation of that instrument. However, such a possibility has unfortunately never been used.

The Court in Vo, after recapitulating the relevant case-law, held that the unborn child was not regarded as a "person" directly protected by Article 2 of the European Convention and that if the unborn did have a "right" to "life", it was implicitly limited by the mother's rights and interests. The Strasbourg institutions have not, however, as was also held, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child.

Finally, the Court held that in the circumstances of the case, an action for damages in the administrative courts could be regarded as an effective remedy that was available to the applicant. Such an action, which she failed to use, would have enabled her to prove the medical negligence she alleged and to obtain full redress for the damage resulting from the doctor's negligence, and there was therefore no need to institute criminal proceedings in that case. Even assuming that Article 2 was applicable, as the Court concluded, there had been no violation of Article 2 of the European Convention.

It can be said that the Court in Vo used the Oviedo Convention as a tool in evaluating whether there was a consensus among the members States of the Council of Europe on a question it had to examine under Article 2 of the European Convention.

In **A., B. and C v. Ireland** [GC], no. 25579/05, 16/12/10, the Grand Chamber held that restrictions on obtaining an abortion violated Article 8 in respect of only the third applicant, who had a rare form of cancer. There was no mention of the Oviedo Convention probably because it does not contain provisions on abortion but the case is interesting in terms of bioethics generally. Since there was no European scientific or legal definition of the beginning of life, the Grand Chamber held that a broad margin of appreciation on legal protection was in principle accorded to the member States to determine whether or not a fair balance was struck between the protection of the public interest in the right to life of the unborn, on the one hand, and the conflicting rights of the parents to respect for private life under Article 8 on the other hand. The Court also held as follows on the role of European consensus in the development and evolution of the European Convention protections:

"234. However, the question remains whether this wide margin of appreciation is narrowed by the existence of a relevant consensus.

The existence of a consensus has long played a role in the development and evolution of Convention protections beginning with Tyrer v. the United Kingdom (25 April 1978, § 31, Series A no. 26), the Convention being considered a "living instrument" to be interpreted in the light of present-day conditions. Consensus has therefore been invoked to justify a dynamic interpretation of the Convention (see Marckx v. Belgium, 13 June 1979, § 41, Series A no. 31; Dudgeon, cited above, § 60; Soering v. the United Kingdom, 7 July 1989, § 102, Series A no. 161; L. and V. v. Austria, nos. 39392/98 and39829/98, § 50, ECHR 2003-I; and Christine Goodwin, cited above, § 85)."

In my opinion, the beginning of life should not be left to the States' margin of appreciation. It is clear from the provisions of the European Convention that it deals with persons, i.e. already born human beings, and the exceptions to the right to life in Article 2 § 2 do not therefore include abortion. If the members of the Council of Europe wish to protect unborn life, apart from using their national legislation, they should enact a relevant Protocol to the European Convention dealing with the rights of the unborn. Article 4 § 1 of the American Convention on Human Rights makes it clear that the protection of the right to life starts from the moment of conception. But that was not the intention of the drafters of the European Convention.

In **Lambert and Others v. France,** [GC] no. 4605/05, 24/6/14, the Grand Chamber held by twelve votes to five that the withdrawal of Vincent Lambert's artificial nutrition and hydration would not be in breach of the State's obligations under Article 2 of the European Convention. In the judgment under the heading "Council of Europe Material" reference is made inter alia to Articles 1, 5, 6 and 9 of the Oviedo Convention and to the Oviedo Guide on the decision-making process regarding medical treatment in end-of-life situations. As is clear from the judgment (paragraph 62) this Guide does not deal with issues of euthanasia or assisted suicide, which some national legislations authorise.

At paragraph 148 of the judgment the Court held the following:

"148. Accordingly, the Court considers that in this sphere concerning the end of life, as in that concerning the beginning of life, States must be afforded a margin of appreciation, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as regards the means of

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> striking a balance between the protection of patients' right to life and the protection of their right to respect for their private life and their personal autonomy… However, this margin of appreciation is not unlimited … and the Court reserves the power to review whether or not the State has complied with its obligations under Article 2."

As it went on to say (see paragraph 180), the Court took the view that the Conseil d'État was entitled to consider that the testimony submitted to it was sufficiently precise to establish what Vincent Lambert's wishes had been with regard to the withdrawal or continuation of his treatment. It concluded that the domestic authorities had complied with their positive obligations flowing from Article 2 of the European Convention, in view of the margin of appreciation left to them in the present case.

The minority based their opinion on **Pretty v. the United Kingdom**, 2346/02, 29/4/02, where it was held that Articles 2 and 3 were "one-way-avenues" and they included only positive and not negative rights. According to the Pretty judgment, "Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life" (paragraph 39). As the minority said, Vincent Lambert was being fed, and food and water are two basic life-sustaining necessities which are intimately linked to human dignity.

In my opinion, with due respect to the majority, the minority's view was the correct one. Human life is sacred and must be considered as an absolute value and must not be dependent on the margin of appreciation of each State. The right to life under Article 2 should not be interpreted in the light of Article 8 or any other provision, since consent and personal autonomy cannot create a right which does not exist, i.e. the right to die. Human dignity should be based on the idea of sanctity of life and should protect a person from every kind of attack even if it is coming from the person himself or herself. The judgment of the majority unfortunately adopted a new hierarchy between the right to life and human dignity, because it considered human dignity more important than life itself, without which, the exercise of any other right is not possible.

It is not clear how much influence the Oviedo Convention had on the judgment in Lambert. The judgment is based on the notion of consent but Vincent Lambert had not left clear instructions in advance and in any event, neither the

Oviedo Convention nor its Guide expressly or impliedly provide that a person's consent may enable the doctors to proceed with euthanasia or assisted suicide. On the contrary, the opposite is stated in the Guide and in the Parliamentary Assembly's Recommendation 1418(1999), also referred to in the judgment in Lambert (see paragraph 70): "a terminally ill or dying person's wish to die never constitutes any legal claim to die at the hands of another person or a legal justification to carry out an action intended to bring about death". Though this Recommendation is cited in the judgment, the above important provision is omitted. The Court should not have based such an issue, which is not covered by the exceptions to the right to life under Article 2 § 2 of the European Convention, on the margin of appreciation of a State.

Lastly reference should be made to **Cyprus v. Turkey**, [GC] no, 25781/94, 10 May 2001. In this case the Grand Chamber held by sixteen votes to one that no violation of Article 2 of the Convention had been established by reason of an alleged practice of the Turkish authorities of denying access to medical services to enclaved Greek Cypriots and Maronites living in northern Cyprus. Judge Marcus-Helmond, ad hoc judge in respect of Cyprus, in his partly dissenting opinion refers to the rapid evolution of biomedical techniques and new threats and dangers to human dignity, some of which the Oviedo Convention seeks to cover. What he said in his opinion is worthy of quotation:

> "My view is that, at a time when freedom of movement is regarded as essential, especially when it comes to obtaining optimal medical care, a denial of such freedom by the State amounts to a serious breach of its obligations towards those within its jurisdiction. I consider that is something which may amount to a violation of the State's undertaking under Article 2 of the Convention to protect everyone's right to life by law.
>
> We are living in a period of rapid scientific evolution and there may be substantial differences between institutions offering medical treatment, whether from one country to another or within the same country. For a State to use force to prevent a person from attending the institution which he considers offers him the best chance of recovery is to my mind highly reprehensible.
>
> Furthermore, I regret that the European Court of Human Rights did not seize this opportunity to give Article 2 a teleological interpretation as it has done in the past with other Articles ...

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With the rapid evolution of biomedical techniques, new threats to human dignity may arise. The Convention on Human Rights and Biomedicine, signed at Oviedo in 1997, seeks to cover some of those dangers. However, to date only a limited number of States have signed it. Moreover, this Convention only affords the European Court of Human Rights consultative jurisdiction. In order this "fourth generation of human rights" to be taken into account so that human dignity is protected against possible abuse by scientific progress, the Court could issue a reminder that under Article 2 of the European Convention on Human Rights the States undertook to protect everyone's right to life by law.

The right to life may of course be interpreted in many different ways, but it undoubtedly includes freedom to seek to enjoy the best physically available medical treatment."

Has any Oviedo Convention issue been raised under Article 3 and Article 5 of the European Convention in the case-law of the Court?

In **Bataliny v. Russia**, no. 10060/07, 23/07/17, the Court held that testing a new drug without the consent of a patient who was held in a psychiatric hospital for two weeks had violated Articles 3 and 5 §§ 1 (c) and 4 of the European Convention. The Court found that it was (paragraph 90) "unacceptable in the light of international standards … that a program of scientific research with new drugs be implemented without the consent of the subject submitted to the experimentation". When mentioning the "international standards", the Court made a reference also to the paragraph (paragraph 55) in which it states the relevant provisions of the Oviedo Convention, including Articles 15, 16 and 17. These provisions come under Chapter V of the Oviedo Convention entitled "scientific research". Under the provisions of these Articles, scientific research in the field of biology and medicine must ensure the protection of the human being (Article 15) and can be undertaken only if the strict conditions of Articles 16 or 17 are met, depending respectively whether the person is or is not able to consent to research.

Has any Oviedo Convention issue been raised under Article 10 of the Convention in the case-law of the Court?

In **Mouvement Raëlien Suisse v. Switzerland** [GC], no. 16354/06, 13/7/12, the Grand Chamber found that the national authorities did not overstep the broad margin of appreciation afforded to them to ban the poster campaign of the applicant

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association, which promoted human cloning, and the reasons given to justify their decisions were "relevant and sufficient" and met a "pressing social need" and therefore it held that there had been no violation of Article 10 of the European Convention. Reference was made under the heading "international law" to the Oviedo Convention and its Protocol on Cloning without specific reference to any provision or any discussion of them in the Court's reasoning.

In view of the above analysis, can the result of the interrelation between the two Conventions be considered satisfactory?

Though I started the speech by explaining how much potential this interrelation should have, I cannot conclude that its outcome has been as satisfactory as could be expected. My concluding thoughts are the following:

1. 20 years after its signature, the Oviedo Convention has not yet been ratified by 18 Member States of the Council of Europe and its Protocols by even more States.
2. The Court has not to date been requested to give an advisory opinion on a legal question concerning the interpretation of the Oviedo Convention, as provided for under Article 29 of that Convention. If the Court were asked to give an advisory opinion on the Oviedo Convention, it would be more willing to refer back to that opinion when applying a Convention provision which relates to the relevant provision of the Oviedo Convention. As I have already mentioned, the Court in **Vo** urged that the possibility of seeking an advisory opinion under Article 29 should be used.
3. With the exception of a few judgments of the Court, in all the rest, the relevant provisions of the Oviedo Convention are either quoted in the introductory law part and not discussed or even referred to later on, or they are not referred at all. Without an explanation in the judgment on the connection or relevance of the reference to an Oviedo Convention provision in the introductory part of the judgment, it would not be safe to anticipate what influence such a mere reference may in fact have had on the outcome of the case.
4. But in the few exceptions, some of which have been Grand Chamber cases, where the Court has gone deeper into the interrelation between the two Conventions, its achievement in bringing the two Conventions closer to each other and to further advancing human rights has been significant. This has been done in the following ways:

(i) By using the standards laid down by the Oviedo Convention as a basis to test a national regulatory framework, as was the case, for example, in **Glass**, **Evans**, **M.A.K**. and **R.K.** In effect, this test of consistency with the Oviedo standards amounts to equalising these standards with the Convention standards.

(ii) By using the Oviedo Convention as a basis to test an interference with a human right as in the **V.C.** and **Bataliny** cases.

(iii) By using the Oviedo Convention as a tool to evaluate whether there is a European consensus on the relevant issue, as for example in the **Evans** and **Vo** cases (where the Court found that there was no European consensus), or whether a State overstepped or transgressed its margin of appreciation, as in the **Evans** case, and apparently in the **Parillo** case.

(iv) By using Oviedo Convention provisions to widen the scope of a European Convention provision, as for example in the **Costa and Pavan** and **Parillo** cases.

5. The Court in its case-law seems to allow issues of unborn life, assisted suicide and euthanasia to fall within the margin of appreciation of member States. It is not clear whether the Court has been influenced, and if so, to what extent, by the Oviedo Convention. With due respect, however, I believe that these issues should not have been left within the margin of appreciation of the member States.

In my view, it is clear that Article 2 of the European Convention does not cover unborn life. By contrast, as has been said above, Article 4 § 1 of the American Convention on Human Rights makes it clear that the protection of the right of life starts from the moment of conception. But that was not the intention of the drafters of the European Convention. However, since unborn life needs to be protected by the Convention, I propose that a new Protocol to the European Convention be adopted to deal with this matter. If, as I suggest, unborn life does not come under Article 2 of the Convention, then no issue should arise before the Court except to the extent that the matter may relate to the life of the mother. If on the other hand, unborn life comes under Article 2, then again the matter should not be left within the margin of appreciation of member States, since the exceptions to the right to life under Article 2 § 2 of the European Convention do not apply to unborn life.

Regarding now the other crucial issue, that of the end of life, there is, in my view, only a right to life and not a right to die, and, since assisted suicide and euthanasia are prohibited by Article 2 of the European Convention and are not

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covered by the exceptions to the right to life, the matter cannot be left within the margin of appreciation of the States.

Conclusion

The nature and purpose of the two Conventions and the common values and principles of the Council of Europe underlying them require that a compatible interpretation between their provisions be made. The principle of effectiveness, which is inherent in the two Conventions and is based on their purpose, assist in making them both effective and closer to each other.

A harmonious interpretation of the provisions of the two Conventions will be a shield against any threats of the progressing science. One must, of course, always be wary of any new dangers, but at the same time be positive, since new challenges of science and society test human rights and make them even stronger in their eternal journey towards fulfilling their purpose.