Children's voices and the Law

Reflections on the role and contribution of the ECHR

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I – Introduction

Lady Chief Justice
Distinguished Guests

It is a real pleasure to be back in Belfast and my warm thanks to the Children's Law Centre for organizing this event.

I know how much Paddy has done for the Centre, how well respected she is in this community and beyond and how much she will be missed when she herself steps back in a few weeks time.

My thanks also to the Lady Chief Justice for giving of her valuable time. Our paths crossed several times during my time in Strasbourg and on each occasion I always thought how fortunate this jurisdiction is to have you at its helm.

As you know, the judgments and decisions of the European Court of Human Rights serve not only to decide the cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.[1]

The Court has consistently emphasised the Convention's role as a "constitutional instrument of European public order" in the field of human rights.[2]

[1] *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25, and, more recently, *Jeronovičs v. Latvia* [GC], no. 44898/10, § 109, 5 July 2016.
[2] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 156, ECHR 2005-VI, and more recently, *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 110, 13 February 2020.

Since the entry into force of the Treaty of Lisbon and the recognition of the equal legal value of the EU Charter in 2009, it would be foolish to ignore the role which the CJEU has also assumed in this regard, at least in certain fields, some of which concern directly or indirectly the rights of children.

Although this jurisdiction is no longer part of the EU, dialogue between the Convention and Charter and their respective European courts, as well as the interpretation of the Trade and Cooperation Agreement (TCA) in cases with a Convention dimension, mean that respect for human rights may, to this day, entail an EU tinge.

Litigation before the Northern Irish courts in relation to the Withdrawal Agreement and its human rights impact has been, by any standard, complicated. However, as an outside observer I can only applaud the clarity and rigour with which the Northern Irish courts have tackled the novel questions with which they have had to deal.

In 2017, in a case called *Unison*, explaining why courts provide a public service like no other, Lord Reed stated that:

> "Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established."[3]

This is equally true of Convention cases. Strasbourg litigants have had to exhaust domestic remedies on their long road to individual justice or the vindication, creation or clarification of Convention legal rules and principles. When successful, their cases have the capacity to alter the minimum standards applicable throughout the vast Convention legal space.

One of the earliest landmark judgments of the Court, which recognized the Convention's character as a "living instrument", was of course *Tyrer v. the United Kingdom*. The case involved a 15-year-old

[3] See *R (on the application of UNISON) (Appellant) v. Lord Chancellor (Respondent)* [2017] UKSC 51, § 66 - 69. The case concerned the payment of fees by claimants in employment tribunals or employment appeals tribunals. The aims of the Fees Order adopted in 2013 was to transfer part of the cost burden of the tribunals from taxpayers to users of their services, to deter unmeritorious claims, and to encourage earlier settlement.

Manx resident, sentenced in 1972 to three strokes of the birch on his bare posterior for an assault on a fellow classmate who had snitched about beer being taken into the school.

At a time when most of us have seen the Netflix series *Adolescence*, one might feel a certain nostalgia for the days when beer, snitching and a schoolyard brawl were the order of the day.

I mention *Tyrer* because the differences between the majority of the Court and the national dissenting judge are instructive. According to the majority:

> "The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence […], ordered by the judicial authorities of the State and carried out by the police authorities […]."[4]

The indignity of having the punishment administered over the bare posterior aggravated the degrading character of the punishment, but was not considered the only or determining factor.

The heart of the dissent by Sir Gerald Fitzmaurice - a seasoned Strasbourg dissenter if ever there was one - can be found in footnote 7 of his separate opinion, where he stated that:

> "… throughout the ages and under all skies, corporal methods have been seen as the obvious and natural way of dealing with juvenile misbehaviour".[5]

He went on to explain the origins of his view:

> "I have to admit that my own view may be coloured by the fact that I was brought up and educated under a system according to which the corporal punishment of schoolboys (sometimes at the hands of the senior ones - prefects or monitors - sometimes by masters) was regarded as the normal sanction for serious misbehaviour, and even sometimes for what was much less serious.

[4] *Tyrer v. the United Kingdom*, n° 5856/72, § 33, 25 April 1978.
[5] Assuming that corporal punishment does involve some degree of degradation, he stated that "it has never been seen as doing so for a juvenile to anything approaching the same manner or extent as for an adult." (ibid, § 11).

> Generally speaking, and subject to circumstances, it was often considered by the boy himself as preferable to probable alternative punishments such as being kept in on a fine summer's evening to copy out 500 lines or learn several pages of Shakespeare or Virgil by heart, or be denied leave of absence on a holiday occasion.
>
> Moreover, these beatings were carried out without any of the safeguards attendant on Mr. Tyrer's: no parents, nurses or doctors were ever present. They also not infrequently took place under conditions of far greater intrinsic humiliation than in his case.
>
> Yet I cannot remember that any boy felt degraded or debased. Such an idea would have been thought rather ridiculous. […] indeed, such is the natural perversity of the young of the human species that these occasions were often seen as matters of pride and congratulation […]."[6]

The spirit of the dissent has not stood well the test of time.

Reports, north and south of the Border, and indeed to the East and West, speak of institutionalized violence and abuse of children and the vulnerable in educational and reform establishments, at the hands of the State or with the State and its citizens turning a blind eye or a deaf ear.

Strasbourg judges are charged with the interpretation and application of a 75-year-old Convention whose 14 principal articles and additional Protocols, touch on almost every aspect of human life and a person's interaction with the State.

But this was not an instrument established with the rights of children in mind.

In the time available to me this afternoon, I'd like to illustrate how, over time, the Strasbourg court has sought to hear better and protect more effectively the voice and rights of children in legal proceedings and look at how children's voices have been lost and found in Convention case-law, examining cases on surrogacy, child placement and adoption and domestic violence. In these areas we see, respectively, the depth (and potential destructiveness) of the human desire to procreate and parent, how the State can fail children in their supposed attempts to protect them, and the targeting of children in our society as a means to inflict harm on others.

[6] Ibid, at § 12.

Turning, thereafter, to more positive themes, I'll illustrate how, over time, the Strasbourg court has become more sensitive to the voice of children in its approach to child friendly justice and how it has sought more recently to get around the experience of children and their future prospects being ignored in and by an adult world.

I don't suggest that the Strasbourg court was, or always is, a pioneer. As it has repeatedly held in cases relating to the rights of children, domestic authorities have direct contact with the persons concerned by an impugned decision, such that the Court must be careful not to substitute itself for the domestic authorities in the exercise of their responsibilities in certain fields.[7] It has usually been national children's advocates, national judges and national courts which have led the way in this field.[8] In this regard, I'll provide later one stellar example from Northern Ireland.

The value of the Strasbourg system, however – an enduring value to which I will return in my conclusion – is the determination, in the general interest, of issues of public policy, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States.[9]

This may mean that where a judge in Belfast has led the way, a judge in Chisinau or Madrid may in time follow suit, on foot of a Strasbourg judgment of a declaratory nature but one which also has *res interpretata* effect.

II – Surrogacy

Turning first to the question of surrogacy, whether working as a Single Judge, on a Committee of three judges, in a Chamber of seven or in the Grand Chamber of seventeen judges, I always felt that one of the bigger challenges facing Convention judges is to ensure that - over time and across all the different facets of law and life with which they are dealing – they remain coherent and consistent in their approach.

It was in surrogacy cases that I must admit to finding this obligation particularly challenging.

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[7] See *K and T. v. Finland*, n° 25702/94, 12 July 2001, §§ 154-155.
[8] See, for example, D. Lawson, H. Stalford and S. Woodhouse, *Promoting Children's Rights at the ECtHR: the Role and Potential of Third-Party Interventions,* June 2023, ECRU, University of Liverpool.
[9] *Konstantin Markin v. Russia* [GC], 30078/06, § 89, ECHR 2012.

In such cases, there are two basic underlying principles which recur:[10]

- Firstly, where ethically sensitive issues are at stake – adoption, the taking of a child into care, medically assisted reproduction and surrogate motherhood – member States are afforded a wide margin of appreciation.

  The Strasbourg Court's task is not to substitute itself for competent national authorities in determining the most appropriate policy for regulating the complex and sensitive matters involved in children born of surrogacy arrangements with the help of medically-assisted reproduction techniques.

- Secondly, in these cases, all decision-makers, national and European, administrative and judicial, must be guided by the best interests of the children involved. The latter must feature predominantly in any weighing up the competing interests at stake.

So far so good. These are two general and eminently sensible propositions.

However, the challenge comes in applying these principles to a myriad of different regimes across 46 different Member States, some of which prohibit surrogacy and others of which tolerate it; to a range of different personal relationships amongst intended parents, which relationships are governed by a host of different national laws, policies, practices and gaps in legal protection, to which one must add the possibilities now afforded by science, which for many years has put pressure on the established dictum of *mater certa semper est*.

In *Paradiso and Campanelli* - which I would rank as one of the harder cases in which I sat - a majority of the Grand Chamber found no violation of the private life limb of Article 8 ECHR. The case concerned the removal of a child born abroad as a result of a surrogacy arrangement entered into in Russia by an Italian couple.

The Court considered that the conditions for the existence of *de facto* family life within the meaning of Article 8 had not been met. For the Court the case concerned:

[10] See what I think was the first major case – *Mennesson v. France*, n° 65192/11, 26 June 2014.

> "[…] applicants who, acting outside any standard adoption procedure, brought to Italy from abroad a child who had no biological tie with either parent, and who had been conceived … through assisted reproduction techniques that were unlawful under Italian law."[11]

According to the intended parents, the commercial surrogacy arrangement had involved the provision of sperm by the intended father. It was not clear why this had not been followed through.[12]

One of the undoubted consequences of the Court's characterization of the case in the manner just described, and in particular the absence of a biological link, is the validation of the decision by the Chamber to refuse the parent applicants standing to act before the Court on behalf of the child.[13]

There are different ways of looking at the *Paradiso* judgment.

On the one hand, given the above ruling on standing, the "voice" of the infant child was nowhere to be heard. He had been born into this world via a legally precarious route not of his own choosing, was removed from his only known environment aged 8 months and continued to be the subject of legal proceedings for 6 long years thereafter, without anyone being accorded rights to participate on his behalf.

On the other hand, the majority judgment, by sanctioning the Italian decision to remove the child from the intended parents, was seeking to protect the best interests of children generally in light of the commercial nature of the surrogacy arrangement and the indices of fraud which had emerged. In this regard, the Court stated:

> "The Court has no doubt that the reasons advanced by the domestic courts are … directly linked to the legitimate aim of preventing disorder, and also that of protecting children – not merely the child in the present case but also children more generally – having regard

[11] *Paradiso and Campanelli v. Italy* [GC], n° 25358/12, § 131, 24 January 2017.
[12] Ibid, § 12: "the Russian clinic (had) certified that the second applicant's seminal fluid had been used for the embryos to be implanted in the surrogate mother's womb".
[13] Ibid, § 86 and Chamber judgment §§ 48-50.

to the prerogative of the State to establish descent through adoption and through the prohibition of certain techniques of medically assisted reproduction …"[14]

The fate of a child, born of a long-standing desire to parent, but dogged by the legal precarity of the path thereto, is also on display in *A.M. v. Norway*.[15]

The applicant's complaints related to the refusal of Norway to recognise her as the mother of X.. The applicant and her former partner, E.B., had tried unsuccessfully to have a child during their ten-year relationship. Their first attempt, when still a couple in 2010, to have a child via surrogacy failed. They continued their efforts even after the relationship had ended and E.B. had embarked on a new relationship with another woman.

X. was born in the U.S. in March 2014 and spent the first months of his life in the care of the applicant and E.B. They then agreed to share the responsibility for raising him, albeit in their now separate homes. Child welfare services became involved when the level of conflict between them rose. In August 2015, E.B., now the father of a second child, born that same month to his new partner, unilaterally cut off contact between X. and the applicant.

By that time, aged only 17 months, X. had had:

- one biological father (E.B.);

- one genetic mother (the anonymous donor of the egg);

- one gestational surrogate mother (K.J.);

- a first "social" mother (the applicant), based on the fact that she had cared for and raised X. since birth;

- one "legal" father (J.J.), the husband of the surrogate mother K.J., and

[14] Ibid, § 197.
[15] N° 30254/18, 24 March 2022.

- a second "social" mother (H.), who was E.B.'s new partner and the biological mother of his second child.

In this case, as in *Paradiso*, the child's right to formal recognition of his family ties within the meaning of Article 8 was not before the Court. As his biological father enjoyed sole parental responsibility under Norwegian law, the applicant had no legal basis to represent the child's interests. The biological father, in every sense, called the shots.

It is difficult, in my view, to find any winners in these tragic cases. It is also increasingly difficult to find a coherent line in the Court's case-law beyond the two principles I outlined initially. The nature of the couples who have sought to rely on Article 8 has varied considerably – married, unmarried, same-sex or heterosexual, together and not.

In some recent cases, the alleged violations of Article 8 have seemed to reflect the quest of parents – legitimate, no doubt, but perhaps misplaced, given the Court's focus on the welfare of children – to use their Strasbourg case as a means to further legal battles in relation to their own social and legal rights as same-sex couples.[16]

As I indicated in the Norwegian case, by entering a surrogacy arrangement abroad, which practice is not lawful in their own State, an intended parent embarks on a legally precarious journey. States cannot necessarily be held accountable for what may subsequently unfold. Too often the cases before the Court reveal the risk that children become the victims of well-intentioned but desperate and at times conflictual parental projects.

However, it is hard not to conclude, from the existing case-law of the Court, that the legal journey is particularly precarious for non-biological parents and, particularly genetic (but not gestational) mothers, in relation to whom the law has not kept pace with either social reality or science.[17]

One final point in relation to surrogacy speaks to how courts can successfully, or unsuccessfully, deal with parents deprived of their "children" in cases of this nature.

In the Italian case, the Minors Court spoke of the minor child being:

[16] See, for example, *C.E. and others v. France*, n° 29775/18 and 29693/19, 24 March 2022.
[17] See, for example, *D. v. France* (dec.), n° 11288/18, 16 July 2020.

> "[…] an instrument to fulfil a narcissistic desire of Mr Campanelli and Mrs Paradiso or to exorcise an individual or joint problem. … all of this throws a consistent shadow over their possession of genuine affective and educational abilities and of the instinct of human solidarity which must be present in any person wishing to bring the children of others into their lives as their own children."[18]

Contrast the harshness of this statement with the approach of the Oslo City Court in the Norwegian case, which, although denying the applicant mother's suit, recognized that she "had everything necessary to offer X. a good and safe relationship".[19]

In cases where the law imposes on litigants, for quite legitimate factual and legal reasons, a loss or suffering which will last a lifetime, I think it is incumbent on judges and legal professionals to understand the additional damage which their words, and their perhaps well-meaning sermons, may wreak.

III – Childcare and adoption

The second category of cases I wish to touch on relates to the placement of children in long-term care and their adoption.

As the national authorities enjoy direct contact with the persons whose rights are affected by any decision alleged to violate the Convention, it is clearly not for the Strasbourg Court to don the mantle of a fourth instance tribunal and substitute its own assessment for that of the domestic authorities in such a sensitive field.[20]

However, the margin of appreciation enjoyed by domestic authorities narrows when parental rights are restricted or removed.[21] Adoption against the wishes of a biological parent, with the consequent breaking of *de facto* and *de jure* ties between parent and child and the termination of access rights, is an irreversible and far-reaching interference with the right to family life of both parent and child.

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[18] *Paradiso and Campanelli*, extract from the Minors court at § 37 of the Grand Chamber judgment.
[19] *A.M. v. Norway*, § 55.
[20] See, for example, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 70, ECHR 2001-V.
[21] See, for example, *Gnahoré v. France*, no. 40031/98, § 54, CEDH 2000-IX or *Sahin c. Allemagne* [GC], no 30943/96, § 65, CEDH 2003-VIII

The interests of children dictate that family ties may only be severed in very exceptional circumstances.[22]

Subsidiarity and the margin of appreciation dictate particular caution in cases of this nature.

However, they do not absolve courts from a forensic examination of the facts, of whether the reasons provided by the domestic authorities were both relevant and sufficient and, lastly, of whether the aforementioned exceptional circumstances standard is met.

In recent years, the Court has invested in what is called "process-based review", in line with the principles of shared responsibility and subsidiarity, and as part of its express recognition of the margin enjoyed by States in certain fields or in relation to certain questions. Process based review ensures Strasbourg review which is less intrusive of domestic court assessments and more respectful of case and country particularities. But it places the onus on domestic authorities and courts to demonstrate that Convention standards have been complied with.

Some cases on childcare have illustrated how national procedural compliance with relevant references to Convention standards can mask an emptying of the substantive rights of the parents and children involved.

A good illustration of this is found in a series of Norwegian cases, of which the Grand Chamber judgment in *Strand Lobben* is the most well-known example.[23]

After the first applicant's child was born in September 2008, she and the newborn moved to a State-run family centre four days later. The mother had agreed, given her recognised need for guidance and support in early motherhood, to stay in such a centre for three months.

When the child was three weeks old, the first applicant withdrew her consent to stay in the family centre. On the very same day, the child was placed in emergency care due to weight loss during the first weeks of life and the mother's reported failure to understand or respond to his needs. The first applicant had sought assurances that, after the three month stay, she would be allowed to return home with her child. When such assurances were not forthcoming, she had sought to leave.

[22] See *Görgülü*, n° 74969/01, 26 February 2004.
[23] *Strand Lobben v. Norway [GC]*, n° 37283/13, 10 September 2019.

In her appeal to the Social Welfare Board, the first applicant indicated that she and X could live with her parents, that her mother was willing to provide support and that she was also willing to accept the help of the child welfare authorities. During the course of the lengthy proceedings, she gave birth to another child which remained with her and her new partner.

Both the Social Welfare Board and the City Court rejected the appeal, referring to the report of the family centre which had considered that the mother was incapable of taking care of her child without support or follow up. An evaluation of X between ten days old and two months had pointed to his early delayed development and the fact that he had been a child at high risk when first sent for evaluation. That report went on to state that by two months old, after placement, X was "functioning as a normal two-month-old baby [with] the possibility of a good normal development".

From the moment of placement, at week three of life, up until the proposed adoption, the child had had only 1 and a half hour weekly sessions with his mother, reduced at the age of five months to six two-hour sessions per year and then further reduced to four two-hour sessions per year.

Policy decisions relating to the choice of child protection scheme and the assessments which underpin them are legitimate and fall within the margin of appreciation of the domestic authorities. [24]Furthermore, this is a difficult area for State authorities. A failure to act can lead to alternative violations of Articles 2, 3 and 8, and devastating and in some cases fatal consequences.[25] Assessments of safety and risk may be devilishly difficult.

The Court's case-law sets out the procedural and substantive legal standards which need to be respected: the domestic decision-making process must be fair and capable of safeguarding the rights of all those concerned, the need to establish particularly weighty reasons if childcare is to

[24] This and other cases demonstrate that the question of which child protection system is most suitable to meet the interests of the child to be protected against harmful influences, and how harmful influences are defined, is answered fundamentally differently in different Convention States. At one end of the spectrum there are countries like Norway, where the threshold for state intervention is low and, after the placement of the child, efforts are quickly made to consolidate the child's place in foster care through adoption. At the other end of the spectrum there are countries where – at least according to official numbers – the placement of children into care rarely occurs. See further I Reinders and J Huijer, "The legal representation of parents and children during placement procedures in the light of Article 8 ECHR" (2024) 20 *Utrecht Law Review* 40-53, at 40.

[25] See, on this end of the spectrum, *Loste v. France*, n° 59227/12, 3 November 2022 and *Association Innocence en Danger v. France*, n° 15343/15 and 16806/15, 4 June 2020.

become long-term or adoption an option, the need to limit the breaking of *de facto* and *de jure* ties to exceptional circumstances and the need to apply stricter scrutiny when the latter occurs.

However, process-based review runs the risk of rendering the concrete application of those principles to the circumstances of an individual case almost exclusively procedural. It can boil down to whether the national assessments were detailed, the process "fair", the parents and child represented and the final outcome underpinned by reasons.

I won't go into all the detail of the *Strand Lobben* case. The Grand Chamber overruled the Chamber finding of no violation of Article 8 ECHR. It considered that the sparse contact which had been imposed on the mother and child from three weeks after birth provided only limited evidence from which to draw clear conclusions with regard to the mother's caring skills. The decision-making process leading to the placing of the child for adoption had been flawed. Article 8 had been violated.

As explained by several concurring members of the majority, the Norwegian authorities had failed from the outset to pursue the aim of reuniting the child with his mother. They rather immediately envisaged that he would grow up in the foster home. This underlying assumption, in line with national policy, ran like a thread through all stages of the proceedings, starting with the first care order.[26]

Process-based review, as we see from this case, cannot exclusively focus on the procedural steps taken. The authorities' attitudes and objectives have likewise to be examined and there has to be a real and substantive engagement, taking account of all interests involved, with safeguards commensurate with the gravity of the interferences and the seriousness of the interests at stake.

Of all the joyful things I have witnessed during my time in Strasbourg – and joy is not the emotion I would most associate with the type of cases dealt with – the response of the applicant and her family to the delivery of the judgment of the Grand Chamber in *Strand Lobben* is one of them.[27]

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[26] As the minority at Chamber level and part of the Grand Chamber majority recognized, the decisions to place the child in care and the nature of those decisions "fed inexorably into the decisions leading to adoption, created the passage of time so detrimental to the reunification of a family unit, influenced the assessment over time of the child's best interests and, crucially, placed the first applicant in a position which was inevitably in conflict with that of the authorities which had ordered and maintained the placement and with the foster parents, whose interest lay in promoting the relationship with the child with a view ultimately to adopting him." See the concurring opinion of Judge Ranzoni et al, § 26, citing § 18 of the separate opinion annexed to the Chamber judgment.

[27] Available at https://static.coe.int/webtv/video_echr.html#20190910_arret_CEDH.

In the words of a Northern Irish judge to whom I will soon turn, the applicant had "lost that most precious of life's gifts, the chance to rear one's own child".[28] The joy one witnesses in the Court recording, which is accessible on the ECHR site, is a joy in being heard.[29]

I should add that *Strand Lobben* was not a Norwegian one off. Prior to that case Single Judges, Committees and Chambers dealing with Norwegian cases had seen many cases of placement and adoption. An overview of the case-load and its characteristics began to point to systemic problems in the respondent State. Subsequent to the Grand Chamber decision, which addressed an individual case but this systemic problem, the Norwegian Supreme Court adjusted its case-law, providing guidance to national authorities and courts involved in similar child welfare cases.[30]

In a not dissimilar case – *AR v. Homefirst Trust*, Lord Kerr had lamented in the NI Court of Appeal in 2005 that:

> "[…] the failure of the trust's officers to be sufficiently alive to the requirements of the convention and the jurisprudence of the European Court of Human Rights has had profound and unfortunate consequences in this case".[31]

It took the ECtHR fifteen more years than the NI Court of Appeal to ensure that the Norwegian authorities would properly take cognizance of the same. The fact that the Governments of Belgium, Bulgaria, the Czech Republic, Denmark, Italy and Slovakia all intervened before the

[28] See Lord Kerr in *AR v. Homefirst Trust* [2005] 8, § 104.
[29] See J. Herman, *Truth and Repair: How Trauma Survivors Envision Justice*, 1997.
[30] See the Norwegian Supreme Court case-law referred to in *M.L. v. Norway*, n° 64639/16, 22 December 2020, and the Court's sensitivity to the different roles of the ECtHR and national authorities in § 98: "The Court is mindful that its approach to cases such as the instant one – namely its practice of considering each case within its own context, in the light of the case as a whole and in retrospect (see paragraph 84 above) – may systemically differ from the approach followed by domestic child care services and authorities (including the domestic courts), which have to decide what to do with the child (and his or her family) on the basis of the child's and the family's situation at the time at which the decision in question is taken and with an eye primarily on the future (see, for example, *Hernehult*, cited above, §§ 75-76). This is a consequence of the distinctive perspectives attached to each respective role – the role of the Court being to assess, within the scope of the application lodged with it, whether the organs of the respondent State acted in accordance with the State's obligations under the Convention. The Court therefore also fully concurs with the emphasis placed by the Supreme Court in its decision cited above [see the judgment of the Norwegian Supreme Court of 27 March 2020, HR-2020-661-S, HR-2020-662-S and HR-2020 663-S] on the crucial importance, from the very outset, of the child welfare services, the County Social Welfare Board and, thereafter, the domestic courts, considering all the relevant requirements under Article 8 of the Convention, in order to avoid errors and shortcomings that cannot readily be repaired at a later stage.»
[31] [2005] NICA 8, at § 21.

Grand Chamber, with diametrically different positions, points to the social and political sensitivity of what Strasbourg was dealing with.

To return to the words of Lord Reed in *Unison*, the name of *Strand Lobben* lives on as shorthand for a review of the legal rules and principles applicable in childcare and adoption cases. It is a confirmation of the principles of subsidiarity and the margin of appreciation, but it is also a reminder that process cannot blind us to substance, particularly in cases involving children.

IV – Domestic violence

As my time in Strasbourg progressed, and when President, several extra-judicial speeches took as their central theme endemic and pervasive forms of violence, which are too often shielded from the glare of the law and public exposure. This is because of where the violence occurs or the feelings of fear and shame it seeks to instill.

I am of course referring to domestic and gender-based violence.

To my knowledge, there are few if any cases on the UK's Strasbourg docket concerning this issue.

However, regular headlines in this jurisdiction and in my own suggest that the investigation, prosecution, adjudication and sentencing of offences in this field remain beset by problems.[32]

There were 1,625 prosecutions under the 2021 Domestic Abuse and Civil Proceedings Act (Northern Ireland) in 2022/23, resulting in 840 convictions (51.7 per cent). This rose in 2023/24 to 2,728 prosecutions and 1,515 convictions (55.5 per cent).[33] The 2021 Act introduced a new stand-alone domestic abuse offence, as well as two child aggravators that can be attached to the offence.

Over the last two decades, starting with a case called *Opuz v. Türkiye*,[34] the Strasbourg Court has developed a rich body of case-law pursuant mainly to Articles 2, 3, 8 and 14 of the Convention, which seeks to protect and compensate individual victims and contributes to greater awareness of

[32] See the Thomas More Lecture of the Lady Chief Justice at Lincoln's Inn, November 2024, at 27-28.
[33] See https://www.irishlegal.com/articles/over-2300-convictions-under-northern-ireland-domestic-abuse-law.
[34] *Opuz v. Türkiye*, n° 33401/02, ECHR 2009.

the legal mechanisms and responses required at national level to prevent and, when necessary, combat this type of violence.[35]

The Court's work has incited and informed the leadership of the Council of Europe in this field, whether through the indefatigable work of GREVIO or the Istanbul Convention,[36] to which 39 Council of Europe States are now parties.[37]

Year on year, do we see in the cases pending in Strasbourg a positive shift in patterns of private behaviour and State action in their regard? Sadly not, or not enough.

In 2023, in cases involving Bulgaria and Georgia, the Court found violations of either Articles 2 or 3 of the Convention, combined with Article 14, against the backdrop of systemic failure by the relevant State authorities to address domestic and gender-based violence.[38]

These cases follow on from judgments against the same two States,[39] as well as other judgments against Italy and Croatia in 2022.[40]

Bulgaria, the Czech Republic, Hungary, Lithuania and Slovakia are amongst the 7 Council of Europe States which have still not ratified the Istanbul Convention. Turkïye withdrew from it; something also threatened by the previous Polish government.

The Court has recently handed down judgments highlighting the secondary victimisation of a 12-year-old orphan who had complained of sexual abuse,[41] or the Moldovan authorities' failure to protect a victim of domestic violence and ensure continued contact with her children.[42]

[35] See *Kurt v. Austria* [GC], n° 62903/15, 15 June 2021, and the authorities cited therein.
[36] Convention on preventing and combating violence against women and domestic violence (CETS No. 210). GREVIO is the Group of Experts on Action against Violence against Women and Domestic Violence.
[37] Along with ratifications by Moldova, the United Kingdom and Ukraine in 2022, as well as Latvia in 2024, the EU itself ratified the Convention in 2023..
[38] *A.E. v. Bulgaria*, n° 53891/20, 23 May 2023 and *Gaidukevich v. Georgia*, n° 38650/18, 15 June 2023.
[39] *Y and Others v. Bulgaria*, n° 9077/18, 22 March 2022, and *A and B v. Georgia*, n° 73975/16, 10 February 2022.
[40] See, for example, *M.S. v. Italy*, n° 32715/19, 7 July 2022, and *J.I. v. Croatia*, n° 35898/16, 8 September 2022.
[41] *B. v. Russia*, n° 36328/20, 7 February 2023.
[42] *Luca v. Republic of Moldova*, n° 553451/17, 17 October 2023.

The latter case is of particular interest because it highlights a recurring aspect of DV cases, namely the blocking of contact or injury of children to compound, supplement or replace direct physical abuse.[43]

In the leading case – *Kurt v. Austria* – decided in 2021, the Grand Chamber adopted a judgment which marked a qualitative step forward in the perception of and response to domestic violence from the standpoint of the Convention.[44]

The facts of the case are as tragic as they are recurrent in this field: a pattern of escalating violence, directed first at the applicant mother and which escalated into a murder-suicide, with the applicant's 8-year old child fatally injured at school by his father.

The emphasis throughout the judgment is on the need for national authorities to take due account of the particular context and dynamics, as well as the known specific features of domestic violence.

The result of the *Kurt* case is the adaptation of the (qualified) duty that the Court has derived from Article 2 for States to take adequate operational measures to protect an individual from a real and immediate risk to their life.[45]

[43] Ibid, at § 94: "The Court accepts that on a practical basis, there may indeed come a stage where it becomes futile, if not counterproductive and harmful, to attempt to force a child to conform to a situation which, for whatever reasons, he or she resists. Moreover, coercive measures against children are not desirable and must be limited in this sensitive area (see *Suur*, cited above, § 96, and *Hokkanen v. Finland*, 23 September 1994, § 58, Series A no. 299-A). However, as the positive obligation of the State to restore and facilitate contact between the applicant and her children was not one as to results to be achieved, but one as to means to be employed, the Court observes that the facts above describe a situation in which there was no attempt by the authorities to support the applicant of their own motion. The applicant was left to defend her right to maintain contact with her children by her own efforts, including by initiating court proceedings against the authorities that were meant to provide her with support. There is nothing in the case file to indicate that the authorities had any awareness of or sensitivity to the applicant's vulnerability as a victim of domestic violence (see the GREVIO standards in paragraphs 54-55 above)."

[44] *Kurt v. Austria* [GC], n° 62903/15, 15 June 2021.

[45] For the preventive operational obligation to arise, it must be established that the authorities knew or ought to have known at the relevant time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (*Kurt v. Austria [GC]*, 2021, § 158). The first limb of this test requires the authorities to immediately respond to allegations of domestic violence. The authorities must establish whether there exists a real and immediate risk to the life of one or more identified victims of domestic violence by carrying out an autonomous, proactive and comprehensive risk assessment. The reality and immediacy of the risk must be assessed taking due account of the particular context of domestic violence cases. If the outcome of the risk assessment is that there is a real and immediate risk to life, the second limb of the test - which requires the authorities to take preventive operational measures that are adequate and proportionate to the level of the risk assessed – must be met (ibid., § 190).

Where the threat to life arises in the context of domestic violence, then more specific obligations are triggered on the part of the authorities, starting with an immediate response to such an allegation or complaint.

According to the minority in the *Kurt* case, which agreed with the general principles developed, but not their application to the facts of that case:

> "Even if the authorities had not conducted a separate risk assessment for the children, they should have, at the very least, considered that domestic violence against the mother should be understood as posing a risk to the children by extension. Domestic violence should be seen as occurring within the family as a unit even if it is primarily directed at a particular family member …. Crucially, under the Istanbul Convention, any risk assessment must address systematically the risk not only for the abused spouse, but also for any affected children (see GREVIO's observations, paragraph 139 of the judgment)."[46]

In *Vieru v. the Republic of Moldova*, decided in 2024, by the time the case had reached Strasbourg, the principal victim of the domestic violence, which had been repeatedly reported to the authorities, was dead. The severity of the violence, which her two children had witnessed for most of their lives, and the (in)actions of the authorities were such that the Court refused to strike the case out despite a unilateral declaration recognising the violation alleged submitted by the respondent Government.[47]

Often in public discourse on domestic and gender-based violence one finds references to vulnerability. Yet the victims of domestic and gender-based violence are not born vulnerable. They are rendered vulnerable, generally on their journey from child to adulthood, by the imbalanced social structures into which they are born, by the law and by law-makers, and by attitudes and patterns of behaviour in their regard which are ignored, permitted or endorsed by society, including the State.

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[46] See the dissenting opinion in *Kurt*, at §§ 12-14, citing *Talpis* v. *Italy*, § 122, and *Volodina v. Russia,* § 86.

[47] *Vieru v. the Republic of Moldova*, n° 17106/18, 19 November 2024: "The present application raises serious issues of systemic deficiencies which have not already been determined by the Court in previous cases as regards the State's positive obligations in respect of domestic violence …". The *Vieru* case demonstrates exactly how a national regulatory system can fail to address a pattern of violence characterised by long-term but what the authorities treated as low-intensity physical violence and unaccounted psychological violence, which continued even after the perpetrator and the victim had divorced and were no longer sharing a residence, in spite of repeated protection orders.

If we derive one positive thing from the four chilling hours viewers spend watching *Adolescence*, it is a realization of the brutal cost, not just to women and girls, but also, albeit differently, to boys and men, of modern-day worship at the altar of certain types of masculinity.

In the cases I have referenced and the hundreds pronounced in previous years, the focus of the Strasbourg Court has been, and must remain the actions and omissions of State authorities in relation to the direct victims of DGBV.

But the silent and damaged children who have witnessed such violence should not be forgotten, when it comes to prevention, prosecution, convictions and sentencing. Even when a case like *Vieru* is not directly about children, it is time for courts to pay greater respect to their story and account for what they have suffered when society and the State have failed to step in.

In Northern Ireland, of the 2,656 cases with offences with the statutory aggravator, 1,478 resulted in a conviction in 2023/24. There were convictions in 17 cases where there was a child-related aggravator in 2023/24, with the aggravator proved in eight of them.[48] Time alone will allow you to develop a clearer picture of how this new model of legislation is working. But at least it provides for consideration of the treatment of the too often unheard.

Many of these cases are complex. This is by virtue of their nature, the occurrence of violence in the private domain and the competing rights of the accused. But the relatively simple legal question which confronts judges remains that framed by the Court in *Opuz* over 15 years ago:[49] were the applicants, young and old, accorded equal and sufficient protection before the law?

V – Legal representation

If the panorama I have presented to you thus far has been bleak, I apologise.

Let us move on toward slightly sunnier uplands.

Children are involved with the justice system in a variety of circumstances, whether it is to address family or criminal matters.

[48] See https://www.irishlegal.com/articles/over-2300-convictions-under-northern-ireland-domestic-abuse-law.
[49] *Opuz*, cited above, §§ 199-200.

Although all of the guarantees set out in the Convention regarding the conduct of proceedings apply to children, over time the Court has insisted that they must be tailored to their maturity and evolving capacities, necessitating the development of particular rules and principles to ensure child-friendly justice.

The Court takes into account the relevant international and European standards stipulated in the UNCRC, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse ("Lanzarote Convention") and the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.[50]

Depending on the specific circumstances of the case, child-friendly judicial settings and proceedings may involve the rights enshrined in Articles 3, 4, 5, 6 and/or 8 of the Convention.

The trial of 11-year-old Venables and Thompson for the murder of 2-year-old James Bulger is probably one of the first and best-known juvenile trials in this jurisdiction and beyond.[51]

As regards their fair trial complaint in Strasbourg, the Court held that a child charged with an offence should be dealt with in a manner which took full account of his age, level of maturity and intellectual and emotional capacities, and that steps should be taken to promote his ability to understand and participate in the proceedings.

When a child is charged with a serious offence attracting high levels of media and public interest, the Court considered that the general interest in the open administration of justice could be satisfied by a modified procedure providing for selected attendance rights and judicious reporting.

According to the Court, although special measures had been taken to promote the applicants' understanding of the proceedings, the formality and ritual of the court must at times have seemed

[50] *M. and M. v. Croatia*, 2015, § 146; *M.K. v. Greece*, 2018, §§ 91-93; *A and B v. Croatia*, 2019, § 112; *R.B. v. Estonia*, 2021, § 84.

[51] They were tried in public in an adult court over a three-week period. The trial was conducted with the formality of an adult trial, although certain modifications were made to the procedure in view of the defendants' age (they were seated next to social workers in a specially raised dock, with their parents and lawyers nearby, and the length of the hearings was shortened). Although massive publicity surrounded the trial, the application lodged by the applicant's counsel for a stay of the proceedings on the ground of the nature and extent of media coverage was unsuccessful. The accused were both convicted of murder and abduction, following which the judge authorised publication of their names.

incomprehensible and intimidating. There was considerable psychiatric evidence casting doubt on their ability to participate in the proceedings. In such circumstances, the fact that they were represented by experienced lawyers was not sufficient for the purposes of Article 6 § 1.[52]

In 1999, when the *V* and *T* cases were heard by the ECtHR, the latter concluded, after an examination of Council of Europe and relevant international standards, that there was no commonly accepted minimum age for criminal responsibility. I know that this is an issue with which the CLC has engaged closely and of relevance, were this issue to arise in a case nowadays, would be the heightened attention to the "vulnerability" of minors in justice systems which we see in the ECtHR's case-law since.[53]

Sadly, since that case, the number of juveniles accused of murder or manslaughter has risen dramatically, with the nature of social media, certain actors on social media, access to and the content of pornography and online violence, all cited as contributing factors. Whether at UK or EU level, it remains to be seen whether new legal instruments designed to tame the toxic effects of social media may find themselves to be the collateral damage of the new global instability.

However, criminal justice lessons have also been learned with time, as reflected, to return to the themes in *Adolescence*, not so much in the arrest via a SWAT team, but in the depiction of the role of the appropriate adult, the sensitivity and immediacy of the legal assistance provided and the psychological reporting which featured.

Real life examples of improvement can be found in the handling by the Irish authorities of the investigation and prosecution of the murder of Anna Kriegel in 2018, detailed in an *Irish Times*

[52] See, for example, *V. v. the United Kingdom*, n° 24888/94, 16 December 1999. To rectify the European Court's criticisms about the trial procedure for children in adult courts, the UK Government issued a Practice Direction in February 2000, which purported to adjust the proceedings in the crown court to accommodate the needs of children. However, it did not address the low age of criminal responsibility or the fact that children as young as 10 can be tried in an adult court. Furthermore, an unrepresentative case had a profound effect on public opinion and on government policies regarding juvenile justice. It showed the impact of media coverage of certain crimes, which fueled both public opinion and pushed the respondent Government to listen to public demands for action (See "Case Study – Bulger and the UK: the media, the public and government action", available at https://hpa2mediastudies.files.wordpress.com/2018/05/roleofstatspublicopinion3uk.doc).

[53] See, for example, in relation to Article 3 ECHR, *Bouyid v. Belgium*, a judgment which is not however without its critics.

report following the conviction,[54] and further illustrated by proceedings brought against those on social media who had breached publication restrictions during the trial.[55]

Leaving criminal justice aside, which is too vast for me to address in the time available, whilst Article 8 contains no explicit procedural requirements, the Court has held that a child must be sufficiently involved in the decision-making related to his/her family and private life.[56]

As specified in Article 12 of the UNCRC, a child who is capable of forming his or her own views has the right to express them and the right to have due weight given to those views, in accordance with his or her age and maturity. He or she has to be provided with the opportunity to be heard in any judicial and administrative proceedings affecting him or her.[57]

Consequently, any judicial or administrative proceedings affecting children's rights under Article 8 of the Convention must ensure that the child concerned is sufficiently involved.[58]

The Court has held, for example, that the involvement of the child concerned was not sufficient, thus entailing a violation of Article 8, in cases where:

- the domestic authorities had ignored the 12-year-old child's wish to live with her mother and where the child had not been heard in the custody proceedings (*M. and M. v. Croatia*, 2015, § 184);

- no guardian *ad litem* had been appointed to represent and protect a 9-year-old child's interest during proceedings in which he had never been given an opportunity to be heard in person (*C. v. Croatia*, 2020, §§ 76-77 and 79-81).

In respect of very young children, it is essential that the courts rely on an expert assessment to make an objective evaluation,[59] in the light of all the evidence available to them, whether contact with the parent should be encouraged/maintained or not.[60]

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[54] See https://www.irishtimes.com/news/crime-and-law/courts/criminal-court/ana-kriegel-murder-trial-the-complete-story-1.3929570.
[55] Recently reviewed in *Corcoran, Doherty and Rooney v. The People* (DPP) [2024] IESC 52.
[56] *M. and M. v. Croatia*, 2015, § 180.
[57] *M. and M. v. Croatia*, 2015, § 171.
[58] Ibid., § 181.
[59] *Neves Caratão Pinto v. Portugal*, 2021, § 138.
[60] *Petrov and X v. Russia*, 2018, § 108, which is to be distinguished from opinions of other actors, see §§ 109-110.

The Court has emphasized, however, that the right of a child to express his or her own views should not be interpreted as effectively giving an unconditional veto power to children without any other factors being considered and an examination being carried out to determine their best interests.[61] While the children's views must be taken into account, in certain cases concerning a custody dispute, the Court has also noted that their views were not necessarily immutable and their objections, which must be given due weight, were not necessarily sufficient to override the parents' interests, particularly in having regular contact with their child.[62] It was thus important to strike a proper balance between the respective interests of the parents and children in the decision-making process.[63]

As noted in the Moldovan case I mentioned on domestic violence and blocked access to children in the custody of the abusive parent, this is particularly important in such cases.[64]

This recognition of children as the subjects of rights is a long way from the dissent in *Tyrer* and the lack of autonomy attributed to them therein.

As regards the Court's own procedures, questions arise regarding who can or should represent the rights of children before the Strasbourg court. In the *Strand Lobben* case, for example, the Italian government had argued that the interests of the applicant birth mother and the adopted child did not necessarily align. It considered that if the Court wanted to ensure that X's interests were looked after, it could indicate to the respondent Government that counsel should be appointed for him.[65]

In *A and B v. Croatia*, this was done. That Chamber case concerned a complaint lodged by the mother and child that the domestic authorities had failed to provide a proper response to the allegations of sexual abuse of the child by her father. However, there were countervailing claims of physical abuse by the mother. The Chamber considered that the contentious nature of the parental relationship and a potential conflict of interest between the applicants, meant that a lawyer should be appointed to submit observations on behalf of the second applicant child so that her

[61] *C. v. Finland*, 2006, §§ 57-59; *I.S. v. Greece*, 2023, § 94.
[62] *Raw and Others v. France*, 2013, § 94; *I.S. v. Greece*, 2023, § 94.
[63] *C. v. Finland*, 2006, § 59.
[64] *Luca*, cited above, § 94.
[65] *Strand Lobben*, cited above, § 184.

rights and interests would be duly presented and taken into account.[66] But the case is worth citing precisely because it is so unusual in Strasbourg terms.

The ECtHR Rules of Court do not provide for clear and accessible rules in this regard such that the Strasbourg court itself would seem to have some homework to do.[67] It would not be desirable if the relevant considerations and decisions were left to a case-by-case basis, depending on the rapporteur, the national judge or the sensibilities of a given judicial formation.

VI - Future generations

My fifth and last category of cases focuses on one aspect of one case, decided just over a year ago.

As many of you will know, courts at national, European and international level, have been seised in recent years by applicants concerned about the present and future consequences of what they claim is the failure of States to mitigate the effects of climate change.

Whether one likes it or not – and, as I'll explain, some Convention critics, are not well pleased - climate change litigation is now a disruptive reality as regards European law and established constitutional orders.

These cases challenge existing mechanisms of and approaches to judicial review, requiring us to reflect on a range of different questions, including the role, if any, courts should play in enforcing climate change commitments, the grounds of review which applicants can ask courts to consider in response to public and private action and inaction, and procedural requirements (such as

[66] *A and B v. Croatia*, n° 7144/15, 20 June 2019. The reasons for the appointment of separate counsel for the child are discussed in § 18 of the concurring opinion of Judges Koskelo, Eicke and Ilievski: "… this case provides a stark example of the difficulties this Court frequently finds itself in cases, usually involving the break-up of a family, in which the interests of one parent and the child are being represented together, by the same lawyer, no doubt on the instructions from the adult applicant. Where, as the Court has rightly held, in any proceedings involving children their best interest should be a primary consideration, the absence of separate representation of the child (and its best interest) makes it extremely difficult if not impossible for this Court to ascertain in any meaningful way what the best interests of the child, in fact, are or were. In highly stressful situations such as e.g. a family break-up it would certainly not be right for this Court to assume that the parent(s) can or should always be the final arbiter of what is in the child's best interest; a conflict of interest will frequently arise (see, in a different context, *Charles Gard and Others v. United Kingdom* (dec), no. 39793/17, § 67, 27 June 2017)."

[67] Ibid, § 20 of the concurring opinion, pointing out that although the Court contacted the Croatian Bar directly in that case, the more appropriate conduit, given also the provisions of domestic law, may counterintuitively have been the respondent Government.

standing or causation etc) which arise in climate change cases and which may differ in part from those developed previously in environmental cases.[68]

It's important to remember that not all climate change cases are human rights cases and that it was national judges – in the Netherlands, Germany, Ireland, France and Belgium, to name but a few[69] - and not the ECtHR which first debated the Convention as part of their national legal response in climate change cases. The early Dutch and German judgments were ground-breaking, as legislative provisions presently in force were identified as the source of impermissible State interference with the enjoyment of fundamental rights in the future.

In 2024, in three cases lodged against Switzerland, France and Portugal (plus 32 other States), the ECtHR had to grapple with its first climate change cases. The essence of the complaints in all three cases was that State authorities had failed to respond adequately to combat the effects of climate change. The applicants – senior Swiss citizens, an environmental association, a former French mayor and a group of Portuguese children – framed their complaints with reference to Articles 2, 8 and 6 of the Convention, which relate to the right to life, to privacy and home life and to access to court.

I won't go into the nuts and bolts of all three rulings. Two of the cases were deemed inadmissible for lack of exhaustion and lack of extra-territorial jurisdiction; the Portuguese minors having introduced their case against their State of origin and residence but also against 32 other States.

[68] See, variously, M. Accetto, "Judicial Review and Climate Change: A Perspective from Slovenia" (2023) 43 *HRLJ* 361 – 365; G. Winter, "Climate Protection before the European Court of Human Rights: The *KlimaSeniorinnen* and *Duarte Agostinho* Cases in Perspective" (2024) 84 ZaöRV 467 – 498, and Maxim Bönnemann & Maria Antonia Tigre (eds.), *The Transformation of European Climate Litigation,* 2024, Verfassungsbooks.

[69] See, for example, *Urgenda Foundation v. State of the Netherlands*, NL:HR:2019:2007. In this case, the Dutch Supreme Court found that the applicant environmental association had standing to represent the interests of the current generation of Dutch nationals subject to the Dutch State's jurisdiction. It further held, on the basis of the available scientific evidence, that a real threat of dangerous climate change exists and, referring to Articles 2 and 8 ECHR, that the State is required to take appropriate steps to safeguard lives and the living environment even if the established risk will only materialise a few decades from now. See also *Neubauer and Others v. Federal Republic of Germany*, Order of the First Senate of 24 March 2021. In that case the German Federal Constitutional Court based itself on different grounds, namely Article 20a of the Basic Law, whereby the State has to be "mindful also of its responsibility towards future generations". The German FCC did not find that the Federal Climate Change Act of 2019 had violated the Article 20a constitutional guarantee or that the legislation was inherently inadequate. However, the 2019 Act was found to offload a considerable part of the carbon reduction budget after 2030. The FCC held that it was impermissible to shift the burden of societal transformation, required to counteract climate change, onto future generations in such a disproportionate manner.

In the Swiss case, the Court found the applicant environmental association's complaints admissible, developing its case-law on the standing of associations in the climate change context. It held that Switzerland had violated their right of access to Court, not having even examined if they had standing to represent the interests of their members.

The Court also found that Article 8 encompasses a right to effective protection by the State authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life. Switzerland was found to have failed to comply with its positive obligations under the Convention, with critical gaps in establishing the relevant domestic regulatory framework, including through a national carbon budget or national GHG emissions limitations. It had also failed to meet its past GHG emission reduction targets.

The judgment was hailed by many and denounced by others.

Lord Sumption regarded it as a good example of what he calls Strasbourg "mission creep" (which he attributes to the living instrument doctrine identified in *Tyrer* almost 50 years ago). He regarded the Swiss judgment as being fundamentally anti-democratic[70] and, in response to those who support the Court's work, citing previous, good decisions as evidence, he argued that:

> "This is actually a little like saying that Mussolini was fine because he made the trains run on time."[71]

I received some extraordinary correspondence when a Strasbourg judge and President. One letter writer suggested that I would better spend my time, and what he considered my limited skills, waitressing in a café in the West of Ireland. But I must admit that I never expected the oeuvre of the Court in which I served to be compared to that of Il Duce!

[70] The Court spent a good deal of time in its preliminary observations in the *Klima* explaining how it had to exercise its judicial powers with caution so as to respect the balance in the Convention system and domestically between the executive and the judiciary. That these observations did not suffice to calm the critics does not however remove the fact that the judgment was carefully framed with the latter also in mind.
[71] See Lord Sumption on the Strasbourg Court on Law Pod UK, 1 Crown Office Row, 24 February 2025.

Leaving extravagant comparisons aside, I refer to these climate change cases today for a reason, namely the identification by the Strasbourg court, for the first time, of the relevance in some contexts of inter-generational burden-sharing.

This had formed the central plank of the reasoning of the German FCC in its judgment in 2021 and also featured in the judgment of the Belgium Court of Appeal.[72]

In the Swiss case, *Klima*, the Court recognised that future generations are likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change. Furthermore, it emphasised that:

> "[T]he intergenerational perspective underscores the risk inherent in the relevant political decision-making processes, namely that short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for sustainable policy-making, rendering that risk particularly serious and adding justification for the possibility of judicial review".[73]

However, it is important to stress that intergenerational burden sharing formed part of the Court's reasoning in relation to its approach to standing and to the nature and scope of the positive obligations it identified pursuant to Article 8 ECHR. Intergenerational burden sharing or equity did not constitute a self-standing reason for the creation of new rights for persons not before the Court or not even alive.[74] And, it should be added, the climate change cases are a particularly good

[72] See the Brussels Court of Appeal in *VZW Klimaatzaak v. the Kingdom of Belgium and Others*, citing O De Schutter, "Changement climatique et droits humains : l'affaire *Urgenda* » (2020) *RTDH* 567-608, at 604-605 (unofficial translation): "[…] the issue of climate change is, arguably par excellence, one that traditional political mechanisms are ill-equipped to handle: the impacts of the accumulation of GHGs in the atmosphere are, for the most part, remote, both in time and space; because of the considerable time lag, of several decades, between emissions and their impacts, the political system, which often operates in the short term according to the immediate preoccupations of the electorate, is not in a position to respond adequately to the challenge; finally, powerful and well-organized economic players, capable of blocking political decision-making, tend to oppose any significant change in direction that the situation calls for".

[73] *Klima*, cited above, § 420.

[74] See, for a comparative analysis of if, and how, intergenerational burden-sharing has featured in national judicial reasoning, S. Djemni-Wagner and V. Vanneau, *Droit(s) des générations futures*, 2023, Institut des Études et de la Recherche sur le Droit et la Justice.

illustration, when read as a trilogy, of strict subsidiarity and the flexible margin of appreciation in action.

Much like some of the previous cases discussed, *Klima* is an example of the Court seeking to hear the voices of minors and ensure that their interests are protected.

VII - Conclusions

This short tour of distinct areas of Convention case-law has sought to highlight the road travelled to ensure that the ECHR, which was not framed with reference to children or, as we saw in the dissent in *Tyrer*, with them in mind, accommodates the power of children's rights alongside other interests in Europe's human rights machinery.

We will perhaps, during the Q & A, explore other areas of interest.

Before concluding, however, and given the turbulent times in which we are living - turbulent times which the ECtHR was already witness to throughout the near decade during which I served - allow me to address a more general question of which one should not tire, namely the purpose and value of the Convention system, which is based on shared responsibilities, and in which the national authorities here present play the fundamental role.

As the Lady Chief Justice eloquently explained in her Thomas More Lecture at Lincoln's Inn in November 2024:

> "[…] human rights have formed the foundation of Northern Ireland's legal system, playing a crucial role during the peace process and continuing to influence today as a key tool in advancing social justice across this jurisdiction.[75]

[75] Lady Chief Justice Keegan, "Human Rights Protections: A View from Northern Ireland", Lincoln's Inn, 20th November 2024.

It is up to you where you prefer to locate their origin and effective core – the Magna Carta, the common law or the ECHR itself. From a Convention perspective, what is relevant is that rights and freedoms are *effectively* protected. The legal foundation highlighted as the basis for their protection is secondary it seems to me.

In the United Kingdom, the value of the ECHR has long been debated, often vociferously denied and regularly chosen by politicians as a subject thought to attract critical voter support.

By referring to the latter my intention is not to trespass into the political domain. However, given that I took Presidential office in the heat of the debate on the Rwanda interim measure and left two days before a UK Parliamentary election in July 2024, I think I can speak on the record of the political heat directed at judges when there is opposition to what they do, how they do it and the authority they exercise when they act.

What independent judges do, as explained by Lord Bingham many years ago, is "[…] interpret and apply the law", which, as he reminded us, is "[…] universally recognized as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself".[76]

Of course, in Northern Ireland, as in the State from whence I come, the role which human rights have played in the shaping of the modern democratic State and the central role of the ECHR in the Good Friday Agreement and constitutional settlements North and South which resulted therefrom, sets both apart.

As the Lady Chief Justice also emphasized in the speech just referenced, that Agreement provided both human rights related obligations and dedicated mechanisms to ensure compliance with human rights standards.

When explaining the value of the Convention I have in the past referenced the UK influence during its drafting, which sought both precision in how the rights were to be framed and symmetry between Convention rights and those already reflected in UK common law. I've also cited the closer alignment between Strasbourg and the UK domestic courts in the application of the Convention brought about via the 1998 Human Rights Act. This has undoubtedly resulted in a

[76] *A. v. the Home Secretary* [2005] 2 AC 68.

reduction in the number of cases brought against the UK but also in the number and nature of any violations found. The UK is now the third lowest State, behind Germany and Ireland, in terms of the number of applications pending per 10,000 inhabitants.

Beyond the seminal cases in which the UK featured as a respondent State, its influence, whether in terms of domestic judgments cited and relied on or interventions by the UK as a third-party intervener, should also be mentioned.[77]

The brittleness at times of the domestic UK debate to which I have just referred thus seems – at least from an Irish common law and continental perspective - to entirely overlook the effective influence and engagement of the UK with the Strasbourg Court over the years and of the tremendous influence which UK judges have had, through their judgments and their extra-judicial pronouncements.

Lord Kerr's judgment in *AR* predated the Strasbourg Grand Chamber judgment by many years and it is striking for its mastery of Convention case-law and principles, as well as for its downright humanity.

But for anyone born on this island – not least someone whose maternal roots lie in Ballycastle, the Glens and Glenshesk - the value of the Convention is also easily explained in terms of its fundamental contribution to peace, prosperity and at least of degrees of historic reconciliation across and in certain parts of the Convention legal space.

To the critics I always say, I agree; the Strasbourg Court should persevere and try to be rigorously better in its reasoning and ever balanced in its approach.

But I would also ask them to look within and beyond Europe's frontiers and shores and reflect on a world where the checks and balances of even venerable democracies can be easily and rapidly

[77] See, for example, *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, §§ 46, 102, 122, 22 October 2018, citing *R (Hicks) v. Commissioner of Police* [2017] UKSC 9, or the reference in *Y. v. France*, no. 76888/17, 31 January 2023 to *R (on the application of Elan-Cane) v. Secretary of State for the Home Department* [2021] UKSC 56.

dismantled, where violence begets violence (with women and children often the primary victims), and where we see how it can be met, when international law is set to nought, by impunity.