Cambridge Yearbook of European Legal Studies (2023), **25**, 1–18
doi:10.1017/cel.2024.1

ORATION

Why the European Convention on Human Rights Still Matters

Síofra O'Leary*

President of the European Court of Human Rights.
Email: Siofra.Oleary@echr.coe.int

I. Introduction

It is an honour to deliver the 25th Mackenzie-Stuart lecture and to pay tribute to a Scottish advocate appointed as the United Kingdom's first judge at what is now the Court of Justice of the European Union ('CJEU').

While I never met Lord Mackenzie Stuart, his remarkable contribution to the European Court, which he went on to preside, is partly captured in the writings of the late Italian judge, Federico Mancini. Explaining the impact on the Luxembourg court of the arrival of judges from common law Member States, Mancini wrote:

> Their most conspicuous contribution concerns the style and the format of the hearings. The typical advocate in continental Europe is accustomed to put on his robe, make his submissions—would-be Cartesian in France, ornate in Italy, ponderous in Germany, entangled in the Netherlands, artful in Greece—and bid adieu.
>
> If a member of the bench dares to question, let alone interrupt him, he is at a loss, coughs, stares at the ceiling and grumbles out a usually irrelevant answer. Some go so far as to resent these judicial interferences, as they would call them, and make no effort to conceal their annoyance.
>
> The advent of the two insular Judges put an end to such habits. Their colleagues loved their refusal to accept listlessly the kind of assistance which the lawyers were prepared to give and started to act accordingly.[1]

If the two European courts have been heavily and positively influenced by common law judicial practices and thinking, as in my consistent experience for almost 30 years they have, then this is in no small part down to the influence of judicial pioneers like Lord Mackenzie Stuart.

The principal reason for the pleasure I have in dedicating a lecture to the honourable judge is closely related to the work for over 70 years of the other European court on which I now serve and whose contribution I will address this evening. It lies in the young Mackenzie Stuart's experience of Europe during the Second World War and the impact of that experience on his approach to multilateralism and integration through law.

Concluding his sixteen-year tenure in Luxembourg, he recalled the indelible effect of seeing the ashes of the Ruhr in Spring 1945:

*This paper was delivered as The Centre for European Legal Studies' Mackenzie Stuart Lecture on 30 November 2023 in the Faculty of Law at the University of Cambridge.

[1]Judge GF Mancini, *Democracy & Constitutionalism in the European Union* (Hart Publishing, 2000), p 181.

> In creating the new climate, which today we all accept as if it had never been otherwise, the Court has played an essential, indeed a pivotal role. It has been the greatest privilege to participate in that great adventure and, to use the words of the Schumann Declaration of 1953, to see the European construction taking shape.

Since the Luxembourg and Strasbourg courts represent the judicial backbone of European multilateralism—a multilateralism, which is now, in some places, bitterly contested—we should regret the passing of that generation of judges which directly lived the events from which the Council of Europe, the EU and these two courts were born. This evening, we gather to honour their European legal legacy.

Finally, as a former associate director of CELS and a fellow of Emmanuel College, I am delighted to return to a Faculty which I joined in the mid-1990s. If my Cambridge stay proved short-lived, it was simply because in European law I had found my calling. It is also a pleasure to see Professor Alan Dashwood here this evening, who welcomed me so warmly to Cambridge and CELS at the time.

Having served both European courts, in different roles, I enjoy quite a solid basis to address the topic of this evening's lecture, namely why the European Convention on Human Rights ('ECHR') still matters.

II. Some Preliminary Observations on What the Lecture Can and Will Not Address

Reviewing the topics which have been the subject of the 24 preceding lectures I am struck by the fact that only one—human rights—has been recurrent.

In 2008 and 2018, Jack Straw and Dominic Grieve, respectively, addressed questions relating to the means and manner of the protection of human rights in the United Kingdom. Both spoke in their capacity as members of Parliament, and both tackled the contested nature of such rights in UK political discourse.

As a sitting judge, I do not enjoy the freedom of such speakers. I am also sensitive to the fact that I am delivering this lecture in the United Kingdom at a particular point in time.

The consequences of Brexit are now embedded in law. Parliamentary attention has moved elsewhere. The original February date for this lecture, postponed due to strike action, was against the backdrop of the then proposed legislation to replace the Human Rights Act. As fate would have it, I now speak to you a few weeks after the UK Supreme Court delivered its judgment on government policy to relocate asylum seekers to Rwanda[2] and with proposals to leave the Convention actively discussed in certain circles.

Let me stress that serving judges do not comment on matters of government or parliamentary policy, still less judges serving on international courts.

There is no call for me in any event to engage with previous domestic legislative proposals to alter your human rights architecture. Those tabled were the subject of lengthy and careful discussion amongst domestic actors, including several former judges such as Lords Mance,[3] Carnworth,[4] Dyson,[5] Gross,[6] and multiple civil society members. They were ultimately withdrawn.

[2] *R (on the application of AAA (Syria) and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department* [2023] UKSC 42, 15 November 2023.

[3] See, for example, Lord Mance in 'The Protection of Rights: This Way, That Way, Forwards, Backwards' (2022 Thomas More lecture, Lincoln's Inn, in which he regarded the Human Rights Act as 'a generally sound system' and expressed concern that the proposed Bill of Rights would 'change this country's relationship with the ECHR and with the ECtHR in particular' and 'risk undermining what used to be the accepted—and successful object of the HRA, to bring rights home'.

[4] Lord Carnworth, 'Human Rights Act Reform: Is It Time for a New British Bill of Rights?' (Centre for Public Law, University of Cambridge, 9 February 2022) https://constitutionallawmatters.org/2022/02/lord-carnwath-lecture-on-human-rights-act-reform-is-it-time-for-a-new-british-bill-of-rights/.

[5] Lord Dyson, 'Human Rights Act Reform: A Dangerous or Welcome Change?' (University of Leeds, 16 November 2022).

[6] Lord Gross, 'The Independent Human Right Act Review: Whether the HRA Is Working Effectively' (October 2022, Public Law Project Annual Conference) https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=

Equally, the Convention compliance of any legislative changes adopted and now in force is not something which falls to me to discuss this evening in an academic setting. Such questions, if and when they arise, will do so in concrete cases lodged in Strasbourg. That would of course only happen after the exhaustion of effective domestic remedies. Furthermore, any examination would not be in the abstract but would only occur in relation to the way in which such changes affect an alleged victim or group of victims, and against the backdrop of extensive Strasbourg case law.

Yet it is inevitable that some of what I say may be assessed in the light of your ongoing domestic debate; a debate, as the Straw and Grieve speeches remind us, that has been running in different forms for near on two decades.

As such, I consider it useful to preface my core remarks with a brief reference to key factors which influence a Strasbourg judge's perspective on the UK's relationship with the Convention and the Court I serve.

That relationship can often seem fragile, even brittle. This is perhaps influenced by the repeated and varying moves to adapt or alter what I just referred to—your domestic human rights architecture—and, more importantly, by the grounds relied on for doing so.

Having been a member of the panel of Strasbourg judges interviewed by Lord Gross as part of the Independent Review of the Human Rights Act,[7] I think the best place for me to turn in my preliminary remarks is to concrete evidence which reflects the nature of the relationship seen from Strasbourg.

I am certainly not the first person in this setting, and will not be the last, to highlight the central role played by the UK in the drafting of the Convention, in particular through the UK section of the European Movement and the work of David Maxwell Fyfe, later Lord Kilmuir.

The Convention was, as you know, conceived of as an early warning system to combat the first signs of totalitarianism and its signatories, with the UK in the fore, expressed their commitment to common European values: democracy, respect for human rights and freedoms and the rule of law.

UK influence sought both precision in how the rights were to be framed and symmetry between Convention rights and those already reflected in UK common law. The UK was one of the first States to sign the Convention, on the day it was adopted, and was the first state to ratify it. Its influence has been manifest ever since.

Over the last two decades the Human Rights Act has led to a closer alignment between Strasbourg and the UK domestic courts in the application of the rights and freedoms the subject of the Convention. This has undoubtedly resulted in a reduction in the number of cases brought against the UK before the Strasbourg court but also in the number and nature of any violations found.

If we still celebrate today the Convention principles established in some of the early seminal judgments of the Court—to which I will return shortly—we cannot forget the much higher case and violation count throughout those first decades of the UK's adherence to the Convention. This was due to the absence of a tailored mechanism for violations of human rights to be remedied within the domestic legal system.

Those decades also put paid to the idea, mistakenly nurtured by some of the drafters and signatories, that the Convention was for *other* States and not a matter of domestic concern; respect for human rights being considered beyond reproach on the home front.

In 2023, the Court decided 176 applications lodged against the United Kingdom. It declared inadmissible or struck out 172 applications.

rja&uact=8&ved=2ahUKEwi4vr6jgdT8AhXYh_0HHTaFBsAQFnoECBcQAQ&url=https%3A%2F%2Fpublicclawproject.org.uk% 2Fcontent%2Fuploads%2F2022%2F10%2Fihrar-plp-speech-oct22.docx&usg=AOvVaw2XAPKgY4DU7OrJD1cjsonp.

[7]The Independent Human Rights Act Review is available at https://www.gov.uk/guidance/independent-human-rights-act-review. The ECtHR also engaged with the JCHR at their request.

Looking at our statistics for allocated applications by population, the UK now ranks as the lowest among the 46 member States, at 0.03 applications per 10,000 inhabitants. Only Ireland and Germany come close at 0.04 and 0.05 respectively.

Beyond the seminal cases in which the UK featured as a respondent State, your 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.

The most commonly cited recent example of the former is the reliance in the Grand Chamber judgment in *SV and A v Denmark*,[8] which concerned Article 5 and preventive detention, on the reasoning of the UK Supreme Court ('UKSC') in *R (Hicks) v Commissioner of Police*.[9] In other cases the influence may be less obvious but is nevertheless present. See also the reference to the judgment of the Supreme Court in *Elan Cane* in *Y v France* from January this year, on whether Article 8 entails a positive obligation to recognise a third, neutral, gender.[10] A Chamber of seven judges found no violation in the French case, in the absence of a European consensus and given the margin of appreciation enjoyed by the respondent State.

As regards the UK's active participation in Strasbourg proceedings as a third-party intervener I refer you, by way of example, to its submissions, alongside Ireland, in the first request for an advisory opinion under Protocol No 16 in a case on surrogacy (despite neither having ratified the Protocol). See also its written and oral interventions in another GC case, *MN and Others v Belgium*, in which the applicants challenged unsuccessfully, relying on Article 3, the refusal by an embassy in a non-Member State to issue a humanitarian visa.[11] In *Banković*, the core of which has remained at the heart of the Court's interpretation of Article 1 jurisdiction, the oral submissions by the UK were made on behalf of all the respondent States.[12] More recently in *Duarte Agostinho*, in which the applicants are challenging State omissions in relation to the need to combat climate change, the 33 respondent States coordinated their pleadings with a KC leading the oral submissions.[13]

The brittleness at times of the domestic 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.

Based on the incontrovertible evidence at our disposal, our submissions to the Gross inquiry were thus to the effect that the Human Rights Act, from a Strasbourg perspective, appeared fit for purpose. It has done, and continues to do, a very good job of embedding the Convention into the domestic legal framework and strengthening the culture of human rights in the UK.

UK domestic courts engage—often rigorously and critically—with Convention principles, speak the language of the Convention and seek to apply those principles faithfully at domestic level.[14]

Furthermore, as we saw in the recent Rwanda judgment, in relation to a given legal question, the Convention may be only one of several international legal instruments to which a State has sovereignly subscribed. In addition, the obligations which it contains may, more often than not, be reflected in statute and even the common law. In short, the judgments issued by the international court which I serve, are not the main or only reason for decisions which influence how government policy must be developed or implemented. As someone familiar with EU law, it is also striking what

[8]*S, V and A v Denmark* [GC], nos 35553/12 and 2 others, paras 46, 102, 122, 22 October 2018.

[9][2017] UKSC 9.

[10]See *Y v France*, no 76888/17, 31 January 2023; *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56.

[11]*M N and Others v Belgium* [GC], no 3599/18, paras 86–90, 5 March 2020.

[12]*Banković and Others v Belgium and Others* (Dec) [GC], no 52207/99, para 3, ECHR 2001-XII.

[13]*Duarte Agostinho and Others v Portugal and 32 Others*, no 39371/20.

[14]For two recent examples, see the UKHC on whether disciplinary sanctions imposed on an NHS surgeon for comments made in relation to the COVID-19 pandemic breached Article 10 (*Adil v GMC* [2023] EWHC 797 (Admin)) and the UKSC in *R ((AAA) Syria and Ors) v Secretary of State for the Home Department* [2023] UKSC 42).

little public awareness there is of the causal link between EU exit and the absence of return mechanisms in relation to the EU Member States from whence many migrants arrive.[15]

The level of embeddedness of the Convention in UK law is reflected in how the Strasbourg Court responds in terms of the principle of subsidiarity and the margin of appreciation. In a leading judgment on the expulsion of a non-national long-term resident convicted of serious crime, *Ndidi v the United Kingdom*, the Court emphasised that:

> The requirement for 'European supervision' does not mean that in determining whether an impugned measure struck a fair balance between the relevant interests, it is necessarily the Court's task to conduct the Article 8 proportionality assessment afresh. On the contrary, in Article 8 cases [it] has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities.[16]

The *Ndidi* judgment is not an isolated one. It illustrates both the well-established dialogic relationship which has been established between the UK courts and the European Court in Strasbourg over the years and the location of the primary responsibility for compliance with Convention obligations as lying with national authorities.

Your domestic debate and events in Europe more generally do however highlight why a reminder of the continuing added value of the European Convention seems timely.

As regards the general context, in a speech delivered last year, the Chief Justice of Ireland commented that: 'the post-war model of judicial protection of human rights is under more challenge today in more significant ways and in more locations than at any time since 1945'.[17]

Strasbourg judges know, from experience, that the post-war model has never really gone unchallenged—and in some quarters may never have been fully accepted. However, it does feel as if we are at a water-shed moment.

I will concentrate on four broad themes as an illustration of why the European Convention really does still matter.

III. The Convention as an Instrument of Peace and Stability in Europe

The first theme—which focuses on the Convention as an instrument of peace and stability in Europe—is illustrated by the tragic events which have unfolded since 24 February 2022 and the new geopolitical situation in which we now find ourselves in Europe and beyond.

The invasion of Ukraine by, at that time, a fellow Council of Europe Member State, has led to the mass displacement of Ukraine's people, reconfigured Europe's legal and political borders and altered dramatically its security architecture.

Following the decision in March last year that Russian membership of the Council of Europe had ceased, the Court explained that it remains competent, by virtue of the 'residual' jurisdiction conferred by Article 58(2)–(3) of the Convention, to deal with applications directed against the Russian Federation.[18] This jurisdiction is restricted to acts and omissions capable of constituting a violation

[15]See further C Briddick and C Costello, 'Supreme Judgecraft' (*VerfBlog*, 20 November 2023).

[16]*Ndidi v the United Kingdom*, no 41215/14, para 76, 14 September 2017.

[17]See Chief Justice D O'Donnell, 'A Court and the World' *The Making (and Re-Making) of Public Law Conference*, UCD, 6–8 July 2022.

[18]Resolution CM/Res(2022)3 on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe (Adopted by the Committee of Ministers on 23 March 2022 at the 1429*bis* meeting

of the Convention if they occurred prior to 16 September 2022. The latter is the date on which the Russian Federation ceased to be bound by the obligations it had assumed under the Convention and its Protocols.

The Court has handed down many decisions and judgments in applications directed against the Russian Federation in the intervening months.[19] Many more will follow.

However, for the purposes of this evening's lecture, one of the most expressive is the admissibility decision delivered in open court in January this year in the case of *Ukraine and the Netherlands v Russia*.[20] The case concerns the invasion of Eastern Ukraine in 2014 and the downing of Malaysia Airlines Flight MH17 in July that same year, with the loss of almost 300 lives.

In a series of important preliminary observations in the decision, the Court recalled that:

> the purpose … in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and 'to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law (see the Commission's decision on the admissibility of Application no 788/60, *Austria v Italy*, 11 January 1961, Yearbook, vol 4, p 18).
>
> It follows that when a High Contracting Party or Parties refer an alleged breach of the Convention to the Court under Article 33 of the Convention, they are not to be regarded as exercising a right of action for the purpose of enforcing their own rights, but rather as bringing before the Court 'an alleged violation of the public order of Europe' (ibid, p 20. See also *France, Norway, Denmark, Sweden and the Netherlands v Turkey*, nos 9940/82, 9942/82, 9944/82, 9941/82 and 9943/82, Commission Decision of 6 December 1983, Decisions and Reports 35, p 143 at p 169)'.

As you know, several international courts and bodies are playing a role in addressing the Russian Federation's actions in Ukraine.[21] But for now, the Strasbourg Court is the only international court engaged at the merits stage and the only court charged with examining alleged violations of human rights.

---

of the Ministers' Deputies). See also Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention (22 March 2022).

[19]See, for examples of Grand Chamber and Chamber judgments, *Fedotova and Others v Russia* [GC], nos 40792/10 and 2 others, 17 January 2023; *Navalnyy v Russia (no 3)*, no 36418/20, 6 June 2023; *Glukhin v Russia*, no 11519/20, 4 July 2023.

[20]*Ukraine and the Netherlands v Russia* (Dec) [GC], nos 8019/16 and 2 others, 30 November 2022.

[21]The International Court of Justice is examining two cases against Russia. Ukraine filed a first case in January 2017 concerning the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)*. The public hearings on the merits of the case concluded on 14 June 2023. Following the Russian invasion of Ukraine, a second case was filed concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation: 32 States Intervening)*. The public hearings on the preliminary objections raised by the Russian Federation concluded on 27 September 2023. The International Criminal Court Prosecutor has opened an investigation into the situation in Ukraine on the basis of the referrals by a number of member States. In March 2023, the ICC established a country office in Ukraine and issued arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova for the unlawful deportation and transfer of Ukrainian children from occupied areas of Ukraine to the Russian Federation. However, by virtue of Article 15*bis*(5) of the Rome Statute in respect of a State that is not a party to this Statute, such as Russia, the ICC cannot exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory. The UN Human Rights Council has established the Independent International Commission of Inquiry on Ukraine whose task is to 'investigate all alleged violations and abuses of human rights and violations of international humanitarian law, and related crimes in the context of the aggression against Ukraine by the Russian Federation'. Following several visits to Ukraine, the Commission has found continued war crimes and human rights violations gravely impacting civilians.

At a time when Europe is once again witnessing armed conflict and devastation, it is thus the Convention's vocation as an instrument of peace which resonates first and foremost. And at the heart of the Court's role in respect of both conflict prevention and conflict resolution lies the inter-State application.

Since 1953, 44 inter-State applications have been allocated to a judicial formation. Compared to the total number of allocated applications over the same period (over 1.1 million), one can say that recourse to Article 33 remains extremely rare.

However, the last decade has seen a marked increase in the number of inter-State applications being brought to the Court, with 13 such cases and 9,600 related individual applications now pending. This is, unfortunately, the result of increased conflict within the European legal space.

But these figures also suggest a confidence in the role that can be played by the European Convention in responding to disputes that arise at inter-State level within the Council of Europe.

Both inter-State judgments and those in individual cases contribute to the establishment of historical and factual truth. They respond to our societies' need to know what happened. In addition, they can act as a basis for further judicial proceedings, as well as restitution mechanisms such as the Register of Damage established by Council of Europe States, including the United Kingdom, at the 4th Summit in Reykjavik earlier this year.[22]

The Convention has sought and seeks to create a climate in which the escalation of conflict becomes less likely. In the words of Luzius Wildhaber, one of my predecessors:

> The ECHR is the product of idealistic realism. … It is anchored in the belief that democratic regimes, respectful of fundamental rights do not go to war with one another, and that it can therefore no longer be an issue of purely domestic jurisdiction whether democracies relapse into dictatorships.[23]

Where conflict does occur, States and individuals, victims of conflicts, can turn to the Court for reparation and a public statement of a violation of international law.

This is a mechanism whose creation the United Kingdom inspired and whose functioning it has largely endorsed for over seventy years. It is a mechanism which provided for a hearing in *Ukraine v Russia (Crimea)* in December 2023 and will provide for a further hearing in *Ukraine and the Netherlands v Russia* in 2024, covering events in Eastern Ukraine from 2014 to 2022. It is also a protection mechanism which allows 26 Council of Europe States, including the UK, to intervene in the latter case in support of accountability for violations of international law and in defence of the 'common public order of the free democracies of Europe'.

IV. The Convention and Access to Justice

The second theme illustrative of the Convention's enduring importance is access to justice.

In its landmark judgment in *Golder v the United Kingdom*, decided in 1975, the Strasbourg Court held that Article 6 of the Convention guarantees a right of access to court.[24]

Although that provision did not expressly provide for such a right, the Court held that the rights to fair, public, and expeditious proceedings, which it does guarantee, would have no value if there was no access to courts and therefore no such proceedings to begin with.

In *Airey v Ireland* the Court held, four years later in 1979, that Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for

[22]Council of Europe, 'Reykjavík Declaration Appendix I: Declaration in Support of the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine', 17 May 2023.

[23]L Wildhaber, 'Rethinking the European Court of Human Rights' in J Christoffersen and M Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011).

[24]*Golder v the United Kingdom*, Series A, no 18, 21 February 1975.

effective access to court.[25] This may be the case either because legal representation is rendered compulsory or because of the complexity of the procedure or the case. It was not, the Court stressed, Strasbourg's function to indicate, let alone dictate, which measures should be taken to comply with the State's positive obligations. The institution of a legal aid scheme was mentioned as one possibility; but simplification and overhaul of procedure was also mentioned as another.

These cases have never lost their relevance. They have been relied on in multiple cases involving different Council of Europe States to find violations of Article 6.[26]

And the difficulties which the Strasbourg court highlighted in the 1970s continue to resonate in this and other jurisdictions to this day. *Coventry v The United Kingdom* is a recent and eloquent example.[27]

We know that there are cases where individuals have suffered wrongdoing, but they are unable to effectively assert their rights because of the cost of going to court. In this jurisdiction Lord Reed expressed concerns about such developments in the unanimous judgment delivered in 2017 in the *UNISON* case:[28]

> Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.
>
> Access to the courts is not, therefore, of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance ….
>
> 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.[29]

It is true that Lord Reed emphasised, at the time, that access to justice has long been deeply embedded in UK constitutional law[30] and, extra-judicially, that the Convention only played a supporting role in the *UNISON* case.[31]

However, in a Convention system based on shared responsibilities, it is precisely the Convention's vocation to play a subsidiary role. The important point is the guarantee of effective access to court, not the preferred legal basis with reference to which that access is secured.

What the 1979 *Airey* judgment stressed was the positive obligation on High Contracting Parties to provide effective access to justice at national level for litigants. Effective access to justice for litigants is also what the Convention seeks to provide to those who consider that national remedies or authorities have failed.

Since the amendments introduced by Protocol No 11, the right to individual application is confirmed as being at the heart of the Convention system. The unconditional character of this right distinguishes the European Convention from other universal or regional instruments.[32]

[25] *Airey v Ireland*, Series A, no 32, 9 October 1979.

[26] See further S O'Leary, 'The Legacy of *Airey v Ireland* and the Potential of European Law in Relation to Legal Aid' (2019) 42 *DULJ* 93.

[27] No 6016/16, 11 December 2022.

[28] [2017] UKSC 51.

[29] See *R (on the Application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51, paras 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.

[30] Ibid, para 64.

[31] Lord Reed, Postscript to response to a call for evidence produced by the IHRAR, pp 5–6.

[32] See further, speech by L-A Sicilianos, 'The European Convention on Human Rights at 70: The Dynamic of a Unique International Instrument' (Kristiansand, 5 May 2020) https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&

The individual is the real subject of the system and has access, provided certain conditions are fulfilled, directly to the European Court of Human Rights.

Hundreds of thousands of litigants, or their relatives, have turned to the Strasbourg Court when they failed at national level and their names are now associated with the Convention rights and principles of great importance which they successfully defended.

To name but a few, and citing, where possible, UK cases:

- *McCann* on the duty of States to effectively investigate (Article 2);[33]
- *Soering* and *Ireland v The UK* and on the prohibition of torture and inhuman and degrading treatment (Article 3);[34]
- *VCL and AN* on human trafficking (Article 4);[35]
- *Ilgar Mammadov v Azerbaijan*[36] on detention for political motives (Article 5);
- *Ibrahim and Others* on the right of access to legal assistance;[37]
- *Kavala v Türkiye* on the right to a fair trial (Article 6);
- *Del Rio Prada v Spain*[38] on retroactive application of case law (Article 7);
- *Christine Goodwin*[39] on the rights of post-operative transsexuals or *Dudgeon*[40] on the open expression of one's sexuality (Article 8);
- *Eweida*[41] on the right to manifest one's religion and the limits thereto (Article 9);
- *Navalnyy v Russia*[42] on the right to freedom of expression and association (Articles 10 and 11);
- *McFarlane v Ireland* on the lack of an effective remedy for delays in criminal proceedings (Articles 13);[43] or
- *JD and A* on discriminatory treatment of certain vulnerable categories of social housing tenants (Articles 1 of Protocol Nos 1 and 14).[44]

V. The Convention and the Rule of Law

My third illustration of why the Convention still matters centres on the rule of law.[45]

The Strasbourg Court has consistently held that the rule of law forms part of and inspires the fabric of the whole Convention and is inherent in all its articles.[46]

The close relationship between the rule of law and democratic society has been underlined by the Court through different expressions: '*democratic society subscribing to the rule of law*',[47] '*democratic society based on the rule of law*',[48] and more systematically '*rule of law in a democratic*

cd=&ved=2ahUKEwijpdWb_9X8AhU6Q_EDHZCMBEgQFnoECBcQAQ&url=https%3A%2F%2Fwww.echr.coe.int%2FDocuments%2FSpeech_20200505_Sicilianos_70th_anniversary_Convention_ENG.pdf&usg=AOvVaw36TiHKL65PSiGIIgfpvoPa.

[33] *McCann and Others v the United Kingdom*, Series A, no 324, 27 September 1995.

[34] *Ireland v the United Kingdom*, Series A, no 25, 18 January 1978; *Soering v the United Kingdom*, Series A, no 161, 7 July 1989.

[35] *VCL and AN v the United Kingdom*, nos 77587/12 and 74603/12, 16 February 2021.

[36] *Ilgar Mammadov v Azerbaijan (no 2)*, no 919/15, 16 November 2017.

[37] *Ibrahim and Others v the United Kingdom* [GC], nos 50541/08 and 3 others, 13 September 2016.

[38] *Del Río Prada v Spain* [GC], no 42750/09, ECHR 2013.

[39] *Christine Goodwin v the United Kingdom* [GC], no 28957/95, ECHR 2002-VI.

[40] *Dudgeon v the United Kingdom*, Series A, no 45, 22 October 1981.

[41] *Eweida and Others v the United Kingdom*, nos 48420/10 and 3 others, ECHR 2013 (extracts).

[42] *Navalnyy v Russia* [GC], nos 29580/12 and 4 others, 15 November 2018.

[43] *McFarlane v Ireland* [GC], no 31333/06, 10 September 2010.

[44] *JD and A v the United Kingdom*, nos 32949/17 and 34614/17, 24 October 2019.

[45] European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist, CDL-AD(2016)007, 18 March 2016, pp 20–24.

[46] See, variously, *Engel and Others v the Netherlands*, Series A, no 22, para 55, 8 June 1976, or *Amuur v France*, para 50, 25 June 1996, Reports of Judgments and Decisions 1996-III.

[47] *Winterwerp v the Netherlands*, Series A, no 33, para 39, 24 October 1979.

[48] *Vereniging Weekblad Bluf! v the Netherlands*, Series A, no 306-A, para 35, 9 February 1995.

society'.[49] Being linked to the notion of '*democratic society*', the rule of law is also related to the broader concept of 'European public order',[50] the defence of which lies at the heart of the Convention system.[51]

Over the years, the Court has developed various substantive guarantees that may be inferred from this notion. These include the principle of legality or foreseeability,[52] the principle of legal certainty,[53] the principle of equality of individuals before the law,[54] the principle that the executive cannot have unfettered powers whenever a right or freedom is at stake,[55] the principle of the possibility of a remedy before an independent and impartial court,[56] and the right to a fair trial.[57] Some of these principles are closely interrelated and can be included in the categories of legality and due process. They all aim at protecting the individual from arbitrariness, especially in the relations between the individual and the State.[58]

A democratic state founded on the rule of law seeks to temper State authority and thus provides the necessary framework for the enjoyment of fundamental rights.

Serious attacks on judicial independence in recent years, within EU and Council of Europe States, have led to a marked increase in disputes before the Luxembourg and Strasbourg Courts which raise questions regarding the independence and impartiality of judges.

In a system of shared responsibility such as that established by the Convention, the integrity of the system itself requires the existence of strong and independent national courts, able to adjudicate free from undue interference and exercise meaningful judicial oversight over national authorities.[59]

Sadly, we now have extensive case law in Strasbourg relating to the recruitment/appointment of judges,[60] career/promotion,[61] transfer,[62] suspension,[63] disciplinary proceedings,[64] and removal from post while formally remaining a judge.[65]

[49] *Malone v the United Kingdom*, Series A, no 82, para 79, 2 August 1984.

[50] *United Communist Party of Turkey and Others v Turkey*, para 45, 30 January 1998, Reports of Judgments and Decisions 1998-I.

[51] See *Al-Dulimi and Montana Management Inc v Switzerland* [GC], no 5809/08, para 145, 21 June 2016: 'One of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle'.

[52] *Del Río Prada v Spain* [GC], no 42750/09, ECHR 2013.

[53] *Panorama Ltd and Miličić v Bosnia and Herzegovina*, nos 69997/10 and 7493/11, para 63, 25 July 2017.

[54] *Roman Zakharov v Russia* [GC], no 47143/06, para 230, 4 December 2015; *Beghal v The United Kingdom*, no 4755/16, para 88, 28 February 2019.

[55] Reflected in the core of *HF and Others v France* [GC], nos 24384/19 and 44234/20, 14 September 2022.

[56] *De Souza Ribeiro v France* [GC], no 22689/07, para 83, ECHR 2012.

[57] *Ibrahim and Others v The United Kingdom* [GC], nos 50541/08 and 3 others, para 250, 13 September 2016.

[58] See, for example, *Grzęda v Poland* [GC], no 43572/18, para 342, 15 March 2022: 'the principles of the rule of law and the avoidance of arbitrary power which underlay much of the Convention'.

[59] See *Tuleya v Poland*, nos 21181/19 and 51751/20, para 264, 6 July 2023: 'The Court cannot over-emphasise the fundamental role played by the national courts as guarantors of justice in upholding that principle through their decisions whereby they give direct effect to the Convention rights and freedoms or remedy Convention violations that have already occurred', citing *Grzęda v Poland* (n 58) para 324.

[60] *Juričić v Croatia*, no 58222/09, 26 July 2011.

[61] *Dzhidzheva-Trendafilova v Bulgaria* (Dec), no 12628/09, 9 October 2012; *Tsanova-Gecheva v Bulgaria*, no 43800/12, paras 85–87, 15 September 2015.

[62] *Tosti v Italy* (Dec), no 27791/06, 12 May 2009.

[63] *Paluda v Slovakia*, no 33392/12, paras 33–34, 23 May 2017; *Camelia Bogdan v Romania*, no 36889/18, para 70, 20 October 2020.

[64] *Ramos Nunes de Carvalho e Sá v Portugal* [GC], nos 55391/13 and 2 others, para 120, 6 November 2018; *Di Giovanni v Italy*, no 51160/06, paras 36–37, 9 July 2013; *Eminağaoğlu v Turkey*, no 76521/12, para 80, 9 March 2021. As regards dismissal, see *Oleksandr Volkov v Ukraine*, no 21722/11, paras 91, 96, ECHR 2013; *Kulykov and Others v Ukraine*, nos 5114/09 and 17 others, paras 118 and 132, 19 January 2017; *Sturua v Georgia*, no 45729/05, para 27, 28 March 2017; *Kamenos v Cyprus*, no 147/07, paras 82–88, 31 October 2017; *Olujić v Croatia*, no 22330/05, paras 31–43, 5 February 2009.

[65] *Baka v Hungary* [GC], no 20261/12, paras 34, 107–11, 23 June 2016; *Denisov v Ukraine* [GC], no 76639/11, para 54, 25 September 2018; *Broda and Bojara v Poland*, nos 26691/18 and 27367/18, paras 121–23, 29 June 2021; *Gumenyuk and Others v Ukraine*, no 11423/19, paras 61, 65–67, 22 July 2021. See, for an overview, K Šimáčková, 'Protection of the Rule of Law and

In *Guðmundur Andri Ástráðsson v Iceland*, the Grand Chamber examined the process for the appointment of judges to the newly established Icelandic Court of Appeal. It held that serious defects in the appointment of judges may give rise to a violation of the right of access to a court established by law. According to the three-step test introduced in this Icelandic case, a defect in the appointment procedure of a judge leads to a violation of Article 6 if it is manifestly in breach of domestic law, affects the ability of the judiciary to perform its duties free of undue interference and the competent national courts have failed to adequately review the alleged irregularity and its consequences. The principles developed in *Ástráðsson* have since been applied in cases involving other respondent States.[66]

That Grand Chamber judgment reminds us that the establishment of independent and impartial tribunals in accordance with law is something which we must seek to protect in all European States, even in those where democracy and the rule of law do not otherwise appear fragile.

The Convention arsenal for safeguarding judicial independence is not either limited to Article 6. For example, in *Baka v Hungary*, the President of the Supreme Court complained under Article 10 that his mandate had been terminated as a result of the critical views he had expressed publicly in his capacity as President of the Supreme Court and the National Council of Justice.[67]

As judges, we must easily accept a duty of reserve when it comes to public statements and interviews with the press. However, as acknowledged in *Baka,* judges may at times have a duty, and not simply a right, to express their opinions on legislative reforms likely to impact the judiciary and its independence when such involvement is intrinsic to whatever role they fulfil within their judicial system.[68]

On the freedom of expression of judges, the Court stated in *Baka* that:

> questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10. Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter. Issues relating to the separation of powers can involve very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate.[69]

The tenor of the *Baka* judgment, in which the Court found a violation of Article 10 of the Convention, is now, sadly, oft repeated in judgments relating to judges and prosecutors from Poland, Bulgaria, Romania and beyond who have brought complaints to Strasbourg following their dismissal or the imposition of disciplinary sanctions.[70]

Of course, one might comfort oneself, in your State or in mine, that such cases are unlikely to emanate from either jurisdiction, given how deeply entrenched judicial independence and the rule of law are in our written and unwritten constitutional settlements.

However, given the many different forms which rule of law backsliding can take, one wonders whether our confidence in the resilience of our own systems might be placed too high. Just three

Judicial Independence through the Protection of the Rights of Judges before the European Court of Human Rights' (EUnited in Diversity, II, The Hague, August 2023, forthcoming CJEU).

[66]See, variously, *Reczkowicz v Poland*, no 43447/19, paras 216–79, 22 July 2021; *Besnik Cani v Albania*, no 37474/20, paras 83–114, 4 October 2022; *Gloveli v Georgia*, no 18952/18, paras 49–51, 7 April 2022.

[67]The applicant had expressed critical views on constitutional and legislative reforms affecting the judiciary, on issues related to the functioning and reform of the judicial system, the independence and irremovability of judges and the lowering of the retirement age for judges.

[68]*Baka v Hungary* [GC], no 20261/12, para 168, 23 June 2016.

[69]Ibid, para 165.

[70]*Żurek v Poland*, no 39650/18, para 224, 16 June 2022; *Miroslava Todorova v Bulgarie*, no 40072/13, para 172, 19 October 2021; *Brisc v Romania*, no 26238/10, paras 106–07, 11 December 2018.

years ago, to mention only one example in the recent past, a minister informed the Commons that a piece of post-Brexit legislation which affected the Withdrawal Agreement would break international law, but only 'in a specific and limited way'.[71]

Even if our confidence in our own systems is justified, and opting instead for a purely mercantile approach, whether inside or outside the EU, the States I have just referred to are our trading partners. Those are the legal systems on which contracts, disputes, trade and business also depend.

It is difficult, whichever the chosen perspective, not to see the advantage of belonging to a system which requires compliance with minimum Convention standards designed to safeguard the rule of law and provides, as a last resort, for an external, subsidiary control.

Returning to the values-based perspective with which I started, the 26 intervening States in the pending inter-State case, of which the United Kingdom is one, intervene because they profess a strong commitment to the protection and promotion of the international rule of law.

As that case demonstrates, under the Convention, the importance of the rule of law cannot simply be reduced to questions relating to the independence of the judiciary. There are other strands to the rule of law under the Convention which are not immediately associated but which are nevertheless of fundamental importance to the type of societies in which we aspire to live.[72]

Secret rendition cases, for example, provide a window into how the Strasbourg Court uses the rule of law as an interpretative tool for the development of substantive guarantees under rights set forth in other articles of the Convention, such as Articles 2, 3, and 5.

The *El-Masri* case shows what happens when an individual is subject to 'extraordinary rendition' and detention 'outside the normal legal system'.[73]

The applicant, a German national, was detained at the North Macedonian border, held incognito for twenty-three days in a hotel room, interrogated repeatedly, subjected to various forms of torture, forcibly tranquillised and flown on a CIA aircraft to Kabul where he was held captive for months.

The Court held that the treatment to which he had been subjected violated Article 3 of the Convention. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. It makes no provision for exceptions or derogations.

In *El Masri* the Court found it 'wholly unacceptable that in a State subject to the rule of law a person could be deprived of his or her liberty in an extraordinary place of detention outside any judicial framework …'.[74]

Again, there may be an inadvertent tendency on our part to comfort ourselves that while this case concerned a German national, the events took place outside this jurisdiction, faraway, on the territory of a non-EU, albeit European, State.

However, similar stories of abuse can be found in *Al Nashiri v Romania*,[75] *Abu Zubaydah v Lithuania*,[76] or *Nasr and Ghali v Italy*.[77]

Furthermore, we do not have to look far back into the history of our own two islands—bound together by geography, history, language, economics, politics, family ties, but sadly also conflict—to remember that brutality does not only occur in far off places, to far off people, whose names we do not properly pronounce.

[71]See further R Hogarth, 'The Internal Market Bill Breaks International Law and Lays the Ground to Break More Law' (Institute for Government, 9 September 2020).

[72]For a more extensive explanation of the role played by the rule of law in Strasbourg case law, contrasting it with the recent case law of the CJEU, see S O'Leary, 'Europe and the Rule of Law' (ECB Legal Conference, 2018).

[73]*El-Masri v The Former Yugoslav Republic of Macedonia* [GC], no 39630/09, ECHR 2012.

[74]Ibid, para 236.

[75]*Al Nashiri v Romania*, no 33234/12, 31 May 2018.

[76]*Abu Zubaydah v Lithuania*, no 46454/11, 31 May 2018.

[77]*Nasr and Ghali v Italy*, no 44883/09, 23 February 2016.

In 1949, as the post-war framework for the protection of democracy, human rights and the rule of law from which we now all benefit was being constructed, Hersch Lauterpacht, proud scholar of this university, wrote:

> [E]ven in countries in which the rule of law is an integral part of the national heritage and in which the Courts have been the faithful guardians of the rights of the individual, there is room for a procedure which will put the imprimatur of international law upon the principle that the State is not the final judge of human rights.[78]

Then and now, when defending the rule of law, in all its different dimensions, the European Convention clearly matters.

VI. The Convention, Oxygen, and Blind Spots

My fourth and last theme illustrating the Convention's continued importance focuses on its ability to bring oxygen into ongoing debates and to cast light on national blind spots.

A former UKSC Judge recently questioned whether you need the European Convention on Human Rights, and the Strasbourg Court, to protect human rights in this jurisdiction. The question sparked an animated reply and counter reply.[79]

So what, in essence, has the ECHR ever done for you?

As I have emphasised in previous speeches, the character of a State is defined in a fundamental way by its fundamental law—therein lies its constitutional identity—informing its whole body of laws, ordering its democratic life, and to some extent, grounding the policy and actions of government. It is not the vocation of a human rights treaty—or international human rights judges—to override, substitute or compete with that.[80]

However, I have made the case in my own jurisdiction for why the Convention still matters. The relatively small number of relevant Irish cases is in inverse proportion to their long-lasting social effects. [81]

Sometimes the Strasbourg Court has had to push for required change, acting as an essential ally for national judges seeking the same. The provision of suitable detention facilities for young, troubled offenders is a case in point.[82] Sometimes it has had to shove. The case of Louise O'Keeffe and historical child sex abuse in primary schools is another.[83]

In many other situations the case law of the Strasbourg Court has successfully nudged my State and others, little by little, into recognising and rectifying their blind spots.

This method works when the respondent State accepts that, under the Convention, it is the State and not the Court in Strasbourg that bears primary responsibility for assuring respect for

[78]H Lauterpacht et al, 'The Proposed European Court of Human Rights' (1949) 35 *Transactions of the Grotius Society* 25, p 34.

[79]Lord Sumption, 'Judgment Call: The Case for Leaving the ECHR' (*The Spectator*, 30 September 2023) https://www.spectator.co.uk/article/judgment-day-the-case-for-leaving-the-echr/; J Simor, 'Why Lord Sumption Is Dangerously Wrong About Our Human Rights Law' (*Prospect Magazine*, 2 October 2023) https://www.prospectmagazine.co.uk/ideas/law/63339/lord-sumption-ehcr-human-rights-law; Lord Sumption, 'Jessica Simor's Misguided Defence of the ECHR' (*Prospect Magazine*, 5 October 2023) https://www.prospectmagazine.co.uk/ideas/law/63392/jonathan-sumption-response-to-jessica-simor-european-convention-human-rights.

[80]See further S O'Leary, 'Legal Tales of European Integration: the ECHR and Modern Ireland' (Iveagh House EU 50 Lecture, 1 February 2023).

[81]S. O'Leary 'Why the European Convention on Human Rights Still Matters' (2023) 7(2) *Irish Judicial Studies Journal* 20; C O'Cinneide, '"What Has the ECHR Ever Done for Us?" The Particular and Specific Importance of the Convention in Protecting Rights Across a Democratic Europe' (2023) 7(2) *Irish Judicial Studies Journal* 32.

[82]See *DG v Ireland*, no 39474/98, ECHR 2002-III.

[83]*O'Keeffe v Ireland* [GC], no 35810/09, ECHR 2014 (extracts).

Convention rights and freedoms. Furthermore, this is a responsibility that finds expression in the obligations to which the State has voluntarily subscribed under international law.

So is this jurisdiction—blessed with the Magna Carta, the common law, an unwritten constitution and a highly respected judicial system—so different?

Decades of Strasbourg cases suggest otherwise.

In the late 1990s, at issue in *Smith and Grady*[84] and *Lustig-Prean and Beckett*,[85] was the investigation and discharge from the army of the applicants solely on grounds of their sexual orientation. The Court of Appeal had held in the relevant cases that since the policy was supported by Parliament and those advising the ministry it was lawful.[86] The applicants were refused leave to appeal to the House of Lords.

The Strasbourg Court held that there had been a violation of Articles 8 and 13 of the Convention but no violation of Articles 3 and 14. While finding that the Article 3 threshold had not been met on the facts of the particular cases, it stated that:

> treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3.[87]

In response, in January 2000, the Government of the United Kingdom introduced The Armed Forces Code of Social Conduct Policy Statement. It lifted the ban and introduced a policy of zero-tolerance as regards harassment, discrimination, and bullying.

These cases led to important and now widely accepted reforms, propelled by the Strasbourg Court, to which the then Master of the Rolls had clearly directed the applicants in his judgment.[88]

We have recently seen how they continue to provide oxygen in an ongoing national conversation more than twenty years later.

In May of this year, the LGBT Veterans Independent Review by Lord Etherton was published. It documents the treatment which veterans experienced under the ban and makes several recommendations.[89] One is the establishment of a system for awarding compensation to affected individuals, referring to the Court's judgments just cited, with particular emphasis on just satisfaction.[90]

The decision whether to implement a compensation scheme is, of course, a matter for domestic lawmakers. However, my point is simply to highlight one series of cases and their reflection of a simple Convention truth, namely that tolerance and broadmindedness, along with pluralism, are the hallmarks of a democratic society.

The other phrase I just used to describe the enduring importance of the Convention system, and transnational law in general, is that it provides opportunities to address national blind spots and in

[84] *Smith and Grady v The United Kingdom*, nos 33985/96 and 33986/96, ECHR 1999-VI.

[85] *Lustig-Prean and Beckett v the United Kingdom*, nos 31417/96 and 32377/96, 27 September 1999.

[86] See further *Smith and Grady* (n 84) paras 35–41; Simor (n 79).

[87] Ibid, para 121.

[88] See *Smith and Grady* (n 84) para 38, where Lord Bingham's judgment is partly summarised as follows: 'He observed that to dismiss a person from his or her employment on the grounds of a private sexual preference, and to interrogate him or her about private sexual behaviour, would not appear to show respect for that person's private and family life and that there might be room for argument as to whether the policy answered a 'pressing social need' and, in particular, was proportionate to the legitimate aim pursued. However, he held that these were not questions to which answers could be properly or usefully proffered by the Court of Appeal but rather were questions for the European Court of Human Rights, to which court the applicants might have to pursue their claim'.

[89] Lord Etherton, 'Independent Review into the Service and Experience of LGBT Veterans Who Served Prior to 2000' (May 2023).

[90] Ibid, pp 42, 163, 164, Annex 5. For just satisfaction judgments, see *Smith and Grady v The United Kingdom* (Just Satisfaction), nos 33985/96 and 33986/96, ECHR 2000-IX; *Lustig-Prean and Beckett v The United Kingdom* (Just Satisfaction), nos 31417/96 and 32377/96, 25 July 2000.

so doing it helps national law to adapt and adjust. The Strasbourg Court has become, in the words of one of my compatriots:

> a credible mechanism for giving substance to otherwise vague and abstract human rights guarantees, and for prodding domestic legal and political actors to align national law with the evolutive understanding of rights developed by the Court.[91]

In many cases where violations have been found, the Court has simply sought to remedy blind spots within national systems; blind spots which it may have been very difficult for national judges to identify or remedy themselves given that their roots are to be found in national, cultural, social or religious heritage or because of the limited nature of the judicial review which national judges considered themselves entitled to exercise.

Leaving aside the work of the Court, the Convention system and all it entails was central to the Good Friday Agreement and underpins the modern devolution settlement in Northern Ireland. Peace in our time is not something which can be dismissed lightly, particularly when we are reminded daily what conflict and division look like.

And leaving the UK and Ireland aside, think of the institutional tolerance of domestic violence on display in cases like *Opuz v Türkiye*,[92] *Talpis v Italy*,[93] or *Tagayeva v Russia*,[94] or secondary victimisation of complainants in sexual violence cases such as *JL v Italy*.[95] To whom were such applicants to turn if not to Strasbourg?

In her recent debate with Lord Sumption in *The Spectator*, Jessica Simor invited the public to think of other UK examples. I can do no better than to recite her list:

> corporal punishment, inhuman and degrading treatment, the protection of journalistic sources, the right of access to a lawyer in police detention, gender recognition certificates, race discrimination, freedom of expression and phone tapping—all areas where 'we' the people, did not want to protect the rights of those individuals affected; 'our' view was that there was no such right.[96]

To conclude on this fourth theme, it is important to emphasise that the Court conducts its supervisory function in accordance with the principle of subsidiarity. Its assessment is informed by European consensus and the margin of appreciation. In this way, the Court's judgments keep pace with the majority of the member States in human rights protection, going generally no faster, but also no slower than the trends across our shared Convention legal space.[97]

The Convention is, of course, an international treaty and it is States' sovereign prerogative to choose whether to remain High Contracting Parties to it. However, were any decision to be taken on continued membership of the Council of Europe and the ECHR, one would hope that all the evidence, forensically compiled and objectively presented, would be placed before those asked to decide.

[91] O'Cinneide (n 81).
[92] *Opuz v Turkey*, no 33401/02, ECHR 2009.
[93] *Talpis v Italy*, no 41237/14, 2 March 2017.
[94] *Tagayeva and Others v Russia*, nos 26562/07 and 6 others, 13 April 2017.
[95] *JL v Italy*, no 5671/16, 27 May 2021.
[96] See Simor (n 79).
[97] D Pavli and R Kondak, 'Beyond the Age of Subsidiarity: Do Established Democracies Still Need the European Court of Human Rights?' (2022) *Liber Amicorum Robert Spano*, p 563.

VII. Conclusions

It has been claimed recently that the ECHR has 'devalued the whole concept of human rights' and been 'transformed … from a noble body of truly fundamental principles, almost universally shared, into something at once intrusive and banal'.[98]

However, when the evidence is compiled and assessed in the manner I have just suggested, it is difficult to find that the charges levelled at the Strasbourg Court are made out.

Those who complain about Strasbourg interference with democratic processes seem to forget judgments like *Animal Defenders v the United Kingdom*[99] and subsequent judicial iterations.[100] The Court has emphasised the importance of the legislative choices underlying measures whose proportionality is being assessed, stating, firstly, that 'the quality of the parliamentary and judicial review of the necessity of the measure is of particular importance'

and secondly, that 'there is a wealth of historical, cultural and political differences within Europe so that it is for each State to mould its own democratic vision'.[101]

Furthermore, it is too often forgotten that the living instrument doctrine effects not just the scope of rights and the applicability of Convention provisions, in relation to which it may at times have been expansive.

But it also influences the Court's approach to the balance that is inherent in the entire Convention, where the effect may be one of recalibration in the light of, for example, a changing context or the development of scientific knowledge.

Let me provide two very different illustrations of what might be termed recalibration, one in cases concerning Articles 5 and 6 in the context of terrorism related offences (*Ibrahim and Others v The United Kingdom*[102] and *Pagerie v France*[103]) and the other concerning compulsory vaccination against childhood illnesses (*Vavricka v Czech Republic*[104]).

At issue in *Ibrahim* was the delayed access to a lawyer of persons arrested on suspicion of involvement in the 2005 London terrorist attack or questioned in that regard. The Court found a violation of Article 6 in relation to only one of the four applicants. As pointed out in one of the separate opinions in that case:

> the matters calling for Convention analysis in the [*Ibrahim*] case directly involve[d] the human rights of many other people than the four applicants. When confronted with such circumstances …, the Contracting States and then this Court are required to identify the appropriate relationship between the fundamental procedural right to a fair trial of persons charged with involvement in terrorist-type offences and the right to life and bodily security of the persons affected by the alleged criminal conduct.[105]

Similar considerations, albeit in the context of stay-at-home orders imposed on certain individuals following successive terrorist attacks in France from 2015 onwards, emerge in the recent unanimous judgment of a Chamber in *Pagerie v France*, where no violation of Article 5 of the Convention was found.

[98]See Lord Sumption (n 79).

[99]*Animal Defenders International v The United Kingdom* [GC], no 48876/08, para 108, ECHR 2013 (extracts).

[100]*Garib v the Netherlands* [GC], no 43494/09, para 138, 6 November 2017; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* [GC], no 931/13, para 192, 27 June 2017; *LB v Hungary*, no 36345/16, 12 January 2021.

[101]*Animal Defenders International* (n 99) 111.

[102]*Ibrahim and Others v The United Kingdom* [GC], nos 50541/08 and 3 others, 13 September 2016.

[103]*Pagerie v France*, no 24203/16, 19 January 2023.

[104]*Vavřička and Others v the Czech Republic* [GC], nos 47621/13 and 5 others, 8 April 2021.

[105]See the partly dissenting opinion of Judges Hajiev, Yudkivska, Lemmens, Mahoney, Silvis, and O'Leary in *Ibrahim and Others*, para 2.

As regards *Vavricka*, on compulsory vaccination, the Court found no violation of Article 8 in its 2021 judgment, emphasising that 'it cannot be regarded as disproportionate for a State to require those for whom vaccination represents a remote risk to health to accept this universally practised protective measure, as a matter of legal duty and in the name of social solidarity'.

In the view of the Court, it was validly and legitimately open to the Czech legislature to opt for the vaccination model chosen.

It is clearly the case that the living instrument doctrine is an important methodological tool allowing Convention rights to remain relevant to the contemporary European landscape. However, it is applied in a manner consistent with the limitations imposed by the fundamental principles of subsidiarity and the margin of appreciation.

As regards the former, emphasis is placed, where possible and necessary, on the process and reasoning of the domestic courts, who bear the primary responsibility for ensuring compliance with Convention guarantees.[106] As regards the margin, it contributes to striking a balance between common minimum standards on the one hand and the needs and specificities of different societies and legal systems.

When speaking in States where the Convention system is contested, it is tempting to cite, as I do here, examples of cases in relation to that State where no violations have been found, to point to the principle of subsidiarity and to the margin of appreciation and to impress upon the listener the modest nature of the Strasbourg Court's judicial enterprise in regard to that State.

The careful recalibration by the Court in recent years, in what has been described as an age of subsidiarity, can also be emphasised on such occasions. And this too I have done this evening.

After all, European judicial overreach is unlikely to protect and solidify the vital contribution which the Convention system has made to the betterment of lives and the improvement of good governance for over seven decades across our continent.

However, it is also incumbent on me as a Strasbourg judge to stress, as stated clearly by the Member States in their 2018 Copenhagen declaration, that the ultimate goal of the Court is 'the effective protection of human rights in Europe'.[107]

In accordance with Article 34 of the Convention, individuals will continue to lodge applications and violations will continue to be found by judges like me where respect for Convention guarantees is found wanting.

In addition, in exceptional cases, where there is an imminent risk of irreparable harm, interim measures may be applied. The latter play a vital role in avoiding irreversible situations. They ensure that national courts and/or the Court in Strasbourg can properly examine Convention complaints and, where appropriate, secure to the applicant the practical and effective benefit of the Convention rights asserted.[108]

The principle of subsidiarity is not intended to limit or weaken human rights protection but rather underlines, as I have stressed, the primary responsibility of national authorities to guarantee Convention rights and freedoms in the first place.[109]

At the heart of the Convention system is the striking of a fair balance by a neutral arbiter in the field of human rights. Depending on a State's domestic human rights architecture, much of that work can be done at national level, by independent and impartial national judges, as we have very recently seen in the UK Supreme Court. However, as Lauterpacht foresaw all those decades

[106]See further the defence by R Spano, 'The Democratic Virtues of Human Rights Law: A Response to Lord Sumption's Reith Lectures' (2020) *EHRLR* 132.

[107]See paragraph 6 of the Copenhagen declaration, which declaration one commentator has noted evoked 'effectiveness' 30 times in 67 paragraphs.

[108]See the domestic proceedings in *R (AAA & Ors) v Secretary of State for the Home Department (UNHCR Intervening)* [2023] UKSC 42 following the imposition of an interim measure by the ECtHR on 14 June 2022 after the UKSC had refused the relevant applicants permission to appeal. All individual decisions were quashed by the Divisional Court and not appealed.

[109]Ibid, para 10.

ago, at times it will fall to Strasbourg judges, in the exercise of their external, subsidiary role, to exercise this function.

Writing in 2017 in defence of the continued utility of international human rights mechanisms, including the Strasbourg court, Philip Leach rightly stated that:

> human rights systems represent a complex web of interaction and interdependence between institutional actors, both domestic and supranational, each of which has different functions, expertise and competences. No one of these actors could secure the objectives of the system alone.[110]

This complex but fruitful interaction and interdependence is borne out by the case law of the Strasbourg court for over seven decades and by the well-established and effective dialogic relationship the Court which I serve has developed with UK courts.

I conclude with an extract from the Thomas More Lecture delivered by Lord Mance at Lincoln's Inn in October 2022:

> Governments can always point to particular judicial decisions that irritate or incommode them. So too can judges. No court, judge, person or institution is perfect. But that is not a reason for abandoning or damaging a generally sound system, still less a hitherto sound institution or relationship.

I pray that the good judge will not object to words coined in relation to the previous domestic debate about the Human Rights Act being transposed to defend more broadly the soundness and continued value of the Convention system for the protection of human rights in this jurisdiction and beyond.

[110]P. Leach, The Continuing Utility of International Human Rights Mechanisms? EJIL:Talk! 1 November 2017.

Cite this article: O'Leary Síofra (2023). Why the European Convention on Human Rights Still Matters. *Cambridge Yearbook of European Legal Studies* **25**, 1–18. https://doi.org/10.1017/cel.2024.1