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

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I – Introduction

President Sreenan,

Ladies and Gentlemen,

And perhaps a special hello to the Academy's new fellows.

It is both a pleasure and an unexpected honour to have been asked to address you today by the beautiful lakes of Killarney.

The honour is unexpected because I'm one of very few people in this room never to have participated in a trial, whether as prosecution, defence, judge, jury (and perhaps I should add for good measure, accused or defendant).

I hear cases at the European court in Strasbourg, but I do so as presiding judge in an international court of 46 judges, which assesses whether States which ratified the European Convention have respected their international legal obligations thereunder. Those 46 States range from Ireland to Azerbaijan and from Finland to Malta and included, until March 2022, the Russian Federation.

Our role is not to establish criminal guilt or civil liability or to substitute the work of national judges whose decisions in the applicants' cases must precede ours.

My brief for today is to explain my own professional history, as well as providing an overview of the work of the European Court of Human Rights. Since I will admit to being somewhat allergic to talking about myself in public, I'll happily answer your questions without speechifying on the subject of my unusual legal trajectory beyond the shores of this common law jurisdiction.

Instead, via some "Tales from Strasbourg", I'd like to explain the origins, nature and legal and political influence of the European Court of Human Rights and of the Convention which we interpret and apply.

I'll do so under four different umbrellas – history, law, politics and, last, but not least, hope.

II - History

The origins of the European Convention on Human Rights are to be found in the atrocities perpetrated by totalitarian regimes on European soil and beyond during the Second World War.

The spirit of the post-war years is summed up in a famous speech delivered by Winston Churchill in Zurich in 1946. There he outlined his plans for recreating a "European family in a regional structure" which he referred to as the United States of Europe.[1]

In the debates which have engulfed the United Kingdom before, during and after Brexit, and which now extend in certain quarters to talk of the UK exiting the European Convention, this speech is, sadly, too often ignored or misconstrued.

The 1948 Hague Congress that inspired the founding of the Council of Europe called for a Charter of Human Rights and for a court to enforce it.

Leading the discussions on the possible charter were former Nuremberg trial prosecutor Sir David Maxwell-Fyfe, a British MP and lawyer, and former French resistance fighter, Pierre-Henri Teitgen. They and others, like Irishman Séan MacBride, drew up a list of rights inspired by the Universal Declaration of Human Rights of 1948.

The Convention was conceived as an early warning system to combat the first signs of totalitarianism. As Teitgen remarked, the latter doesn't develop in a day: evil progresses cunningly and democracies are asphyxiated over time.[2]

While the constitutions of many European States guaranteed individuals certain elementary rights and freedoms at that time, it was recognized, and experience has shown, that these constitutional guarantees, when purely national, were and are not always strong enough to secure their protective aims. Constitutional guarantees can be overridden by governments and national authorities, out of neglect, by mistake, or on purpose.

The establishment of the Strasbourg Court represented an abandonment of the idea that the State's sovereignty over its citizens was absolute and unrestrained.

As Cambridge Professor Hersch Lauterpacht remarked in a 1949 visionary article about a future European Court of Human Rights:

> "[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."[3]

[Of course, under the system established by the Convention originally, which prevailed for almost forty years until October 1998, three institutions exercised responsibility for enforcing the obligations undertaken by the contracting states: the European Commission of Human Rights (which

[1] Winston Churchill, Speech on a Council of Europe, Zurich 19 September 1946.
[2] Tietgen's speech cited in Janis, Richard and Bradley, *European Human Rights Law*, 3rd Edition, OUP, 2008, p. 16.
[3] Lauterpacht et al, 'The Proposed European Court of Human Rights', (35) Transactions of the Grotius Society (1949), p. 34.

initially examined applications), the European Court of Human Rights (to which a case could be referred under certain conditions for further judicial examination) and the Committee of Ministers of the Council of Europe (which would adopt a resolution accepting the Commission's findings if the case was not referred to the Court).]

The striking difference between then and now is that for a long time it was not possible for applicants to bring their case before the Strasbourg Court themselves. It was only the subsequent changes to the Convention system that empowered individuals to seize the Court directly.

In the Court's early days, work was scarce. Between 1959 and 1976 just 18 cases were brought before the Court. For a period of seven years, no cases were brought at all. The first Belgian Judge, Henri Rolin, in a lecture given in 1965 ("Has the Court got a future?") hesitated as to whether he deserved the title of "Judge" at all.[4]

Yet even during this fallow period, the Court established some important founding principles in cases like *Lawless v Ireland* (1960),[5] which concerned the extra-judicial internment of members of the IRA in the 1950s in the Curragh, just outside Dublin, or the *Belgian Linguistics* case (1968),[6] in which the Court established its case-law on the prohibition of discrimination and the right to education.

The 1970s ushered in what was considered a golden era of Strasbourg case-law during which many landmark rulings were handed down[7]. Examples include *Golder v. the United Kingdom* (1975) on the right of access to Court, *Tyrer v the United Kingdom* (1978) on the use of corporal punishment, *Airey v Ireland* (1979) on the establishment of a positive obligation on States to provide effective access to Court in civil cases, including via the provision of free legal aid, and *Marckx v Belgium* (1979) on the prohibition of discrimination against children born out of wedlock.

In these cases, the Court began to develop its teleological approach to interpretation (according to which the protection of Convention rights must be effective), the living instrument doctrine (according to which the Convention can and must be interpreted in the light of present-day conditions) and recognition that States may owe positive obligations and not simply be bound by an obligation not to interfere negatively with individuals' rights.

The fall of the Berlin Wall and the dissolution of the Soviet Union were the next major game-changers.

The former Soviet Republics sought entry first to the Council of Europe and subsequently to the European Union. The enlargement in the 1990s of the Council of Europe and the accession of States from Central and Eastern Europe led to a huge increase in the work of the Court.

From 1959 to 1998, in other words for the first forty years of its existence, 143,325 applications were lodged, 32,552 decisions were declared inadmissible, 837 judgments were delivered by the former Court, and 37,552 decisions were adopted by the Commission.[8]

By 2011, however, the Court's docket had reached the all-time high of 160,000 applications.

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[4] *Michael O'Boyle and John Darcy*: The European Court of Human Rights: Accomplishments, Predicaments and Challenges, Germany Yearbook of International Law, Vol. 52, 2009, p. 142.

[5] See, for instance, *S., V. and A. v. Denmark* [GC], nos. 35553/12 et al., §§ 104-108, 22 October 2018.

[6] See, for instance, *Georgia v. Russia (II)* [GC], 38263/08, § 313, 21 January 2021.

[7] See Elisabeth Lambert Abdelgawad, "The European Court of Human Rights", in The Council of Europe: Its Law and Policies, Oxford University Press (2017), p. 229 and Ed Bates, "The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights", Oxford University Press (2010), p. 320.

[8] Yearbook of the European Convention on Human Rights 2002 (2003), 202.

After a decade of reforms and the development of new internal procedures, we now have to deal with the more modest figure of 76,000 pending applications and we do so on a budget of 75 million euro a year. Over sixty years since its establishment the Court has dealt with over 1 million applications and has handed down over 26,000 judgments. Each year we reject as inadmissible over 30,000 applications and last year alone we handed down over 4,000 judgments.

The importance of the European Convention on Human Rights and the Court's jurisprudence was underlined by one of my predecessors, President Ryssdal (1985 – 1998), who noted that by the mid-1990s the Convention had become:

> "the single most important legal and political common denominator of the States of the continent of Europe in the widest geographical sense ... a constitutional law for all Europe in the field of human rights protection".[9]

In the context of the enlargement of the Council of Europe which I just mentioned, the Convention system has played a prominent role in ensuring democratic change in Central and Eastern European States.[10] In relation to those States which have also joined the European Union, it played a crucial role in preparing them on the road to accession. The same can be expected to happen in relation to Council of Europe States – such as Moldova, Ukraine, Serbia and others - which are now EU candidate States.

So why the increase in applications in the first decade of this century? The greater number of States parties to the Convention is one explanation. Another is the multitude of legal questions relating to the rule of law and the protection of individual rights which arise in transitional democracies. However, the major reason was the creation in 1998 of a single, full-time European Court, putting an end to the filtering out of inadmissible complaints by the former European Commission of Human Rights.

The structure and logic of this change were conceived long before the full ramifications of Council of Europe enlargement to 47 States, including, at that time, Russia, were understood.

With the benefit of hindsight there is a certain irony that the full judicialisation of the Convention system [which Protocol No. 11 brought about] coincided with the progressive appearance of case-load characteristics in respect of which it was and is legitimate to question whether they are susceptible to and/or warrant full judicial treatment.

In essence since 1998 the Court has been grappling with the difficulty of reconciling, on the one hand, the filtering of a huge volume of inadmissible cases and the processing of large numbers of more or less identical but well-founded claims for compensation with, on the other hand, the careful scrutiny and adjudication of other complaints raising complex and novel issues of human rights law in sufficiently good time for the outcome to be meaningful for the applicant and the respondent Government.

[9] R. Ryssdal, 'The coming of Age of the ECHR', 1 (1996) EHRLR 18 at 18. This position is also reflected in the case-law; see

[10] Motoc and Ziemele (eds.), The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial perspectives, 2016, CUP.

III – Law

After more than seven decades, it is fair to say that the Strasbourg Court has made an important contribution to the betterment of European lives and to improving good governance across a complex Continent.

Before I turn to some of the examples of the impact which the Court's transformative legal rulings have had on European societies, let me first return to the theme of *History*, this time taken from a slightly different angle: namely, from the perspective of *Law*.

The link between history and law has given rise to fascinating debates as regards the value of international courts and trials as "historiographical tools".[11]

The question that has been raised is whether the past can be written through law.[12]

I don't intend to engage in these academic debates at length nor am I able to provide a ready answer to this question.

I rather want to refer to some of the examples of key historic events which have found their way into the Court's case-law.

In *Janowiec and Others v. Russia*,[13] the Court examined the failure of the Russian State to adequately account for the fate of Polish prisoners executed by Soviet secret police at Katyń in 1940 (the Katyń massacre). While noting the circumstances of this historic event and the plight of the individual victims and their relatives, the Court found that the Convention's *ratione temporis* scope could not extend beyond the date of its adoption, to an event which took place 58 years before the Convention entered into force in the respondent State.

A similar conclusion was reached in *Chong and Others v. the United Kingdom*,[14] concerning the 1948 killing of a group of twenty-four unarmed civilians by British soldiers in Batang Kali in Selangor, Malaya.

On the other hand, and from a different angle – namely, the right to freedom of expression under Article 10 of the Convention – the Court has examined a case concerning the criminal conviction of an individual for rejecting the legal characterisation as "genocide" of atrocities committed in 1915 by the Ottoman Empire against the Armenian people.[15] The case was brought by a Turkish politician who had described the idea of an Armenian genocide as an "international lie" and who was, for that reason, criminally prosecuted and punished in Switzerland.

The Court stressed in its *Perincek* judgment, that it was not for it to determine whether the massacres and mass deportations could be characterised as genocide within the meaning of international law. It instead concentrated on Article 10 and found a violation of the applicant's right to freedom of expression. His statements were considered by the majority to have related to a matter of public interest and had not amounted to a call for hatred or intolerance or otherwise

[11] Turković, "The Value of the ICTY as a Historiographical Tool", in T. Kruessmann (ed.), ICTY: Towards a Fair Trial (Cambridge, Intersentia 2009).
[12] Bárd, "The difficulties of writing the past through law – historical trials revisited at the European court of human rights", Revue internationale de droit pénal, vol. 81, no. 1-2, 2010, pp. 27-45.
[13] *Janowiec and Others v. Russia* [GC], 55508/07 and 29520/09, 21 October 2013.
[14] *Chong and Others v. the United Kingdom* (dec.), no. 29753/16, 11 September 2018.
[15] *Perinçek v. Switzerland* [GC], no. 27510/08, 15 October 2015.

effected the dignity of members of the Armenian community to a point requiring a criminal-law response in Switzerland.

The crimes committed during and in the aftermath of the Second World War have also given rise to legal issues in cases before the Court.

For instance, in *Kononov v. Latvia*,[16] a member of a Soviet commando unit of Red Partisans was prosecuted on the basis of legislation introduced in 1993 for war crimes committed in 1944. The Court found – stressing that it was not called upon to rule on the applicant's individual criminal responsibility – that there had been a sufficiently clear legal basis, having regard to the state of international law in 1944, for the applicant's conviction and punishment. The Court held that the applicant's acts had constituted offences defined with sufficient accessibility and foreseeability by the laws and customs of war.

[By contrast, in *Vasiliauskas v. Lithuania*,[17] concerning a conviction in 2004 for alleged genocide of Lithuanian partisans in 1953 on the basis of the domestic courts' understanding that the 1948 Genocide Convention included political groups among the range of protected groups, the Court found that the applicant's conviction for the crime of genocide could not be regarded as consistent with the essence of that offence as defined in international law at the material time and had therefore not been reasonably foreseeable by him. This finding was based, in particular, on the fact that international law in 1953 did not include "political groups" within the definition of genocide.]

Similar issues have arisen from the perspective of Article 7 of the Convention and the principle of nullem crimen sine lege in relation to crimes committed by senior GDR (German Democratic Republic) officials[18] and soldiers[19] during the Cold War. They had participated in the killing of East Germans attempting to escape to West Germany and who were later tried after Germany's reunification. The Court found that, at the time when they were committed, the applicants' acts constituted offences defined with sufficient accessibility and foreseeability in GDR law and in the rules of international law on the protection of human rights. Individual soldiers could not show total, blind obedience to orders which flagrantly infringed both sets of rules.

In 2020, in a case brought by a former member of the SS, complaining about the unreasonable delay in the bringing of legal proceedings against him in Germany, the Court dismissed the application as manifestly ill-founded.[20] The applicant, Mr. Gröning, is probably better known to you as the "accountant of Auschwitz", following the Netflix documentary of that name.

Given the tragic events unfolding in Europe at present, and without making pronouncements which might affect my participation in pending and future applications in cases concerning Ukraine and the Russian Federation, one sees, sadly, the enduring relevance of the Strasbourg Court's case-law.

Coming closer to home, events relating to the troubles in Northern Ireland have also profoundly marked the Court's case-law. It suffices to note the Court's seminal ruling in the 1978 case of *Ireland v. the United Kingdom*[21] relating to the use by the UK security forces of what are known as the "five techniques" of interrogation.[22] The Court found that these techniques

[16] *Kononov v. Latvia* [GC], no.36376/04, 17 May 2010.
[17] *Vasiliauskas v. Lithuania* [GC], no. 35343/05, 20 October 2015.
[18] *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 et al, 22 March 2001.
[19] *K.-H.W. v. Germany* [GC], no. 37201/97, 22 March 2001.
[20] *Gröning v. Germany* (Dec.), no. 71591/17, 20 October 2020.
[21] *Ireland v. the United Kingdom*, no. 5310/71, 18 January 1978.
[22] These are: (a) wall-standing: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart

constituted a practice of inhuman and degrading treatment, in breach of Article 3 of the Convention. But it stopped short of considering that they constituted torture.

The principles developed in that case are still regularly cited when examining whether treatment amounts to torture, inhuman or degrading treatment within the meaning of Article 3.[23] The finding that the five techniques did not constitute torture were famously relied upon by the Deputy Assistant Attorney General in the "torture memos" in 2002 in relation to the use of "enhanced interrogation techniques" in Afghanistan and Iraq.

The case of *McCann and Others v. the United Kingdom*, which concerned the killing in Gilbraltar by members of the UK security forces of three members of the IRA suspected of involvement in a bombing mission, set the benchmark for the Court's treatment of cases concerning the protection of the right to life under Article 2 of the Convention. The use of force, while permitted, must be no more than "absolutely necessary" for the achievement of one of the legitimate aims set out in Article 2. In the case at issue, the Court was not convinced that the force used and the killing of the suspects complied with the requirements of Article 2.

Our rulings do not always please, either the respondent Governments to which they are addressed, or members of the public who, for better or worse, may have very different views on where the correct balance between, for example, the protection of human life and the protection of the general public, may lie.

A British tabloid published the phone number of the Court's registrar the day of the *McCann* ruling; an event which gave rise to the creation of our very dynamic press service, whose task it is to explain complex rulings to press and public in 46 Council of Europe States and beyond.

But even a professional press service cannot protect modern judicial institutions from attack in various forms. Following the handing down of a judgment in 2020 in relation to a prominent Turkish opposition politician, the Court's website was subject to a sustained cyberattack.[24]

While this brief overview of the situations where history has met law in the Court's cases doesn't – at least not conspicuously – provide a reply to the question whether the past can be written through law, it does suggest that European history has left an indelible mark on the writing of Convention law.

The more historical cases I have just referred to don't, however, give a sufficiently complete picture of the depth and range of subjects which cross our desks any given week or month.

When preparing this talk, I reflected on the Grand Chamber cases I am currently presiding, as well as press releases issued in prominent cases just decided or pending:

- In some States, like Poland, a burning issue at present is the right of pregnant women to abortion.

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and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers"; (b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation; (c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise; (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep; (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

[23] See, for instance, *Georgia v. Russia (II)* [GC], 38263/08, § 240, 21 January 2021.

[24] See *Selahattin Demirtas v. Turkey (No. 2)*, no. …., 22 December 2020.

There is no right as such, under the Convention, to abortion. But the manner in which States restrict, legislate for or fail to regulate reproductive rights may affect an individual's right to private and family life. Some 1000 cases relating to termination of pregnancy are currently pending against Poland.

Such litigation is of course familiar to Irish members of the audience, who will know that several cases were brought to Strasbourg against this State in the past in relation to reproductive rights,[25] and the issues will be familiar to those from the US given litigation past and present at State and Federal level.

- On the other end of the spectrum, when it comes to rights relating to privacy and family life, are cases brought by commissioning parents who have had a child via surrogacy arrangements (whether in the US or some other State where such arrangements are lawful); or cutting-edge cases on the rights of transgender persons[26] or those who would prefer to be designated in a non-binary way rather than as male or female.[27] [Judgments on the right to privacy have also influenced legislation to improve protection for journalists and their sources in Belgium[28] and ensure that the DNA records of innocent people are destroyed in the United Kingdom.[29]]

- In a very different context, as regards the prohibition in Article 3 of torture and ill-treatment, Strasbourg Court judgments led to North Macedonia providing compensation and an official apology to a victim of CIA torture and secret "rendition,"[30] or to France putting in place legal reforms to combat human trafficking (the subject of one of tomorrow's talks)[31]. In 1989, in the case of *Soering v. the United Kingdom*, the Court held that the extradition of a person to a country, such as the U.S., where s/he risked the death penalty, could give rise to a violation of Article 3.[32] It based this finding on a virtual consensus in Western European legal systems at the time that the death penalty was not consistent with regional standards of justice.

- On freedom of assembly, the right of individuals to gather with others to make their collective voice heard is a fundamental aspect of a proper-functioning democracy and guaranteed through key Court rulings in relation to Poland,[33] or the Republic of Moldova, to name just two.[34]

  Memorial, a Russian NGO and winner of the 2022 Nobel Peace Prize along with a fellow Ukrainian NGO, has been a successful applicant before our Court in defence of rights of freedom of assembly.[35] Sadly, that judgment came too late for the Russian NGO which, like much of civil society, has been shut down under legislative reforms introduced since last year's invasion of Ukraine.

[25] See *Open Door and Dublin Well Woman v. Ireland*, nos. 14234/88 and 14235/88, 29 October 1992, and *A, B and C v. Ireland* [GC], no. 25579/05, ECHR 2010.
[26] See *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI , or *O.H. and G.H. v. Germany*, no. 53568/18, 4 April 2023 and *A.H. and Others v. Germany*, no. 7246/20, 4 April 2023.
[27] See *Y v. France*, no. 76888/17, 31 January 2023.
[28] *Ernst and Others v. Belgium*, no. 33400/96, 15 July 2003.
[29] *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, ECHR 2008.
[30] *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, ECHR 2012.
[31] *Siliadin v. France*, no. 73316/01, ECHR 2005-VII.
[32] *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161.
[33] *Bączkowski and Others v. Poland*, no. 1543/06, 3 May 2007.
[34] *Hyde Park and Others v. Moldova*, no. 33482/06, 31 March 2009.
[35] *Ecodefence and others v. Russian Federation*, no. 9988/13, 14 June 2022.

- Our Convention fair trial guarantees are too numerous and detailed to mention in passing, stretching from the right of access to a lawyer, established in *Salduz v. Turkiye*,[36] to the general right to a fair trial which underpins the guarantees in Article 6 of the Convention, applied to French nationals in proceedings on their return to France who had given statements when detained in Guantanamo.[37]

- On environmental issues, judgments from the Court have already helped to strengthen environmental protection in several countries such as in relation to power plant pollution in Georgia[38] or industrial hazards related to gold mining in Romania.[39]

  Important climate change cases are currently pending before the Court and in two of them a hearing and first deliberations have already taken place.[40]

IV - Politics

Turning to my "Politics" heading, it is difficult for a sitting judge and the President of an international court to discuss *politics* as such. I am not the most fun dinner companion.

What, however, makes this task somewhat easier is the fact that the Strasbourg Court has always been conscious of its limited, external and supervisory role and has paid due deference to national democratic processes (provided minimum Convention requirements are respected).

It is the established methodology of the Court's assessment that when the domestic legislature adopts a measure of general application its proportionality is determined by having due regard to the legislative choices underlying it.

The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation or discretion accorded by the Strasbourg court to States.

The Court has applied this methodology when assessing State legislative choices in a variety of situations such as economic and social policy, welfare and pensions, electoral laws, the destruction of frozen embryos, assisted suicide, and prohibitions and restrictions on religious and political advertising, to name but a few.[41]

However, the Court has also held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail. A balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position.

Thus, for instance, in a case concerning the absence of any form of legal recognition and protection for same-sex couples in Russia, the Court did not accept, in a judgment earlier this year, that the attitude of the Russian population, namely widespread opposition to same-sex relationships, could be taken as a decisive argument for its assessment under Article 8 of the Convention (the right to respect for private and family life). The Court explained that it would be incompatible with the

[36] *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008; *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016; *Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018.
[37] *Sassi and Benchellali v. France*, nos. 10917/15 and 10941/15, 25 November 2021.
[38] *Jugheli and Others v. Georgia*, no. 38342/05, 13 July 2017.
[39] *Tătar v. Romania*, no. 67021/01, 27 January 2009.
[40] See *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (no. 53600/20)* and *Carême v. France (no. 7189/21)*. The case of *Duarte Agostinho and Others v. Portugal and Others (no. 39371/20)* will be heard after the judicial summer recess.
[41] *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, §§ 106-108, 22 April 2013.

underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention.[42]

From the perspective of *politics* it is important to note that recent Court judgments have responded to the type of democratic and rule of law backsliding which we are now witnessing in some European countries.

It has recently dealt with issues of judicial independence and the protection of the autonomy and independence of the judiciary in cases against Albania,[43] Belgium,[44] Bulgaria,[45] Georgia,[46] Hungary,[47] Iceland,[48] the Republic of Moldova,[49] Poland,[50] Romania,[51] Türkiye,[52] and Ukraine.[53] This list of countries is, unfortunately, longer than one would have hoped or expected in 2023.

In a series of cases against Poland, the Court has dealt with recent judicial reforms dating back to 2015. It found that the new procedure for appointing judges to the different chambers of the Supreme Court had been unduly influenced by legislative and executive powers. That amounted to a fundamental irregularity that adversely affected the whole process and compromised the legitimacy of the courts, most notably from the perspective of the requirement of "independent and impartial tribunals established by law" within the meaning of Article 6 of the Convention.[54] The Court has reached a similar finding as regards the appointment of a Constitutional Court judge in Poland.[55] Indeed, the Strasbourg Court's position on the judicial reform in Poland corresponds to the position taken by the Court of Justice of the European Union – the EU Court of 27 - which has condemned the Polish judicial reforms from the perspective of the requirements of EU law.[56]

In *Kövesi v. Romania*, the Court examined the premature termination of the mandate of the anti-corruption chief prosecutor following her public criticism of legislative reforms. The Court found violations of Article 6 (due to the lack of an effective access to court to challenge the termination of her mandate) and of Article 10 (due to unjustified restriction on the applicant's freedom of expression relating to her criticism of the legislative reforms). Ms Kövesi later became Head of the recently established European Public Prosecutor's Office within the framework of the European Union.

Freedom of expression of members of national judiciaries have been undermined in some States to the extent that judges have at times been obliged to turn to the European Court in Strasbourg seeking protection. One of them was a former judge of the Strasbourg Court who then became President of the Supreme Court of Hungary, Mr András Baka (the case cited above). His mandate as President of the Supreme Court was prematurely terminated as a result of views expressed publicly

[42] *Fedotova and Others v. Russia* [GC], nos. 40792/10 et al, §§ 214-219, 17 January 2023.
[43] *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021
[44] *Loquifer v. Belgium*, nos. 79089/13 et al, 20 July 2021.
[45] *Donev v. Bulgaria*, no. 72437/11, 26 October 2021.
[46] *Gloveli v. Georgia*, no. 18952/18, 7 April 2022.
[47] *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016.
[48] *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020
[49] *Catană v. the Republic of Moldova*, no. 43237/13, 21 February 2023.
[50] *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021, *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021, *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022 and *Żurek v. Poland*, no. 39650/18, 16 June 2022.
[51] *Kövesi v. Romania*, no. 3594/19, 5 May 2020.
[52] *Bilgen v. Türkiye*, no. 1571/07, 9 March 2021.
[53] *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013.
[54] See cases in note 64 above; see also *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, 8 November 2021; *Advance Pharma sp. z o.o v. Poland*, no. 1469/20, 3 February 2022.
[55] *Xero Flor w Polsce sp. z o.o.* (cited above).
[56] *European Commission v. Republic of Poland*, C-791/19, 15 July 2021.

in his professional capacity as regards certain judicial reforms in the country. The Court found that it was not only Mr Baka's right, but also his duty, to express his opinion on legislative reforms which were likely to have an impact on the judiciary and its independence.

Accordingly, for the Court, his position and statements called for a high degree of protection for his freedom of expression and strict scrutiny of any interference. In this connection the Court also stressed that the premature termination of Mr Baka's mandate undoubtedly had a chilling effect in that it must have discouraged not only him but also other judges and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary. This was in breach of the right to freedom of expression under Article 10 of the Convention.

Similar findings were reached in the case of *Miroslava Todorova v. Bulgaria*,[57]concerning disciplinary proceedings and sanctions against the President of the judges' association in retaliation against her criticism of the Supreme Judicial Council and the executive.

The *Todorova* case is interesting in that for the first time in the context of the protection of the judiciary the Court applied Article 18 of the Convention, a provision previously almost exclusively reserved to cases concerning prominent opposition politicians.

Frequent recourse is now made to Article 18 in our case-law – one of our "nuclear" options. This provision provides that restrictions of Convention rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed. It therefore seeks to protect against the misuse or "misapplication of power" by the authorities of a State.[58]

In *Miroslava Todorova* the Court found that the predominant purpose of the disciplinary proceedings against the applicant – who was President of the Bulgarian judges' association - had not been to ensure compliance with her judicial duties, but rather to penalise and intimidate her on account of her criticism of the Supreme Judicial Council and the executive. This was clearly in breach of Article 18 of the Convention.

Reliance on Article 18 in recent years has been particularly noticeable in cases brought by prominent opposition politicians and civil society activists. A short roll call speaks for itself: Aleksey Navalnyy[59] from Russia, Selahattin Demirtaş[60] and Osman Kavala[61] from Türkiye, Ilgar Mammadov[62] and Natig Jafarov[63] from Azerbaijan, as well as former politician Yuliya Tymoshenko[64] from Ukraine and Ivane Merabishvili,[65] former Prime Minister of Georgia.

The Court found violations of Article 18 in these cases in relation to detention and/or criminal prosecution on various charges, often fictitious and primarily aimed at silencing their political activity.

Allow me to close this excursus into politics on a less somber, but nevertheless striking note, namely the situation whereby politicians who, to put it diplomatically, are skeptical of the Convention system and the European Court, nevertheless have recourse to it when the need arises in their own

[57] *Miroslava Todorova v. Bulgaria*, no. 40072/13, 19 October 2021.
[58] *Travaux préparatoires*, CDH (75) 11, p. 8.
[59] *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, 15 November 2018.
[60] *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020.
[61] *Kavala v. Turkey*, no. 28749/18, 10 December 2019.
[62] *Ilgar Mammadov v. Azerbaijan (no. 2)*, no. 919/15, 16 November 2017.
[63] *Natig Jafarov v. Azerbaijan*, no. 64581/16, 7 November 2019.
[64] *Tymoshenko v. Ukraine*, no. 49872/11, 30 April 2013.
[65] *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017.

political lives. Such cases convey a fundamentally important and positive message, namely that the Convention is a bill of human rights of everyone and for everyone. Even those sceptical of the Convention system do rely on the Convention or apply to the Court seeking the protection of *their* Convention rights when they perceive the need arises.

As a court of law we are charged with interpreting and applying the law of the Convention whilst often navigating very choppy political waters. The repatriation of children and ISIS brides from the camps in Syria, the prohibition on wearing the niqab in public in France, the imposition of interim measures in relation to an asylum-seeker placed by the UK Home Secretary on a flight to Rwanda or the display of a crucifix in public schools in Italy - politics are never far from our courtroom, but politics is not what we do.

And this brings me to the final heading of my intervention today: "Hope".

V – Hope

The concept of "hope" is not a stranger to the Court's case-law.

In the case of *Vinter and Others v. the United Kingdom*[66] the Court devised the requirement of reducibility of life sentences giving rise to what has been called "the right to hope".[67]

It considered that a whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions. While this does not give life prisoners the right to be released after a certain time, it gives them the right to hope that they might be released if they seriously and genuinely work towards rehabilitation and if, therefore, their imprisonment is no longer justified on penological grounds.

Recently, the Supreme Court of Canada has found that a life sentence without a realistic possibility of parole is contrary to the right not to be subjected to cruel and unusual punishment under the Canadian Charter. In reaching this conclusion it relied, amongst others, on the Strasbourg Court's case-law.[68]

Earlier in my intervention I linked politics and hope and now allow me to return to that link, although this time from a somewhat different perspective.

After the Court's judgment in *Vinter*, and other cases in which the rights of prisoners have been safeguarded, it was suggested that the authors of the Convention must be turning in their graves.[69]

Suffice it to say that society's underdogs and political elites can equally rely on the hope which the Convention offers. As pointed out by US Supreme Court Justice Frankfurter:

> "it is a fair summary of history to say that the safeguards of liberty have been forged in controversies involving not very nice people."[70]

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[66] *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 et al, 9 July 2013.
[67] Trotter, Hope's Relations: A Theory of the 'Right to Hope' in European Human Rights Law, (22)(2) HRLR (2022), 1-21.
[68] R. v. Bissonnette, 2022 SCC 23, paras 104 and 106.
[69] Daily Mail (2013) Dozens of Britain's worst killers set to launch bids for freedom after European Court of Human Rights rules we DON'T have the right lock them up for life. Available at www.dailymail.co.uk.
[70] Felix Frankfurter - Oxford Reference. For its part, and along the same lines, the Court has stressed the following:
"[E]ven those who commit the most abhorrent and egregious of acts, nevertheless retain their essential humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, some day, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the

Leavings prisoners aside, in my experience at the Court, the hope promised by the Convention more often than not translates itself into a case doggedly pursued by, for example, a grieving mother whose son has died, prematurely and without sufficient medical care, after his brutal treatment in a European prison.[71]

Or in the bravery of Russian women, one of whom had had her hands chopped off by a violent husband, bringing their cases all the way to the European Court. We issued, when Russia was still a High Contracting Party, a judgment so stark in its identification of the Russian State's failures in relation to domestic violence that it was picked up by the New York Times.[72]

I would recommend you read some of these cases.

They are a reminder of the precious instrument – however fragile the Convention or criticised our judgments may be – created for our protection and the protection of European societies by the survivors of the Second World War.

As a devastating war now rages in Ukraine, the most critical contemporaneous contribution that the Convention can bring to the hope of stability and order in the Continent is its capacity to serve as an instrument of peace and as a guardian of effective political democracy.

It suffices to recall the direct reference to the rights and freedoms protected by the Convention in the Good Friday Agreement that ended the years of troubles in Northern Ireland 25 years ago. Or the stipulation in the Dayton Agreement that ended years of bloodshed in Bosnia and Herzegovina according to which "the rights and freedoms set forth in the [Convention] shall apply directly in Bosnia and Herzegovina" and "shall have priority over all other law."[73]

VI – Conclusion

Let me therefore conclude by saying that I remain hopeful that today's political leaders are able to recognise the continued value of the values expressed in the Preamble to the European Convention and that they seek to defend them.

In Strasbourg we are essentially a judicial canary in Europe's democratic mine; an early warning signaller which points to where European States are failing with reference to their commitments to democracy, the rule of law and the protection of human rights.

On that note – sombre but hopeful - I hand the floor back to President Sreenan and to you ladies and gentlemen.

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experience of hope would be to deny a fundamental aspect of their humanity and to do that would be degrading." See *Matiošaitis and Others v. Lithuania*, nos. 22662/13 et al, § 180, 23 May 2017.

[71] See, for example, *Zakshevskiy v. Ukraine*, no. 7193/04, 17 March 2016.

[72] See *Tunikova and Others v. Russia*, nos. 55974/16 and 3 others, 14 December 2021, see also *Volodina v. Russia*, no. 41261/17, 9 July 2019. See Russia's Police Tolerate Domestic Violence. Where Can Its Victims Turn? - The New York Times (nytimes.com).

[73] The General Framework Agreement for Peace in Bosnia and Herzegovina, 1995, Annex 4, Article II.