Judging Europe in turbulent times: some thoughts from the Strasbourg bench

6th November 2024
Lincoln's Inn

Equality, Diversity and Inclusion Committee Lecture

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I – Introduction

My warm thanks to Master Karen Schuman for the invitation to address you and to Judge Singh for his kind introduction.

When asked by the Chair of the EDI Committee to propose a topic, I struggled a little.

She encouraged me to address female representation on the international bench. But I must admit that I didn't wish, at the end of your working day, and for reasons I'll later explain, to occupy you on that one topic for 40 minutes or so.

I've opted instead for a broader umbrella topic – Judging Europe – looking at the work of a Strasbourg judge and the challenges facing the Court in what can only be described as turbulent times.

Having served as a Judge in Strasbourg from 2015 to 2024, I'll first place the nine-year mandate in its European context (II), then turn to a strand

of Strasbourg case-law on domestic and gender-based violence which I hope is of interest (III), using that subject as a springboard to touch on the issue of judges and gender in my conclusion (IV).

II – Judging Europe in turbulent times

When I arrived in Strasbourg in the Summer of 2015, formations of French soldiers were already patrolling the streets. The bloody attack on the Charlie Hebdo weekly magazine, the subject of Court case-law under Article 10,[1] having cost 14 lives a few months previously.

Further terrorist attacks were to follow in the immediate and subsequent years: in Paris, Nice, Brussels, Manchester and Strasbourg, to name but a few. The patrols in Strasbourg fluctuated between 3, 5 and 7 soldiers, depending on the security situation or the assessment of risk at any one time.

Convention complaints arising in cases concerning terrorism occupied the Court throughout this period, ranging from questions on access to legal assistance and fair trials in *Ibrahim and others v. United Kingdom*,[2] to stay at home orders imposed on radicalised Islamists during France's state of emergency,[3] the Convention compatibility of secret rendition in cases

[1] See, in relation to a disciplinary sanction imposed on a teacher following his comments on the attack, *Mahi v. Belgium* (dec.), no. 57462/19, 3 September 2020.
[2] No. 50541/08, judgment of 13 September 2016.
[3] *Pagerie v. France*, no. 24203/16, judgment of 19 January 2023.

involving Lithuania, Poland and Romania,[4] or the expulsion of Chechens from France following the beheading of teacher Samuel Paty.[5]

2015 was also the year of migration, as over 1.3 million people crossed the continent seeking asylum or simply a better home to that which they had left behind.

Asylum and immigration have long been, and are set to remain, a burning political issue for many EU and Council of Europe States, not least your own. The Grand Chamber has been repeatedly seized over the last decade, via referral and relinquishment procedures, of questions relating to Articles 3 and 8 in that context and this is set to continue.[6] Currently before it are three cases against Latvia, Poland and Lithuania in relation to alleged pushbacks at the Belarus border. It is widely accepted that, since July 2021, Belarus has allowed for, facilitated or forced the irregular entry of third-country nationals into the EU. Neighbouring States, including Finland and now Poland, have been adopting measures in the face of what they regard as a form of "hybrid warfare" and cases relating to these measures are inexorably finding their way to the two European courts in Strasbourg and Luxembourg.[7]

[4] See, for example, *Al Nashiri v. Poland*, no. 28761/11, judgment of 24 July 2014.
[5] *K.I. v. France*, no. 5560/19, judgment of 15 April 2021. The case also highlights the delicate interaction between EU and Convention law in certain fields.
[6] See, for example, *J.K. v. Sweden*, no. 59166/12, 23 August 2016, on the burden of proof in asylum cases or *Savran v. Denmark*, no. 57467/15, judgment of 7 December 2021, on expulsion of a mentally ill long-term resident following a criminal conviction.
[7] See for further details https://strasbourgobservers.com/2024/09/06/for-better-or-for-worse-grand-chamber-takes-over-cases-concerning-pushbacks-at-the-belarusian-border/.

2016 brought Brexit and a change of regime in the US, with significant consequences, then and now, for multi-lateralism, whether in Europe or globally, and for States' engagement with international courts.

2016 also saw an attempted coup d'État in Türkiye, with lasting consequences in that State, in neighbouring States and for the Council of Europe.

Prior to 2016, Türkiye had featured in third position on the Court's top ten list of high case count countries.

Of the approximately 62,000 plus applications now pending, 37 % have been lodged against Türkiye. The vast majority relate to the repressive measures adopted by the Turkish authorities in the wake of the attempted coup.

Following relinquishment to the Grand Chamber in 2023 in a leading case – *Yalcinkaya* – the Court found violations of Articles 6 and 7 of the Convention due to the domestic courts' characterisation of the use of a mobile phone application called ByLock.[8] Essentially, anyone whose use of that application is established by the domestic courts can be convicted on that sole basis of membership of an armed terrorist organisation pursuant to Turkish law.

[8] *Yuksel Yalcinkaya v. Türkiye*, no. 15669/20, 26 September 2023.

I mention the *Yalcinkaya* case because it gives you a real sense of the size and nature of the Court's docket and the resources and case management challenges which it presents the registry and judges. The violations found in this individual case were considered to stem from a systemic problem, evidenced by the fact that there were then over 8,000 applications on the docket involving similar complaints. This number will certainly have risen since.

The Court called on the Turkish authorities to address the defects identified in the judgment on a larger scale in order to avoid the Court having to establish similar violations in numerous cases in the future.[9]

Up to three thousand similar applications have since been grouped and communicated.[10] But it remains to be seen whether the Turkish authorities will cooperate as requested. In the meantime, limited court resources have to be directed to one group of cases regarding one State, thousands of applicants and their individual factual constellations but similar or identical underlying legal questions.

Turning back to the perma-crisis experienced through the last decade, a global pandemic hit us all in 2020, bringing with it a host of societal, political, economic and legal challenges, some of which are still felt today.

[9] *Yalcinkaya*, cited above, § 418.
[10] See the press release on the communication of the most recent batch on 8 July 2024 - https://hudoc.echr.coe.int/fre-press#{%22itemid%22:[%22003-7994743-11154522%22]}.

And then came war in 2022. For the residents of Ukraine the war started not on 24th February that year but eight years earlier in Crimea. The number of pending inter-State cases rose to a record high during this period. 13 such cases remain pending, almost all of which are conflict related.

A first judgment relating to the Ukrainian conflict and specifically Crimea was handed down in June this year and the Grand Chamber's consideration, on the merits, of the case concerning the East of Ukraine and the 2022 invasion is well advanced following a hearing last July.[11]

But of course, other conflicts simmer on – in Nagorno-Karabakh or Transnistria, to name just two. These conflicts also give to a significant number of individual applications and contribute to the record number of inter-State complaints previously mentioned.

The Strasbourg court sits at the centre of a fragile but nevertheless resilient web, serving a legal space which now covers 46 States, 46 legal orders and 46 court systems, inhabited by over 650 million potential applicants.

When serving your term as a judge one is often more struck by the fragility than by the established resilience.

[11] *Ukraine v. Russia (Crimea)*, nos. 20958/14 and 38334/18, judgment of 25 June 2024 and *Ukraine and the Netherlands v. Russia* (dec.), nos. 8019/16, 43800/14 and 28525/20, decision of 30/11/2022.

That fragility manifests itself externally in different ways, not least the non-execution of Court judgments or, in some quarters, open political opposition to the Convention system, despite the 2023 recommitment of the Heads of State and Government at the Reykjavik summit.

Internally, the fragility of the Court during the period described was rendered painfully evident by the withholding of budgetary contributions by the Court's two largest case count countries – the Russian Federation and Türkiye – and by the failure of other States, until after the expulsion of Russia from the Council of Europe in 2022 - to step into the breach. This contributed to the loss, during the consequent period of austerity, of much needed registry case-lawyers and support staff.

The increase in the budget, negotiated following the 2023 summit, has stemmed the flow and will lead to the replacement of personnel lost.

But in reality, the Strasbourg Court was and remains understaffed and underfunded; unable to tackle quickly enough many of the admissible applications which raise new and difficult legal questions and in relation to which individual justice and wider interpretative guidance is much needed.

The need for significant investment in justice systems is not unique to Strasbourg, as evidenced by the comments of the Lady Chief Justice earlier this year.

However, domestic judges in common law jurisdictions enjoy at least three assets which Strasbourg judges lack. Firstly, they have the possibility of opening a case file and reading it from start to finish in their own language. Secondly, they enjoy the assistance of a professional bar, in your case of world-renowned excellence. Thirdly, given that effective domestic remedies generally exist, by the time a case reaches the highest domestic court, the applicant's Convention complaints will have been examined in detail. Take a look at a Hungarian Grand Chamber case, *Fabian v. Hungary*, which concerned pension restrictions imposed by the respondent State during and after the financial crisis, for an example of how exposed the Court's largest judicial formation can be when it is found that no effective domestic remedies existed to exhaust.

It is no exaggeration to say that these different events, which have characterised the last decade, manifest themselves in one form or another on the Court's docket. This can sometimes be to the tune of thousands of individual applications. I've already mentioned the Turkish influx.

But other societal events can also cause sudden and potentially unmanageable spikes.

A French case, *Zambrano*, provides a good illustration. The applicant in that case challenged different French Covid provisions and, in particular, the requirement of a "health pass" to allow the holder to access aspects of daily life.

Mr Zambrano invited visitors to his website to submit multiple applications through an automatically generated and standardised application form.

Almost 18,000 applications reached the Court in the space of weeks via this route. In unambiguous terms, the applicant explained on his website that his objective was not to win the respective cases, but, on the contrary, to bring about "congestion, excessive workload and a backlog" and to "derail the system" in which the Court was a "link in the chain".

It was clear that such a major surge was liable to affect the Court's ability to fulfil its mission under Article 19 in relation to other applications.

Having particular regard to the objectives openly pursued by the applicant - questions of victim status and exhaustion also arose - the Court held that his approach was manifestly contrary to the purpose of the right of individual application and an abuse of procedure.

The Chamber which dealt with the case acted in a record 35 days, a speed unusual for the Court but nevertheless necessary since the mail room, where all applications are received, had been brought to a standstill by the sudden influx.[12]

[12] See *Zambrano v. France* (dec.), no. 41994/21, decision of 21 September 2021.

As regards the UK, I mentioned Brexit in passing but I don't think that any judge who has served in Strasbourg in the last decade (or two) would or could omit a reference to the UK when referencing recent Convention challenges.

I hold the distinction I believe of having been the only Court President to have met, in the space of a year, and at their request, the Prime Minister, two Lord Chancellors and the Attorney General twice.

The impetus for these meetings – all of which were constructive and on public record – was a mixture of domestic political concerns and the fallout from the interim measure issued by a duty judge in relation to two passengers on the June 2022 aborted flight to Rwanda.

Whether one agrees or disagrees with the interim measure, or the process leading to its adoption, what it ensured and was designed to ensure was that the Convention issues raised by persons subject to the relevant legislation and consequent decisions could be examined by the UK courts in accordance with the principle of subsidiarity.

We now know the final outcome of that assessment in the form of the unanimous decision of the Supreme Court of 15 November 2023.[13]

[13] See R *(on the application of AAA (Syria) and others) v. Secretary of State for the Home Department* [2023] UKSC 42.

As you well know, but parts of the press stubbornly refused to grasp, the Strasbourg court has and had no jurisdiction, under Rule 39 or any other provision of the Convention, to ground a plane or to opine in the abstract on government policy or indeed legislation. As explained in a press release issued when the interim measure was lifted, following the decision of the High Court to quash the individual measures in relation to the applicant, N.S.K., under the Convention system, interim measures play a vital role in avoiding irreversible situations that would prevent national courts and/or the Court from properly examining Convention complaints in cases brought by individual applicants, or groups of applicants.[14]

Incidentally, the case in question was recently struck out, asylum having been granted.

The fallout from the Rwanda interim measure did tempt me to extend the *Judging Europe* title to read – *Judging Europe (while being judged)*. The response of one minister to the Court's good faith engagement to further clarify its procedural rules and issue a revised Practice Direction in relation to interim measures was to condemn the Court on the Today programme as being "… politicised, … interventionist and [not following] a process that we would recognise as being due process."[15]

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[14] See https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://hudoc.echr.coe.int/app/conversion/pdf/%3Flibrary%3DECHR%26id%3D003-7620973-10489477%26filename%3DCourt%2520gives%2520notification%2520of%2520case%2520concerning%2520asylum%2520seeker&ved=2ahUKEwje-szpg_-IAxXu_7sIHQWeGWQQFnoECBgQAQ&usg=AOvVaw0DA3AxVrs_95WAF3HlT2Mi.

[15] https://www.bbc.com/news/uk-politics-64907772.

All courts, national and international, should be self-critical and open to both criticism and reform.

However, then and now I consider it surprising how little consideration is given to the external impact of political statements of this nature. They provide welcome fodder for other respondent States, particularly if they come from founding Convention States like the UK, to justify refusals to execute Court judgments, refusals to free individuals whose detention has been deemed unlawful and more generally a basis to defy the authority not just of the Court but of the Convention system, including the primary role of national courts within it.

It is reassuring to read the Attorney General in his recent Bingham lecture emphasise that:

> "international law is not simply some kind of optional add-on, with which States can pick or choose whether to comply. It is central to ensuring […] prosperity and security, … and that of all global citizens."

I note that he further stated the will to "abide by and unequivocally support the European Convention on Human Rights, including by complying with requests from the Court for interim measures".[16]

[16] See the Attorney General's 2024 Bingham Lecture on the Rule of Law, https://www.gov.uk/government/speeches/attorney-generals-2024-bingham-lecture-on-the-rule-of-law.

This overview of turbulence, case-law, case-processing and reform, is but a snapshot of the Court's work over a period of almost ten years. I provide it for a reason.

Too often political and press, and sometimes even legal, attention can be limited to 5 to 10 judgments or decisions touching on new or controversial legal issues such as, for example, climate change, compulsory vaccinations or the repatriation of ISIS children, all high-profile issues which have been dealt with by the GC in the last few years.

However, much of the Court's time is dedicated to more mundane or more voluminous issues.

Last year, 38,260 applications were disposed of, with 6,931 giving rise to a judgment. Single-judge formations dealt with over 25,000 applications.

The Strasbourg court houses in reality 4 differently functioning judicial entities operating in parallel: Single judges who filter out inadmissible applications; Committees of three judges across all five Sections, which are now seised of the bulk of admissible applications; Chambers of 7 judges, which deal with almost 19,000 more complex applications requiring more time and resources, and the Grand Chamber of 17 judges which deals with only a fraction of cases, albeit high profile and complex or raising novel issues.

To these four functioning judicial entities have now been added two others, reflecting the degree of conflict afflicting Europe at present. Firstly, the treatment of inter-State conflict cases has led to the creation within the Court of a conflicts unit to better work with judges in order to provide applicant and respondent States with more timely responses. The judgment in *Georgia v. Russia II*, a case lodged in 2008, was handed down in 2023. This was untenably slow. In contrast, a revised approach to the processing of inter-State cases led to the holding of a rolled-up hearing in July this year, partly on admissibility but also on the merits of the applications covered by the case *Ukraine and the Netherlands v. Russia*, which includes the 2022 application lodged after the invasion.

Secondly, following the expulsion of the Russian Federation from the Council of Europe in March 2022, the Court continued to exercise its residual jurisdiction, pursuant to Article 58 of the Convention, to examine cases pending against that respondent State. The relevant cases must fall on the right side of the temporal cut off point which results from Russia's exit from the Convention system as a High Contracting Party on 16 September 2022. The creation of additional 3-judge committees has allowed for the examination of almost 10,000 of the 17,000 applications pending when Russia was expelled.

This residual jurisdiction of the Court is the means available to ensure that a former High Contracting Party remains accountable under international law for its actions and omissions during the relevant period. But it comes

at a cost and diverts judicial time and limited Court resources from other areas where greater speed and/or greater depth are needed.

My apologies if I come across in this first contextual part as a purveyor of doom. But I do think it important not to lose sight of the seismic changes lived over the last decade on our continent; changes which by their nature generate Strasbourg cases. In addition, this overview chimes with the central message of the Attorney General in his recent address as regards the value of the soon to be 75-year-old Convention system:

> "Walking, or threatening to walk away, would be a total abdication of … international law responsibilities and send out precisely the wrong message at a time when the rule of law is under threat in so many places."

III – Domestic and gender-based violence

I turn now to an area of Convention case-law which I hope may be of interest to your Committee, both in relation to legal questions already clarified and others where the Court's case-law is showing signs of continued progress.

I'm referring to cases in which individual applicants who have been victims of domestic and gender-based violence have introduced complaints under different provisions of the Convention in relation to

their State's response to that violence and its perpetrators or to them as victims.

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

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

A report published just last month by Victim Support depicting the experience of survivors of sexual violence of going to court and of cross-examination should give rise to serious concern.

From the 2009 landmark *Opuz v. Türkiye* ruling onwards,[17] a succession of domestic violence cases has seen the European Court approach the issue from the angle of several substantive provisions of the Convention – mainly the right to life (Article 2), the prohibition of inhumane or degrading treatment (Article 3), the right to protection of one's physical and psychological integrity as part of the right to respect for private life (Article 8), and the prohibition of discrimination (Article 14).

[17] *Opuz v. Turkey*, no. 33401/02, ECHR 2009.

In 2021, in *Kurt v. Austria*, the Grand Chamber adopted a judgment which marked a qualitative step forward in the perception of and response to domestic violence from the standpoint of the Convention.[18]

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

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

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

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

These are difficult cases. The violence at the root of the Convention complaints generally builds up and manifests itself in the private sphere,

[18] *Kurt v. Austria* [GC], no. 62903/15, 15 June 2021.

deliberately shielded from public view by the perpetrator and/or by the victim. Any accused may also have Convention rights which domestic courts (and eventually the Strasbourg court) must equally respect; a point highlighted by the majority in *Kurt*. In addition, as the Court has repeatedly held in its case-law on Article 2, the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, mean that Convention obligations must be interpreted in a way which does not impose an impossible or disproportionate burden.

What is striking about the *Kurt* case is that while the Grand Chamber was unanimous on the legal principles applicable, it split 10:7 on their application to the facts of this case; a point to which I will return when looking at gender and judging.

There is a natural interplay between Articles 2, 3 and 8 of the Convention in the context of domestic violence. They all aim to protect an individual from infringement of their physical and psychological integrity.

But what role, if any, should Article 14 ECHR play in this field, given that its prohibition of discrimination enjoys no independent Convention existence.[19]

[19] See, for a recent authority, *Yocheva and Ganeva v. Bulgaria*, nos. 18592/15 and 43863/15, 11 May 2021, § 71.

In 2009 the Court decided in *Opuz* to have recourse to Article 14, combined with Articles 2 and 3, for the first time in the domestic violence context. Statistical evidence presented to the Court in that case pointed to features common to reported victims of domestic violence in the respondent State.[20] The Court found that available domestic remedies did not function effectively, complaints were not investigated, and sentences, in the event of convictions, were mitigated on the grounds of custom, tradition or honour. The Court deduced from the material before it a pattern of toleration and passivity on the part of the Turkish authorities in relation to domestic violence.[21]

It is important to stress the obvious here – when Article 14 is engaged it is the conduct of State officials in response to alleged violence, when applying or failing to apply existing criminal law and other tools, which is the subject of the complaint. In rare cases the regulatory framework itself is found to be deficient. In most cases it is the failure to apply existing tools properly which is at stake.

The change of tack in *Opuz* has been followed in other cases subsequently: See *Eremia v. Moldova* from 2013,[22] *Volodina v. Russia* from 2019 or *Tunikova v. Russia* in 2021.

[20] All victims were female and the vast majority were of Kurdish origin, illiterate or of a low level of education and generally without any independent source of income.
[21] See *Opuz v Turkey*, cited above, §§ 197-198, 200.
[22] *Eremia v. the Republic of Moldova,* no. 3564/11, 28 May 2013.

However, the Court does not systematically engage with Article 14 when pleaded by applicants. Because complainants must rely on a substantive right or freedom combined with Article 14 the Court has a choice:

- to engage on the merits with the substantive Convention provision (e.g. under Articles 2, 3 or 8 ECHR) before moving on to assess Article 14;[23]
- to combine the two from the outset;[24]
- or to declare that it is not necessary to examine separately Article 14 if a violation is established with reference to the main substantive provision.[25]

In cases following *Opuz*, the threshold for finding a violation of Article 14 combined with Articles 2 or 3 was regarded by some Strasbourg judges as very high. There had to be proof of the authorities repeatedly condoning such violence and reflecting a discriminatory attitude towards an applicant as a woman, the burden being on the applicant to prove this.[26]

However, what type of evidence must an applicant produce to establish that the acts or omissions of a respondent State in the context of domestic violence are in fact a reflection of discriminatory practices or State passivity?

[23] See, for example, *Munteanu v. the Republic of Moldoda*, no. 34168/11, 26 May 2020.
[24] See, for example, *Tkhelidze v. Georgia*, no. 33056/17, 8 July 2021.
[25] See, for example, *Civek v. Turkey*, no. 55354/11, 23 February 2016.
[26] See § 18 of the dissenting opinion of Judge Spano in *Talpis* or *Eremia v. the Republic of Moldova*, cited above, § 89.

The *Opuz* violation had highlighted discrimination and bias on a colossal and systemic level in Türkiye.[27] In concluding in 2010 in a case called *A. v. Croatia* that the applicant had not produced sufficient *prima facie* evidence to support her Article 14 complaint, the Court held that she "[had] not submitted any reports in respect of Croatia of the kind concerning Turkey in the *Opuz* case".[28]

In some past cases, despite the examination of Article 14 complaints following on from established failures by the respondent State authorities in relation to their positive procedural obligations under Articles 2 and 3, the Court seems to have required individual applicants to displace an excessive and perhaps misplaced burden of proof pointing to collective difficulties, bias and burdens borne by female victims of particular offences. The underlying message in these cases may have been that if the *collective* burden is not heavy, brutal or obvious enough, the *individual* applicant will not succeed in their Article 14 complaint.

Article 14 complaints should lead us to ask: but for the complainant's gender and the crime reported, would the authorities have responded differently? The answer to that question cannot surely be determined by whether domestic or gender-based violence has reached the level of a systemic or structural societal problem on a par with that seen in Turkish or Russian cases like *Opuz* or *Tunikova*.

[27] See *Opuz v. Turkey*, cited above, § 96.
[28] See *A. v. Croatia*, cited above, § 97.

Recent Bulgarian cases point to a discernible shift. In *Y and Others v. Bulgaria*, decided in 2022,[29] the Court considered that the *prima facie* evidence required to shift the burden of proof on to the State needed to demonstrate that: (i) domestic violence affected mainly women, and that (ii) the general attitude of the authorities had created a climate conducive to such violence. That attitude can manifest itself in the way in which women are treated in police stations when they report domestic violence, or in judicial passivity in providing effective protection to women who are victims of it.[30]

In *Y and others* the Court noted that a refusal to ratify the Istanbul Convention could be seen as "lack of sufficient regard for the need to provide women with effective protection …".[31] Nonetheless, it was not prepared to draw consequences in that case from non-ratification or from the State's failure to establish comprehensive statistics on domestic violence cases and their handling by State authorities.[32]

A shift in approach appears to come in *A and E v. Bulgaria*, decided one year later, involving a claim of domestic violence by a minor at the hands of her boyfriend in relation to which the prosecutor refused to open

[29] *Y and Others v. Bulgaria*, no. 9077/18, § 103, 22 March 2022, § 122.
[30] *Ibid*, § 122 (f)
[31] *Ibid*, § 130. *See also* §§ 71-74: Bulgaria signed the Istanbul Convention in April 2016 but has not ratified it. In July 2018, the Bulgarian Constitutional Court ruled that the Istanbul Convention was unconstitutional, claiming that it encourages homosexuality and a wrong interpretation of "gender", leading to a questioning of traditional values. Following the controversy, Bulgaria withdrew its ratification bill. In November 2019 (P9_TA(2019)0080), the European Parliament urged Bulgaria to ratify the Convention without delay.
[32] *Ibid*, § 130.

criminal proceedings. The boyfriend had been warned by police and the applicant was instructed to prosecute any alleged offence privately.[33]

This was the third case in respect of Bulgaria in which the Court had found a substantive violation of the Convention, stemming from the authorities' response to acts of domestic violence against women. The applicant in this case provided statistics about domestic violence as well as violence against women in society in broader terms which showed that in Bulgaria women are the predominant victims. The Court held that while it could not be said that Bulgarian law had wholly failed to address the problem of domestic violence, the way in which those provisions were worded and had been interpreted by the relevant authorities was bound to deprive a number of women victims of effective protection. The absence of official comprehensive statistics by the authorities could no longer be explained as a mere omission on their part, given the level of the problem in Bulgaria.

In addition, Bulgaria's refusal to ratify the Istanbul Convention was taken as a negative indication of its level of commitment to effectively fighting domestic violence.

Much has been achieved since *Opuz*. Sadly, given the number of cases pending before the Court, with notable pockets coming from Bulgaria,

[33] No. 53891/20, 23 May 2023.

Italy, Croatia and Georgia, to name but a few, much clearly remains to be done.

Gender and judging

Which provides a springboard to the last part of my address and the question of gender and judging.

When asked to address the Irish bar on International Women's Day a few years ago, I shared a certain reluctance with the audience about being asked, as a female judge, to address gender issues in legal life.

Firstly, women, like men, choose professional paths and follow turning points as, just that, professionals. Our gender is a constant companion but not one by which we have sought to define ourselves professionally.

Furthermore, gender is only one dimension of identity that informs our experiences. In my particular case other factors have been as formative. I am a first-generation university goer who studied law in a small jurisdiction where law, like politics, was, more often than not, a family business. I also took the road less travelled and specialized in European law in the 1980s, following a career path which brought me far away from the Irish bar. Nationality, marriage to a lawyer from another European country, and the absence of family roots in the law in my country of origin: these factors as much as gender have influenced the directions my career took and my progression.

The second reason for my reluctance at that time was that, more often than not, it is still the underrepresented gender which is asked to publicly address this issue. Women are asked to bare their souls in relation to the varied, few or perhaps many obstacles which may have been encountered in their ascent or which may have hampered the latter.

Then and now, I'm left wondering why male judges are not asked to engage with large audiences of their peers on similar topics, offering up personal pounds of flesh in the process.

I know, for example, from articles and interviews, of the experience of the UK's first female President of the Supreme Court. However, in 2024 I would find it very interesting and equally useful to hear the reflections of male members of the judiciary on the subject of gender and judging and on the obstacles, or lack thereof, which they have encountered.

I came across the excellent speech to this Committee of the Master of the Rolls, Sir Geoffrey Vos, after I had finished preparing my own text and can only applaud his direct and forceful engagement with the need for engagement with issues of inclusion and exclusion.

Whether in relation to gender, race, social class or religion, how quickly we will change existing paradigms in a given profession depends not or not only on the efforts and experiences of the underrepresented, or on the work of committees like yours, but on the actions and inactions of the

overrepresented and their genuine engagement with or understanding of the obstacles encountered by others whose experience – whether on the way up or at the top - does not correspond to theirs.

Having explained my reluctance previously to put gender centre stage, as the 17th President of the Strasbourg court and, as you've been reminded, the first female, I realized that my election represented something important for some female peers and for younger generations of female lawyers and judges, particularly in States where gender representation on the bench remains problematic, particularly in the superior courts.

In a study published in the *Leiden Journal of International Law* in 2022, the picture regarding female representation on the international bench was as follows:

- The ICJ then had four women on its bench of 15 judges; a number which has remained steady, despite the departure of President Joan E. Donoghue.
- The ITLOS had five female judges out of 21.
- The ICC had then achieved parity, with nine women out of 18 judges. That number has since risen to 11.
- The UN International Residual Mechanism for Criminal Tribunals had 8 female judges out of 24.
- In 2022, the ECtHR had 16 female judges out of 47 (Russia not yet having been expelled); the African Court of Human Rights had 6 female judges out of 11 (now down to 5) and the Inter-American

Court of Human Rights had 3 female judges out of 7 (a number which has remained steady).

At present, the Strasbourg bench stands at 17 female Judges out of 46 but 4 female Judges are due to depart in 2024 and their replacements are either male or not yet chosen. All-male lists of judicial candidates continue to be presented and rejected by the PACE, including by States like Denmark, which appointed the first female Judge. The reason given was the paucity of women in senior judicial roles.

As regards the CJEU, which did not feature in the 2022 study, of the 38 slots for Judges and Advocates General, only 8 members are currently female.

Of relevance also is the record of certain States regarding their judicial appointments since the European courts were established. 15 Council of Europe States have never seen a female Judge elected to the Strasbourg bench; a figure which includes, after 75 years, founding States like France and the UK. In the case of the UK, no female Judge has ever been appointed to the Luxembourg bench either (I do not of course overlook the appointment of Eleanor Sharpston to the post of Advocate General).

Progress in terms of female representation on the international bench has been slow, uneven, and is not linear. This uneven pattern would seem to be mirrored in the experience of your own Supreme Court where only 2 of the 12 judges currently serving are female, contrasting with the situation

just a few years ago. According to recent statistics of the International Bar Association, female representation on the bench is quite high in this jurisdiction, at 43 %, but it drops down to 26 % at senior level.

Of course, one needs to ask, does gender matter when it comes to appointments to the international (or indeed national) bench and, if it does, why? Here I'll try not to fall into the dreaded trap of generalisations.

In addition, a particularity of the Strasbourg bench is worth stressing. It is composed of Judges coming from different backgrounds – judicial, academic, governmental legal services, practicing lawyers and NGOs. The regional and professional spread of the Strasbourg bench thus means that it can house bearers of contrary views founded in life experiences which have been poles apart. Gender is but one factor. And if it is given priority over the aptitude of candidates to exercise what is a judicial function in a regional human rights court which, as I have explained, is under considerable pressure, then the Parliamentary Assembly to which the final choice of judge falls, may ultimately weaken the strength of the Court.

The first point of course is whether there are sex or gender based differences in the ways that men and women perform their judicial functions. Several studies of national judges have considered this question but their findings have been regarded as inconclusive or inconsistent.[34] Indeed the difference theory has been condemned as "theoretically weak,

[34] See L. Hodson, "Gender and the international judge: Towards a transformative equality approach" (2022) *Leiden Journal of International Law* or, in relation to the ECtHR, E. Voeten, 'Gender and judging: evidence from the European Court of Human Rights', (2021) *Journal of European Public Policy* 1453.

empirically questionable and strategically dangerous".[35] With the Strasbourg court studies have often focused on separate opinions and have failed to take into account that many judges, whether male or female, will resort to separate opinions with great economy and only as a last resort.

I looked at the composition of the different benches in the domestic and gender-based violence case-law which constituted the filler of my presentational sandwich this evening. In the ground-breaking *Opuz* case, the Chamber was composed of a majority of women. In some of the more criticized Strasbourg decisions, such as *Talpis v. Italy*, those opposing the finding of a violation were male judges. In several cases, the bench was split. Most notably, the GC judgment in *Kurt* is defined by concurrence on the general principles but a 10:7 split on their application with female judges (3) evenly represented on the majority and minority sides. However, reading the dissent I thought it striking that some of the dissenting members of the bench had worked in the field in question. Yet their apparently expert voices failed to carry around the deliberation table when it came to the outcome of the case.[36] In the most recent Bulgarian case which shifted the Chamber's approach on Article 14 the ratio was 6 male Judges to 1 female.

Legitimacy is the other factor commonly cited in support of greater gender representation on the bench or gender parity. Achieving gender

[35] See K. Malleson, "Justifying Gender Equality on the Bench: Why Difference Won't Do" (2003) 11 *Feminist Legal Studies* 1–24.
[36] See *Kurt*, cited above.

parity on international benches, it is argued, would itself have the important effect of enhancing the sociological legitimacy of international courts and tribunals.[37] One is reminded of the observation of Baroness Hale in *Radmacher (formerly Granatino) v Granatino* [2010] on the enforceability of ante-nuptial agreements. She noted that there was "a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman".

The legitimacy point is well illustrated in a recent judgment of a Strasbourg Chamber of 7 judges in *Semenya*. The case raises questions relating to the existence of effective remedies in respect of alleged discrimination against a professional athlete with differences of sex development who was required under non-State regulations to lower her natural testosterone level to compete in women's categories in international competitions. The Chamber found in favour of the applicant in a split decision. As the case was referred to the GC and is pending I will say nothing on the reasoning of the Chamber majority. What is striking for the purposes of our reflections is the impact in terms of a perception of balanced representation of it having been decided by an all-male bench.

Rule 25 § 2 of the ECtHR Rules of Court provides that "The composition of the Sections shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties". Gender is but one factor when composing Sections but where the female

[37] N. Grossman, 'Achieving Sex-Representative International Court Benches', (2016) 110 *American Journal of International Law* 82.

representation ratio in the Court is low this makes compliance with the balance sought by the Rules of Court difficult if not impossible to achieve.

A related argument that does not depend on 'difference' in judging outcomes is based on the importance of demonstrable equality of opportunity and the need for female role-models to secure the progression of women.[38] Given the persistently low number of female KCs in this jurisdiction,[39] or the persistently low number of women appearing before the supreme court in recent years (23 % in 2019), as well as the identified reasons lying behind these low statistics, the role model objective remains highly relevant.[40]

A few years ago, as I explained, I would have sought to de-centre the gender question and play down its relevance. However, having walked in a first female's shoes as President of the Strasbourg court, I no longer shy away.

Lord Hoffman's historic picture of the judge as "old, white, male geezers" no longer holds sway nationally or internationally. But leadership and authority may still be associated by some (or by many) with the male form. Some of the traditional signifiers of gravitas are not amenable to or sought by female judicial leaders. So we must not shy away from the process of changing those signifiers and traditional perceptions, which may still hold

[38] B. Hale, 'Equality and the Judiciary: Why Should we Want More Women Judges?', (2001) *Public Law* 489.
[39] The figures are poor for Irish Senior Counsel also, with the ratio 4:1.
[40] See Hale speech to the Bar of England and Wales 2019.

sway in some quarters, of where judges hail from, what they should look like and even how they should speak.

I graduated from university young, gained my doctorate young, joined the CJEU young. But time stands still for no man or woman. Decades pass and senior women can still experience, at judicial events and conferences, what I call the "who's the girl moment". Perhaps this no longer occurs in this jurisdiction but it does elsewhere. Any judicial leadership position requires resilience and perseverance – a subject beautifully addressed by Dame Anne Rafferty in her speech to the Royal Society Diversity Conference in 2018. But first females require a double measure of both.

Leaving aside leadership positions, female representation on the bench matters, and for their contribution to be meaningful women must be present in sufficient numbers. On retiring recently from the Irish Supreme Court one female justice wondered "whether the women on the court have a different approach to discourse than the men", being more solution-based than "debaters".[41]

The approach of a given judge to a legal question may not be gendered – indeed judicial impartiality demands the opposite - but the deliberative *process* through which a solution is reached can be positively influenced in terms of inclusivity, style and collegiality by a bench which reflects different life experiences. This diversity can in turn enhance the

[41] Irish Times, interview with Ms. Justice Marie Baker (retired), 28 July 2024.

development of the law. Therein, in my experience, lies the relevance of gender and diversity more generally.

I thank you again for your invitation and for the honour bestowed by Lincoln's Inn on one of the judges judging Europe and therefore the recognition by you of the work of the European bench on which I served.