

Foreword

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The Council of Europe has been upholding children’s rights for a long time and a number of major instruments have been adopted in this area. But the programme “Building a Europe for and with children”, implemented as a result of the Third Summit of Heads of State and Government of the Council of Europe (Warsaw 2005), is a very significant step forward and is also a great success, including in terms of media coverage.

The Council of Europe programme tackles some truly crucial problems, particularly violence against children, whether in the form of corporal punishment, sexual abuse or human trafficking, and wherever it occurs, whether in the family, at school or elsewhere. The programme also addresses the issue of children’s access to national and international justice.

The European Court of Human Rights could not stay on the sidelines of this programme and I wanted it to participate fully. Admittedly, the European Convention on Human Rights does not contain a specific provision on children. However, Article 1 of the Convention provides that states “shall secure” – rather than simply “undertake to secure” as in most international treaties – the rights and freedoms defined in the Convention to “everyone”, which necessarily includes children. A child does not become a “person” only when they reach the age of majority; children are persons, and therefore included in “everyone”.

The Court has in fact had to deal with a number of cases involving children. Its case law continuously adjusts to changes in our societies and it is often pointed out that the Court has described the European Convention on Human Rights as a “living instrument”. The first Court judgment to use this expression, the *Tyrrer vs the United Kingdom* judgment of 1978, precisely concerned children and dealt with the corporal punishment inflicted on them in the Isle of Man. It considered this punishment to be a degrading penalty, in breach of Article 3 of the Convention. This demonstrates the close link between that long standing judgment and the campaign launched by the Council of Europe in 2008 against corporal punishment of children, which still occurs in a number of Council of Europe member states, although the Court judgment prompted an awakening and caused some countries to abolish such punishment. In cases involving family law (such as those on custody or child welfare), the Court refers to the United Nations Convention on the Rights of the Child or the Hague Convention on the Civil Aspects of International Child Abduction. Strictly speaking, these conventions are not binding on the Court, but its approach reflects its concern to give priority to children, who are by definition vulnerable.

One of the events included in the Council of Europe programme “Building a Europe for and with children” was the conference on “International justice for children” held in Strasbourg on 17 and 18 September 2007, in which the Court was involved. As the Deputy Secretary General of the Council of Europe, Ms Maud de Boer-Buquicchio, rightly pointed out when opening the conference, children’s access to international justice is unsatisfactory. I agree with her that children must have “a real chance to have their voices heard and interests taken care of by an international judicial or non-judicial body”. She quite rightly added that “the Strasbourg Court is increasingly taking into consideration the principles of the best interest of the child and the specific needs of children when examining cases involving them”.

This book contains a selection of contributions from the participants, including two judges of the Court, Françoise Tulkens and Isabelle Berro-Lefèvre, who drew the conference’s attention to the part played by the Court in upholding children’s rights.

Françoise Tulkens focused her presentation on the sensitive issues of minors' asylum and immigration, minors in detention and violence in the family. Using examples taken from our case law, she showed how effectively the Court had addressed the extremely vulnerable situations of minors. She also showed what kind of action the Court had taken in holding that states' positive obligation to take measures to ensure that children are not subject to inhuman or degrading treatment also applied where such treatment was administered by private individuals. That is an example of the "indirect protection" established by the Strasbourg Court's case law. She rightly pointed out that new and complex issues were arising such as the right to know one's origins, consent to adoption and the situation of foreign and immigrant minors.

However, the conference did not simply review the Court's case law on protection of children's rights. In her presentation, another judge of the Court, Isabelle Berro-Lefèvre, looked at the situation of minors in terms of their access to the European Court of Human Rights and the processing of their applications; above all, she discussed the practical improvements that could be made to facilitate children's access and speed up the processing of their cases. The Court has embarked on an internal study of the issue of "prioritisation", and speeding up proceedings involving minors is an avenue that it wishes to explore. In the same vein, the Council of Europe has taken the excellent initiative of setting up the Theseus database, which contains analyses of the Court's case law on children's rights.

I have referred to my two colleagues' presentations, but I am also bound to mention those given by all the internal and international specialists who contributed to the success of the event. The Court gave a reception for the participants at the end of the conference and their contributions are included in this book.

Other conferences will be held as part of the programme "Building a Europe for and with children". The European Court of Human Rights will continue to support this major initiative, particularly with its judges' participation in the various events aimed at introducing the

tools required to make both national and international justice child-friendly. This is a further example of the synergy I have always wanted between the Court I preside over and the Council of Europe.

*Jean-Paul Costa,
President of the European Court of Human Rights*

Preface

During my years at the European Commission and European Court of Human Rights, I dealt with a number of cases involving children. What struck me at the time, and still strikes me today, is that most of these cases, particularly where issues of family life were at stake, were introduced by adults claiming their rights and interests in relation to children, rather than the protection of the rights and interests of children themselves. Nonetheless, both the Commission and the Court have consistently developed a child-oriented approach in ruling on these cases, giving their primary consideration to the best interests of the child.

In other areas, where children could claim their own rights under the Convention, the principle of positive obligations for our member states developed by the Commission and the Court has greatly improved the protection of human rights of vulnerable individuals, including children.

Indeed, it was in a case brought on behalf of a young girl, which I dealt with in the early 1980s, that this principle was first developed. It involved a 16-year-old mentally disabled girl who had been the victim of sexual assault, allegedly by the person to whose care she was entrusted. Under the national law concerned, it was impossible to prosecute the person suspected of having assaulted her in the absence of a complaint by the girl herself. But as the girl suffered from a severe mental disorder, she was incapable of determining her own will in this respect. In its ruling, the European Court of Human Rights held that it was up to the state concerned to adapt its legislation to avoid such gaps in the law.

It was on the basis of these two combined approaches that last year the Court, in a ruling involving the conditions surrounding the deportation of an unaccompanied 5-year-old girl to her country of origin, found the respondent government to have breached Article 3 of the Convention, the latter having “demonstrated ... a total lack of humanity towards a very young, unaccompanied minor as to amount to inhuman treatment”.

Indeed, it is first and foremost for our member states to ensure that children’s rights are respected nationally. Our programme “Building a Europe for and with children” is designed to ensure that national action plans address, in a comprehensive manner, all aspects of children’s rights: in short, that it encourages states to adopt “child-proof” legislation and to implement it through concrete action in the best interests of the child. Our monitoring mechanisms are there to ensure that states meet their obligations under the corresponding international texts and translate them into national laws and practices. It is only when national structures do not protect and adequately promote children’s rights that access to international justice becomes crucial for them.

But what do we mean by “access” to international justice for children? I believe that it means more than being able to fill in a form to lodge an application with the Court. I believe that access to international justice for children occurs when they have a real chance, be it directly or indirectly through family members, legal representatives or NGOs, to have their voices heard and interests taken care of by an international judicial or non-judicial body.

The fact is that the European Court of Human Rights rarely deals with cases brought on behalf of children and even less with cases brought by them. To the best of my knowledge, the situation is similar in all other international mechanisms monitoring respect for human rights. It is not because children’s rights are not violated – regrettably, we know that they are frequently violated across the

globe – it is because their access to international justice is inadequate.

The starting point is that every human being, as a holder of rights, is protected by core international human rights treaties. Article 1 of the European Convention on Human Rights requires contracting parties to secure the rights and freedoms defined in the Convention to everyone within their jurisdiction. This is extremely important as it shows the non-discriminatory nature of the protection afforded by the European Convention on Human Rights. This principle is at the heart of my motto that “children are not mini persons with mini rights”.

During the 1980s, new treaties dealing specifically with children or containing specific references to children were adopted. The 1989 United Nations Convention on the Rights of the Child marked a turning point, recognising worldwide that children are not only subjects of protection but also holders of civil and political rights.

The European Convention on the Exercise of Children’s Rights adopted in 1999 was the first treaty to develop the right of the child to participate in family proceedings concerning him or her.

We now have a number of specific, children-related international instruments. A very recent example of such a treaty is the new Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, opened for signature at the Conference of European Ministers of Justice in Lanzarote in October 2007.

In parallel, new treaties with general scope have introduced provisions specifically addressing the situation of children. A good example is the Council of Europe Convention on Action against Trafficking in Human Beings, which contains specific measures requesting states to respect children’s rights and to take into account children’s particular needs.

However, as we all know, the proof of the pudding is in the eating. Therefore, we have to make sure that all of these legal provisions are respected and effectively applied, in order to make a real difference in the life of children.

Most universal and regional human rights treaties have established monitoring mechanisms. Some of these mechanisms allow for individual or collective complaints procedures, while others rely on reports by governments or bodies of independent experts.

International justice for children examines both of these two interlinked issues, namely international standards concerning children's human rights and the issue of children's access to international justice.

The Strasbourg Court is increasingly taking into consideration the principles of the best interest of the child and the specific needs of children when examining cases involving them. One way to improve the protection of children's rights is through a combined approach between different mechanisms with specific, but complementary advantages and approaches.

In addition to the European Convention on Human Rights, the Council of Europe also has the European Social Charter, which includes a collective complaints procedure. This is an innovative mechanism which has proved very efficient as concerns child-rights related cases. It allows, *inter alia*, non-governmental organisations to lodge complaints on behalf of children against states parties for alleged breaches of the European Social Charter. The procedure is relatively speedy, accessible and simple. There is no victim requirement and, as it is not an individual procedure, issues of capacity do not arise. Many complaints to date have concerned children's rights, and dealt with issues such as child labour, rights of children with disabilities to education, rights of children to protection against violence, notably corporal punishment and access to health care for children of irregular migrants.

For international justice to be really meaningful for children, we have to identify and act upon ways to improve children's access to information on standards, procedures and decisions; to facilitate their participation in proceedings; to incorporate children's rights in the functioning and decisions of the monitoring mechanisms; to improve the contacts between children and their representatives with the monitoring bodies; and last, to accelerate procedures and improve the scrutiny of the execution of decisions.

Child-friendly justice is a priority of the Council of Europe's work in children's rights. We are currently preparing guidelines to assist in a very concrete manner governments in making their judicial systems more adapted to children's needs. Three major intergovernmental committees dealing with civil law, criminal law and human rights respectively have started their work in preparing the guidelines. The guidelines will build on the existing international, European and national standards and will cover the place and voice of the child in all circumstances where he or she is, for whatever reason, likely to be brought into contact with civil, administrative or criminal justice. Furthermore, the guidelines will promote the rights of information, representation and participation of children in judicial as well as extrajudicial procedures and will deal with the place and voice of the child before as well as during procedures and after judicial decisions. As a concrete tool, the guidelines will present good practices and propose practical solutions to remedy legal lacunae.

International justice for children highlights many of the ideas and recommendations that are being incorporated into the guidelines and it is my hope that this publication will serve as a further platform to inform and help translate these into practical application in justice systems across Europe.

Maud de Boer-Buquicchio
Deputy Secretary General of the Council of Europe