

Children Justice for Europe's

THE SIXTH KILBRANDON CHILD CARE LECTURE

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Deputy Secretary General Council of Europe, Glasgow, on 1 December 2003

Justice for Europe's Children

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Introduction

Principal, distinguished guests, ladies and gentlemen,

I would like to express my great pleasure to be here in Scotland today, at the University of Glasgow, one of the oldest universities in Europe. It is a great honour for me to be invited to give this year's Kilbrandon Childcare Lecture, organised by the University of Glasgow and the Scottish Executive, to discuss a topic that is dear to my heart and to the Institution I represent, the Council of Europe, namely: "Justice for Europe's Children".

It was in 1961 that the Kilbrandon Committee was set up by the Secretary of State for Scotland in response to the great concern over the effect of adult courts on children. Its task was "to consider the provisions of the law of Scotland relating to the treatment of juvenile delinquents and juveniles in need of care or protection or beyond parental control"¹. In 1964, this Committee reported that children who appeared before the courts because they had committed an offence and those who appeared because they were in need of protection had common needs. It is through what have become known as the Kilbrandon principles that the unique Children's Hearing System was set up in 1968, which created a comprehensive process of juvenile justice and child welfare reform in Scotland.²

The Council of Europe and the University of Glasgow have forged strong links over the years. The "Glasgow Centre for the Child and Society", located at the University, is highly appreciated by the Council of Europe, as it contributes to a wide promotion of children's human rights. The fact that children are holders of rights that should be protected at the same level as adult rights is our shared position. On this basis, we have undertaken in the past, and I hope we will do so in the future as well, a number of joint initiatives such as colloquia, hosted by the Centre, for Council of Europe experts from Central and Eastern Europe or technical assistance activities in the

¹ The Scottish Parliament, The Information Centre, Children and the Scottish Criminal Justice System, Devolved Area 01/05, 10 September 2001.

² Ibid.

Russian Federation concerning residential care for children. The great expertise and assistance provided by the University of Glasgow has assisted the Council of Europe in many aspects of its work on children's rights from both the social and the legal points of view and has helped us to develop programmes for street children in Romania for example, or our own activities concerning children, for example in the context of the Decade Review prepared for the Special UN General Assembly Session on Children³.

In this context, I would like to mention and, in particular, to pay tribute to Professor Stewart Asquith, former Head of Department of Social Policy and Social Work at the University of Glasgow, who unfortunately cannot be with us this evening due to health problems. For many years he has been devoted to the children's cause in the broad sense, both in Europe and overseas.

The Council of Europe, the oldest political organisation on the European continent, was established in 1949 to protect and build democracy, human rights and the rule of law, and through the achievement of these goals, to promote a greater unity amongst its Member States. Through the elaboration of a variety of texts and treaties in key areas and commitments undertaken by its 45 Member States, the Council of Europe has substantially contributed to the creation of a common legal space, based on common norms and rules. With the enlargement of the EU, that mission by no means loses its importance: indeed, when human rights are at stake, there can be no room for dividing lines between the 25 and 45.

In its pursuit of peace and stability based upon respect of human rights, justice and international co-operation on the European continent, the Council of Europe spares no efforts to combat all forms of discrimination. That applies not only to minorities and the socially underprivileged groups of society, but indeed all groups of persons who do not represent the majority and are left voiceless.

³ Held in May 2002 in New York

It is for this reason that the Council of Europe has developed important standards for the benefit of Europe's children, be it at procedural or substantial level through an impressive number of international treaties, in other words: Conventions. Some of the Council of Europe's Conventions not only contain minimum norms and guidance to Member States for their implementation at domestic level, be it through internal domestic legislation, practice and the creation of adequate institutions or mechanisms, but provide for an international monitoring mechanism. A monitoring body is thus empowered to assess the implementation of Convention obligations at national level and enables States to exchange information on best practices.

Many Conventions in the field of family law were initiated by the Parliamentary Assembly of the Council of Europe, an essential part of our Organisation, which is composed, unlike the European Parliament, of parliamentarians elected and sitting in their national parliaments. In that way their national experience can be directly transposed to a European level, and their European experience to national parliaments.

I should recall here that between 1999 and 2001, an eminent Scot – Lord Russell-Johnston, was President of our Assembly. His strenuous efforts have significantly contributed to a greater unity among Council of Europe Member States at a time of great change and many challenges.

Council of Europe treaties

Attitudes towards children have undergone some dramatic positive changes since the beginning of the last century in Europe and the international community has, to a large extent, acknowledged and recognised that children need special care and protection because they are vulnerable. Yet, at the same time we are witnessing increasing awareness that children are not only in need of care and special protection but that they are also legal subjects and holders of rights. Making them aware of

their position in society and of the rights and obligations they hold is a necessary corollary to this development.

What are these rights and where are they found?

The European Convention on Human Rights

The most important instrument of the Council of Europe is the European Convention on Human Rights. This international treaty and its additional Protocols, through which the Member States of the Council of Europe have sought to guarantee numerous human rights and fundamental freedoms to everyone within their jurisdiction⁴, guarantee rights ranging from the right to life, liberty and security of the person to the right to property and prohibit, among others, torture and inhuman or degrading punishment.

The Convention has become a model for other systems around the world⁵ and is the only permanent and independent judicial control machinery in Europe which controls whether Member States respect their commitments. Any person who claims to be the victim of a violation of the rights guaranteed in it by one of the Contracting Parties may file an application before the Court. Unless domestic remedies have been exhausted the Court cannot entertain such application⁶.

How does this instrument help children?

In the first place by requiring States to secure the rights and freedoms enshrined in the Convention to everyone within their jurisdiction. Hence the Convention benefits adults and minors alike.

Moreover, by prohibiting discrimination in the enjoyment of these rights and freedoms “....on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property,

4 Article 1, European Convention on Human Rights.

5 Including the American Convention on Human Rights.

6 Article 34.

*birth or other status*⁷ it lays down an important principle of non-discrimination. Although age is not one of the explicitly mentioned grounds of prohibited discrimination, the European Court of Human Rights has implicitly considered it to be included in the concept of “*other status*”.⁸

It should, however, be emphasised that the right not to be discriminated against is only of an accessory nature, and can only be relied on in conjunction with another substantive right guaranteed by the Convention. In this respect the adoption of Protocol No. 12 to the European Convention on Human Rights, which gives the prohibition of discrimination an autonomous character, is a major step forward.⁹

The European Social Charter

Whereas the European Convention on Human Rights mainly sets forth civil and political rights, the Council of Europe’s European Social Charter is its counterpart in the field of economic and social rights.

The Charter and Revised Charter¹⁰ guarantee a wide range of rights, relating to housing, health, education, employment, social protection, movement of persons and non-discrimination.

How does this instrument help children?

The Charter, as interpreted by its organs, guarantees rights to children from birth (and even before) to adulthood. Many of the general rights enshrined in the Charter have a specific relevance to children,¹¹ while others relate exclusively to children.¹²

⁷ Article 14.

⁸ See *B.B. v. the UK*, Application no. 53760/00, Decision of 27 May 2003, where the question of discrimination based on age was declared admissible.

⁹ On 21 November 2003, Protocol no. 12 has been ratified by Bosnia and Herzegovina, Croatia, Cyprus, Georgia and San Marino.

¹⁰ The Charter (either the 1961 text or the 1996 Revised text) is signed by 43 of the 45 Member States and ratified by 33.

¹¹ For example Article 11 (Right to protection of health), Article 16 (Right of the family to social, legal and economic protection).

¹² Article 7 (Right of children and young persons to protection); Article 17 (Right of children and young persons, to social legal and economic protection).

The Charter requires there to be procedures for establishing parentage; that adoption is adequately regulated and that in principle there is a right for an adopted child to know his or her origins.¹³ It further requires that there is no discrimination between children born in and children born out of wedlock, for example in matters relating to inheritance rights and maintenance obligations.

When families break up, the Charter applies in particular to children and States must therefore take account of children's interests when settling questions of custody and access and allow children to express their views in proceedings concerning them.

The Charter includes a general right to education¹⁴ and States are required to establish and maintain an education system that is free of charge, and compulsory at least until the minimum age for admission to employment. The education system must be both accessible and effective.

The provisions of the Charter obtain particular relevance for:

- children with disabilities: physical, mental and intellectual;¹⁵
- children in public care;¹⁶

¹³ See however a recent judgment of the European Court of Human Rights concerning a person born of an unknown mother: *Odièvre v. France*, judgment of 13 February 2003, Application no. 42326/98.

¹⁴ Article 17.

¹⁵ Children with disabilities should be integrated into mainstream facilities; education and training should be made available within the framework of ordinary schemes and only where this is not possible through special facilities.

¹⁶ Any restrictions or limitations of parents custodial rights should be based on criteria laid down in legislation, and should not go beyond what is necessary for the protection and best interest of the child and the rehabilitation of the family. The long term care of children outside their home should take place primarily in foster families suitable for their upbringing and only if necessary in institutions. Fundamental rights and freedoms such as the right to integrity, privacy, property and to meet with persons close to the child must be adequately guaranteed for children living in institutions. National legislation must also provide a possibility to lodge an appeal against a decision to restrict parental rights to take a child into public care or to restrict the right of access of the child's closest family. Complaint procedures must also exist with respect to the care and treatment in institutions.

- young offenders (requiring the age of criminal responsibility not be too low) and includes in this respect that the criminal procedure relating to children and young persons, be adapted to their age¹⁷ and prison sentences should only exceptionally be imposed on young offenders;¹⁸ and
- to the situation of street children.¹⁹

Where necessary, special measures should be taken to ensure equal access to education for these children.²⁰

The Charter also prohibits child labour and requires special working conditions for young persons.²¹ States are required to set the minimum age of admission to employment at 15 and the prohibition on the employment of children under that age applies to all economic sectors, including agriculture, and to all places of work, including work within family enterprises and in private households. It also extends to all forms of economic activity, irrespective of the status of the worker, whether employed, self-employed, unpaid family helper or other. The Charter, however, allows an exception concerning light work.

Other Council of Europe Conventions

The Council of Europe conventional achievements in this field represent a solid contribution to a set of international instruments in this field, in particular UN

¹⁷ Minors should only exceptionally be remanded in custody and only for serious offences and should in such cases be separated from adults.

¹⁸ The length of the sentence for young offenders must be laid down by a court. Young offenders should not serve their sentence together with adult prisoners.

¹⁹ Under Article 7 paragraph 10.

²⁰ However, the European Committee of Social Rights has stated that special measures for Roma children must not involve the establishment of segregated schooling facilities. This corresponds to the general approach of the Council of Europe on this issue.

²¹ By virtue of Article 7.

treaties, Hague Conventions and the regulations within the EU. Council of Europe Conventions include the European Convention on the Exercise of Children's Rights²², which was drafted to assist Council of Europe Member States (and other States) in implementing Article 4 of the UN Convention on the Rights of the Child of 1989,²³ a Convention to which all Council of Europe Member States are party.

This Council of Europe Treaty supplements the 1989 UN Convention by facilitating the exercise of the substantive rights of children in strengthening and creating procedural rights which can be exercised by children themselves or through other persons or bodies. It is based on the understanding that children are to be respected as individuals and that therefore, they should be given a greater degree of autonomy in judicial proceedings that affect them. More particularly, this Convention deals with family proceedings affecting children which take place before national authorities, which means either courts or administrative authorities with adjudicating powers.²⁴

This empowerment of children, which allows them to be heard and have their opinion taken into account in legal proceedings affecting them, implies that children are no longer merely the objects of family proceedings as, even if they are not granted the

²² This Convention was ratified by nine States and signed by 15 (not including the UK), see ETS 160 at <http://conventions.coe.int> (all Council of Europe conventions can be found on this website). It also provides for the establishment of a Standing Committee (Article 16, the T-ED will meet for the first time in 2004) whose function is to monitor issues raised in the Convention, which will give the representatives of the States Parties the possibility of meeting in order to evaluate the application of the Convention and propose measures which they consider likely to improve its operation.

²³ Article 4: States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

²⁴ Article 1 paragraph 4 of the European Convention on the Exercise of Children's Rights requests Contracting States to choose at least three categories of family cases before a judicial authority to which this text is to apply. A non-exhaustive list of examples is set out in paragraph 17 of Explanatory Report, which includes: custody, residence, access, questions of parentage, legitimacy, adoption, legal guardianship, administration of property of children, care procedures, removal or restriction of parental responsibilities, protection from cruel or degrading treatment and medical treatment.

formal status of parties to the proceedings, they possess a number of subjective rights which they can exercise.

The Council of Europe's activities are designed to cover the full range of rights guaranteed to children by the 1989 UN Convention and to facilitate and coordinate implementation at a European level.

Indeed, the fact that in our Member States in many respects children have a legal status that is different from that of adults may well be motivated by the fact that children require special protection. They have to be protected first against any physical or moral danger to which they can be exposed in our rapidly changing and increasingly commercial and globalised world. Children must benefit fully from their right to education and good health protection; they must have the opportunity to develop their full potential without carrying on their shoulders, before the age of 15 according to the European Social Charter, responsibilities linked to work. This special protection does not mean discrimination; it is in their best interests.

However, when for instance children are still being discriminated against as to their inheritance rights, due to the fact that they were born out of wedlock or because they were adopted, a serious issue of discrimination arises.²⁵

²⁵ See the case *Marckx v. Belgium*, judgment of 13 June 1979, Application no. 6833/74 and the case of *Inze v. Austria*, Application no. 8695/79, judgment of 28 October 1987. With respect to the issue of discrimination, especially against children born out of wedlock, the case of *Marckx v. Belgium* was a landmark judgment. In that case, the Court recognised that any distinction in law between legitimate and illegitimate children in their relationship to their mother with regard to the proof of their descent and the extent of that relationship was discriminatory and unacceptable under the terms of the European Convention on Human Rights. It is in this judgment that the Court developed for the first time the idea that in addition to primarily negative undertakings there may be positive obligations inherent in an effective respect for family life. In this case, these included the obligation to recognise from birth the family ties existing between the mother and her child born out of wedlock and the integration of the latter in the mother's family.

The Council of Europe's Convention on the Legal Status of Children born out of Wedlock (1975) and the Convention on the Adoption of Children (1967)²⁶ are designed to eliminate a number of unjustified forms of discrimination.

While aiming at updating and harmonising the laws of the Member States and avoiding conflict of laws when there is a cross border adoption, the European Convention on the Adoption of Children sets out a number of conditions that have to be met before the adoption of the child takes place and, very importantly, it contains provisions aimed at equating the status of the adopted child to the status of the biological child of the adopter. However, the Council of Europe is nevertheless currently looking into revising the European Convention on the Adoption of Children, which is one of its oldest Conventions in the field of family law, because it contains provisions that still make a difference in treatment between children born in and children born out of wedlock.

If it is true that the Convention on the Legal Status of Children born out of Wedlock is a major step forward in the right direction and has been ratified by almost half of the Council of Europe Member States, it must be said that its effect is considerably reduced by the large number of declarations, reservations and other types of communications limiting its application. However, this Convention has been taken as the basis for the European Court of Human Rights case-law concerning equality between children born in wedlock and those born out of wedlock in respect of relations with their parents, integration into each parent's family and inheritance rights.²⁷

Today, increased importance is being placed on children's relationships with their parents in both the psychological and the legal sense. This has led, at an international level, to a greater consideration of the child's perspective and to the

²⁶ Both of Conventions were ratified by nearly half the Member States of the Council of Europe, including the UK.

²⁷ See the case of *Marckx v. Belgium*, judgment of 13 June 1979 (see footnote 25); *Inze v. Austria*, judgment of 28 October 1987; *Johnston v. Ireland*, judgment of 18 December 1986, Application no. 9697/82.

view that the child's interests are of paramount importance and at least as important as those of the parents. This is not only reflected by the case-law of the European Court of Human Rights in the area of Article 8 of the European Convention but is a trend that is also reflected in the 1989 UN Convention which regards access as a fundamental right of the child, making it possible to safeguard children's relationships and contacts with parents with whom they do not live.

With respect to contact or access rights, the group of persons whose right of contact or access may be recognised varies from one Member State to another. However studies²⁸ show that parents in all countries enjoy a right of access, with the notable exception of cases of abuse or where there is a potentially serious risk of harm to the child. However, although the circle of persons to whom access will be granted goes rarely beyond the parents, there is a trend to extend access to other persons who have family ties with the child.

In matters of access or contact rights, the child's opinion is taken into consideration in almost all Member States of the Council of Europe. The modalities vary from the child being interviewed by the body making a decision either at that body's own discretion or as a mandatory measure, in person or through the intermediary of social services, in the course of proceedings and/or after their conclusion, and in any event, subject to the child's age and/or maturity.²⁹

Two Council of Europe conventions deal with the question of custody of, or access to, children: the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (1980, the "Custody Convention") and the more recent Convention on Contact concerning Children (2003, the "Contact Convention").³⁰

²⁸ See "The Right of Access to Children in Europe", Council of Europe document CJ-FA (99) ACCESS, 6 September 1999.

²⁹ See the case of Hokkanen v. Finland, judgment of 23 September 1994, Application no. 19823/92 and the case of Bronda v. Italy, judgment of 9 June 1998, Application no.22430/93.

³⁰ The Custody Convention was ratified by over half the Member States of the Council of Europe, including the UK; the Contact Convention has been signed by 16 States (not including the UK) and has not yet entered into force.

The Custody Convention seeks to provide a remedy to child custody disputes between parents living in different European States. It recognises that the welfare of the child is of overriding importance in reaching decisions concerning custody, while the aim of the new Contact Convention is to improve certain aspects of the right of national and transfrontier contact and, in particular, to specify and reinforce the basic right of children and their parents to maintain contact on a regular basis. This right may be extended, if necessary, to include contact between a child and persons other than his or her parents, such as grandparents, in particular when the child has family ties with such persons.

Mechanisms

European Court of Human Rights case-law

Undoubtedly the European Court of Human Rights plays a major role in the standard setting for fundamental rights and freedoms to which children are entitled in the European legal space. Although this entitlement extends to all rights and freedoms enshrined in the Convention and its additional Protocols, some provisions are particularly relevant, such as Article 8 (right to respect for family life) and Article 3 (prohibition of torture and of inhuman or degrading treatment).³¹

While it is rare that children lodge applications themselves, the standards developed by the Court in many areas following applications by others on their behalf are directly relevant to children.

The case-law of the European Court of Human Rights has moved forward with developing trends in the status of children.³² For instance, whereas the European Convention on the Adoption of Children requires the consent of the father of the child to an adoption only if the child is born in wedlock, the case-law of the European Court of Human Rights, in particular the case of *Keegan v. Ireland*³³,

³¹ See also below under juvenile delinquency.

³² See “White Paper on principles concerning the establishment and legal consequences of parentage”, prepared by the Committee of experts on Family Law (CJ-FA) of the Council of Europe: www.coe.int/family .

³³ Judgment of 26 May 1994, Application no. 16969/90.

establishes that the placing for adoption by a mother, where the law did not give the father of a child born out of wedlock the right to be consulted, was in breach of Article 8 of the European Convention of Human Rights. Custody and contact rights of a father in relation to his children born out of wedlock have also been implicitly recognized.³⁴

More recently, the question has been put before the Court as to whether an abandoned child has the right to know her or his origins under Article 8.³⁵ The Court found no violation of this Article in a case where a child born of an unknown mother wanted to obtain information about her natural family. The interference had not been disproportionate to the aim of protecting the rights of the mother, who did not wish her name to be known, and her new family. The Court took into account the fact that this question is subject to very different rules in the different States party, and there is accordingly no common European standard in this respect.

Article 9 of the 1989 UN Convention states the principle that States shall ensure that a child shall not be separated from his or her parents unless it is deemed to be in the child's best interests and in case of separation of the parents the child shall be entitled to maintain contact with both of them. Although not explicitly stated, it appears that through its case-law on Article 8, the same rights are enshrined in the European Convention on Human Rights.³⁶

Especially for young children, the family unit is undoubtedly the privileged environment for a harmonious development. The assessment of the justification for removing children from parental care is, of course, a very delicate exercise. It should be borne in mind that the role of the Court in this respect is a subsidiary one: it is in the first place up to the domestic authorities, who are better placed than the international judge, to evaluate the situation, in particular since they dispose of the

³⁴ Case of McMichael v. the UK, 24 February 1995, Application no. 16424/90 as well as the case of Lück v. Germany, admissibility decision of 13 June 2002, Application no. 58364/00.

³⁵ See the case of Odièvre v. France, judgment of 13 February 2003.

³⁶ See the case of Berrehab v. the Netherlands, judgment of 21 June 1988, Application no. 10730/84, where the applicant was deported after his divorce, thus making impossible any contact with his minor Dutch daughter.

necessary tools to assess what is in the best interests of the child, being able to rely on expertise by specialists and on direct contact with the parties concerned, including the child. Notwithstanding this margin of appreciation afforded to domestic authorities, the Court does not merely consider whether the State has exercised its discretion reasonably carefully and in good faith, but actually looks at the evidence relied on by domestic courts and considers whether, in the light of that evidence, the reasons for taking the child from the family were relevant and sufficient so that the taking into care of the child can be said to be justified in terms of paragraph 2 of Article 8.³⁷

Whereas in the early days, the European Court of Human Rights placed particular emphasis on the need to refrain from interference with family life and conditions for interference by the public authorities were assessed by it with particular regard to the right of parents to enjoyment of family life, to the extent of warranting by critics the qualification of the European Convention of Human Rights as a “parents-treaty” rather than a “children-treaty”, the Court, as from the eighties, has turned more towards the positive obligations on the State in relation to family life so as to protect the rights of children. This implied, *inter alia*, the need to involve parents actively in the procedure leading to measures of child protection, failing which a violation of Article 8 could be found.³⁸

³⁷ See the case of *Olsson v. Sweden* (no. 1), judgment of 24 March 1988, Application no. 10465/83 where the applicant’s children were placed in three different families in three different cities far from her own home, or the case of *Johansen v. Norway*, judgment of 7 August 1996, Application no. 17383/90 where the fact of depriving the applicant of her parental and visitation rights in respect of her daughter was held to constitute itself a violation.

³⁸ See the case of *O., H., B., W. and R. v. the UK*, judgment of 8 July 1987, Application no. 9276/81 and the case of *Johansen v. Norway*, see above.

States may also have a positive obligation to ensure the transfrontier execution of judgements concerning custody and visitation rights, when one of the parents refuses to return the child to the parent who has custody and takes him or her abroad in violation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction.³⁹

This case-law appears to have implied that the right of parents to unfettered enjoyment of their rights coincided with the interest of the children.

However, over the past few years there has been a notable trend towards paying more attention to children's interests, even where these do not coincide with those of the parents. In such a case, the Court requires that the views of the child, when he or she has the required maturity, are taken into account. In the case of *Bronda v. Italy*, the Court has given due weight to the fact that the child (aged 14) had stated that she wished to stay with her foster family.⁴⁰

Such an approach appears to be fully justified when dealing with a right which is absolute in nature, namely that of not being treated inhumanly or degradingly or even tortured. Is not the meaning of an absolute right that no circumstances can ever justify its breach?

Article 3 is amongst the most fundamental of fundamental rights and implies a positive obligation on States, in particular where it concerns children and other vulnerable groups in society (e.g. the elderly) that require particular protection, to take sufficient measures to avoid ill-treatment in the form of domestic violence, of which the State was or could have been aware.⁴¹

³⁹ See the case of *Ignaccolo-Zenide v. Romania*, judgment of 25 January 2000, Application no. 31679/96. See also, the Hague Convention on the Civil Aspects of International Child Abduction (25 October 1980) and the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children and the Convention on Contact concerning Children.

⁴⁰ See footnote 24, above.

⁴¹ See the case of *E and others v. UK*, judgment of 26 November 2002, Application no. 33218/96, paragraph 88.

A failure to take reasonably available measures which could have a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.⁴²

It is interesting to note that in cases of this kind the Court deviates from its classical approach to the subsidiary nature of its jurisdiction, requiring the domestic authorities to establish the facts first rather than establishing them itself.⁴³ In the case of *E. and Others v. the United Kingdom*, which concerned serious sexual abuse of a child by the partner of the child's mother, against whom no criminal charges were brought, the Court concluded that the pattern of lack of investigation, cooperation and communication by the relevant authorities had a significant influence on the course of events and that a proper and effective management of their responsibilities might have minimised the risk of damage suffered by the children. In doing so it rejected the Government's plea that this conclusion could be construed as establishing criminal liability in proceedings to which the stepfather was not a party (the case being directed by representatives of the children against the Government).

The Court distinguished between criminal law responsibility and international responsibility under the Convention and found that it was not concerned with reaching any findings as to the guilt or innocence under domestic law. This case in fact constitutes a step forward from previous case-law of the Court concerning the protection of children (and handicapped persons) against rape and sexual abuse. In the case of *X and Y v. the Netherlands*⁴⁴, the Court had considered the lack of legal

⁴² *idem*, paragraph 100. If the Court is satisfied that the pattern of lack of investigation, communication and co-operation by the relevant authorities disclosed in a particular case must be regarded as having had a significant influence on the course of events and that proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least, minimise the risk or the damage suffered, it finds a breach of Article 3.

⁴³ In several cases the Court did not contest the domestic authorities' decisions concerning the placement of children into public care based on suspicion of the child being the victim of domestic violence (case of *O. v. the UK*, 8 July 1987).

⁴⁴ Judgement of 26 March 1985, Application no.8978/80. On the other hand, the Court has considered that criminal conviction of the applicant for domestic violence against his ex-wife did not constitute a violation of Article 8 (case of *S.W. v. UK*, Judgment of 22 November 1995, Application no. 20166/92).

protection of a minor against rape under criminal law to constitute itself a violation of Article 8.

The above described three successive stages in the development of the Court's case-law, starting from the respect of the parents' right not to have their family life unduly interfered with, to underlining the positive obligations incumbent on States to make effective family life possible (assuming that parents' interest and that of children necessarily coincide) to considering separately children's interest, could arguably be followed by a fourth one: holding a State responsible for the failure of individuals to take preventive action by signalling to the public authorities potential or real harm to children in their family environment.

Such responsibility could conceivably be construed on the lack of information provided by the authorities to the general public of the existence of children at risk or even their failure to provide tools to do so. Awareness-raising regarding this mounting scourge of violence committed in the family is imperative and failure to do so could engage the responsibility of a State. So far, no omission of this kind has been put to the test in Strasbourg.

The above goes to show that, even if one can be satisfied with the development of human rights standards by the European Court of Human Rights, their relevance and real impact depends to a large extent on whether children can effectively rely on them and benefit from them and obtain redress easily when things go wrong. The existence of easily accessible telephone lines for children in distress, as is the case in some but not all of the Council of Europe's Member States, would be an important step forward to prevent or reduce abuse of children.⁴⁵

In this respect, it has to be noted that the Court's judgements are not just declarative. Judgments of the Court are binding, and supervision of compliance is entrusted to the Committee of Ministers of the Council of Europe.⁴⁶ Compliance does

⁴⁵ E.g. France: Allo Enfance Maltraitée (119); Italy: Telefono Azzurro (blue telephone); Belgium: Child Focus (110); UK: ChildLine Helpline (0800111). For more information please see Appendix 2 of the Final Report of the Audit on the protection of children against sexual exploitation, www.coe.int/childprotection.

⁴⁶ Article 46, paragraph 2 of the European Convention on Human Rights.

not only imply taking individual measures to redress the alleged violation of the Convention, but may also lead to the necessity to adopt legislative changes removing the cause of the violation.

To cite but a few examples in the area we are dealing with today:

- the case of *Johnston and Others v. Ireland*, judgment of 18 December 1986 (Series A no. 112) resulted in the enactment of the Irish Status of Children Act (1987) that ensures equal rights for all children, whether born in or out of wedlock ; and
- the cases of *O., W., B. and R. v. the United Kingdom*, judgments of 8 July 1987 (Series A nos. 120 and 121) resulted in the adoption of The Children Act 1989, making it possible for parents to have all questions of contact with their children placed in local authority care determined by a court.

The European Committee of Social Rights

This Committee is a quasi-judicial body under the Social Charter and its work is set in motion through two monitoring procedures. The first is a monitoring procedure based on national reports. Under this procedure States are required to submit a report indicating how they implement the Charter in law and in practice. These reports are examined by the European Committee of Social Rights which makes a legal assessment of the situation under each provision of the Charter. Its decisions known as “conclusions” are published every year.

If a State takes no action on a Committee decision to the effect that it does not comply with the Charter, the Committee of Ministers addresses a recommendation to that State, requesting it to change the situation in law or in practice. The Committee of Minister’s work in this respect is prepared by a Governmental Committee.

The European Committee of Social Rights, in monitoring compliance with the Charter, checks whether access to education is guaranteed for children from vulnerable groups, ranging from children from minorities to children with disabilities.

The second procedure is the collective complaints procedure, which entered into force in 1998. It is a unique and pioneering procedure in International Human Rights Law. Under the collective complaints procedure, complaints of violations of the Charter may be lodged with the European Committee of Social Rights by trade unions, employer organisations and certain NGOs.

Complaints are examined by the European Committee of Social Rights, which firstly determines whether they are admissible in the light of the criteria laid down in the Protocol. If the complaint is admissible, the Committee examines the merits. It may hold a public hearing. The Committee then takes a decision on the merits of the complaint, which it forwards to the parties concerned and the Committee of Ministers in a report, which is made public within four months of its being forwarded. When the State does not undertake to remedy the situation, the Committee of Ministers makes a recommendation to press the State concerned to take specific measures to bring the situation in conformity with the Charter.

To date, there have been seven complaints that directly concern children's rights. These range from complaints concerning child labour⁴⁷ to complaints concerning corporal punishment⁴⁸ as well as the right to education for children with disabilities.⁴⁹

Standard setting and the promotion of rights

The Commissioner for Human Rights

The Commissioner for Human Rights⁵⁰ is an important actor in the promotion of human rights, including those of children, in Council of Europe Member States.

⁴⁷ Complaint No. 1 /1998, ICJ v Portugal.

⁴⁸ No. 17/2003 OMCT v Greece; No. 18/2003 OMCT v Ireland; No. 19/2003 OMCT v Italy and No. 20/2003 OMCT v. Portugal.

⁴⁹ No. 13/ 2002 Autism Europe v France, lodged on 27 July 2002.

⁵⁰ Currently Mr. Alvaro Gil-Robles

His mandate includes: (1) promoting awareness of human rights; (2) identifying possible shortcomings in the law and practice of Member States and (3) helping to promote the effective observance and full enjoyment of human rights, as embodied in the various Council of Europe instruments.

As a non-judicial institution and in order to avoid duplication with the Court, he does not have the mandate to take up individual complaints. He *“may act on any information relevant to the Commissioner’s functions. This will notably include information addressed to the Commissioner by governments, national parliaments, national ombudsmen or similar institutions in the field of human rights, individuals and organisations”*.⁵¹ This information enables him to focus his activities on major human rights issues in Member States and he may address these issues in Member States in his reports, recommendations or opinions.

The Commissioner’s activities with regard to children have, to a large extent, been country specific. One of the ways in which he fulfils his mandate is through official country visits to the Member States in order to examine the human rights situation there. During such visits, the Commissioner meets with relevant actors such as local authorities, human rights institutions, NGOs, and also visits institutions such as prisons, refugee reception centres, orphanages or institutions for the mentally ill. Following his visit, the Commissioner issues a report on the situation in the country with a set of recommendations to improve the situation and these reports are public.⁵²

Prior to such visits, the Commissioner examines the situation in the country concerned, and if particular concerns are identified – as there often are – he addresses them during his visit. In this way, matters concerning children to which the Commissioner has paid particular attention to are the following:

⁵¹ Article 5, Resolution (99) 50 on the Council of Europe Commissioner for Human Rights.

⁵² www.commissioner.coe.int.

- domestic violence, which affects children both physically and mentally;⁵³
- victims of trafficking in human beings, including children;
- access to education;
- detention of children in mental institutions; and
- refugee children.⁵⁴

Depending on their nature, the Commissioner's recommendations may require immediate action. In his recent report on the human rights situation in the Czech Republic,⁵⁵ the Commissioner recommended that action be taken with a view to preventing foreign illegal immigrant children to be kept in prison-like detention centres pending expulsion from the country. This recommendation has been immediately implemented by the Czech authorities. In other cases, the implementation of the Commissioner's recommendations may require a series of legislative and administrative measures and, consequently, full compliance may be delayed. The Commissioner has initiated a systematic follow-up to his recommendations in countries previously visited. During such a follow-up, the Commissioner examines what measures have been taken to implement the recommendations and what remains to be done.

In January of this year, the Commissioner was asked by the Parliamentary Assembly to investigate the situation of separated children in Europe, with a particular emphasis on expulsion procedures. Following this request, the Commissioner is

⁵³ The Commissioner stresses the fact that domestic violence is not a private issue, but a human rights issue, and urges the authorities to ensure that effective measures are taken to prevent such violence and to punish the perpetrators.

⁵⁴ For instance, during his recent visit to the Czech Republic, the Commissioner visited a detention centre for foreigners and found out that among the detainees was a five year-old girl who was facing deportation with her mother, whose petition for asylum had been rejected. The Commissioner urged the authorities to immediately release the child and her mother, as well as any other children that might be in a similar situation.

⁵⁵ Comm. DH (2003) 10.

currently preparing a survey in which he examines the legal and material conditions under which separated children are being received by and expelled from the Council of Europe Member States, be they refugees, asylum-seekers, migrants or victims of trafficking.

The protection and promotion of the rights of the child is high on the Commissioner agenda and recently, a dedicated staff member has been assigned to his office to deal exclusively with children's issues.

Ombudspersons for children

The Council of Europe encourages its Member States to set up adequate structures that are able to tackle children's circumstances in their entirety – a structure capable of identifying the most urgent problems and their possible solutions and to establish the necessary dialogue among the various actors involved. We therefore encourage States to set up, at least on a national basis, children's ombudsmen or commissioners which will lead to a real improvement in children's circumstances in our Member States.

Ombudsmen have the opportunity to take practical action at both national and regional levels on grounds that they are very familiar with and where it is possible to have direct contact with the child concerned, as soon as the need is felt to do so.

Both the 1989 UN Convention and the Council of Europe⁵⁶ have recommended States to consider establishing an office of an ombudsperson or a commissioner to monitor the implementation of children's rights and the 1989 UN Convention and the majority of Member States are in favour of encouraging the creation of ombudsmen or commissioners for children on a national rather than a European level.

⁵⁶ See also Article 12 of the European Convention on the Exercise of Children's Rights, ETS 160.

Already in 2000, the Council of Europe's Parliamentary Assembly adopted a Recommendation on setting up a European Ombudsman for children⁵⁷ under which the first step was to ask those Member States that have not already done so, to appoint a national children's ombudsman.

I am therefore very pleased to learn about the recent appointment of a Children's Commissioner for Scotland (on 27 November 2003), following the Children's Commissioner for Wales (established in 2001), the Commissioner for children and young people in Northern Ireland (established in October 2003) and I understand that legislation is expected to be introduced in the next session of the Westminster Parliament to establish a Commissioner to act as an independent champion for England's children.

In March of this year, the Forum for Children and Families within the Council of Europe, held a debate on the role and powers of national ombudsmen for children and ways to support setting up ombudsmen for children in each Member State of the Council of Europe and on the possibility of creating the position of a European Ombudsperson for Children. Among the participants were a large number of members of the European Network of Ombudspersons for Children (ENOC)⁵⁸. The conclusion reached during that debate included that the majority of the Forum's members preferred focusing on establishing a national ombudsperson for children in each country to creating a European ombudsperson for children. A similar conclusion prevailed in the informal Conference of EU Ministers responsible for Childhood, held in Lucca⁵⁹, where the creation of a European Ombudsman for Children was considered premature.

However, the "added value" of such an institution could well be examined in the future, in particular where "transfrontier" issues are at stake.⁶⁰ Moreover, it is

⁵⁷ Recommendation 1460 (2000).

⁵⁸ The list of participants to the debate is included in the report of the 5th meeting of the Forum for Children and Families – CS-Forum (2003) 4.

⁵⁹ Informal Meeting of the EU Ministers for Childhood, 25-26 September 2003.

⁶⁰ The Forum's next meeting will be held on 9 and 10 December 2003 to discuss "Access to Education".

obvious that the coordinating function of a European Ombudsman would be most welcome.

Co-ordination at a European level, although not covering all member States of the Council of Europe, between ombudsmen already exists through the European Network of Ombudspersons for Children (ENOC). Pending further developments, the Council of Europe has recently reinforced its links with this Organisation through the establishment of a liaison office in the Council of Europe premises.

Forum for Children and Families

The Council of Europe has also established a Forum for Children and Families⁶¹ whose primary purpose is to be a kind of clearing-house for child-related issues. The Forum brings together major international actors in the field of children's affairs, including national representatives, non-governmental and governmental organisations, steering committees and the Parliamentary Assembly of the Council of Europe, experts and, most importantly, children themselves. Children take part in all debates and voice their views as other participants do.

The Forum for Children and Families has a child-oriented approach and initiates debates on some current questions of concern to modern European families and to children as individuals. Thus since 2001, it has discussed issues such as reconciling work and family life as well as leisure time for children and their parents, perinatal psychiatry, corporal punishment of children in the family and the role and competences of national ombudsmen for children's rights. It will address, on this coming 10 December – at the occasion of the International Human Rights Day⁶², children's rights to education, notably on the basis of the relevant provisions of the Revised European Social Charter.

It should be underlined that the Forum works in the context of the Council of

⁶¹ The Forum is responsible to the European Committee for Social Cohesion (the "CDCS") and was set up in 2001 to address and discuss issues related to children and families.

⁶² In Recommendation n° R (85) 7 on teaching and learning about human rights in schools, the Committee of Ministers invites Member States to encourage schools and teacher training establishments to observe International Human Rights Day.

Europe's Social Cohesion Strategy and this Strategy focuses on social policy based on an understanding of social rights as an integral part of human rights. It is clear that human beings find their full fulfilment above all in relationship with others and that families are the first place where children experience and learn ties between individuals and where they find examples of solidarity or egoism, respect or violence, dialogue or the use of force. In the family, they are, or are not, prepared for life in society. This aspect of our work concerning adults as parents is, in my opinion, of growing importance.

It is important that children be considered as members of our society, with rights and equal protection under the law; they must also be prepared through formal and informal education, including participatory processes, for their future role as active and responsible adults. Their socialisation, from a very early age, is of the greatest importance. For this reason, the Forum prepared, and the Committee of Ministers adopted in September 2002, a Recommendation on child day-care,⁶³ recommending Governments of Member States to promote accessible, affordable, flexible and good quality child day-care services for all children.

A new Recommendation is currently being prepared at the Forum concerning residential care for children, quality standards in institutions and respect for the dignity and rights of children living in institutional care. Residential care is too widespread in some European countries and we have a special obligation to protect and offer children without natural parents, or separated from them, the possibility of growing up into balanced and responsible adults.

Juvenile Justice

Although in the enjoyment of human rights children should be likened to adults, it should not be forgotten that children are nevertheless children and that in some areas a more child- specific approach is necessary.

⁶³ Recommendation (2002) 8.

What if a child has turned to crime, whether it is a way of expressing his or her frustration or a means of drawing attention to his or her situation or out of despair? Why have children in Europe become more violent? Irrespective of whether juvenile crime and violence has increased in Europe, there is clearly a general public perception that juvenile violence is increasing, that offenders are starting to offend earlier and that better ways of dealing with a small proportion of juveniles who commit large numbers of offences need to be found.

In the 1980s, juvenile justice policy in Europe was heavily influenced by the prevailing view that exposure to the juvenile justice system was at best ineffective and at worst counter-productive and that means other than prosecution should be used to deal with young offenders whenever possible.

Today, developments in research tell us more about the causes of crime and cautiously suggest that some interventions may work with some young offenders some of the time. Experimentation with alternative approaches to dealing with juvenile offenders, such as the emergence of restorative justice and intensive, community-based support and supervision, suggests that there are ways of supplementing the more traditional approaches, which could improve our response to juvenile crime and violence.

However, at the same time as concern over juvenile crime and violence is increasing, there is a parallel concern that the system for tackling such crime and violence is slow, ineffective and over-burdened. Delays are commonplace, public confidence is low and re-offending rates are as high as or even higher than for adults. These developments have led, at least in a few Member States, to a popular response for a more repressive approach, which is reflected in higher rates of custody for juveniles and a shift from a needs-led (or 'welfare') model to a punishment-led (or 'just deserts') model. In others, there is simply not enough information to establish whether custody rates are rising or whether the data they do publish includes those

on pre-trial detention or in secure residential homes. It is believed that in many countries, increasing use is being made of such provisions.

Over the past years the Council of Europe has addressed, on several occasions, the anti-social and criminal behaviour among children and juveniles as well as the ways of improving juvenile crime prevention and control while protecting the child's best interest. The Recommendation on social reactions to juvenile delinquency⁶⁴ indicates that:

- the juvenile justice system is only part of the overall response to juvenile crime;
- the juvenile justice system should avoid repressive approaches and focus on education and reintegration;
- juveniles should at least receive the same level of procedural safeguards as adults; and
- depriving juveniles of their liberty should only be used as a last resort and that, as far as possible, interventions should be carried out in the juvenile's home environment.

The rationale underpinning a Council of Europe Recommendation of 2000 on the role of early psychosocial intervention in the prevention of criminality⁶⁵, is that the rise in juvenile crime, anti-social and violent behaviour requires new measures and in particular a reappraisal of the role of the juvenile justice system.

This Recommendation was completed by a very recent one on new ways of dealing with juvenile delinquency and the role of juvenile justice.⁶⁶

64 Recommendation No. R (87) 20.

65 Recommendation Rec (2000)20.

66 Recommendation (2003) 20 on new way of dealing with juvenile delinquency and the role of juvenile justice was adopted by the Committee of Ministers on 24 September 2003. This Recommendation (2003) 20 recommends *inter alia* the elaboration of separate European Rules for Community Sanctions and Measures and European Prison Rules for juveniles, because the current ones do not deal with juveniles as the latter have a number of specific distinct needs different from those of adults, which require specific interventions. The elaboration of these rules will start in the near future.

The issue of the child offender and the manner of his treatment in the criminal justice system was squarely before the Court in the recent cases of *T. v. the United Kingdom* and *V. v. the United Kingdom*. T. and V., both ten-year old boys at the time, abducted a two-year old child, battered him to death and left him on a railway line to be run over. Following a public trial before a jury lasting three weeks, they were convicted of murder and abduction. The Home Secretary fixed their tariff at fifteen years, which was much higher than the sentencing judge had recommended. The applicants complained in the Convention proceedings that the manner in which they were tried - in an adult court in the full glare of publicity - amounted to inhuman and degrading treatment and also breached their right to a fair trial.

The T. and V. cases illustrate the Court's readiness to look beyond the four corners of the Convention and to take account of standards set in other international fora in the area of juvenile justice. Thus, in addressing the applicants' complaints the Court did not hesitate to draw on the 1989 United Nations Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules"). In the event, the Court found that Article 3 of the Convention had not been violated either as regards the conduct of the trial or the attribution of criminal responsibility to the applicants for acts which they had committed at the age of ten; nor did the Court find that the sentences imposed on the applicants or their punitive detention were in violation of Article 3. On the other hand, the Court was critical of the fairness of the proceedings. It stressed that, from the standpoint of Article 6 of the Convention, it was essential that a child charged with an offence was dealt with in a manner which took full account of his age, level of maturity and intellectual and emotional capacities, and that steps were taken to promote his ability to understand and participate in the trial proceedings. These requirements were not satisfied at the applicants' trial, even if some steps had been taken to cater for the applicants' young age. In sum, the Court was not persuaded that the applicant children were able to participate effectively in the proceedings, a conclusion which was in fact borne out by psychiatric evidence.

Although the age of criminal responsibility varies considerably across Member States from as young as age 7 up to age 18, all European countries should adhere to the principle that children should not be held as accountable or responsible for their actions as adults. They should be seen as children first and only as offenders second. However, a current trend is moving towards reducing the age of criminal responsibility and this trend must be reversed. This is compounded by the treatment of young people placed in penal institutions in many Member States, which is in breach of their fundamental rights.

On the other hand when children are over the age of criminal responsibility, this should not automatically result in them being treated like adults. As children are more vulnerable in the face of the power of the State's criminal law than adults they need additional procedural safeguards.

It must be stressed that States should concentrate on the rehabilitation and re-integration of all children under the age of 18 in conflict with the law and not on criminalisation.⁶⁷

Most European States recognise, to some degree, the need to lay down specific rules for juvenile delinquents in the administration of justice. Deprivation of liberty, if at all required, should have a primarily educational purpose and trials, if at all required, ought to take into account the young age of the accused. Specialised courts with Judges properly trained for that purpose must be instituted. Contrary to the 1989 UN Convention, the European Convention on Human Rights does not contain an explicit reference to the situation of children before the Courts. However the concept of fairness, which is the main ingredient of its Article 6, covers these interests.⁶⁸

⁶⁷ See The European Network of Ombudspersons for Children (ENOC) statement, Stockholm, 17 October 2003.

⁶⁸ It is on this particular ground that the Court found a violation of Article 6 in the case of *T. v. the UK*, in view of the intimidating nature of the proceedings before an adult court, the proceedings of which attracted high levels of public and press interest, having regard also to their immaturity and disturbed emotional state. (Judgment of 16 December 1999, Application no.24724/94).

Diversion from the criminal justice system should be used as much as possible as it reflects the fact that the majority of juvenile offenders only ever commit one or two relatively minor offences and that a caution or a warning is often enough to deter them from further offending. It is simply disproportionate, expensive and potentially counter-productive to use the criminal justice system in these cases.

Restorative justice, which brings together all the parties involved in a particular offence to resolve collectively the aftermath of an offence and its implications, is increasingly becoming a component of juvenile justice strategies. In several countries providing opportunities for offenders to apologise to their victims and make amends for the harm they have caused is now increasingly used to help offenders see and understand the impact their behaviour has on others and to modify their behaviour in the future. This fosters respect not only for the legal system, but also for the underlying social values. But the requirement for reparation and mediation will not always be suitable or possible and must only occur with the full consent of the victim.

Justice delayed is justice denied. This is true for adults and even more so for minors. Neither young offenders nor victims benefit from delays in court proceedings, which can also seriously undermine public confidence in the law. Recognising the importance of a swift response to juvenile offending, Member States are beginning to address the issue of delays in a number of ways by, for instance, setting maximum time periods for each stage from arrest through to sentencing or improving information sharing between criminal justice agencies.

Different juvenile justice systems will have different weak points, but explicitly setting targets to reduce delays should form a key part of an overall strategy.

With respect to the role of the family in this field, there is considerable empirical evidence on its importance and on the fact that family relationships and poor

parenting and lack of parental care and supervision are important influences on juvenile delinquency. Whilst parents cannot and should not be held solely or directly responsible for the offending behaviour of their children, they clearly have an important role to play, particularly when their children are still young.

Priorities of the Organisation

Empowering children, that is, ensuring that they are aware of their rights and can exercise them, goes hand in hand with ensuring that they are also protected from harm. But how can the Member States ensure this? We have seen that the Council of Europe has looked into a number of ways Member States can do so, through its instruments and through the mechanisms that have been set up under them, but also by identifying new issues on a European level that need to be dealt with in order to protect and promote children's rights.

Trafficking in human beings⁶⁹ is a terrible reality in today's world and is a very sensitive issue which is at the very core of contemporary anxieties concerning the global political economy, population growth, gender and ethnic stratification, transnational (organised) crime and human rights abuses. Every year, a large number of people, the majority of whom are women and children, are trafficked within and over borders and subjected to sexual or other exploitation. This phenomenon has now reached such an unprecedented level that it is possible to speak of a new form of slavery, which is prohibited by the European Convention on Human Rights⁷⁰.

Trafficking in human beings directly undermines the values on which the Council of Europe is based. As a pan-European organisation, the Council of Europe regroups, among its 45 Member States, countries of origin, transit and destination of the victims of trafficking. Our organisation is therefore very well placed to ensure that Member States adopt, together, measures to combat this phenomenon.

⁶⁹ www.coe.int/trafficking

⁷⁰ Article 4.

Our Organisation has already carried out numerous initiatives to contribute to the international fight against the trafficking of human beings and these include both awareness-raising and action oriented activities which enabled the drawing up of important international legal texts.⁷¹

Recently the Council of Europe has begun work on the drafting of an international binding legal instrument to combat this phenomenon. A European Convention on action against trafficking in human beings will follow the United Nations achievements in this field in a European context, with a particular emphasis on the protection of victims.⁷²

This Convention will not be a declaration of principle but a practical tool of international cooperation and will:

- require States, which have not yet done so, to criminalise the trafficking of human beings in their national laws;
- aim at a proper balance between matters concerning human rights and prosecution;
- improve existing mechanisms of international co-operation (including by taking into account “cyber-trafficking”); and
- set up a strong monitoring mechanism to ensure the respect by States of the provisions of this Convention.

Other related situations that have negatively affected children over centuries, but that have only come to light and increased in our modern society cover such terrible

⁷¹ Recommendation N° R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation, Recommendation; N° R (2001) 16 on protection of children against sexual exploitation; Recommendation 1545 (2002) of the Parliamentary Assembly: Campaign against trafficking in women.

⁷² Consideration is being given to the possible adoption of a definition based on the definition contained in the Palermo Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime.

phenomena as sexual exploitation, which includes child pornography, prostitution, sexual slavery and trafficking in children for such purpose.⁷³

The Council of Europe has worked in the field of the protection of children against sexual exploitation for over a decade and has adopted numerous international instruments in this field.⁷⁴ It has an important role to play in fighting this phenomenon and is working to achieve better co-ordination and eventually assess Member States' efforts to combat this problem more effectively.

Towards that end, the Council of Europe set up last year a Group of Specialists on the protection of children against sexual exploitation⁷⁵ and entrusted it with the task of providing an effective follow-up to the Yokohama Second World Congress against Commercial Sexual Exploitation of Children that was held in December 2001.

This issue is also important within the EU, since it has already adopted three instruments in this field already.⁷⁶ During this summer,⁷⁷ the Council of the EU adopted a Framework Decision on combating the sexual exploitation of children and child pornography, which seeks to harmonise the legislative and regulatory provisions of Member States of the EU concerning police and judicial co-operation in criminal matters with a view to combating trafficking in human beings. Member States of the EU have been given up to August 2005 to take the necessary measures to comply with this Framework Decision.

⁷³ Recommendation Rec (2001) 16 on the protection of children against sexual exploitation.

⁷⁴ Recommendation No. R (91) 11 concerning sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults; Recommendation Rec (2001) 16 on the protection of children against sexual exploitation; Convention on Cybercrime (see Article 9); the European Social Charter (see Article 7 paragraph 10).

⁷⁵The PC-S-ES : www.coe.int/childprotection.

⁷⁶European Council Resolution on the contribution of civil society in finding missing or sexually exploited children (of 9 October 2001); European Council Framework Decision on combating trafficking in human beings (of 19 July 2002) and the European Council Decision to combat child pornography on the Internet (of 29 May 2000).

⁷⁷ 29 July 2003.

Hence, Europe, on every level, is working to put an end to this scourge.

However, amongst prohibited forms of violence, we must also address what is regarded as “routine” violence against children in their homes which does not reach the degree of severity or abuse warranting penal sanctions for the perpetrators.

There is a general feeling among the Member States of the Council of Europe that corporal punishment of children is no longer acceptable in a society that tries to empower children and make them responsible members of our society. Many European States have taken measures against corporal punishment, and studies have shown that such punishment leads to the acceptance of violence by children and perpetuates the vicious circle of violence within our society.

The Committee on the Rights of the Child, which is responsible for monitoring the implementation of the 1989 UN Convention, has stated that no level of corporal punishment is compatible with the Convention and has formally recommended prohibition, coupled with education programmes to eliminate it.

If we are to make real progress in challenging the extreme forms of violence and exploitation which still threaten a minority of European children, we have to improve the status of all children in all our societies. In particular, we have to ensure that they are perceived as holders of human rights with full respect for their human dignity and physical integrity and to equal protection under the law. There is no more symbolic demonstration of the low status of children in many European States – than the persisting legality and prevalence of corporal punishment. The human rights imperative is that children should have at least equal protection under the law on assault. Prosecution can be a different matter and should indeed take into account children’s interests, which may argue against prosecution of their parents.

The Forum for Children and Families of the Council of Europe held a seminar at the

end of last year, in which children participated, on raising awareness of the nature and extent of corporal punishment of children within the family and to consider its causes and consequences. The aim of the seminar was to identify concrete measures that could be taken by the Council of Europe Member States and by the Council of Europe to prevent and eliminate corporal punishment of children within the family. Two publications will soon emanate from the Seminar: a handbook on the abolition of corporal punishment in Council of Europe Member states, and a manual on social campaigns against corporal punishment.

While it seems that all European countries have prohibited corporal punishment in their schools and penal systems for children (although it is not as yet always effectively enforced), corporal punishment in the family home remains widespread.⁷⁸ Go back a century or two, and legal defences existed for husbands who beat their wives - with a rod no thicker than their thumb. While there is still far too much violence against women, a long time ago we moved on in our laws to recognise women's equal right to protection. Why should children – who are people too - have less respect and less protection from assaults on their fragile bodies?

The Committee of Ministers of the Council of Europe first recommended in 1985 that Member States should take legal action against corporal punishment in the family and has followed this up with other Recommendations.⁷⁹ The 1989 UN Convention, which all our 45 Member States have ratified, requires States to take legislative and other action to protect children from “all forms of physical and mental violence” while in the care of parents and others. The Committee on the Rights of the Child, Treaty

⁷⁸ It should be noted that the European Court of Human Rights has emphasised that there is no conflict between abolishing all corporal punishment and the right to privacy.

⁷⁹ Council of Europe Committee of Ministers, Recommendation on “Violence in the family”: Recommendation R 85 (4) ; all Recommendations are available at http://www.coe.int/t/E/Committee_of_Ministers/Home/Documents/; also see Recommendation on “Social measures concerning violence within the family” : Recommendation R (90) 2; and Recommendation on “The medico-social aspects of child abuse” : Recommendation R (93) 2.

Body for the Convention, has consistently interpreted the Convention as requiring prohibition of all corporal punishment.⁸⁰

The European Committee of Social Rights, monitoring conformity with the European Social Charter and Revised Social Charter, states in a General Observation issued in 2001 that compliance with Article 17 requires prohibition of all corporal punishment and of all other humiliating treatment or punishment of children.⁸¹ The Committee notes in its Observation that it *“does not find it acceptable that a society which prohibits any form of physical violence between adults would accept that adults subject children to physical violence”*.⁸²

The Committee is now systematically following up this Observation in its examination of Member States’ reports. It has already found five States to be not in conformity with the Charter because they have not explicitly prohibited all corporal punishment⁸³. In addition, collective complaints have been registered against five other Member States⁸⁴ under the process established by an Additional Protocol to the Charter, on the same grounds.⁸⁵

The European Court of Human Rights, in its landmark judgment in 1998 concerning corporal punishment by a stepfather, *A. v. the United Kingdom*, found that the United Kingdom’s domestic law allowing “reasonable chastisement” failed to provide adequate protection including “effective deterrence” of a young boy’s Convention rights.⁸⁶ Five years on, the execution of this judgment by the United Kingdom

80 United Nations Convention on the Rights of the Child, Article 19. All the reports and concluding observations of the Committee on the Rights of the Child are available at <http://www.unhchr.ch/html/menu2/6/crc/>

81 See Collective complaints nos. 17/2003 OMCT v Greece, 18/2003 OMCT v Ireland, 19/2003 OMCT v Italy, 20/2003 OMCT v Portugal, 21/2003 OMCT v Belgium concerning the corporal punishment of children.

82 European Committee of Social Rights, General Observations regarding Article 7 paragraphs 10 and 17, *Conclusions XV-2*, Vol. 1, General Introduction, p. 26.

83 Poland, France, Romania, Slovak Republic and Slovenia.

84 Greece, Ireland, Italy, Portugal and Belgium.

85 Conclusions of the European Committee of Social Rights and details of collective complaints can be found at http://www.coe.int/T/E/Human_Rights/Esc/

86 European Court of Human Rights, *A v. UK*, Judgment of 23 September 1998.

Government is still being actively supervised by the Committee of Ministers; other States have expressed deep concern at the lack of appropriate legislative action, given commitments the United Kingdom made to the European Court.⁸⁷

I am aware that, following devolution, the Scottish Parliament is now responsible for legislation on corporal punishment in Scotland. However, in spite of the pioneering reputation that Scotland has concerning children's law, the provision in your Criminal Justice (Scotland) Act, which came into force at the end of October introducing the concept of "justifiable assault" of children,⁸⁸ would appear to conflict with international and European human rights standards. Defining certain assaults, in this case blows round the head, use of implements and shaking as unjustifiable may result in confirming parents' rights to assault and hurt children in other ways; telling courts that they must consider a list of factors in order to decide whether an assault is "justifiable" does not appear to contribute to the "effective deterrence" required by the European Court's judgment.

As the UN Committee on the Rights of the Child outlined in its commentary on the United Kingdom Government's second report under the Convention on the Rights of the Child in October 2002, "*... proposals to limit rather than to remove the 'reasonable chastisement' defence do not comply with the principles and provisions of the Convention ... particularly since they constitute a serious violation of the dignity of the child... Moreover, they suggest that some forms of corporal punishment are acceptable, thereby undermining educational measures to promote positive and non-violent discipline.*"⁸⁹

The hesitation of governments of the United Kingdom and some other States to grasp the nettle and legislate to fully respect children's fundamental rights appears to be based on their perception of and fear of public opinion. Banning all corporal punishment is undeniably still a controversial issue in some States. But where the

87 Committee of Ministers, supervision of execution of judgments of the European Court of Human Rights ; annotated agendas are available at <http://cm.coe.int/stat/E/Public/2003/agendas/>

88 Criminal Justice (Scotland) Act 2003, section 51; brought into force October 2003.

89 Committee on the Rights of the Child, concluding observations on the UK's second periodic report under the Convention on the Rights of the Child, CRC/C/15/Add.188, 9 October 2002.

human rights obligations of the State are clear cut, as in this case, it must be the task of governments to shape public opinion. And it should be emphasised that decisions of the European Commission and Court of Human Rights have underlined that banning all corporal punishment does not breach rights to family privacy or religious freedom.⁹⁰

At least 10 Member States of the Council of Europe have explicitly prohibited all corporal punishment, and more have removed defences equivalent to the “reasonable chastisement” defence.⁹¹ Building on this progress, we must move quickly now to a Europe-wide ban on all corporal punishment of children, rigorously enforcing the human rights standards on which the Council is based. Just as the Council has effectively eliminated the use of the death penalty across the 45 Member States, now we must move quickly to eliminate this unjust and dangerous practice of corporal punishment of children. I would like to take this opportunity to challenge your Government and others across Europe to stop defending – or disguising as discipline – deliberate violence against children and to accept that children, like adults, have the fundamental human right not to be assaulted. Hitting children is no more acceptable than hitting anyone else and the law must say so.

I hope that Europe will soon be a corporal punishment-free area and that Member States fulfil their obligations under international human rights instruments to prohibit all forms of violence, including corporal punishment against children in the family and in all other settings and to ensure that all existing defences are repealed to end the cycle of violence.

Concluding remarks

Children’s rights are often violated because governments are not doing enough and sometimes because they are doing too much. This must change. The bottom line is that children are not mini-adults with mini-rights. They are human beings with all

⁹⁰ European Commission on Human Rights, admissibility decision, *Seven Individuals v. Sweden*, 1982, Application no. 8811/79; European Court of Human Rights, admissibility decision, *Philip Williamson and Others v. the UK*, 2000, Application no. 55211/00.

⁹¹ A forthcoming Handbook from the Council of Europe will detail Member States’ human rights obligations to end all corporal punishment and its current legal status.

human rights and some special needs. The Council of Europe is doing its share to protect children's fundamental rights and put them above political considerations. Our focus today must be to develop a comprehensive and coherent approach which will bring together all measures and instruments aimed at protecting the well being of children. They must be put at the centre of our efforts. The Council of Europe will continue to develop ever higher standards and insist that member States apply them to the letter. The protection of children is not just an area of governmental responsibility. It is the ultimate test of its worth. Of our worth.

