An Address Relating to the European Convention on Human Rights

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The following is a transcript of an address given by Luzius Wildhaber at the Old University, Aula Magna, Valletta, Malta 16 January 2003.

The principal and overriding aim of the system set up by the European Convention on Human Rights is to bring about a situation in which in each and every Contracting State the right and freedoms are effectively protected, that is primarily that the relevant structures and procedures are in place to allow individual citizens to vindicate those rights and to assert those freedoms in the national courts. This the first level at which Convention protection should operate, but it is not the only one. The quantum leap achieved by the Convention was the recognition of the individual as a subject of international law and the offering of international protection to individuals. At the heart of this system are the notions of human dignity, of democracy and the rule of law. These aims come together in that it is through individual applications that structural or systemic weaknesses are identified.

The Convention system is a subsidiary one: it falls firstly to the national authorities to secure the protection sought. This is why the Convention has a strong procedural bias. Clearly this is the case for the due process provisions which are essentially aimed at securing procedural safeguards in relation to detention and the conduct of judicial proceedings under Articles 5 and 6 of the Convention. However, it is also true of the other substantive provisions of the Convention. In a number of cases[206] involving alleged breaches of

[205] Dr. Wildhaber is the President of the European Court of Human Rights.
[206] Kaya v. Turkey, 19.2.1998, Reports 1998-I, p. 329, § 105; Tanrikulu v. Turkey, 8.7.2000, § 101.

the right to life guaranteed by Article 2 of the Convention where it has been unable to establish to the required standard of proof the substantive violation, the Court has found a "procedural" violation on account of the lack of an effective investigation or effective judicial proceedings at national level capable of establishing the true facts at the origin of the allegation. The Court has also held[207] that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 (which prohibits torture and inhuman or degrading treatment) at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention, likewise requires by implication that there should be an effective official investigation. As with the duty to carry out an investigation under Article 2, such investigation should be capable of leading to the identification and punishment of those responsible.

In the context of Article 8 the Court will have regard to whether there are adequate procedural safeguards in place to protect the Article 8 interest[208]. In the recent case of P., C. and S v. the United Kingdom involving the removal into care of a baby shortly after birth and where the parents were not legally represented either in the care proceedings or the subsequent freeing for adoption proceedings, the Court stressed the importance of the procedural obligations inherent in Article 8[209]. In these difficult and sensitive cases it is often hardly possible for the Court to make an assessment of the substantive issues before the national courts, for instance whether or not the care decision was justified. It can however consider whether the parents were properly involved in the decision-making process to a degree sufficient to provide them with the requisite protection of their interests under Article 8 of the Convention. This approach is entirely consistent with the Court's longstanding jurisprudence that it is not to be seen as a "fourth instance", in other words that it does not rehear cases as to their facts and law on appeal, as it were, from national courts. It is, as

[207] See for example, Assenov v. Bulgaria, 28.10.1998, Reports 1998-VIII, p. 3290, § 102; Labita v. Italy, 6.4.2000, § 131; Veznedaroğlu v. Turkey, 11.4.2000, §32.
[208] Chapman v. the United Kingdom, 18.1.2001, ECHR 2001, § 114.
[209] P., C. and S. v. the United Kingdom, 16.7.2002.

has been frequently pointed out, not a court of last instance, but a court of last resort.

It follows that practically all the Convention guarantees contain at least an implied positive obligation to set up and render effective procedures making it possible to vindicate the right concerned at national level. This is of course confirmed by the requirement of exhaustion of domestic remedies under Article 35 of the Convention and the obligation to afford an effective remedy under Article 13. This must indeed be so if the system is to function as a subsidiary one. As the Court has recently emphasised, "the object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, the Court exerting its supervisory role subject to the principle of "subsidiarity"[210]. This was confirmed in the context of Article 13 when the Court held that the obligation to provide a remedy extended also to problems of length of proceedings in breach of Article 6. As the Court noted in the case of **Kudła v. Poland**, "the rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights. In that way, Article 13, giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the *travaux préparatoires*[211], is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court"[212].

[210] Z. and Others v. the United Kingdom, 10.5.2001, ECHR 2001-V, § 103.
[211] See the Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights, vol. II, pp. 485 and 490, and vol. III, p. 651.
[212] Kudła v. Poland, 26.10.2000, ECHR 2000-XI, § 152.

This must work both ways. In other words, where there are no or insufficient procedural safeguards protecting the right in question, there may well be a violation of the right in both its substantive and procedural aspects and of Article 13. On the other hand, where such safeguards are in place a significant part of the Contracting State's obligations has been fulfilled. That does not mean that the Court in exercising its supervisory review is precluded from finding a violation, since, clearly, substantive issues will also arise, but it does make it possible for that review to be carried out from the right distance, from the right perspective. If in addition the national authorities are in a position to apply Convention case-law to the questions before it, then much, if not all, of the Strasbourg Court's work is done. This is ultimately, as I have said, the objective underlying the system: to ensure that individual citizens throughout the Convention community are able fully to assert their Convention rights within their own domestic legal system.

Another way of putting this is that fulfilment of the procedural obligation leaves room for the operation of what we call the margin of appreciation. This area of discretion is a necessary element inherent in the nature of international jurisdiction when applied to democratic States that respect the rule of law. It reflects on the one hand the practical matter of the proximity to events of national authorities and the sheer physical impossibility for an international court, whose jurisdiction covers 44 States with a population of some 800 million inhabitants, to operate as a tribunal of fact. The Court has observed that it must be cautious in taking on the role of first instance tribunal of fact. Nor is it, as we have seen under the "fourth instance" doctrine, the Court's task to substitute its own assessment of the facts for that of the domestic courts. Though the Court is not bound by the findings of domestic courts, it requires cogent findings of fact to depart from findings of fact reached by those courts[213].

But the margin of appreciation also embraces an element of deference to decisions taken by democratic institutions, a deference

[213] Tanli v. Turkey, 10.4. 2001, at § 110.

deriving from the primordial place of democracy within the Convention system. It is thus not the role of the European Court systematically to second-guess democratic legislatures. What it has to do is to exercise an international supervision in specific cases to ensure that the solutions found do not impose an excessive or unacceptable burden on one sector of society or individuals. The democratically elected legislature must be free to take measures in the general interest even where they interfere with a given category of individual interests. The balancing exercise between such competing interests is most appropriately carried out by the national authorities. There must however be a balancing exercise, and this implies the existence of procedures which make such an exercise possible. Moreover the result must be that the measure taken in the general interest bears a reasonable relationship of proportionality both to the aim pursued and the effect on the individual interest concerned. In that sense the area of discretion accorded to States, the margin of appreciation, will never be unlimited and the rights of individuals will ultimately be protected against the excesses of majority rule. The margin of appreciation recognises that where appropriate procedures are in place a range of solutions compatible with human rights may be available to the national authorities. The Convention does not purport to impose uniform approaches to the myriad different interests which arise in the broad field of fundamental rights protection; it seeks to establish common minimum standards to provide a Europe-wide framework for domestic human rights protection.

The search for a balance between competing interests may be relevant even to the due process guarantees. Thus for instance in respect of detention there may be a conflict between an individual's right to procedural guarantees and ultimately his or her freedom and the need to protect the community at large. The Court has found that in connection with the lawful detention of persons of unsound mind under Article 5 § 1 (e) the "interests of the protection of the public" may "prevail over the individual's right to liberty to the extent justifying an emergency confinement in the

absence of the usual guarantees"[214]. Again it has accepted, in the context of Article 5 of the Convention aimed at prohibiting arbitrary detention, that the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding an arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity[215]. Liberty even in its narrowest sense is subject to the constraints of living in and protecting society. Taking another example, the right to a court, which the Court has read into the Article 6 fair trial guarantee in a pure exercise of rule of law logic, is not absolute[216]. It may be subject to legitimate restrictions, such as statutory limitation periods, security for costs orders, regulations concerning minors and persons of unsound mind. Where the individual's access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and in particular whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved[217]. In other words there is a need to strike a balance between public policy interests militating in favour of any such restriction and the individual's access to a court which may be frustrated thereby.

Freedoms such as those of expression and association are subject to express restrictions in so far as such restrictions are necessary in a democratic society. In connection with the freedom of association under Article 11 of the Convention, in the case of **Refah Partisi and Others v. Turkey**[218] a Chamber of the Court concluded that the grounds cited by the Turkish Constitutional Court to justify the dissolution of Refah, an Islamic party, were relevant and sufficient and that the interference complained of was necessary in a democratic society. Refah had, so the Court found, declared their intention of

[214] X v the United Kingdom, 5.11.1980, Series A no. 46, § 45.
[215] Fox, Campbell and Hartley v. the United Kingdom, 30.8.1990, Series A no. 182, §§ 32 and 34.
[216] Golder v.the United Kingdom, 21.2.1975, Series A no. 18, § 35.
[217] Z and Others v. the United Kingdom, 10.5.2001, ECHR 2001-V, § 93.
[218] Judgment of 31.8.2001.

setting up a plurality of legal systems and introducing Islamic law (the sharia) and had adopted an ambiguous stance with regard to the use of force to gain power and retain it. The majority in the seven-Judge Chamber was 4-3. The dissent within the Chamber was, however, based more on the strength of the evidence that Refah's aims were anti-democratic, than any disagreement about the general principles applicable. These were in particular that there can be no democracy where the people of a State, even by a majority decision, waive their legislative and judicial powers in favour of an entity which is not responsible to the people it governs, whether it is secular or religious and that, as it is a function of written law to establish distinctions on the basis of relevant differences, the rule of law cannot be sustained over a long period of time if persons governed by the same laws do not have the last word on the subject of their content and implementation.

The Court accepted that a political party might campaign for a change in the law or the legal and constitutional basis of the State on two conditions: first that the means used to that end must in every respect be legal and democratic and, second, that the change proposed must itself be compatible with fundamental democratic principles. It followed that a party whose leaders incited recourse to violence or proposed a policy that did not comply with one or more of the rules of democracy or was aimed at the destruction of democracy and at infringement of the rights and freedoms granted under democracy could not lay claim to the protection of the Convention. The case is now pending before the Court's Grand Chamber of seventeen Judges and we must wait for its judgment to see whether the Chamber's ruling is confirmed.

If one of the main roles of human rights law is to maintain balance in a democratic society, that clearly includes striking the right balance between, on the one hand, appropriate measures to protect democratic society against genuine threats and, on the other, disproportionate repression. The current debate on terrorism focuses on this problem. Terrorism, as indeed violence in general, raises two fundamental issues which human rights law must address. Firstly, it strikes directly at democracy and the rule of law,

the two central pillars of the European Convention on Human Rights. It must therefore be possible for democratic States governed by the rule of law to protect themselves effectively against terrorism; human rights law must be able to accommodate this need. The European Convention should not be applied in such a way as to prevent States from taking reasonable and proportionate action to defend democracy and the rule of law. Moreover, as the European Court of Human Rights has held, Convention States have a duty under Article 2 of the Convention to take appropriate steps to safeguard the lives of those within their jurisdiction[219]. Some compromise may then be necessary, as the Court has recognised, between the requirements for defending democratic society and individual rights[220]. It would run counter to the fundamental object and purpose of the Convention, for national authorities to be prevented from making a proportionate response to such threats in the interests of safety of the community as a whole.

But the second way in which terrorism and violence challenge democracy and human rights law is by inciting States to take repressive measures, thereby insidiously undermining the foundations of democratic society. Our response to terrorism has accordingly to strike a balance between the need to take protective measures and the need to preserve those rights and freedoms without which there is no democracy. At the same time and from a wider perspective, it is precisely situations in which there is a lack of respect for human dignity, a lack of effective human rights protection, which breed terrorism. Efforts to prevent the spread of international terrorism should therefore embrace the aims of international human rights law. Limitations must moreover never be so broad as to impair the very essence of the right in question; they must, in Strasbourg terms, also pursue a legitimate aim and bear a reasonable relationship of proportionality between the means employed and the aims sought to be achieved. Looking at the question of balance in this context one needs to ask whether there are

[219] See most recently, Pretty v the United Kingdom, 29.4.2002, ECHR-2002, § 38.
[220] Klass and Others v. Germany, see note 3 above, § 59.

techniques which can be employed which accommodate legitimate security concerns and yet accord the individual a substantial measure of procedural justice[221]. It should not in any event be possible for the national authorities to free themselves from effective control by the domestic courts, or ultimately international jurisdiction, simply by asserting that national security and terrorism are involved. As the Court has recently confirmed in **Al-Nashif v. Bulgaria**, "even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence"[222]. An individual must be able to challenge the executive's assertion that national authority is at stake[223]. On the other hand, the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism[224].

One well-known principle of the Strasbourg case-law is that the European Convention on Human Rights is a "living instrument", that is to say that it is interpreted "in the light of present day conditions", that it evolves, through the interpretation of the European Court of Human Rights (and formerly the Commission of Human Rights), to take account of changes in social and moral attitudes and technological developments. Convention terms have not remained frozen in the meaning which might most obviously have been attributed to them in 1950; had they done the Convention would have lost a part of its relevance. If this principle of dynamic interpretation was first enounced in relation to corporal punishment following criminal proceedings[225], in the **Tyrer** case, it has received its most frequent expression in relation to Article 8. This is hardly surprising not only because of the breadth of the

[221] See for example Chahal v. the United Kingdom, 15.11.1996, Reports 1996-V, § 131.
[222] Al-Nashif v. Bulgaria, 20.6.2002, § 123.
[223] Ibid., § 124.
[224] Fox, Campbell and Hartley,v. the United Kingdom, cited above note 3, § 34.
[225] Tyrer v. the United Kingdom, 25.4.1978, Series A no. 26, § 31

interests covered by Article 8, that is private and family life, correspondence and home, but also because it is precisely those interests which are most likely to be affected by changes in society. In a dynamic instrument, Article 8 had proved to be the most elastic provision. Thus it has embraced such matters as the taking of children into care, nuisance caused by a waste treatment plant, planning issues, aircraft noise, transsexuals' rights, corporal punishment in schools, data protection, access to confidential documents relating to an applicant's past in the care of the public authorities, the choice of a child's first name, application of immigration rules, disclosure of medical records and I could go one; the list is a long one.

The breadth of the potential scope of the interests protected by Article 8 has thus been an advantage in allowing the development of the Court's case-law in this area to keep pace with the modern world. It is, however, something of a disadvantage when Governments are seeking to establish exactly what is expected of them under the Convention. This is all the more so, because in one of its earliest judgments concerning Article 8[226] in the famous case of **Marckx v. Belgium**, the Court made it clear that in addition to the obligation to abstain from arbitrary interference with the protected interests, the State authorities could be under a positive obligation to ensure effective "respect" for those interests. In the context of that case, which concerned the status of a child born out of wedlock, the Court noted that respect for family life implied in particular "the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his [or her] family". Moreover, such positive obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves[227].

Whether the obligation imposed on the State is primarily negative or positive, the right to respect is not absolute. In common with the

[226] Marckx v. Belgium, 13.6.1979, Series A no. 31, § 31.
[227] X and Y v the Netherlands, 26.3.2000, Series A no. 91, § 23.

other Articles of the Convention dealing with "the freedoms", Articles 9, 10 and 11, the Convention accepts that under paragraph 8 § 2 restrictions may be imposed on the exercise of these rights. Thus, in regard to the negative obligation, in order to satisfy the requirements of Article 8 § 2, interference by a public authority must be "in accordance with the law", must pursue one of the legitimate aims set out in the paragraph and must be "necessary in a democratic society". In determining what is necessary in a democratic society in this field, as in others, Contracting States enjoy a margin of appreciation, or area of discretion, whose justification is, as I have suggested, both practical and theoretical.

As with Articles 9 to 11 of the Convention the margin of appreciation will vary according to the context. Thus for example, with respect to family life, the Court recognises that national authorities enjoy a wide margin of appreciation in assessing the necessity of taking children into care, but calls for stricter scrutiny in respect of any further limitations such as restrictions on parental rights and access. As regards respect for the home the Court again accepts that national authorities in principle enjoy a wide margin of appreciation in the implementation of planning decisions. The scope of the margin of appreciation depends on such factors as the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned.

Whether at national level or in Strasbourg, the assessment of whether a measure is necessary in a democratic society is essentially a question of balancing the individual's interest against that of the community. Where what is in issue is the existence of a positive obligation, much the same balancing exercise has to be carried out. As the Court has pointed out, in determining whether or not a positive obligation exists "regard must be had to the fair balance that must be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention.[228] The Court has indeed made clear that the boundaries between the States'

[228] Cossey v. the United Kingdom, 27.9.1990, Series A no. 148, § 37.

positive and negative obligations do not always lend themselves to precise definition. In both cases regard has to be had to the competing interests of the individual and the community as a whole, and in both cases the State enjoys a certain margin of appreciation[229].

A line of cases on transsexuals' rights are interesting in that they shed light on the evolutive process of interpretation of the Convention. The essence of the applicants' complaints has been that the respondent States in question have failed to take positive steps to modify a system which operates to their detriment, the system being that of birth registration. Carrying out its usual exercise of seeking a fair balance between the general interest and the interests of the individual, the Court had until last year, by a small and dwindling majority and with one exception distinguished on the facts[230], found that there was no positive obligation for the respondent State to modify its system of birth registration so as to have the register of births updated or annotated to record changed sexual identity[231].

However, the Court never closed the door on the possibility of requiring legal recognition of new sexual identity. It has reiterated the need for Contracting States to keep the question under review. In a case decided in 1998, it acknowledged the increased social acceptance of transsexualism and increased recognition of the problems which post-operative transsexuals encounter. In order to determine whether it should revise its case-law, the Court has looked at two aspects: scientific developments and legal developments. As to scientific developments, it confirmed its view that there remained uncertainty as to the essential nature of transsexualism and observed that the legitimacy of surgical intervention was sometimes questioned. There had not been any findings in the area of medical science which settled conclusively

[229] X, Y and Z v. the United Kingdom, 22.4.1997, Reports 1997-II, § 41.
[230] B v. France, 25.3.1992, Series A no 232-C.
[231] Rees v. United Kingdom, 17.10.1986, Series A no. 106; Cossey v. the United Kingdom, 27.9.1990, Series A no. 184; Sheffield and Horsham v. the United Kingdom, 30.7.1998, Reports 1998-V.

the doubts concerning the causes of the condition of transsexualism. The non-acceptance by the respondent State of the sex of the brain as being the crucial determinant of gender could not be criticised as unreasonable[232].

Looking at the legal development, the Court examined the comparative study that had been submitted by a human rights organisation. It was not satisfied that this established the existence of any common European approach to the problems created by the recognition in law of post-operative gender status. In particular there was no common approach as to how to address the repercussions which such recognition might entail for other areas of law such as marriage, filiation, privacy or data protection.

In the case of **Goodwin v. the United Kingdom**[233] decided last year however, the Court finally reached the conclusion that the fair balance now tilted in favour of legal recognition of transsexuals. It recalled that it had to have regard to the changing conditions within the respondent State and within Contracting States generally and to respond to any evolving convergence as to standards to be achieved. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement. In this case the Court attached less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed by transsexualism than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals, but of legal recognition of the new sexual identity of post-operative transsexuals. No concrete or substantial hardship or detriment to the public interest had been demonstrated as likely to flow from the changes to the status of transsexuals. Society could reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with sexual identity chosen by them at great personal cost.

[232] Sheffield and Horsham, § 55.
[233] Goodwin v. the United Kingdom, 11.7.2002.

The Court is understandably wary of extending its case-law on positive obligations. It has first to be convinced not only that there has been a clear evolution of morals, but that this evolution, where appropriate substantiated by an accompanying evolution of scientific knowledge, is reflected in the law and practice of the majority of the Contracting States. The Court will then interpret the terms of the Convention in the light of that evolution. It is not, I would say, the Court's role to engineer changes in society or to impose moral choices.

Another, rather different example, of the living instrument approach can be seen in the case of **Stafford v. the United Kingdom**[234], where the Court revised its earlier finding that mandatory life sentences for murder in the UK constituted punishment for life. The applicant had been convicted of murder and released on licence after completing the punitive element or tariff of his sentence. He was subsequently convicted and sentenced for an unconnected, non-violent offence. His continued detention after completing the second sentence under the first mandatory life sentence was found to be in breach of Article 5 § 1. Although the Court found that there was no material distinction on the facts between Stafford and the earlier case[235], having regard to the significant developments in the domestic sphere, it proposed to re-assess "in the light of present-day conditions" what was now the appropriate interpretation and application of the Convention. This was necessary to render the Convention rights practical and effective, not theoretical and illusory. Thus the Court had regard to the changing conditions and any emerging consensus discernible within the domestic legal order of the respondent Contracting State. It found that there was not a sufficient causal connection between the applicant's continued detention and his original sentence for murder. The Court also held that there had been a breach of Article 5 § 4 in that the power of decision concerning the applicant's release lay with a member of the executive, the Home Secretary, who could reject the parole board's recommendation. In other

[234] Stafford v. the United Kingdom, 28.5.2002, ECHR 2002-IV.
[235] Wynne v. the United Kingdom, 18.7.1994, Series A no. 294-A.

words the lawfulness of the applicant's continued detention was not reviewed by a body with a power to order his release or with a procedure containing the necessary judicial safeguards.

The Court drew attention to another aspect namely the separation of powers and the difficulty of reconciling the power of a member of executive to fix the punitive element of a prison sentence and to decide on a prisoner's release with that notion, which had assumed a growing importance in the case-law of the Court. In another British case, concerning the release of persons detained in a mental hospital[236] the power to order release lay with the Secretary of State. The decision to release would therefore be taken by a member of the executive and not by the competent tribunal. This was not a matter of form but impinged on the fundamental principle of separation of powers and detracted from a necessary guarantee against the possibility of abuse.

The question of the separation of powers or more specifically the independence of the judiciary has arisen in other contexts. Last year the Court found a violation of the fair trial guarantee in the Ukrainian case of **Sovtransavto Holding** in which there had been in the domestic proceedings numerous interventions of the Ukrainian authorities at the highest level. Such interventions disclosed a lack of respect for the very function of the judiciary[237]. The Strasbourg Court has itself had on occasion to remind Governments of the special character of its judicial function, which should command the same respect owed to a national judiciary and to which the doctrine of the separation of powers also applies mutatis mutandis.

Another recurring theme in the Court's case-law is the notion of human dignity which lies at the heart of many of the Convention guarantees. So the Court held last year in **Kalashnikov v. Russia** that a State must ensure that a person is detained in prison in conditions which are compatible with respect for his human

[236] Benjamin and Wilson v. the United Kingdom, 26.9.2002.
[237] Sovtransavto Holding v. Ukaine, 25.7.2002.

dignity. The manner and execution of the measure should not subject him to distress and hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. Moreover the absence of any positive intention to humiliate or debase the detainee, although a factor to be taken into account, could not exclude a finding of inhuman and degrading treatment prohibited by Article 3 of the Convention[238].

Human dignity was at issue in other cases in 2002. Early in the year a Chamber of the Court had a particularly poignant case to decide in which human dignity was in issue.[239] The applicant, Mrs Pretty, a British national in the terminal stages of motor neurone disease, had sought an undertaking from the Director of Public Prosecutions that her husband would not be prosecuted if he assisted her to commit suicide. The applicant claimed that this refusal infringed, among other things, her right to life under Article 2 of the Convention, the prohibition of inhuman or degrading treatment under Article 3 and the right to respect for private life under Article 8.

The Court was not persuaded that "the right to life" guaranteed in Article 2 could be interpreted as involving a negative aspect. Article 2 was, the Court held, unconcerned with issues to do with the quality of living or what a person chose to do with his or her life. Article 2 could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor could it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.

The Court accordingly found that no right to die, whether at the hands of a third person or with the assistance of a public authority, could be derived from Article 2 of the Convention.

[238] Kalashnikov v. Russia, 15.7.2002.
[239] Pretty v. the United Kingdom, 29.4.2002, ECHR 2002, § 38.

Looking at Article 3 the Court considered that it could be described in general terms as imposing a primarily negative obligation on States to refrain from inflicting serious harm on persons within their jurisdiction. However, in light of the fundamental importance of Article 3, the Court has reserved to itself sufficient flexibility to address the application of that Article in other situations that might arise. Thus for example the suffering which flowed from naturally occurring illness, physical or mental, might be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible[240].

In the case before the Court, it was beyond dispute that the respondent Government had not, themselves, inflicted any ill-treatment on the applicant. Nor was there any complaint that the applicant was not receiving adequate care from the State medical authorities. The applicant claimed rather that the refusal of the authorities to give an undertaking not to prosecute her husband disclosed inhuman and degrading treatment for which the State was responsible. This sought to place a new and extended construction on the concept of treatment, which went beyond the ordinary meaning of the word. Article 3 had to be construed in harmony with Article 2, which hitherto had been associated with it as reflecting basic values respected by democratic societies. As the Court had already held, Article 2 of the Convention was first and foremost a prohibition on the use of lethal force or other conduct which might lead to the death of a human being and did not confer any claim on an individual to require a State to permit or facilitate his or her death. The positive obligation on the part of the State which was invoked would require that the State sanction actions intended to terminate life, an obligation that could not be derived from Article 3 of the Convention.

The Court nevertheless noted, in its consideration of the complaint under Article 8, that the very essence of the Convention was respect for human dignity and human freedom. In an era of

[240] See for example D. v. the United Kingdom, 2.5.1997, Reports 1997-III.

growing medical sophistication combined with longer life expectancies, many people were concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflicted with strongly held ideas of self and personal identity. The Court was not prepared to exclude that the circumstances of the case could give rise to an interference with the right to respect for private life.

This meant that that under the second paragraph of Article 8 the Court had to determine the necessity of such interference. It found that States were entitled to regulate through the operation of the general criminal law activities which were detrimental to the life and safety of other individuals The law in issue was designed to safeguard life by protecting the weak and vulnerable and especially those who were not in a condition to take informed decisions against acts intended to end life or to assist in ending life. It was primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. The contested measure could be justified as "necessary in a democratic society".

This sensitive and difficult case provides a further example of the Court's cautious approach to the living instrument doctrine in areas which are still the matter of intense legal, moral and scientific debate. It also reminds us that there are areas of action within which States must retain a degree of discretion both as the local authorities best placed to carry out certain assessments and also in accordance with the principles of a democratic society.

Dignity in the context of personal autonomy also played a part in the Court's reasoning in the British transsexual case, Christine Goodwin, to which I have already referred. In that case the Court repeated its statement that respect for human dignity and human freedom was the very essence of the Convention. Protection was given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.

I have concentrated briefly on three aspects of the Court's case-load in 2002, evolutive interpretation, separation of powers and human dignity. It goes without saying that this is a mere glimpse of the Court's recent activity, even if the themes are recurring and fundamental ones. The sheer volume of the Court's case-load brings with it its own problems.

This brings me to some figures. The Court has currently some 30,000 applications pending before its decision bodies. An audit carried out in 2001 by the Council of Europe Internal Auditor predicted over 20,000 applications annually by 2005. Our own figures suggest an even steeper rise. In 2001 we registered some 14,000 applications. Applications have increased by around 130% since the present Court took office in November 1998, by about 1,400% since 1988. The potential for growth is almost unlimited as a result of the expansion of the Council of Europe over the last decade and this situation will be compounded when new member States ratify. Moreover, the evolution of case-load is not merely quantitative. The nature of the cases coming before the Court inevitably reflects the changed composition of the Council of Europe with a significant number of States which are still in many respects, and particularly with regard to their judicial systems, in transition, even if considerable progress has been made in some of them. In such States there are likely to be structural problems, which cannot be resolved overnight.

I am now more than ever convinced that, only just over four years after the radical reform of the Convention mechanism implemented by Protocol No. 11, replacing the two original institutions by a single judicial body, the system is in further need of a major overhaul.

That is why we should now be looking for a mechanism not only for the expeditious and cheap disposal of applications which do not satisfy the admissibility requirements, but also to relieve the Court of routine, manifestly well-founded cases and indeed beyond that cases which do not raise an issue in the sense that the issue of principle has already been resolved. If the obligation for a respondent State arising from a finding of a violation of the Convention is the elimination of the causes of the violation to

prevent its repetition, then subsequent applications whose complaint derives from the same circumstances should be seen as problem of execution. This is particularly true of violations of a "structural" nature[241].

Once the Court has established the existence of a structural violation or an administrative practice, is the general purpose of raising the level of human rights protection in the State concerned really served by continuing to issue judgments establishing the same violation? Here we see the conflict between general interest and individual relief at its clearest. If individual relief is the primary objective of the Convention system then of course in the situation described the Court must continue to give judgments so as to be able to award compensation to the individual victim. Yet if we look at the scheme for just satisfaction set up by the Convention under Article 41, we can see that it hardly supports the individual relief theory. To begin with it is discretionary as the Court is to award satisfaction "if necessary". The Court's case-law shows that it is indeed not the automatic consequence of a finding of violation. Hence the Court's well-established practice of holding in appropriate cases that a finding of a violation is in itself sufficient just satisfaction[242]. This is surely also an indication of the "public-policy" nature of the system.

But let us take a concrete example. The Court found as I have said a violation of Article 3 prohibiting inhuman and degrading treatment in respect of prison conditions in Russia and the evidence adduced by the Government itself indicated that this was a widespread situation throughout the State concerned. It has to be asked whether there would be a great deal of sense in the Court's processing the potentially tens of thousands of applications brought by detainees in similar conditions? Would the award of the no doubt quite substantial compensation on an individual basis, always supposing that the Court was able to deal with the cases concerned, hasten the resolution of the problem, contribute to the elimination

[241] See Botazzi v. Italy, 28.7.1999, ECHR 1999-V.
[242] The first time this formula was used was in Golder v. the United Kingdom, 21.2.1975, Series A no. 1975.

of the causes of the original violation? Very probably not and particularly if it is considered that one of the causes may well be a lack of funding. At the same time it would undermine the credibility of the Court for it to continue to issue findings of violations with no apparent effect.

The inflow of thousands of same issue cases would clog up the system almost irremediably. This might lead to judgments delivered five, six years or more after the lodging of the application. Not only is this sort of delay unacceptable, it also complicates the execution process because Governments can claim that the situation represented in the judgment no longer reflects the reality. I cite prison conditions, but the same problem could, indeed undoubtedly will, arise in relation to structural dysfunction in the operation of legal systems in some contracting States. We have already a foretaste of this with length of proceedings in Italy. We now realise that about half the Contracting States have problems with the length of judicial proceedings; we also know that there are in many of them grave difficulties with regard to the non-execution of final and binding judicial decisions.

It does therefore seem to me that the way forward is to make it possible for the Court to concentrate its efforts on decisions of "principle", decisions which create jurisprudence. This would also be the best means of ensuring that the common minimum standards are maintained across Europe. The lowering of standards is often cited in European Union circles as a potential consequence of the enlargement of the Council of Europe. Examination of the cases decided over the last three years belies this fear. Yet there is a risk in the longer term, a risk that can be avoided if the Court adheres to a more "constitutional" role as I have advocated.

With many thousands of applications being brought annually the right of individual application will in practice be in any event seriously circumscribed by the material impossibility of processing them in anything like a reasonable time. Will we really be able to claim that with say 30,000 cases a year, full, effective access can be guaranteed? Is it not better to take a more realistic approach to the

problem and preserve the essence of the system, in conformity with its fundamental objective, with the individual application being seen as a means to an end, rather than an end in itself, as the magnifying glass which reveals the imperfections in national legal systems, as the thermometer which tests the democratic temperature of the States? Is it not better for there to be far fewer judgments, but promptly delivered and extensively reasoned ones which establish the jurisprudential principles with a compelling clarity that will render them *de facto* binding *erga omnes*, while at the same time revealing the structural problems which undermine democracy and the rule of law in parts of Europe?

This brings me back to my opening comment about the fundamental goal of the Convention system. That system will never provide an adequate substitute for effective human rights protection at national level; it has to be complementary to such protection. It should come into play where the national protection breaks down, but it cannot wholly replace national protection or even one area of national protection. Apart form anything else, although the Convention is about individuals, it is not only about the tiny proportion of individuals who bring their cases to Strasbourg, and it will never be more than a tiny proportion.

As long as we remain too wedded to the idea of purely individual justice, we actually make it more difficult for the system to protect a greater number. At the same time I keep in my mind two images from last year: a dying woman in a wheelchair whose first and last trip abroad was to the hearing of her case in Strasbourg, whose own dignity and courage provoked universal admiration. The second image was also that of a woman, but one who had been born a man and whose suffering over many years although on a different level it is difficult for most of us to imagine. She came, with her adult children, to the public delivery of the Court's judgment and again impressed by her quiet dignity and apparent serenity.

Luzius Wildhaber
16 January 2003