

DIALOGUE BETWEEN JUDGES 2013

**“Implementing the
European Convention
on Human Rights
in times of economic
crisis”**



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

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Dialogue between judges

Seminar 25 January 2013

“Implementing the
European Convention on Human Rights
in times of economic crisis”

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Dean Spielmann

**President of the
European Court of Human Rights**

Presidents, Ladies and Gentlemen, Dear friends,

I should like first of all to say how pleased I am to see so many of you gathered here today for this seminar, which is being held as usual before the Court's solemn sitting. The level of attendance illustrates your great interest in this valued dialogue between the European Court of Human Rights and the Supreme Courts of Europe. The presence of academics and Government agents before the Court will also certainly contribute to the interest of the discussions this afternoon.

I should like to thank Judges Raimondi, Bianku, Nußberger and Sicilianos, who have organised the seminar with the assistance of Roderick Liddell, and particularly to mention Judge Laffranque, who agreed to take over the daunting role of Françoise Tulkens in the organisation of this event. Speaking of Françoise Tulkens, our former Vice-President, it goes without saying that it is a great pleasure for me to welcome her back here today as one of our speakers; I should thus like to offer her my warmest greetings, and likewise welcome our other two speakers: Ioannis Sarmas, member of the European Court of Auditors and Lauri Mälksoo, professor of international law at the University of Tartu in Estonia.

The theme that has been chosen this year, "implementing the European Convention on Human Rights in times of economic crisis", is a particularly important one.

You are all, in your respective countries, confronted with the crisis and national courts are often on the front line. The impact of the crisis on social and economic rights is self evident. However, the impact on human rights is also considerable.

In the difficult period that our societies are currently facing, we see the emergence of attitudes of intolerance and rejection of others. There is a tendency to believe that might is right, and human rights are sometimes left to one side, with some taking the view that they are luxury that one cannot afford at a time of crisis. It must be said that those most affected by the crisis are the vulnerable, for example prisoners (and in difficult times many people clearly find it hard to accept high expenditure on prison renovation), migrants, who are not received with much enthusiasm, pensioners, who see their pensions being reduced – that is to say, the kind of people that our Court tends to protect in many of its cases.

A number of Convention provisions are applicable in this domain and I am sure that Articles 3, 6, 8 and 14, together with Article 1 of Protocol No. 1, will be at the heart of your discussions today.

Without going into as much detail as in my speech this evening, allow me already to cite, among the case-law from 2012, the case of *Hirsi Jamaa and Others v. Italy*, which is fully relevant to the theme of this seminar, and also the very important case of *M.S.S. v. Belgium and Greece*.

Dear friends – and I do not hesitate to address you as such, as you are all friends of the Court – I am convinced that in the times in which we are living our Court has a crucial role to play and I believe that this will particularly be shown in our discussions today.

I have already spoken for too long, so I will now immediately give the floor to my colleague and friend Julia Laffranque.



Julia Laffranque

Judge of the European Court of Human Rights

Mr President,
distinguished judges,
ladies and gentlemen,
dear colleagues,

Introduction

Every year since 2005 the European Court of Human Rights has organised a seminar to coincide with the official opening of the judicial year. Please allow me, first of all, to thank you for coming in such great numbers to take part in this seminar today, which represents an opportunity for all of us to exchange views and share our experience in relation to our common task of protecting human rights. I am particularly honoured and pleased to have been given the heavy responsibility of preparing and overseeing this dialogue between judges, an extremely important dialogue which is particularly close to my heart and which the European Court of Human Rights is seeking to intensify with national courts and, where possible, with all other courts that view respect for and protection of human rights as essential.

Theme of the seminar and main issues

The theme of our seminar – “Implementing the European Convention on Human Rights (‘the Convention’) in times of economic crisis” – raises two main issues: firstly, to what extent does the scope of the protection offered by the Convention extend to severe hardship caused by economic crisis? And secondly, what impact does the economic crisis have on States’ Convention obligations and their margin of appreciation? And to continue along these lines: does the economic crisis have an impact on how the European Court of Human Rights (“the Court”) assesses acts and omissions of the public authorities? What is the role of the national courts in this respect? Should the Court fill in the possible gaps caused by the crisis in the protection provided at national level, and to what extent should the Court take into consideration the socio-economic realities resulting from the crisis?

1. Preliminary observations on certain concepts relating to the theme of our seminar

2 – The crisis as such: its consequences and impact

The word “crisis”, describing an event that leads to, or is expected to lead to, an unstable and dangerous situation affecting an individual or the whole of society, has its origins in the Greek language. Greek culture has contributed to most of Europe’s cultural heritage and richness. Ironically, many of Europe’s worries nowadays come from Greece. But the crisis is not a problem of individual countries

or even the sum of their problems; it is a problem affecting the whole continent, a problem on a global scale with effects on lives and livelihoods across the world, especially those of the poorest people in the poorest countries; it is a systemic problem which, among other things, has its roots in the architecture of the European Economic and Monetary Union.

We are speaking at today's seminar about the economic crisis connected with the financial crisis, but I think there is much more to it than that, because a crisis in one sector tends all too easily to create others. To name but a few, in a rather random order: Europe's identity crisis, ethical and psychological crisis, political crisis, crisis of trust and of confidence, cultural crisis based on cultural differences and diversity in traditions, crisis of solidarity, social crisis, crisis of democracy and the rule of law, environmental crisis, security crisis. There has even been talk of Europe's own human rights crisis¹. This is a serious statement. Is the European project at stake?

The crisis is a test for human rights, solidarity and democracy.

It exposes the most vulnerable people – children, migrants and minorities – and encourages recourse to extremism of different forms and the search for scapegoats, so that these negative developments might urge us to talk at future meetings about such issues as protection of minorities or protection against racism and xenophobia.

It is also important to acknowledge that economic crisis threatens not only economic, social and cultural rights, but also civil and political rights.

Of course, talking about the crisis helps to some extent. True knowledge and a sense of reality are the beginning of wisdom. But we must avoid making the crisis a "thing in itself", an anti-hero on the way to becoming a celebrity.

Ladies and gentlemen, I am waiting for a crisis of crises; eventually it will come and hopefully not too late.

2 – Mechanisms to overcome the crisis and their legality

Solutions are not easy to find. Both short – and long-term measures are quickly needed and, furthermore, one should not forget prevention, to avoid a repetition of similar hardships in the future. We all have a joint responsibility in this regard. Idealistic approaches are confronted with the most pragmatic ones; the reality lies somewhere in the middle. Many plans and strategies, including fiscal and political, have been proposed and implemented both in different States as well as at an overall European level. Some of them affect State sovereignty, such as banking union or deeper political union; some of them have a questionable legal basis; and most of them have an impact on people and their rights.

However, regardless of the crisis – both during and outside the crisis – human beings and respect for their rights should be of primary importance.

Navi Pillay, the United Nations High Commissioner for Human Rights, has said that "States can neither waive nor limit their obligation of upholding civil, cultural, economic, political and social human rights in times of crisis. Rather, by fully integrating human rights principles and standards into law and practice governments are able to respond to an economic downturn in a truly sustainable manner..."².

It is true that effective human rights protection is expensive, but human rights are not an option: they are a fundamental value, and therefore measures taken to address the economic crisis should not be at the expense of the minimum standards set out in the Convention. No matter how difficult or even unpopular preserving these standards might seem (for example, in Ireland there was a referendum to

1 Benjamin Ward, "Europe's own human rights crisis", Human Rights Watch, available at: http://www.hrw.org/sites/default/files/related_material/eucrisis_2012.pdf.

2 Statement of Ms Navanethem Pillay at the General Assembly High Level Conference on the World Financial and Economic Crisis and its Impact on Development, 18 June 2009, available at: <http://www.unhcr.ch/hurricane/hurricane.nsf/0/9A42BB1B8AA9CBF9C12575E600366136?opendocument>.

remove the constitutional ban on reducing judges' salaries³), there should be limits to budget cuts that threaten the proper functioning of democracy and the rule of law, because eventually for a State it will be much more expensive to combat a climate of ferocity, for example, than to maintain an independent and impartial judicial system.

The Center for Economic and Social Rights, back in 2009, proposed some immediate responses for States to address the consequences of the crisis, such as refraining from violating civil and political rights, prioritising a basic minimum of effective economic and social rights, protecting the most vulnerable and ensuring non-discrimination, and respecting human rights principles in policy processes as well as outcomes⁴. As far as long-term responses at national level were concerned, it suggested rethinking the role of the State and adhering to the duty to respect, protect (through regulation) and fulfil (through positive action) human rights. At international level, it advised reforming international financial institutions and global economic governance and fulfilling the duty of international assistance.

In the institutions of the European Union the topic of human rights protection has also become more and more present. One of the key elements in the European Union's Strategic Framework and Action Plan on Human Rights and Democracy is respect for human rights throughout EU policy⁵. The European Union Agency for Fundamental Rights has published a working paper on protecting fundamental rights during the economic crisis⁶, and in December 2012 the Agency's annual conference focused on challenges and opportunities for access to justice in austerity. Two important messages which are also relevant to our discussions can be taken from this conference. Firstly, despite the economic crisis or because of it, access to justice must be increased, not reduced. However, this is not so much about the quantity, but about the quality of access to justice. And secondly: it is crucial to ensure that people, and especially vulnerable groups, are aware of their rights⁷.

In this connection I would like to emphasise the importance of a general fundamental rights culture in Europe, which is especially vital in times of crisis.

II. Proposals for addressing the questions raised in the introduction

1 – The scope of protection

Unlike the European Union's Charter of Fundamental Rights, the Convention does not guarantee economic and social rights. However, the Court held in the 1979 *Airey v. Ireland*⁸ judgment that although social and economic rights were largely dependent on the situation – notably financial – in the State in question, the Convention should be interpreted in the light of present-day conditions and many of the civil and political rights it enshrined had social or economic implications.

This would, of course, apply not only in times of crisis. Unfortunately, poverty was already a subject of concern in many European countries before the current global economic difficulties, and this is likely to continue after the crisis. Therefore, it might be difficult to differentiate between the protection of social and economic rights and the level of this protection in general and during the crisis.

3 The Twenty-Ninth Amendment of the Constitution of Ireland relaxed the previous prohibition on the reduction of the salaries of Irish judges. The Twenty-Ninth Amendment of the Constitution (Judges' Remuneration) Bill 2011 (No. 44 of 2011), having been passed by both houses of the Oireachtas, was put to a referendum on 27 October 2011. The referendum was passed, and the amendment bill was signed into law as the Twenty-Ninth Amendment of the Constitution Act, 2011.

4 Center for Economic and Social Rights, "Human Rights and the Global Economic Crisis. Consequences, Causes and Responses", 2009, available at: <http://cesr.org/downloads/CESR-Human%20Rights%20and%20the%20Global%20Economic%20Crisis.pdf>.

5 Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy, Luxembourg, 25 June 2012, 11855/12, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf.

6 European Union Agency for Fundamental Rights (FRA), "Protecting fundamental rights during the economic crisis", working paper, December 2010, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1423-FRA-Working-paper-FR-during-crisis-Dec10_EN.pdf.

7 Closing remarks by Maija Sakslin, Chairperson of the Management Board, at the Fundamental Rights Conference 2012, available at: <http://fra.europa.eu/en/speech/2012/closing-remarks-fundamental-rights-conference-2012>.

8 *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32.

Another question is, of course, whether the war on poverty as such can be won through broad interpretation of the Convention. This question was answered in the negative by former Judge Thór ilhjálmsson in his dissenting opinion appended to the *Airey* judgment⁹. On the other hand, the reference to the evolution of the general economic situation could also mean that this is a factor that might be taken into account.

In connection with poverty I would like to draw attention to two cases: *Larioshina v. Russia*¹⁰ from 2002 and *Budina v. Russia*¹¹ from 2009. Although in both cases the applications were declared inadmissible, the Court did not rule out the possibility that a complaint alleging that the amount of a pension or of other social benefits was wholly insufficient might in principle raise an issue of inhuman or degrading treatment under Article 3 of the Convention.

Besides social benefits and pensions, there are many other aspects relating to the decline of the economic situation both at State level and on a personal level, such as the question of housing and eviction, the situation of migrants and asylum-seekers, the right to respect for family life and, of course, access to justice. The latter may encompass issues such as alternative dispute resolution, court fees, legal aid and extending the right of defence to the early stages of proceedings, but also the proportionality of compensation awarded by the courts.

Many applicants have also sought assistance from the Court by invoking Article 8 of the Convention and Article 1 of Protocol No. 1. In general, the Court has reminded them that the Convention does not guarantee socio-economic rights as such, and that the Court cannot take the place of the national authorities in this regard. However, by examining the specific circumstances of the case the Court has, for example, indicated that an obligation to secure shelter for particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases¹². It has also found that where a decision to place children in care was based solely on the children's unsatisfactory accommodation owing to their parents' insufficient resources, the right to respect for family life had been breached¹³. It is interesting to note that recently, in November 2012, the Estonian Supreme Court delivered a similar decision and advised the first-instance court to explore alternative, less radical means when re-examining the case¹⁴.

I suppose we can agree that the Court should maintain the existing scope of protection; there is no turning back. The other issue is how much room there is to widen the scope of protection. And this brings us to the second point.

2 – The impact of the crisis on member States' Convention obligations

Here I would first of all like to underline the well-established principle in the Court's case-law to the effect that a lack of resources cannot justify non-compliance with the Convention. This has been said in many different contexts, for example concerning the non-enforcement of court decisions¹⁵ or very poor prison conditions¹⁶. This does not in itself mean that budgetary considerations should not be taken into account at all. However, an interference with Convention rights can occur only in extreme circumstances and needs to be fully justified.

In a few cases, the Court has referred directly to the economic crisis. For example, in last year's Grand Chamber judgment in the case of *Hirsi Jamaa and Others v. Italy*¹⁷, the Court observed that the economic crisis and recent social and political changes had had a particular impact on certain regions of Africa and the Middle East, throwing up new challenges for European States in terms of immigration

9 Dissenting opinion of Judge Thór Vilhjálmsson, *Airey v. Ireland*, cited above.

10 *Larioshina v. Russia* (dec.), no. 56869/00, 23 April 2002.

11 *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009.

12 *Yordanova and Others v. Bulgaria*, no. 25446/06, 24 April 2012.

13 *Wallová and Walla v. the Czech Republic*, no. 23848/04, 26 October 2006.

14 Judgment of the Civil Law Chamber of the Supreme Court of Estonia in case no. 3-2-1-121-12, 14 November 2012.

15 *Burdov v. Russia*, no. 59498/00, § 35, ECHR 2002 III, and *Burdov v. Russia* (no. 2), no. 33509/04, ECHR 2009.

16 See, for example, *Poltoratskiy v. Ukraine*, no. 38812/97, § 148, ECHR 2003-V; *Orchowski v. Poland*, no. 17885/04, § 153, 22 October 2009; *Samaras and Others v. Greece*, no. 11463/09, 28 February 2012.

17 *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 176, ECHR 2012.

control. As far as austerity programmes in European States are concerned, there are examples of cases concerning the pressures of cuts in the public sector (for example, *Khoniakina v. Georgia*¹⁸; *Bakradze v. Georgia*¹⁹). I will mention two decisions in cases against Romania. In the *Frimu and Others v. Romania*²⁰ decision of November 2012, the Court dealt indirectly with the reduction of the retirement pensions of former court officials, which had been carried out in order to maintain a balanced State budget at a time of economic crisis. Judgments of courts of appeal in Romania had taken different views as to whether such cuts were justified. The Court held that there had been no violation of Article 6 § 1 (on account of the discrepancy in the practice adopted by the courts in similar situations), but rather a proportionate application of clearly defined statutory provisions to differing personal circumstances and that in any case it was acceptable for there to be a period of divergent practice among the courts lasting two years or even longer before consistency was introduced.

In another case, *Mihăieş and Senteş v. Romania*²¹ (decision of December 2011), where the Court of Justice of the European Union had declared that it had no jurisdiction in the matter, the applicants complained to the Court under Article 1 of Protocol No. 1 to the Convention that their remuneration as public-sector employees had been reduced by 25% as part of the Government's austerity programme. The Court found that even assuming that the applicants had a "possession", the authorities had remained within their margin of appreciation.

The margin of appreciation is a topic of endless discussion. At the moment, on the basis of the Brighton Declaration, a new Protocol No. 15 to the Convention is being drafted. According to the draft, the principles of subsidiarity and the margin of appreciation will be inserted into a new recital in the preamble to the Convention²².

The Court has usually afforded the State a margin of appreciation when it comes to general social and economic measures, unless the national legislature's choice is manifestly without reasonable foundation²³. Let me point out two issues arising in this connection: first, the tendency for States to combine the welfare of the State with the general interest of the community and the complexity of weighing this against individual interests, and secondly, whether and to what extent the Court should take note of the serious socio-economic problems faced by countries in transition, as it has done in the past in cases concerning German reunification²⁴, and whether this approach may be used in cases involving economic crisis.

Finally, I would like to draw your attention to some other questions relating to the Court which may be connected to the theme of our seminar. For example, what kind of impact, if any, has the economic crisis had on the reform of the Court, including the rights of applicants and the guarantees for judges? How has the economic crisis influenced the ability of States both to pay compensation where violations have been found and to take the necessary remedial action, particularly in cases concerning structural or systemic violations? Should the Court take this into consideration, and if so, how? It is interesting to note that the Court of Justice of the European Union is taking into account, in infringement proceedings, the ability of the Member State concerned to make a lump-sum payment in times of economic crisis and is assessing

18 *Khoniakina v. Georgia*, no. 17767/08, 19 June 2012.

19 *Bakradze v. Georgia*, nos. 1700/08, 22552/08 and 6705/09, 8 January 2013.

20 *Frimu and Others v. Romania* (dec.), nos. 45312/11, 45581/11, 45583/11, 45587/11 and 45588/11, 13 November 2012.

21 *Mihăieş and Senteş v. Romania* (dec.), nos. 44232/11 and 44605/11, 6 November 2011.

22 See, for example, Steering Committee for Human Rights (CDDH), drafting group "B" on the reform of the Court (GT-GDR-B), 2nd Meeting, Strasbourg, 10-12 October 2012, available at: http://www.coe.int/t/dghl/standardsetting/cddh/GT_GDR_B/GT-GDR-B%282012%29OJ002_DRAFT%20Annotated%20agenda_2nd%20meeting%20GT-GDR-B_10-12%20Oct%20%2712%20%282%29.pdf.

23 *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI.

24 *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, ECHR 2005-VI..

this factor on the basis of current economic data (see, for example, the *European Commission v. Ireland* judgment of 19 December 2012)²⁵.

Today, we have a unique opportunity to hear how these and many other questions relating to the implementation of the Convention in times of crisis are addressed by our three eminent speakers: Mr Ioannis Sarmas, member of the European Court of Auditors, Professor Lauri Mälksoo and Françoise Tulkens – well, I find it difficult to call her a former judge of the Court as to me she is still very present in our hearts, so I would use a more positive tone and call her a future member of the association of former judges of the Court which Judge Mark Villiger has proposed to set up!

Thanks

But before we hear what our three speakers have to say on this subject, I would like to express my warmest thanks to the organising committee formed within the Court to prepare this seminar. Let me introduce the other members of our committee: Judges Guido Raimondi, Ledi Bianku (who unfortunately is unwell today), Angelika Nußberger and Linos-Alexandre Sicilianos, together with Roderick Liddell, to whom I wish to pay special tribute. My heartfelt thanks also go to Valérie Schwartz and my assistant Erika Nyman. Nor can I forget the interpreters, to whom I am deeply grateful for their assistance this afternoon.

25 Case C-374/11, judgment of the Court of Justice of the European Union (Luxembourg), 19 December 2012.



Ioannis Sarmas

Member of the European Court of Auditors

Economic crisis is a phenomenon which concerns real life: the world as it is. The judge's role is to subject the world "as it is", the reality, to the world "as it should be", which is the sphere of standards. In the time allowed to me I will attempt to set out the respective claims of these two worlds when it comes to the observance of human rights in times of economic crisis. In order to do this I will make four assertions which I will endeavour to substantiate. These will enable us to identify the challenges facing the European Court of Human Rights in seeking to act with the consistency required of it during a period of economic crisis.

I – The first assertion relates to the world "as it should be" and invites us to read the Convention from a "financial" perspective. It reminds us that, according to the Court's case-law, respect for the human rights protected by the Convention entails budgetary sacrifices linked not only to the obligation to execute the Court's judgments but also to the provision of public services.

The European Court of Human Rights has introduced into its case-law the concept of positive obligations on the part of the State. It considers that it is not sufficient for the State to refrain from doing something in order to meet the standards required of it by the Convention¹. It must also act. And in order to act the State has no choice but to spend. In public finances there are three different ways of accounting for State expenditure. *Cash-based accounting*, which deals only with incoming and outgoing payments, *accruals-based accounting*, which records rights and obligations and, lastly, *cost accounting*, which calculates the cost of each State product². A court judgment is an example of such a product. Its cost will vary depending on whether it is delivered following a public hearing, in which case a hearing room is required³, and whether it is accompanied by detailed reasons, which entails an additional workload for the judge responsible for drafting it⁴.

From a cost-accounting perspective, all the State's positive obligations involve public spending. The obligation on the authorities to conduct an effective and prompt investigation in the event of an alleged violation of Article 2 or Article 3 of the Convention calls for the setting-up of appropriate public services equipped with the necessary resources⁵. A person whose life is in serious danger must have access to the appropriate police protection⁶; prisons must protect inmates who develop suicidal tendencies⁷. Likewise, in order to ensure that prisoners are not subjected to inhuman or degrading treatment, the State

1 *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 332-52, ECHR 2004-VII.

2 Frank MORDACQ, *La LOFT : un nouveau cadre budgétaire pour réformer l'État*, L.G.D.J. 2006, pp. 325 et seq.

3 *Martinie v. France* [GC], no. 58675/00, § 43, ECHR 2006-VI.

4 *Gorou v. Greece (no. 2)* [GC], no. 12686/03, 20 March 2009.

5 *Oğur v. Turkey* [GC], no. 21594/93, ECHR 1999-III.

6 *Osman v. the United Kingdom*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII.

7 *Keenan v. the United Kingdom*, no. 27229/95, ECHR 2001-III.

must provide them with sufficient space⁸, clean sanitary facilities⁹, decent food¹⁰ and the requisite medical care¹¹. And while access to a judge presupposes the existence of a judge, ensuring that individuals are tried within a reasonable time requires a large number of judges, just as a fair trial accompanied by a full set of guarantees necessitates procedures which are costly because of the input of all the legal officials involved.

Article 13, meanwhile, by requiring fair compensation for the victims of violations of Convention rights, may entail considerable public expenditure in cases of large-scale violations resulting from structural or systemic factors (a failure to satisfy the reasonable-time requirement may concern hundreds of thousands of cases¹²). Article 14 (prohibition of discrimination) may upset the fiscal balance where remedying a violation necessitates the widespread application of a social right (for instance, the extension to male military personnel of entitlement to three years' parental leave¹³). Lastly, Article 1 of Protocol No. 1 requires not only that persons whose property has been expropriated receive fair compensation but also, like Article 6 of the Convention, that the State execute any judicial decision recognising a breach of their rights under Article 1 of the Additional Protocol¹⁴.

On closer examination, therefore, almost all the Articles of the Convention which enshrine rights can be read from a financial perspective.

II – The second assertion takes us into the realm of real-life situations and invites us to view the world “as it should be” by starting from the world “as it is”. The experience of Greece has taught us that a country in economic crisis cannot be regarded as having an inexhaustible fund of resources to meet all its possible human rights related financial obligations.

A review of the violations of the Convention by Greece up to 2009¹⁵, the first year of the crisis, shows clearly that budgetary shortages, an endemic problem for the Greek State, were the main cause of over 90% of the violations found by the Court. As regards the excessive length of proceedings (50% of the violations), the only means by which the Greek State could remedy the problem was to increase the number of judges. To do that, it needed funds. Failure to comply with the obligation to put in place effective remedies (13% of the violations) was due in a large number of cases to the lack of an effective remedy in respect of procedural delays, while the breaches of the right to a fair trial (17% of the violations) often stemmed from intervention by the State aimed at safeguarding its interests. Elsewhere, the cases concerning inhuman or degrading treatment (2% of violations) almost all related to overcrowding in prison or to the inadequacy of services provided to prisoners. As to violations of the right to the peaceful enjoyment of possessions (10%), these resulted by and large from expropriations which were not completed successfully owing to a lack of funds to compensate the owners or to a failure to execute judicial decisions recognising the existence of a claim against the State.

In 2009 the Greek State budget, totalling around 125 billion euros, recorded a deficit of 37 billion euros, or roughly one third¹⁶. In order to put the public finances back on track a fair balance had to be struck between increasing revenue, in particular by means of taxation, and cutting expenditure, by reducing the State wage bill and social spending. However, the new taxes simply deepened the recession and the revenue forecasts turned out to be inaccurate. The deficit persisted. A haircut on Treasury bills was needed; however, in a climate of fears of a return to the drachma, this resulted in capital flight and in huge losses for the banks, calling for further sacrifices. A vicious circle was created, a downward spiral which threw everything into turmoil. The courts were then called upon to rule on the compatibility of the

8 *Karalevičius v. Lithuania*, no. 53254/99, 7 April 2005.

9 *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011.

10 *Tabesh v. Greece*, no. 8256/07, 26 November 2009.

11 *Kotsafis v. Greece*, no. 39780/06, § 53, 12 June 2008.

12 See III below.

13 *Konstantin Markin v. Russia* [GC], no. 30078/06, ECHR 2012.

14 *Burdov v. Russia*, no. 59498/00, ECHR 2002-III.

15 Ioannis SARMAS, *Les 60 ans de la Convention européenne des droits de l'homme- spécificités nationales : le cas grec*, Petites affiches, special issue no. 254, 22 December 2010, pp. 44 et seq.

16 Ioannis SARMAS, *The Greek Crisis and the Role of Audit*, Ant. N. Sakkoulas Publishers 2012, p. 36.

economic recovery measures with supra-legislative principles¹⁷: human dignity, undermined by cuts in benefits to below the survival threshold; equality, infringed by discrimination in the distribution of the tax burden; property, jeopardised by the haircut on Treasury bills, the reorganisation of pension funds and the charges imposed on immovable property¹⁸. Successive governments found themselves unable to satisfy all the rights invoked to the extent demanded by the right-holders.

In view of the perpetual worsening of the economic recession and the impact of the recovery measures on human rights, it was clear that a rise in even the most fundamental public spending would seriously affect the country's fiscal balance.

III – The third assertion leads us to the hearing room of the European Court of Human Rights. It is a statement of fact concerning the effect on the Court of cases which stem from the economic crisis. It tells us that the dispute-resolution procedures established by the European Court in order to remedy large-scale human rights violations bring it face-to-face with the financial constraints under which States are operating.

Three categories of cases concerning human rights protection are more likely than any others to increase during a period of economic crisis. The first category concerns violations of the principle of non discrimination combined with interference with property rights, stemming from the fact that stabilisation of the State's finances necessitates tax rises, extension of the tax base and cuts in civil servants' salaries and in retirement pensions. There will also tend to be an increase in cases in which a reasonable time has been exceeded and those concerning failure to execute judicial decisions, as the crisis triggers a huge number of appeals against taxation measures and measures dismantling the welfare State, while at the same time emptying the State's coffers and making it impossible for the State to honour its debts. The third and last category of cases concerns inhuman or degrading treatment, as the State's already stretched resources are being used to meet needs deemed to take priority over the needs of prisoners or asylum seekers.

The European Court of Human Rights has already had to examine cases of this kind, which place a huge strain on its Registry. The Court has previously found against several States on account of the degrading conditions in their prisons, the inhuman treatment meted out to individuals in police custody and discrimination in the allocation of benefits¹⁹. It has delivered three pilot judgments requiring Greece to remedy the problem of delays by the courts in hearing administrative²⁰, criminal²¹ and civil cases²². Other countries which are experiencing or have experienced serious economic crisis have also been the subject of pilot judgments on account of the failure to execute judicial decisions ordering the State to fulfil its obligations²³ and on account of prison conditions²⁴.

The number of cases which have been the subject of pilot judgments is alarming and the budgetary implications of executing the Court's judgments in this sphere are enormous. The *Broniowski* judgment concerned the immovable property of 80,000 people²⁵, *Hutten-Czapska* related to the housing of 100,000

17 See the Greek Supreme Administrative Court judgments 668/2012 and 1972/2012 (presented by Eleni THEOCHAROPOULOU in Δ.Φ.Ν. 2012 pp. 1539 et seq.), and the opinion of the Greek Court of Auditors of 31 October 2012.

18 Kostas CHRYSOGONOS, Stylianos-Ioannis KOUTNATZIS, *Die finanzielle Tragödie Griechenlands aus verfassungsrechtlicher und institutioneller Sicht: Feudalistische Grundstrukturen hinter demokratischer Oberfläche? Jahrbuch des Öffentlichen Rechts der Gegenwart, neue Folge/ Band 60*, pp. 401 et seq.

19 See in this connection the factsheet on pilot judgments produced by the Press Unit of the European Court of Human Rights, available on the Court's website.

20 *Vassilios Athanasiou and Others v. Greece*, no. 50973/08, 21 December 2010.

21 *Michelioudakis v. Greece*, no. 54447/10, 3 April 2012.

22 *Glykantzi v. Greece*, no. 40150/09, 30 October 2012.

23 *Burdov v. Russia* (no. 2), no. 33509/04, ECHR 2009.

24 *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10 January 2012.

25 No. 31443/96, ECHR 2004-V.

people²⁶ and *Kurić* concerned the social rights of 26,000 people²⁷. And while the pilot judgments against Greece may relate to only a few thousand applications, in reality they involve close to a million cases in which a reasonable time has been exceeded. It is clear to even a casual observer that the Court's work, when it comes to the so-called repetitive cases, no longer consists solely in dealing with individual applications but means finding solutions to major societal problems affecting large categories of persons.

Having undertaken, via its pilot judgments, to assist Contracting States in their efforts to solve their structural and systemic problems linked to human rights protection, the Court is thus confronted at first hand with the constraints imposed on States as a result of budget shortages.

IV – The fourth and final assertion invites us to combine a series of elements into an enriched concept of the role of the European Court of Human Rights. It thus helps us to identify the requirements which the Court must meet in terms of consistency and leads us to conclude that the Court cannot adopt an approach that would deprive human rights of their universal character.

The European Court of Human Rights has already acknowledged Contracting States' positive obligations and is conscious that these entail spending which has a severe impact on national budgets. It cannot overlook the fact that in times of economic crisis States do not have an inexhaustible fund of resources but have to make painful compromises in order to meet their human rights obligations. Lastly, the Court is mindful of the fact that, in ruling on a case, it is laying down a doctrine for the interpretation of the Convention which concerns not just the case before it, or even the State in question, but 47 different legal systems. Indeed, in the 47 member States of the Council of Europe there is scarcely a branch of the law which is not profoundly affected by the Court's case-law. The Court has acquired the status of a European supra-legislative body which, by pointing up States' positive obligations, requires them, indirectly but nevertheless bindingly, to incur certain types of public expenditure. In its historic judgment in *Refah Partisi*²⁸ it taught us that legal standards in a democracy do not emanate from an immutable Platonic world but from contact with real-life situations. Its judgments could scarcely be exempt from this rule when they bring to light positive obligations which, if complied with, affect fiscal balance to such an extent that other positive obligations are also affected.

It is true that the absolute prohibition on inhuman and degrading treatment²⁹ raises a specific issue. Article 3 of the Convention would appear to impose a pan-European standard, since, even if it entails public spending, it must be applied uniformly everywhere irrespective of Contracting States' economic situations. The truth of this is beyond dispute. However, the threshold of severity beyond which treatment is deemed contrary to Article 3 must not be defined according to economic standards which only wealthy countries can attain. Human rights are universal: to view them otherwise is to betray their very nature. Respect by a democratic State for those rights cannot therefore depend on a mathematically fixed level of public spending. We should bear in mind in that regard that, according to the Court, although the right enshrined in Article 3 is absolute, the threshold of severity which determines whether there has been a violation is subject to the principle of proportionality³⁰. It could therefore be argued that this threshold cannot be set at the same level for the poorest and the wealthiest countries of the Council of Europe when it comes to making budgetary sacrifices.

To conclude, the implementation of the Convention in times of economic crisis confronts the European Court of Human Rights with the painful compromises made necessary by States' efforts to meet all their positive obligations simultaneously. This enriches the Court's experience and imposes on it a significant duty of consistency in order to safeguard the character of human rights as universal rights which are not the preserve of wealthy nations.

26 No. 35014/97, 28 April 2008.

27 [GC], no. 26828/06, ECHR 2012.

28 [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II.

29 *Gäfgen v. Germany* [GC], no. 22978/05, ECHR 2010.

30 *Caloc v. France*, no. 33951/96, §§ 98, 100 et seq., ECHR 2000-IX, and *Galotskin v. Greece*, no. 2945/07, § 38, 14 January 2010.



Lauri Mälksoo

University of Tartu (Estonia)

Excellencies,

I would like to thank the Court for this invitation to speak at the seminar opening the Court's judicial year.

We Europeans have been very fortunate in recent times to live in and enjoy the culture of human rights. However, most of us are aware in the abstract, and many remember through personal experience, that this culture is not necessarily self-evident; that societies and political power can, in principle, be organised without a particular emphasis on human rights. Let us not overlook the fact that this continues to be the case today in a number of important parts of the world. I understand that the main question of today's seminar, in broad terms, is whether the relatively clear skies of the protection of rights in Europe have become cloudier. Will the economic and financial problems facing Europe today have a negative impact on the culture of rights? To put it dramatically: is it necessary to be rich, as a society and as individuals perhaps, in order to fully protect and enjoy human rights? To what extent is prosperity a precondition for the culture of rights? If a society loses some of its absolute or relative wealth, are rights endangered too?

Let us look at some news regarding the economic crisis. The EU Commission, in its recent study entitled "Employment and Social Developments in Europe 2012", comes to quite devastating conclusions: joblessness has been increasing in a number of countries, the gap between the European periphery and the centre, or the South and East on the one hand and the North on the other hand, has been increasing¹. Relatively random examples taken from the media give a similar snapshot of the gloominess of our present situation and the future. Finland's Prime Minister Jyrki Katainen has in his recent speeches argued that the country will be unable to support the welfare society as it has been maintained so far – owing to the changing demographic situation and economic conditions. In Finland, one of the economically most successful European countries, some 60,000 jobs have been lost over the last four years². The Swiss banker Christophe Barnard, a Frenchman by nationality, points out in an interview with *Die Welt* that in France, State expenditure accounts for 56% of GDP, the highest percentage in Europe³. Barnard considers the mentality of the elites who assume that the State will ultimately fix things as the biggest challenge for the future of France – and Europe.

Another aspect of the problem is demography. Perhaps in the future there should also be a Court seminar on the impact of demographic decline in Europe on the culture of human rights and, if I may be a bit provocative, vice versa: the impact of the culture of human rights on demographic processes. For example, the German demographic scholar Thomas Straubhaar argues that Europe's biggest crisis is not the "debt" or the "economy" as such; it is declining birth rates⁴. In 1964, per 100 women in Germany, 250 children were born; currently, the number is 136. According to the same scholar, the biggest cause

1 <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7315>. For one reaction in Germany, see also <http://www.bild.de/geld/wirtschaft/europaeische-union/amer-sueden-reicher-norden-so-gespalten-ist-europa-28011168.bild.html>.

2 <http://www.e24.ee/1088898/katainen-soomel-ei-jatku-raha-et-heaoluhiskonda-toetada/>.

3 <http://www.welt.de/finanzen/article111840008/Sollte-Europa-scheitern-dann-an-Frankreich.html>.

4 <http://www.welt.de/wirtschaft/article112160366/Kinderlosigkeit-ist-das-wirkliche-Problem-Europas.html>.

for concern is the shift in mentalities and in people's general outlook on life. He cites by way of example the fact that not even half of Germans (45%) in the 18-50 age bracket who do not have children believe that their lives would be more fulfilling and happier if they had children. Linking these issues together, economic and demographic experts consider the level of social expenditure in certain Council of Europe countries, particularly in western Europe, to be a ticking time bomb. Furthermore, the need to rely heavily on immigration in order to maintain the level of welfare will potentially trigger other kinds of human rights conflicts.

I imagine that people in your position, on occasions like today's, will primarily be interested in personal experience rather than in the repetition of the wisdom of books or reports from the media. In the following paragraphs, I will therefore try to combine some personal hunches and observations "at the grassroots level" with reflections on my most lasting academic interest, which is the history and theory of international law, including human rights theory.

When I taught on the EU-supported Master's Programme in Human Rights and Democratisation, based in the Human Rights Village in Venice's Lido, my teaching was always scheduled for the week dealing with social and economic rights. I tried to impart to students an awareness of the history of social and economic rights, through the experience of post-Communist eastern Europe. In doing so, I sensed that some students were very frustrated by the status of social and economic rights as the "poor relation" in the general architecture of human rights. The political promise that human rights were "universal and indivisible" often did not hold up in the face of real-life facts. How could it be that civil and political rights had such strong protection mechanisms as this distinguished Court, for example, whereas social and economic rights were often non justiciable in practice, at least on a regional or international level?

Of course, how this issue is perceived is also a matter of whether one's political sympathies lie with the political left or the right. At this distinguished Court too, there are judges who in their previous lives as human rights scholars have, in terms of political philosophy and ideas, given clear preference to civil and political rights. In the period of "real existing socialism", social and economic rights used to be a bastion of pride in and defence of the official State ideology, in contrast to the Western – Council of Europe – emphasis on freedom-based rights. It is no coincidence that some of today's most prominent European sceptics on social and economic rights have this historical experience and background in the back of their minds. Thus, in their mental rejection of extensive social and economic rights, post-Communist elites in a number of countries in central and eastern Europe seem to follow what is understood here as the more freedom-oriented Anglo-Saxon concept of rights.

How to relate to social and economic rights continues to be a divisive matter – just think of the reservations entered with regard to the EU Charter of Fundamental Rights. Between 2003 and 2006, when I was a member of the EU Network of Independent Experts on Fundamental Rights – as was the Court's current President Dean Spielmann – we experts were supposed to report on fundamental rights developments in our respective countries, based on the Articles of what was later officially adopted as the EU Charter of Fundamental Rights. We were given very detailed and elaborate questionnaires on civil and political rights and very few, if any, details on Articles dealing with social and economic rights. Either those Articles were not considered equally important or the conveners of our network did not want to alienate even further certain critically minded Member States. It is worth noting, by the way, that the Fundamental Rights Agency has still not been given a comprehensive mandate to regularly monitor the observance of all EU Charter rights within the EU Member States.

The governments of a number of Council of Europe member States seem to hold the view that securing social and economic rights is a national rather than a regional or international matter. It seems that while torture is everybody's business, deep poverty and depravation are not. In some ways, the dividing line even goes through the core – and if you like, the rich core – of Europe. Whereas France has ratified all Articles of the 1996 Revised European Social Charter, Germany, Denmark, Luxembourg, Poland and the UK, for example, have not ratified this instrument.

Moreover, there seems to be a sense in a number of countries that not only are social and economic rights strictly a national matter, they are also primarily a political (that is, not judicial or justiciable) matter. Some five years ago, in Estonia, when the Chancellor of Justice – then Mr Allar Jõks – became judicially

active in raising the issue of social rights as fundamental rights, his initiatives, to put it euphemistically, were not received with great enthusiasm by the Government, and the Parliament did not re-elect Mr Jöks to the position of Chancellor of Justice for another term. I advised Mr Jöks at that time, albeit not on social rights issues, and am thus not an entirely neutral observer of course. It seemed to me that the matter was one of principle for the political parties forming the Government: they seemed to want to imply that high-ranking legal officials should keep their fingers out of democratic policy-making and decisions as to who got how much, even if some got really very little.

This brings our discussion finally to the European Court of Human Rights. In times of budget cuts, austerity and crisis, can the ECtHR to some extent step in like a guardian angel and correct the worst forms of deprivation and the lack or scarcity of social security? The non-official background paper to today's seminar raises the same questions. Firstly, the question is to what extent does the scope of protection offered by the Convention encompass severe hardship caused by economic crisis? Secondly, what impact does the economic crisis have on governments' Convention obligations and their margin of appreciation? I suppose what looms behind these questions is an even more general one: what can rights achieve; where are their limits?

So, does the ECtHR have any mandate to decide on social and economic rights? The background paper notes that the Court argued in the case of *Airey* that "the further realisation of social and economic rights is largely dependent on the situation – notably financial – reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions. ... the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention." Further, the background paper concludes that "an evolution in the general economic situation is something which the Court can take into consideration". But this does not give us guidance as to how this taking into consideration should happen or what it should look like.

In another case, that of *Larioshina v. Russia* (2002), it was stated in the admissibility decision that a "complaint about a wholly insufficient amount of pension and the other social benefits [could], in principle, raise an issue under Article 3 of the Convention". The non-official background paper concludes: "It therefore seems that, although the Court has so far been somewhat cautious in its approach, it has by no means ruled out the application of Convention standards to situations of severe hardship caused by the economic crisis."

Yet the tricky issue in *Larioshina* was that this promising statement was rather an *obiter dictum*, since in essence the Court rejected the application. Generally speaking, no such case – about a wholly insufficient pension amount – has as yet been decided by the Court in the applicant's favour. Why is the case of *Larioshina* tricky? It is tricky because the applicant was a Russian pensioner who received a total amount in social payments of 653 Russian roubles per month (currently, that would be approximately 16 euros). Now, one wonders: if that is not an insufficient pension amount, what would be?

The case of *Larioshina* reveals that economic crisis is not a new state of affairs for a number of Europeans – and European countries. Average living standards and social security allowances in some post-Communist countries have been at such a low level that one can speak of a continuing economic crisis since the collapse of the Eastern Bloc (and possibly before that). It would be morally questionable to consider that no judicial intervention was necessary when *Larioshina* got her 16 euros from the State but that the present economic crisis, forcing cuts in Western Europe but on an entirely different scale – let us say bringing an allowance down from 800 to 300 euros – should finally trigger judicial rights protection. I suppose that this kind of judicial protection should be possible and may even be necessary at some point, but on a national rather than a regional or international level. Living expenses in different Council of Europe countries differ too, as does the culture of helping one's family members economically. Nevertheless, if and when substantive inequalities exist, including between Council of Europe countries, it will be very difficult, and probably impossible, to eliminate these disparities via regional judicial policy. The Court could not help Ms *Larioshina* primarily because in terms of policy in her country, her case was just the tip of the iceberg. Judges may in principle be able to help but it remains impossible for them to advise where the money should come from. By the way, this concern applies even to national judges to some extent.

Thus, my own advice is straightforward: the Court should, if possible, avoid going down this route and starting to tell States that the low level of certain social allowances and benefits violates Articles of the Charter.

Let us now turn to the second issue discussed in the background paper: could economic hardship constitute a valid excuse for member States not honouring their Convention obligations? In legal parlance, might it be relevant in terms of the use of the margin of appreciation doctrine? If a Council of Europe country needs to serve its huge foreign debt and cut social allowances, can that country neglect prison conditions or conditions for asylum seekers as well? In democracies, we know that these kinds of groups will often be targeted first – financially and verbally – in times of economic hardship.

The background paper concludes that insufficient resources will not normally justify failure to secure Convention rights and freedoms. The well-known *Burdov v. Russia* case is a good illustration of this position. The background paper concludes:

“It is therefore clear that while States retain a relatively wide margin of appreciation in regard to issues falling within the ambit of socio-economic policy, only in rather extreme circumstances will the lack of resources justify a failure to comply with Convention standards. This suggests that, from the Court’s perspective, the economic crisis will have little impact on how it assesses the acts and omissions of the public authorities. At the same time, where it is necessary to weigh up the individual interest against that of the community, it may be that the economic situation tips the scales in favour of the community in certain circumstances.”

While it is easy to agree emotionally with this policy suggestion expressed in the background paper, one wonders whether this position can always be upheld consistently. If we take a natural law approach to human rights, then economic hardship should have little to do with the safeguarding of human rights. Rights are universal and unconditional. However, if we take a Marxist perspective, then it is questionable whether the economic *Unterbau* and the ideological *Überbau* can be separated from each other in that manner. Europe’s high level of protection of fundamental rights may after all have something to do with the fact that Europe is still quite wealthy and prosperous. On the other hand, from a liberal perspective, the opposite may be true as well: Europe may have become wealthy because it cherished human freedom and rights. Viewed in this way, compromises in the sphere of rights protection may not be an efficient “cure” for economic hardship but, on the contrary, an accelerator of further economic decline.

One final point. When discussing economic crisis and its impact on human rights, we tend to primarily think, by instinct and habit, about vulnerable groups and the poor – and rightly so. However, one might also ask whether in some ways, the rich can also become a vulnerable group rights-wise. If the rich – some famous actors, for example – are subjected to extremely high taxes, is there a point at which massive taxation, which is arguably in the interests of the whole of society, can constitute expropriation and violation of property rights and human rights? Diplomats of some Council of Europe member States are currently having an interesting time discussing this issue with their peers and it cannot be ruled out that in a few years’ time cases of that kind may end up on the ECtHR’s docket as well.

All the issues I have just sketched out are not only of concern for Europe, of course. Considering the fact that this Court and its jurisprudence have been role models for many other countries and jurisdictions beyond Europe, the measures taken here will be studied and sometimes borrowed elsewhere too, thus creating a global spill-over effect. Where will Europe go with its culture of rights and, once again, where are the limits of rights? The eyes of the world are on its most influential human rights court.

Thank you.



Françoise Tulkens

**Former Vice-President of the
European Court of Human Rights**

1. It is a real pleasure to return this afternoon to the Court, this unique and indispensable place where the protection and development of human rights in Europe are taking shape for our time. I am very happy to have been invited, even though – or perhaps because – the subject is a difficult one.
2. Clearly, the economy and human rights are closely linked¹, even if the relationship is not necessarily always harmonious². On the one hand, human rights, and especially those guaranteed by the Convention, are a *sine qua non* for effective economic activity. On the other hand, we must be mindful of the risks that powerful economic players may pose for rights and freedoms³.
3. I would like to begin with a few thoughts on the **notion of crisis itself**. The crisis is real, serious and lasting, as we hear frequently – I’m almost tempted to say hundreds of times per day – in the newspapers and on radio and television. The crisis has infiltrated every debate and is becoming the prism through which everything is viewed. I mean the economic crisis of course, but also a political and institutional crisis, a crisis of authority and of democracy. A “never-ending crisis”, as Mr Revault d’Allonnes observes, robs us of the future dimension; this is a strange reversal, given that modernists have tended, by contrast, to view the crisis as a dynamic period of transition between one era and another⁴.
4. So, the crisis today is perhaps no longer a crisis but rather the sign of a transition or shift. A geopolitical and economic shift, undoubtedly, but also a digital shift, with our entry into the virtual “sixth continent” (the Web), a biotechnological shift in the new degree of control we exert over “life” and procreation, and also an ecological shift, with the awareness of the limits imposed on our development models by the finite nature of the world’s resources. We are experiencing a “historic bifurcation point” to borrow the expression used by Ilya Prigogine, the (Belgian) winner of the Nobel Prize in Chemistry. This “bifurcation point” holds as many threats as promises. It is not the end of the world, but the end of a world. Contemplating it face-on leads us not to be pessimistic but to be determined⁵.
5. But let us now look more specifically at **economic crisis**, the one we are currently experiencing and the impact of which on human rights is very well illustrated in the excellent background paper provided by the seminar’s planners. An impact which is diffuse but undeniable and which pervades everything, as you demonstrate clearly, especially when you stress that economic crisis “exposes vulnerable people and minorities to special hardship” and that it “also tends to encourage recourse to extremism of different forms [and] is often accompanied by a search for scapegoats”. As history has taught us, “these trends threaten to undermine the twin pillars on which the Convention is based: democracy and the rule of law”.

1 S. VAN DROOGHENBROECK, *“La Convention européenne des droits de l’homme et la matière économique”*, Droit économique et droits de l’homme, Bruxelles, Larcier, 2009, pp. 25 et seq.

2 hM. COURET BRANCO, *Economics vs. Human Rights*, London, Routledge, 2008

3 Compare F. DE TINGUY DU POUËT, *“L’économie et les droits de l’homme”*, Karel Vasak Liber Amicorum. Les droits de l’homme à l’aube du XX^e siècle, Brussels, Bruylant, 1999, pp. 163 et seq.

4 M. REVAULT D’ALLONNES, *La crise sans fin*, Paris, Seuil, 2012.

5 Interview with J.-C. GUILLEBAUD, *“Cette crise multiple révèle une prodigieuse mutation”*, La Libre Belgique, 29 December 2012.

6. To what extent does the protection which the Convention affords “to everyone” (Article 1) encompass the severe hardship caused by economic crisis? Today, the relationship between poverty and human rights is on the political agenda at both international⁶ and European level⁷. I will therefore deal, in this context, with certain aspects of the contribution made by the Court’s case-law in dealing with situations of poverty and extreme poverty. Understanding and applying the instincts which underpin the principle of indivisibility of fundamental rights, the Court soon realised that the effectiveness of the civil and political rights it sought to protect was possible in certain cases only if the social implications of those rights were taken on board. Thus, by acknowledging the “porous” nature of the Convention *vis à vis* social rights⁸, the Court has achieved impressive breakthroughs and the case-law may develop further in the future.

7. While situations of poverty may result in violations of civil and political rights, persons affected by poverty are also limited in their capacity to assert the rights guaranteed by the Convention⁹. But, as E. Decaux put it, “the aim should not be to invent new rights for those living in poverty but to ensure that the rights proclaimed are genuinely effective for everyone”¹⁰. Human rights have no meaning unless they apply to everyone.

Access to justice

8. The *Airey v. Ireland* judgment of 9 October 1979 affirmed that, from the standpoint of Article 6 of the Convention and in certain circumstances, the State had an obligation, even in civil matters, to provide free legal aid to those most in need. This principle was subsequently confirmed and fine tuned¹¹, but also broadened to encompass the entire issue of access to justice. Of course, the Court never intended that an unconditional right of access to justice completely free of charge should be derived from Article 6¹². Nevertheless, that provision has, on a case-by-case basis, acted as a bar to disproportionate financial obstacles preventing economically vulnerable individuals from gaining access to justice, whether on account of excessive court fees¹³, either laid down in advance¹⁴ or adjusted depending on the amount of the claim¹⁵, or on account of the refusal to admit ordinary appeals or appeals on point of law to the detriment of persons whose lack of resources made it impossible for them even to begin to pay the amount ordered by the judgment in question¹⁶. Recently, the Court did not rule out the possibility that a decision ordering the

6 *Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, doc. A/HRC/21/39, 18 July 2012.* This document was adopted by the United Nations Human Rights Council on 27 September 2012 and by the UN General Assembly’s Third Committee on 21 November 2012. On 20 December 2012, in draft Resolution III entitled “Human rights and extreme poverty”, which was adopted without a vote, the General Assembly welcomed the guiding principles on extreme poverty and human rights adopted by the Human Rights Council in resolution 21/11 as a tool for use by States in formulating and implementing policies to reduce or eradicate poverty, as appropriate. The Assembly commits States to taking all necessary measures to eliminate all forms of discrimination, especially against persons living in poverty. States should also refrain from adopting any law, rules or practice that would prevent those persons from fully exercising their human rights and fundamental freedoms, including economic, social and cultural rights, or would restrict the exercise of those rights, and should take steps to ensure equal access to justice for persons living in poverty. See also *Eradication of poverty and other development issues: implementation of the Second United Nations Decade for the Eradication of Poverty (2008-2017)*, Report of the Second Committee of the UN General Assembly, doc. A/67/441/Add. 1, 12 December 2012.

7 EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA), *Protecting fundamental rights during the economic crisis*, Working paper, December 2012; *Poverty and Inequalities, Paradoxes in Societies of Human Rights and Democracy? Proposals for an inclusive society*, conference organised by the Council of Europe in partnership with the European Union, Strasbourg, 21-22 February 2013 (<http://rights-poverty.eu/conference/>).

8 F. SUDRE, “La perméabilité de la Convention européenne des droits de l’homme aux droits sociaux”, *Mélanges J. Mourgeon*, Brussels, Bruylant, 1998, pp. 467 et seq.

9 CENTER FOR ECONOMIC AND SOCIAL RIGHTS, *Human Rights and the Global Economic Crisis. Consequences, Causes and Responses*, 2009 (available online at: www.cesr.org).

10 E. DECAUX, “Les droits des pauvres : une pierre blanche sur un long chemin”, *Droits fondamentaux*, no. 5, January-December 2005, p. 2. In relation to this issue as a whole, I have drawn on and updated the following paper: Fr. TULKENS and S. VAN DROOGHENBROECK, “Pauvreté et droits de l’homme. La contribution de la Cour européenne des droits de l’homme”, in *Pauvreté – dignité – droits de l’homme. Les 10 ans de l’accord de coopération*, Brussels, Service de lutte contre la pauvreté, la précarité et l’exclusion sociale, 2008, pp. 65 et seq.

11 For a summing-up of the applicable principles, see *Laskowska v. Poland*, no. 77765/01, 13 March 2007.

12 *Kreuz v. Poland*, no. 28249/95, § 59, ECHR 2001-VI.

13 For a summing-up of the applicable principles, see *Bakan v. Turkey*, no. 50939/99, §§ 66 et seq., 12 June 2007.

14 *Mehmet and Suna Yiğit v. Turkey*, no. 52658/99, 17 July 2007. In that case the Court held that the requirement for the applicants, who had no income, to pay court fees amounting to four times the minimum monthly wage at the time amounted to a disproportionate restriction of their right of access to a court (§ 38).

15 *Stankov v. Bulgaria*, no. 68490/01, 12 July 2007.

16 For a summing-up of the applicable principles, see *Cour v. France*, no. 44404/02, 3 October 2006.

losing party in proceedings to reimburse the winning party's legal costs might result in a violation of Article of the Convention if the amount concerned was grossly disproportionate to the financial resources of the unsuccessful party¹⁷. Lastly, in the case of *Guidi v. Italy*, the Court decided to apply Rule 39 of the Rules of Court in order to speed up payment of a sum of 14,500 euros owed by the State (Pinto compensation) to the applicant and his daughter, whose situation of severe financial hardship was known to the State.

9. This issue of access to justice also features on the European Union's agenda. "Justice in austerity – challenges and opportunities for access to justice" was the theme of the 2012 Fundamental Rights Conference organised by the Fundamental Rights Agency. In Mr Kjaerum's view, the conclusion is clear: access to justice should be strengthened in times of crisis. Cutting budgets during such times simply shows a lack of long-term vision; the crisis should be used to encourage innovative solutions capable of contributing to the shaping of future policies.

Right to the peaceful enjoyment of possessions

10. The Court's constructive interpretation of Article 1 of the First Additional Protocol to the European Convention on Human Rights has resulted in some remarkable advances being made. The leading decision in *Stec v. the United Kingdom* summarised and expanded upon the existing case-law, accepting that the notion of "possessions" contained in that Convention provision could extend to all social security benefits, whether contributory or non-contributory¹⁸. Significantly, the Court observed that in the modern democratic State "many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. ... Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable"¹⁹.

11. Of course, this does not mean that the States Parties to the Convention are henceforth required to guarantee social security benefits that do not exist within their legal system²⁰. However, Article 1 of Protocol No. 1, read in conjunction with Article 14 of the Convention, precludes refusing such benefits, where they exist, on grounds of sex²¹, marital status²² or nationality²³. This combination is all the more effective since, in a parallel development, the recent case-law of the European Court has produced an interpretation of Article 14 particularly favourable to the protection of groups that are structurally vulnerable, whether by accepting the legitimacy of positive action²⁴, asserting the prohibition of indirect discrimination²⁵ or ruling that the burden of proof regarding discrimination must be shared²⁶.

Private and family life and respect for the home

12. Article 8 of the European Convention, which enshrines the right to respect for private and family life, has also proved to be of particular benefit to the least well-off as regards social implications²⁷.

13. For instance, in its judgment in *Moldovan v. Romania*²⁸, the Court examined, from the standpoint of Article 8 and the right to respect for private life, the extremely precarious situation of persons whose houses had been burned down, and found a violation of that provision. No less significant is the judgment in *Wallová and Walla v. the Czech Republic* of 26 October 2006 concerning family life, in which "the

17 See *Collectif National d'information et d'opposition à l'usine Melox-Collectif stop Melox et Mox v. France*, no. 75218/01, § 15, 12 June 2007. It should be recalled that the reimbursement of court costs by the losing party was traditionally presented, including within the Council of Europe (Recommendation No. R (81) 7 of the Committee of Ministers of the Council of Europe to member States on measures facilitating access to justice of 14 May 1981), as a means of promoting access to justice for the least well-off.

18 *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, ECHR 2005-X.

19 *Ibid.*, § 51.

20 *Ibid.*, § 54.

21 *Willis v. the United Kingdom*, no. 36042/97, ECHR 2002-IV.

22 *Wessels-Bergervoet v. the Netherlands*, no. 34462/97, ECHR 2002-IV.

23 *Koua Poirrez v. France*, no. 40892/98, ECHR 2003-X.

24 *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, ECHR 2006-VI, esp. §§ 61 et seq.

25 *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007-IV.

26 *Ibid.*

27 In addition to the judgments cited below, see, in relation to the eviction of a tenant without alternative accommodation being provided, *Stanková v. Slovakia*, no. 7205/02, 9 October 2007 (violation of Article 8).

28 *Moldovan and Others v. Romania* (no. 2), nos. 41138/98 and 64320/01, ECHR 2005-VII.

order for the applicants' children to be taken into care was made on the sole grounds that the family lived in unsuitable housing at the time. ... this was therefore a material shortcoming which could have been remedied by the national authorities by means other than the complete break-up of the family, which would seem to be a most drastic measure, to be applied only in the most serious cases"²⁹.

14. With regard to respect for the home, I would mention the *McCann v. the United Kingdom* judgment of 13 May 2008, in which the Court stated, on the subject of the applicant's eviction from a local authority-owned dwelling, that "[t]he loss of one's home is a most extreme form of interference with the right to respect for the home", with the result that any such measure was permissible under the Convention only if it was possible to have its proportionality effectively reviewed by the courts³⁰. In its *Yordanova and Others v. Bulgaria* judgment of 24 April 2012 the Court went a step further, stating that an obligation to secure shelter to particularly vulnerable individuals could flow from Article 8 of the Convention in exceptional cases³¹.

Towards a right to housing?

15. The issue of the position occupied by the right to housing in the law of the European Convention on Human Rights is worth raising³². It is true that, as matters stand, the Convention does not protect a "right to housing" as such, although the possibility of a change in that situation cannot be discounted should the Court be called upon to examine cases that might permit it to extend or fine-tune its case-law. However, it would be just as much an overstatement to say that, because it has not attained that status, housing is simply consigned to a legal limbo where the Convention is concerned, beyond the reach of the European human rights judges. In the space between full blown personal rights and pure facts we have, as pointed out by F. Ost³³, legally protected interests. It seems indisputable, in the light of the case-law of the European Court of Human Rights, that housing already enjoys that status.

16. The recognition of the right to housing as an interest protected by the Convention emerges very clearly from the case-law concerning the limits that may be imposed on property rights. As far back as the landmark judgment of 21 February 1986 in *James and Others v. the United Kingdom*, the Court did not hesitate to state: "Eliminating what are judged to be social injustices is an example of the functions of a democratic legislature. More especially, modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces"³⁴.

17. *Mutatis mutandis*, the same motivation underlay the judgments and decisions which found to be justified, or at least justifiable *a priori* from the standpoint of Article 1 of Protocol No. 1, measures restricting property rights, such as those freezing or reducing rents or staying the enforcement of court eviction orders³⁵ – provided that the measures concerned did not extend beyond a reasonable period³⁶. More recently, in its judgment in *Almeida Ferreira and Melo Ferreira v. Portugal* of 21 December 2010, the Court found that a statutory bar to terminating a long-term lease did not infringe the applicants' property rights because, in that specific case, the impugned legislation was based on concern to protect a section of society deemed by the State to require special protection³⁷. In a different context, the Court declared inadmissible a complaint under Article 6 § 1 and Article 1 of Protocol No. 1 alleging that the public authorities had refused to

29 *Wallová and Walla v. the Czech Republic*, no. 23848/04, §§ 73-74, 26 October 2006. See also, to the same effect, *Havelka and Others v. the Czech Republic*, no. 23499/06, 21 June 2007, especially § 61.

30 *McCann v. the United Kingdom*, no. 19009/04, § 50, ECHR 2008.

31 *Yordanova and Others v. Bulgaria*, no. 25446/06, 24 April 2012.

32 On this issue, see Fr. TULKENS and S. VAN DROOGHENBROECK, "Le droit au logement dans la Convention européenne des droits de l'homme. Bilan et perspectives", in *Le logement dans sa multidimensionnalité. Une grande cause régionale*, edited by N. Bernard and C. Mertens, Ministère de la Région Wallone, Etudes et documents, Namur, 2005, pp. 311 et seq.

33 Fr. OST, *Droit et intérêt*, vol. 2, *Entre droit et non-droit : l'intérêt*, Brussels, Publications des Facultés universitaires Saint Louis, 1990.

34 *James and Others v. the United Kingdom*, 21 February 1986, § 47, Series A no. 98.

35 *Spadea and Scalabrino v. Italy*, 28 September 1995, Series A no. 315-B.

36 See, among many other authorities, *Scollo v. Italy*, 28 September 1995, Series A no. 315 C, and *Immobiliare Saffi v. Italy* [GC], no. 22774/93, ECHR 1999-V.

37 *Almeida Ferreira and Melo Ferreira v. Portugal* no. 41696/07, § 33, 21 December 2010.

enforce a final court ruling ordering the clearing of a block of flats, on the grounds, *inter alia*, that the squatters were in a precarious and vulnerable situation and therefore deserved enhanced protection³⁸.

18. Studying these different examples, we see that the issue of housing has already been given a certain weight in the balancing exercise, in cases which entailed restricting all or some of the classic property related prerogatives on that account. It may be that even greater weight will be attached to it thanks to a more fundamental change in the way that we perceive property itself and the reasons traditionally advanced to justify protecting it. “Property entails obligations”, as Article 14 § 2 of the German Constitution states.

Inhuman and degrading treatment

19. From the point of view of Article 3 of the Convention, we can and should raise questions as to the suitability of this provision as a basis for a State duty towards persons in difficulty. It would be unthinkable not to consider that extreme poverty “humiliates the individual in his own eyes and in the eyes of others” and “is such as to arouse feelings of fear, anguish and inferiority”. As P.-H. Imbert put it: “Is it really so ridiculous to think that if corporal punishment in schools is considered to be degrading, the same should apply to the situation of someone who ‘lives’ in a slum?”³⁹.

20. That said, the absolute nature of the prohibition contained in Article 3 – the situations coming within the ambit of that provision are not normally justified on any grounds, including budgetary grounds⁴⁰ – calls, almost as a matter of necessity, for a certain degree of restraint in applying it in practice, in other words, for a raising of the threshold of human suffering beyond which Article 3 will be held to apply. The decision of the European Commission of Human Rights of 9 May 1990 in *Van Volsem v. Belgium*, which was severely criticised⁴¹, was partly echoed ten years later in the case of *O’Rourke v. the United Kingdom*⁴². Here again, this time in relation to an ex-prisoner forced to live on the streets after being evicted by the local authority from the temporary accommodation he had obtained, the Court held that there had been no violation of Article 3, as the suffering which the applicant had experienced as a result of his eviction had not attained the requisite threshold of severity⁴³.

21. However, this line of case-law was subsequently qualified, not to say superseded, by the *Larioshina v. Russia* decision of 23 April 2002, which states as follows: “The Court recalls that, in principle, it cannot substitute itself for the national authorities in assessing or reviewing the level of financial benefits available under a social assistance scheme *This being said, the Court considers that a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman and degrading treatment*”⁴⁴. In *Budina v. Russia*, the Court pursued the same line and addressed the arguments which, in the view of some observers, weigh in favour of a change in the case-law⁴⁵. The Court did not rule out the possibility that the State’s responsibility could be engaged on account of the treatment meted out to the applicant, who was wholly dependent on State support and found herself faced with official indifference despite living in a state of great hardship incompatible with human dignity⁴⁶.

22. Lastly, as the background document rightly points out – and I would like to thank most sincerely the friends and colleagues who prepared it – “another consequence of the economic crisis which the Court has dealt with in the context of Article 3 is the increasing influx of migrants and asylum seekers”. Thus, in the

38 *Société Cofinco v. France* (dec.), no. 23516/08, 12 October 2010.

39 P.-H. IMBERT, “Ouverture”, in *Les droits fondamentaux ou la démolition de quelques poncifs*, edited by C. Grewe and Fl. Benoît-Rohmer, Presses universitaires de Strasbourg, 2003, p. 12.

40 With regard to situations contrary to human dignity in a prison setting (overcrowding etc.), see *Khokhlich c. Ukraine*, no. 41707/98, § 181, 29 April 2003.

41 See F. SUDRE, “La première décision ‘quart-monde’ de la Commission européenne des droits de l’homme: une ‘bavure’ dans une jurisprudence dynamique”, R.U.D.H., 1990, pp. 349-353; J. FIERENS, *Droit et pauvreté. Droits de l’homme, sécurité sociale et aide sociale*, Brussels, Bruylant, 1992, pp. 134 et seq.

42 *O’Rourke v. the United Kingdom* (dec.), no. 39022/97, ECHR 26 June 2001.

43 However, had the applicant’s situation been the result of State inaction rather than his own choice (he had refused all temporary accommodation as well as two offers of permanent housing) the Court’s conclusion would have been different.

44 *Larioshina v. Russia* (dec.) no. 56869/00, 23 April 2002 (italics added).

45 D. ROMAN, *Le droit public face à la pauvreté*, Paris, L.G.D.J., 2002.

46 *Budina v. Russia* (dec.), no. 45603/05, ECHR 2009.

M.S.S. v. Belgium and Greece judgment of 21 January 2011, in which an asylum seeker, because of the authorities' inaction, had found himself living on the streets for several months with no resources or access to sanitary facilities and without any means of providing for his essential needs, the Court found that the applicant had been the victim of humiliating treatment showing a lack of respect for his dignity and that the situation had aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. The Court considered that such living conditions, combined with the prolonged uncertainty in which he had remained and the total lack of any prospects of his situation improving, had attained the level of severity required to fall within the scope of Article 3 of the Convention⁴⁷. In the *Hirsi Jamaa and Others v. Italy* judgment of 23 February 2012, the Court observed that "the economic crisis and recent social and political changes have had a particular impact on certain regions of Africa and the Middle East, throwing up new challenges for European States in terms of immigration control"⁴⁸. In that case, the Court did not hesitate to assert that "having regard to the absolute character of the rights secured by Article 3, that [situation] cannot absolve a State of its obligations under that provision"⁴⁹.

23. This last judgment takes me back to my starting point. If we accept the idea that crisis and economic crisis are not just cyclical but are the sign of an underlying shift, then I believe that, as far as human rights are concerned, this should prompt us to lend greater meaning, scope and effect to the indivisibility of fundamental human rights which is without doubt the guiding line for the international protection of those rights.

47 *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 263, ECHR 2011.

48 *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 176, ECHR 2012.

49 *Ibid.*, § 122.

**SOLEMN HEARING
OF THE EUROPEAN COURT OF
HUMAN RIGHTS ON THE OCCASION
OF THE OPENING
OF THE JUDICIAL YEAR**



Dean Spielmann

**President
of the
European Court of Human Rights**

Minister of Justice,
Presidents of Constitutional Courts and Supreme Courts,
Chairman of the Ministers' Deputies,
Secretary General of the Council of Europe,
Excellencies,
Ladies and Gentlemen,

I should like to thank you, both personally and on behalf of all my colleagues, for kindly attending this solemn hearing on the occasion of the opening of the judicial year of the European Court of Human Rights. Your presence here is a sign of the high regard and esteem in which you hold our Court, and for which we are most grateful. Allow me also, as there is still time, to wish you a happy new year 2013.

Today's hearing is one of particular significance for me. It is the first time that I have taken the floor on this occasion and I would add that it is a great honour for me to do so. Traditionally, this ceremony for the opening of the judicial year has provided an opportunity to look back at our Court's activity over the past year. This task is a particularly gratifying one to discharge, as 2012 has been an outstanding year for our Court.

We are all aware of the fragility of human rights and their protection. It was our Court itself that appeared fragile in the early part of 2012.

It had become fragile in a number of respects and, in particular, on account of the very high number of pending applications, which at the beginning of 2012 dauntingly crossed the 150,000 mark. That figure needs no comment. Even though a considerable majority of those cases were bound to lead to inadmissibility decisions, such a high number had negative repercussions. First of all, the massive influx of applications prevented the Court from examining, within a reasonable time, the most serious cases – those in which severe human rights violations had been committed, or in which major issues for the interpretation of the Convention were raised. Secondly, it could not be excluded that some would-be applicants might refrain from bringing their cases before the Court as a result of the length of its proceedings.

On top of these difficulties, this Court endured a veritable barrage of criticism as the year began – a good deal of it excessive and unfair. Time and again the Court was singled out for special criticism in the British press, and this was echoed in certain other parts of Europe. It was a harsh political climate in which to prepare the third high-level conference on Convention reform, which was convened by the United Kingdom in Brighton. There was a real prospect of a radical change in the tone and direction of the reform process.

At that turbulent time, the Court naturally looked to its President to deploy fully the authority of his office in defence not only of this institution but of the very principle of protecting human rights through international law. And that is what he did. I pay tribute here this evening to my predecessor, Sir Nicolas Bratza, who contributed in large part to the overall success of the Brighton Conference. In those – at times – heated discussions, his voice was influential and his counsel ever wise. To him we owe a great debt of recognition

and of gratitude. In his many years of service to this Court, he was an outstanding judge, and a great President.

The assessment of the year gone by must, I believe, be a positive one in all respects. First of all, and for the first time ever in its history, the Court managed to gain the upper hand over the inflow of new cases. Secondly, the Brighton Conference turned out to be a very positive event for the Court. And thirdly, the Court maintained a high degree of protection of human rights. I will develop each of these points.

Regarding the number of cases, I believe you have already received the figures, and they really speak for themselves:

The number of applications decided by judgment was 1,678, compared to 1,511 in the previous year. Overall, the Court decided almost 88,000 applications, which is an increase of 68% in relation to 2011. The number of pending applications stood at 151,600 at the beginning of 2012 – by the end of the year it was 128,100, a decrease of 16%. The quite remarkable success is due to very hard work, as well as to the ingenuity of the Court and its Registry. We have managed to put together practical solutions to the problems caused by our excessive case load by modernising and rationalising our working methods. The Single Judge procedure has been utilised to the full. To adapt the phrase so often spoken in relation to this Court, it is no longer a victim of its own success.

An important element in the Court's practice is the pilot judgment procedure, now regulated in detail in the Rules of the Court. As encouraged by the States themselves, and by the Parliamentary Assembly, the Court applied the procedure more intensively than ever in 2012.

In essence, the procedure entails not just declaring a violation of the individual applicant's rights, but also analysing the underlying systemic – or structural – situation that is at variance with the Convention. From this analysis, the Court proceeds to give guidance to the State on suitable remedial measures.

In 2012, the situations and the States concerned were very diverse, including:

- The very poor material conditions in Russian remand jails;
- Excessive delay in judicial proceedings in Turkey, and also in Greece;
- The denial of citizenship to a category of persons living in Slovenia (known as the erased);
- In Albania, problems with the functioning of the system for paying compensating to those whose property was expropriated during the communist era.

At the very beginning of this year, a pilot judgment has been given concerning Italy, regarding prison overcrowding.

These examples show both the adaptability of the procedure, and how much of its potential has been realised.

I turn now to the Brighton Conference. Everyone agrees that the Court emerged from it in a stronger position. In particular, the intentions expressed by some to restrict access to the Court by changing the admissibility criteria were not ultimately successful. A significant number of States gave us their firm support and rallied round us. The Court is now undeniably strengthened in its mission of supervising compliance with the European Convention on Human Rights. Above all, the right of individual petition, to which we are all committed – a major characteristic of our system – has been preserved.

However, the most important thing remains the case-law and the quality of the Court's judgments. Efficiency has not undermined the quality and weight of our rulings. On the contrary, it is precisely because we have been able to deal with the numerous cases that had been creating a backlog that, at the same time, we have paid all due attention to the most serious cases.

To keep within my allotted time, I will not mention many examples of cases that we dealt with in 2012. Among the judgments that have made a decisive contribution to the harmonisation of European norms in the field of rights and freedoms, I should like to mention just two cases that I feel are emblematic of the essential role that our Court has played in the protection of human rights: first the judgment in *Hirsi Jamaa and Others*, delivered on 23 February 2012, against Italy. It concerned the interception at sea of

groups of refugees who were then pushed back by the authorities. We refused to allow the existence of a legal black-hole, even on the high seas. At a time when the phenomenon of migration by sea is increasing, we felt that the individuals in question, whose vulnerability was evident, needed to be protected by the Convention guarantees. As to the second case, you will not be surprised that I have chosen to cite *El Masri against "the former Yugoslav Republic of Macedonia"*, a judgment of 13 December. For the first time, the Court found against a State for taking part in an extraordinary rendition of prisoners to the CIA, putting an end to the impunity with which such operations had, for a long time, been carried out. Above all, our Court is the first in the world to have classified as torture the actions committed by the CIA in the context of such operations, even though it was the respondent State that was found responsible for the violation on account of the express or tacit approval of its authorities. These two key judgments remind us that European States cannot renege on their obligations under the Convention, whether in their fight against terrorism or in their efforts to curb illegal immigration.

In 2012 we pursued our dialogue with other national and international courts. I do not intend to give you an exhaustive list of all the visits we have received and which have allowed the dialogue of judges to progress. I will cite just two examples, as they illustrate our Court's renown even beyond the European continent. First, a very important visit was paid to the United States Supreme Court, where we received a particularly warm welcome. Secondly, there was a visit to the Inter-American Court of Human Rights, our sister court, so to speak, on the other side of the Atlantic. During those visits we were able to witness how much attention those courts paid to our Court and its case-law.

As regards the Inter-American Court of Human Rights, with its seat in San José, Costa Rica, our cooperation will continue in 2013 thanks to the generosity of the Luxembourg Government.

Speaking of generosity, I should also like to express gratitude to the following States, which have agreed to support the Court by contributing to the special account created after the Brighton Conference to help absorb the backlog, or by placing seconded lawyers at our disposal: namely, Germany, Austria, Armenia, Azerbaijan, Bulgaria, Cyprus, Croatia, the Russian Federation, Finland, France, Ireland, Italy, Liechtenstein, Luxembourg, Republic of Moldova, Monaco, Norway, the Netherlands, Poland, Romania, Sweden, Switzerland and Turkey.

Among the positive points of the past year should also be mentioned the assessment of our Court's performance by the French Court of Audit, which highlighted the results and efficiency of the Court and its Registry. That seal of approval is of the utmost importance for us.

Before closing I cannot avoid mentioning the very important question of the European Union's accession to the European Convention on Human Rights. Provided for by the Lisbon Treaty and made possible by Protocol No. 14, it can undoubtedly be counted among the great European legal projects and will complete the European legal area of fundamental rights. The idea of this accession is indeed in essence to ensure the coherence of Europe with regard to its most profound legal and ethical principles.

Since July 2010 the European Commission and the member States of the Council of Europe have been negotiating the terms of the treaty which will bring about the accession. They have now accomplished 95% of the work and that is certainly to be commended. Whilst a few stumbling blocks remain, none of them are insurmountable provided the political will is forthcoming. Admittedly, some doubts have been expressed about the usefulness of the accession, in view of certain difficulties encountered during the negotiations. That is quite understandable and nobody expected them to be easy, given the scale of the task. Those difficulties, however, must not serve as a pretext for calling into question this noble endeavour. By acceding to the Convention and thereby allowing external judicial supervision of its action, the European Union will prove that, like its member States, it is willing for its action to be bound by the same international requirements as those applying to the action of individual States. A hallmark of credibility, the external review by the European Court of Human Rights will also be a hallmark of progress. It will represent a powerful message from Europe to the world, indeed a solemn declaration that beyond all its differences and specificities, however legitimate, be they occasional, regional or systemic, Europe shares a common foundation of fundamental rights, which we call human rights. The time has now come for the negotiators to bring their work to fruition and for the European Union, recent recipient of the Nobel Peace Prize, to sign up to the Convention.

Over the past year, our Court has been considerably transformed by the departure of a large number of judges. But happily they have been replaced and thankfully our orchestra bears no resemblance to that of Joseph Haydn's "Farewell" symphony. Those of you who are familiar with this magnificent work by the great Austrian composer will recall that the musicians put down their instruments, one after the other, and leave. At the end, just two muted violins remain. Although many of our musicians have departed, our orchestra has certainly not been reduced to silence. On the subject of our former judges, I would express the hope that once they have returned to their country they are able to put to use the experience acquired in Strasbourg for the benefit of their respective States and at the appropriate level.

That is in their own interest, of course, but it is also important for the Court's image, and indeed for the attractiveness of serving as a judge at the Court. I hope to raise this matter with the Committee of Ministers in due course.

Ladies and Gentlemen,

I am aware that I have already spoken at some length, but I am sure you will agree with me that the achievements of 2012 warranted such consideration. I would now like to welcome, on a more personal note, our two guests of honour.

Mr Theodor Meron, who will take the floor in a few moments, is the President of the International Criminal Tribunal for the Former Yugoslavia. He presides over the Appeals Chamber of that Tribunal, and of the International Criminal Tribunal for Rwanda. He is also the President of the Mechanism for International Criminal Tribunals. President Meron is a leading figure of international law, and we are honoured by his participation in this year's formal ceremony. The advent of international criminal justice at the end of the 20th century was a landmark achievement, on a par with the post-war movement to protect human rights internationally. The ICTY and ECHR are courts with strongly complementary roles, and the norms developed by each serve as valuable points of reference for the other. It is therefore with the greatest of interest that we shall listen to him.

But, first of all, we are going to hear Madam Christiane Taubira, Garde des Sceaux, Minister of Justice.

Madam,

Your presence here bears witness to the host State's attachment to our Court. Your personal action and your determination, particularly as regards the humanising of prisons, are to be highly commended. Through your intermediary, I should like to express my gratitude to François Hollande, President of the French Republic who, when he received me at the Élysée in late December, emphasised your country's attachment – and I quote – "to the role, missions, authority and independence of our Court, whose action is essential for the progress of fundamental rights and freedoms on the European continent". That firm support encourages us to pursue our mission.

I thank you.



Christiane Taubira

Minister of Justice, Garde des Sceaux

(Retranscription of the speech)

President Dean Spielmann,
 President Theodor Meron,
 Presidents of the higher courts,
 Prosecutors General,
 Presidents and Vice-President,
 Members of Parliament,
 Elected representatives,
 Ladies and Gentlemen, Excellencies,

I must say that I am particularly pleased and honoured to be with you for this important and splendid event, on the occasion of the solemn opening of the judicial year of the European Court of Human Rights. I would add that since the Court has its seat here, in Strasbourg, in France, I have the privilege of speaking to you as the host, on behalf of the Government, of this outstanding and great institution.

I wish to take this opportunity to pay tribute to the pioneers of the Council of Europe, those who, just over 60 years ago, rightly understood, for example, the experience of the League of Nations, which through its declaratory nature had shown the limits of its effectiveness; pioneers who were ambitious enough to create an institution, an organisation, that was capable of ensuring the effective protection of human rights. A venture that, today, has resulted in this community of values that we have established for ourselves, one that is underpinned by a sound, normative foundation, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, by the institutional supervision of the Parliamentary Assembly and the Committee of Ministers, and by the institutional supervision of this European Court of Human Rights, which guarantees respect for those rights and fundamental freedoms.

President Spielmann, you were elected a few weeks ago and you are now presiding over this institution. I would like to express my sincerest congratulations on behalf of the French Government, after the warm welcome that you received recently from President François Hollande. Your career as a jurist – an eminent jurist – began as a lawyer and you subsequently lectured in law, including at the University of Nancy. You were appointed judge of this institution in 2004, then you became Section President in 2011 and Vice-President in 2012. You have followed brilliantly in the footsteps of President Costa. President Costa, who admirably presided over this great institution.

President Spielmann, I wish above all to commend you for your faultless commitment, your keenness to move forward, the particular talent that you have applied to the settlement of disputes, that art of reaching a consensus that you have brought to bear without reneging on principles, and the reforms and modernisation that you have introduced so that the Court can move resolutely into the 21st century.

President Spielmann, you have risen to those challenges, you have taken your place at the helm to secure an ever-greater efficiency, greater authority, an even greater and better reputation for this

esteemed Court, moving on from the time when the Court addressed, or was asked to address, a number of constraints, as pointed out in the Wise Persons' report of 2006.

Since then the conferences have taken place – you were present at Brighton, and there was one at Izmir, another at Interlaken. Those conferences have brought about progress, and solutions have certainly been forthcoming in relation to the difficulties observed in the functioning of the Court. Those solutions have now been tried and tested and today this Court is in a position to show, first and foremost, how it is unique in the world and how it can reach out, how it reaches out to 47 States and to over 800 million Europeans; how it reaches out through its specific missions, which confer on it a responsibility for settling disputes – disputes that are referred to it by two types of application, those lodged by States, albeit rarely, and individual applications, which, by contrast, are constantly increasing in number.

This Court is, to some extent – as you yourself said, President Spielmann – a victim of its own success. It is a victim of its own success because, not only does it encompass the 47 States of Europe, it also serves as a benchmark and a source of inspiration for many other countries throughout the world. That responsibility is immense. It reflects the idea expressed by Edouard Glissant that the time is now past when only one part of the world was responsible for the world as a whole; and that today it is the whole world which is responsible for the whole world.

As a result, all the judgments that you deliver and which uphold human rights and fundamental freedoms, as the States of Europe and its pioneers, to whom I referred earlier, defined them, all these judgments that you deliver, contribute to the development of democracy in the world. Because we are all responsible for the world. And with all this democracy, underpinned as it is by the application of human rights and fundamental freedoms, we have a fine illustration of how our achievements in one place can contribute to improving the state of the world.

As I was saying, the Court is thus a victim of its own success; it has delivered a considerable number of judgments. Set up in 1959, it has in fact been sitting on a full-time basis since 1998 and it is noteworthy that between 1959 and 1998 it delivered, I believe, 837 judgments. But I have to be careful in speaking about statistics, about the output of your Court, as you are more familiar with the figures than I am. 837 judgments between 1959 and 1998 and more than 16,000 since then. About 390,000 inadmissibility decisions between 1999 and 2012 and for the year 2012 alone, some 80,000 inadmissibility decisions. This goes to show that, since the establishment of the right of individual petition, the Court has come to represent a remedy and a safeguard in the minds of European citizens.

But concerns have been expressed by France, through its President – and I confirm them now in my capacity as Minister of Justice – concerns for the future of the Court, which must not be an appeals tribunal, a super appeals tribunal; we want it to be above the fray, the pinnacle in the architecture of our judicial authorities, safeguarding human rights and fundamental freedoms, and it should not be another stratum, a higher instance in relation to our national courts.

It therefore goes without saying that we should be supporting the new impetus of this Court which, as a result of its success, means going beyond the solutions that have already been found, for its functioning, solutions that require an increase in its staff, the improvement of its budget, the adaptation of its methods, in particular the methods of the Registry, the review of certain procedures. Going beyond such solutions, there is a need to ensure that the Court examines only those applications that really concern human rights and fundamental freedoms.

This clearly involves the States, which have responsibilities, in cooperation with the Court of course, in relation to its operation and in particular to the inadmissibility mechanism, because with some 95% of inadmissibility decisions certain questions are inevitably raised as to the formal requirements or the place of the merits in the examination of such applications before the Court.

But the States must play their role, for they must ensure that the individual application remains the principle and above all must sustain the practice of subsidiarity, that is to say that not only must the States render effective the decisions of the European Court of Human Rights, they must also anticipate, in other words, they must take preventive action through information – they must ensure the execution of the Court's judgments and, above all, must adopt general measures to avoid repetitive cases; for all cases that are

alike, general measures must be taken in line with the Court's rulings. In that manner, we – the States – will be able to keep alive the case-law of the European Court of Human Rights.

We must also develop a common culture, essentially through the dialogue between judges, through the training of our judicial personnel, with a need to increase exchanges, and by sharing his case-law of the European Court. France is keen to support this new impetus. It has shown its commitment in particular by its active participation in the negotiations for the accession of the European Union to the Convention. As you have just said, President Spielmann, there is no reason for the European Union to remain hesitant. First, the political decision has been taken; it is enshrined in the Treaty of Lisbon, and moreover, the European Union has to accept such external scrutiny. This will be of great benefit for the Union, as it will enhance the credibility of its decisions.

President, Ladies and Gentlemen, the reason why we are, why France is so active in its support of the European Court of Human Rights is because we share the essential principles in matters of justice. A justice system that must be accessible, one that must be diligent and efficient. With the vigilance of the European Court of Human Rights and the mobilisation of Europeans, this vigilance has helped to bring about improvements in our domestic law. In recent years that vigilance, those decisions, those judgments of the European Court of Human Rights, have carried our law forward on the path of individual rights and freedoms.

The fact that you have so many cases before you can be explained by the trust placed in you by judges, by lawyers, by academics, by civil society and, of course, by the citizens who turn to you for help. And that trust is justified. As I was saying, you have brought about progress in our law, and you have done so in particular through Articles 2 and 3 of the Convention – respect for life, the inviolability of the human body, the prohibition of inhuman and degrading treatment, the prohibition of torture. And the Court's decisions and judgments have been of great inspiration for the law.

First of all, they have imposed certain changes on our domestic law. France, on a certain number of subjects, has most willingly complied and has even on occasion gone beyond the content of the rulings, but has welcomed the Court's judgments, and continues to receive them with interest and with careful attention. Over the past twenty years our law has progressed, thanks for example to the *Kruslin and Huvig* judgments on telephone tapping, whether administrative or judicial.

We have progressed – and we continue to progress – thanks, among others, to the *Medvedyev* judgment on the French public prosecutor, and we are working on the reform of the Conseil supérieur de la magistrature (National Legal Service Council), a reform that will take effect, subject to Parliament's approval, in a few months' time.

With the *Brusco* judgment we made progress in matters of police custody; and with the *Ravon* judgment, on challenges – especially concerning procedures and time-limits – challenges to searches decided by the tax authorities; then we have a number of judgments, especially the *Frérot and Paillet* judgments, which led us, among other things, in French prison legislation, to take into account and introduce the notion of human dignity, respect for the dignity of human integrity. We also have the *Funke* judgment, through which we reinforced the presumption of innocence.

The *Baudoin* judgment, through which we can provide better protection to persons receiving psychiatric treatment. The judgments of the European Court of Human Rights have thus really raised standards in our domestic law. We are grateful to it for that. Nevertheless, I cannot hide the fact that over the past few months I have felt particular injustice because, whenever there is a judgment against France, it is for the Minister of Justice to respond, to provide explanations and sometimes to present apologies. This is a very uncomfortable position to be in; but it is not particularly unpleasant, since I adhere fully to the requirements of the Court in terms of rights and freedoms.

This Court will continue to prosper. It will be necessary for each one of us, each State, to ensure that it is not overloaded. In any event, France will once again be fully supportive of your efforts. Allow me to pay a special tribute to René Cassin, an outstanding French figure, *Compagnon de la Libération*, who fought to combat the horror of the Nazi regime, who was awarded the Nobel Peace Prize in 1968, who presided over the European Court of Human Rights from 1965 to 1968 and who, as we all know, was one

of the drafters of the Universal Declaration of Human Rights of 1948. A truly great and outstanding figure, who reminds us of the role played by France in the promotion of these rights and fundamental freedoms.

But all States of Europe contribute to this, and they contribute with much passion, with much enthusiasm. They contribute to bringing together our various laws, our different legislations, and that outstanding capacity of European countries to be able to sustain, by working together, those notions of dignity, integrity, human rights and fundamental freedoms, is an example in the eyes of the world that we have good reason to uphold, to assert and to cherish.

For it is humanism that inspires our decisions, humanism that inspires our action, humanism that inspires the mobilisation of France in its support for the European Court of Human Rights. We assume this fully, unequivocally. A humanism in the sense expressed by René Char, who spoke of a humanism conscious of its duties and discreet about its virtues, wanting to reserve the inaccessible free field for the fantasy of its suns – for the fantasy of the suns of Europe – and determined to pay the price for this.

Thank you.



Theodor Meron

**President of the
International Criminal Tribunal
for the former Yugoslavia
President of the
Mechanism for International Criminal Tribunals**

HUMAN RIGHTS STANDARDS IN THE JURISPRUDENCE OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Mr. President,
Madame la Garde des Sceaux,
Fellow Judges,
Ladies and Gentlemen

It is a true honour for me to join you today for the opening of the judicial year, and I thank you for the invitation to take part in this important occasion.



In its landmark decision in 1995 on jurisdiction in the *Tadić* case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia – then presided over by my dear friend, the late Nino Cassese – acknowledged that international law does not provide for “an integrated judicial system operating an orderly division of labour among a number of tribunals”. The Appeals Chamber explained that in international law **“every tribunal is a self-contained system”**¹.

As a description of the underlying architecture of international justice, this statement still holds true today. Yet, while this Court and the ICTY stand apart as distinct, self-contained systems, the relationships between our courts and between human rights law and other parts of international law are far more nuanced than our separate structures might at first suggest.

Indeed, international humanitarian law—the law applied as substantive law by the ICTY – has been shaped in profound ways by the human rights movement and by human rights principles. In return, our tribunal – as well as other international criminal courts and tribunals that have been established during

¹ Prosecutor v. Duško Tadić a/k/a/ “Dule”, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (“*Tadić* Decision”), para. 11 (emphasis added).

the past two decades – have contributed to a greater understanding of and protection of human rights, including by explicit reference to and reliance upon the Convention which is your governing law and upon the case-law of this Court.

In my remarks to you today, I would like to explore the relationships between human rights and humanitarian law (including international criminal law and procedure), and between the European Court of Human Rights and the community of international criminal courts and tribunals by focusing on three transformative moments in international law.



The law of war – today known as international humanitarian law – long pre-dates the modern human rights movement, of course. In keeping with traditional Westphalian precepts, the classic law of war primarily regulated States' behaviour towards one another and was based on the principle of reciprocity. When a soldier violated the rules, the State for which he fought was typically liable for the violation not to the victim, but to the victim's State. The remedies available to the injured State were largely methods of self-help: reprisals and, after the war, reparations for war damage.

It is no exaggeration, I think, to suggest that the devastating horrors committed during the Second World War led to a seismic shift in the foundations of international law. This shift fundamentally altered not just how international law governs relations among States but also how it governs the relations of States with **individuals** – and the responsibilities of both States and individuals for breaches of international law.

Indeed, in the years that followed the end of the war, we saw the birth of a new generation of international instruments of human rights. Underlying these instruments, as well as the more specialized conventions that would follow in the decades to come, was the belief that certain rights vest not in the State, but in individuals; that States must not simply **refrain** from taking certain actions against individuals but also have **affirmative duties** to provide for individuals' basic needs; and that what a State does to its own citizens and to those within its jurisdiction is not just the concern of that State but of the whole world. Human rights law, in short, was born.

It is small wonder that this tidal change in international law – this **human rights revolution** for which the European Convention itself was an early model – gave rise to extraordinary changes in the law of war as well.

These changes are most evident in the Geneva Conventions adopted in 1949. The Geneva Conventions marked a movement away from reactively protecting civilians – as in the earlier Hague Conventions – to pro-actively safeguarding their welfare. The Geneva Conventions also helped transform the law of war from a system based on State-to-State reciprocity to a framework of individual rights. Common Article 1 of the Geneva Conventions epitomizes this denial of reciprocity with its analogue to the prerogative of all States to invoke obligations *erga omnes* against States that violate fundamental human rights.

In short, the paradigm shifts introduced by the human rights revolution, and reflected in and further promulgated by the Geneva Conventions, marked a profound humanization of the law of war.



If the human rights revolution and the humanization of the law of war reflect the first truly transformative moment in international law during my lifetime, then the creation of the ICTY 20 years ago and the establishment of other international criminal courts and tribunals – including the world's first permanent international criminal court – represent a second such tidal shift. This second transformative moment comes not from an emphasis on the **rights** of individuals so much as from a growing focus on individual **accountability**, and not from promulgation of new rules of State responsibility but from the increased recognition of the criminal responsibility of individual actors based upon norms of behaviour first developed principally for States.

Of course, the ICTY was not the first international court to try those accused of committing crimes under international law; the International Military Tribunal at Nuremberg was an important predecessor in this respect. Nor does the ICTY reflect the international community's first efforts to ensure prosecution for the worst of crimes committed during warfare: the Geneva Conventions of 1949 themselves explicitly established a regime governing grave breaches of the Conventions and requiring States parties to prosecute or to extradite for violations listed as such – thus introducing the principle of universality of jurisdiction, at least *inter partes contractantes*, though the provisions to prosecute or extradite have practically never been applied.

Yet, what truly sets the ICTY and the other modern international criminal courts apart from Nuremberg and from early efforts aimed at ensuring accountability is the degree to which these modern courts – while formally mandated to apply international humanitarian law – have rigorously applied human rights standards, and done so not just once or twice but in case after case.

This is certainly true at the ICTY, where we are governed in all that we do by the fundamental criminal law precept of *nullum crimen sine lege* and where, in a myriad decisions and judgements, we have weighed such questions as the right of an accused to represent himself on appeal, the scope of the principle of the equality of arms, and the standard for establishing fitness to stand trial. In addressing these and other fair-trial questions, we have – not surprisingly – turned time and again to the case-law of this Court concerning Article 6 of the European Convention. This is not simply because the fair trial provisions in the ICTY's Statute mirror in many respects those found in Article 6 but also because of the leading authority and invaluable guidance of this Court's extensive jurisprudence addressing fair-trial guarantees.

In its 2001 appeal judgement in the *Čelebići* case, for example, the ICTY drew upon this Court's reasoning in *Condron v. The United Kingdom* and other cases to conclude that, in the absence of express statutory safeguards and warnings, an accused's silence could not be considered in the determination of guilt or innocence². In the *Furundžija* appeal judgement, the ICTY was guided by this Court's jurisprudence concerning the right to a reasoned opinion³, and in a 2007 decision in *Prlić*, the ICTY turned to the Court's precedents in relation to questions of admissibility and evaluation of evidence⁴.

The ICTY's sister institution, the International Criminal Tribunal for Rwanda, has also had occasion to refer to the jurisprudence of this Court, including in construing the right of an accused to be informed promptly of the reasons for his arrest and the nature of the charges brought against him⁵. In considering whether to refer cases for trial in Rwanda, the ICTR has also made reference to this Court's jurisprudence concerning conditions of detention as well as to the Court's 2011 judgement in the case of *Ahorugeze v. Sweden*⁶.

As the ICTR has made plain, case-law construing the European Convention does not constitute binding authority for the Tribunal. But the jurisprudence of this Court and of other regional human rights bodies nonetheless represents, as the ICTR explained so well in 1999, "persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law" – and the decisions of this Court and bodies like the Inter-American Court of Human Rights are to be considered, where appropriate, "authoritative as evidence of international custom."⁷ This same approach has been adopted by the ICTY, where a simple search reveals discussion of the European Convention and case-law of this Court in nearly one hundred ICTY judgements and decisions. The fair-trial jurisprudence of your Court has been particularly significant to us because you too have had to address the relationship between human rights principles and different civil law and common law practices in your work.

2 See *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, paras. 782-783.

3 See *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 69.

4 *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, paras. 51, 53.

5 See, e.g., *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999 ("Barayagwiza Decision"), paras. 84-85.

6 See, e.g., *The Prosecutor v. Fulgence Kayishemana*, Case No. ICTR-01-67-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 22 February 2012, para. 30.

7 Barayagwiza Decision, para. 40.

Like the ICTY and the ICTR, the International Criminal Court (the ICC) has referred to and relied upon the case law of this Court on numerous occasions, particularly in construing fair-trial guarantees. Thus, for instance, the ICC has taken pains to consider this Court's jurisprudence concerning what evidence must be disclosed to an accused prior to the commencement of a trial⁸ and whether formal amendments of charges are required when there is a change in the legal characterisation of facts in the course of a trial⁹.

In short, international criminal courts and tribunals such as the ICTY and the ICC, are indebted to this Court. Your careful approach to each case before you has yielded a jurisprudence that has proven invaluable to us in construing the procedural guarantees of our own statutes and in ensuring that the new era of individual accountability rests on principles of fairness and due process.

We may remain, as the ICTY's *Tadić* Decision suggested, self-contained systems – separate islands in a sea of international law – but the success of international criminal justice over the past two decades has been in great part due to its strict adherence to human rights standards, and, in particular, those standards articulated and upheld by your Court every day.

Indeed, the unequivocal commitment to human rights protections has been a common thread connecting the self-contained systems of international courts. Just last year, this Court issued a judgement in the case of *Nada v. Switzerland*, in which it suggested that States have an obligation to implement binding United Nations Security Council resolutions in a manner consistent with fundamental human rights¹⁰. In my own reports on behalf of the ICTY to the Security Council, I have repeatedly emphasized this very same point¹¹.



In the time that remains, I would like to discuss the third transformation that is taking place in international law, one reflected in the increasing impact of international criminal courts and tribunals on human rights protections as a matter of *substantive* law.

As we are all too aware, human rights treaties have traditionally protected individuals from abuse in times of peace, but unfortunately many of these protections may be derogated on grounds of national emergency. What is more, these treaties often offer little protection against the acts of non-governmental actors, such as rebel groups during internal armed conflicts. At the same time, instruments governing international humanitarian law, like the Geneva Conventions, have generally focused on **international** armed conflicts. Indeed, common Article 3 of the Geneva Conventions – a quintessential statement of human rights, I suggest, albeit in the international humanitarian law context – is the sole article of the Conventions to expressly apply to internal armed conflicts, and its explicit provisions are far more limited than those applied to international conflicts. There was, in short, a gap in the conventional protections to be applied in internal armed conflicts.

This changed thanks in great part to the jurisprudence of the ICTY. In the same 1995 *Tadić* Decision which I mentioned earlier, Judge Cassese and his colleagues made plain that customary international law rules governing internal strife have emerged over time and that many of the rules and principles governing international armed conflicts apply to internal armed conflicts as well. In the nearly two decades that followed, the ICTY has been at the forefront of articulating and applying these protections under humanitarian law, thus helping to redress not through treaty but through customary law the void of protection left between **treaty-based** human rights law and humanitarian law.

This is not the only way in which international criminal courts such as the ICTY have contributed to human rights law and protections. In construing the material elements of crimes under international humanitarian law, international criminal tribunals have also had recourse to human rights law and jurisprudence, thereby strengthening human rights law and opening new avenues for its enforcement.

8 See, e.g., *The Prosecutor v. Fulgence Kayishemana*, Case No. ICTR-01-67-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 22 February 2012, para. 30.

9 See *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 15 OA 16, Judgment, 8 December 2009, para. 84.

10 See *Nada v. Switzerland*, Application No. 10593/08, Judgment, 12 September 2012 (ECtHR), paras. 195-196.

11 See, e.g., S/2012/847, 19 November 2012, Annex I, paras. 6, 90.

For instance, in articulating a definition of torture in the context of international humanitarian law, the ICTY relied heavily on the jurisprudence of human rights bodies, including this Court¹². Importantly, the ICTY adapted the constitutive elements of the crime of torture, which were originally established in the context of State responsibility for official State conduct, and held that individuals, regardless of official capacity, may be prosecuted for and convicted of torture¹³.

In addition, the ICTY has held that rape may constitute torture as a crime against humanity based in part on this Court's 1997 judgement in *Aydin v. Turkey*¹⁴. The ICTY has also referred to the *Aydin* judgement and other rulings by this Court in construing the degree of harm required for an act to constitute torture¹⁵ or for an act to constitute inhuman treatment under customary international law¹⁶.

And the ICTY has surveyed a variety of sources of human rights law – including the European Convention – to arrive at a definition for persecutions as a crime against humanity, concluding that it was possible to identify a set of fundamental rights, the gross infringement of which may amount to persecutions as a crime against humanity¹⁷. The definition of persecution as a crime against humanity thus directly implicates human rights law. Indeed, in the famous *Brđanin* case, the ICTY concluded, on the facts of the case, that violations of the rights to employment, freedom of movement, proper judicial process, and proper medical care – all of which could be considered human rights violations – constituted persecutions as a crime against humanity¹⁸.



Our two courts – and, indeed, all international criminal courts and tribunals as well – have not been alone in our pioneering commitment to either the protection of human rights or to the principle of accountability. With us today are distinguished representatives from a host of national judiciaries, each of which has played and continues to play a truly vital role in this respect.

The mandates of our various courts, of course, differ. Human rights courts pursue governmental accountability for systematic violations of human rights, while international criminal courts, in essence, “pierce the veil” of the State and pursue accountability – often for the same or similar violations – on an individual level. National judiciaries, meanwhile, may approach accountability from a wide range of perspectives. But it is through all of our work – taken as a whole – that we are knitting together a web of rights. It is together that we are contributing to the creation of a world in which human dignity and human rights are respected without normative gaps. And it is shoulder to shoulder, if not perfectly in step, that we – as jurists – are playing our part in bringing about a world in which accountability will be the rule, and not the exception.

And I thank you.

12 *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001 (“*Kunarac et al. Trial Judgement*”), paras. 465-497.

13 *Kunarac et al. Trial Judgement*, paras. 465-497, upheld and expanded upon at *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23& IT-96-23/1-A, Judgement, 12 June 2002 (“*Kunarac et al. Appeal Judgement*”), paras. 143-148.

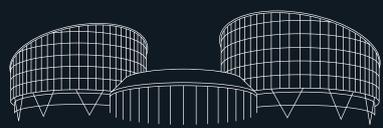
14 See *Kunarac et al. Appeal Judgement*, paras. 184-185.

15 See *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement, 3 April 2007 (“*Brđanin Appeal Judgement*”), para. 250.

16 See *Prosecutor v. Željko Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998, paras. 534-538.

17 See *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000, paras. 566, 621.

18 *Brđanin Appeal Judgement*, paras. 297, 303, 320.



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