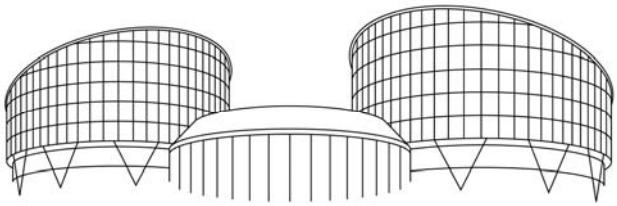

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Human Rights Standards in the Jurisprudence of International Criminal Courts and Tribunals

25 January 2013
European Court of Human Rights
Opening of the Judicial Year
Strasbourg, France

Judge Theodor Meron
President, International Criminal Tribunal for the former Yugoslavia
President, Mechanism for International Criminal 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.

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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 the past two decades—have contributed to a greater understanding of and protection of

[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).

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.

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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.

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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 innocence.[2] In the *Furundžija* appeal judgement, the ICTY was guided by this Court's jurisprudence concerning the right to a reasoned opinion,[3] and in a 2007 decision in *Prlić*, the ICTY turned to the Court's precedents in relation to questions of admissibility and evaluation of evidence.[4]

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 him.[5] 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]

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[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.

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.

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 trial[8] and whether formal amendments of charges are required when there is a change in the legal characterisation of facts in the course of a trial.[9]

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 rights.[10] In my own reports on behalf of the ICTY to the Security Council, I have repeatedly emphasized this very same point.[11]

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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-

[7] *Barayagwiza* Decision, para. 40.
[8] *See The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07 OA 11, Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial", 16 July 2010. paras. 51, 78-80.
[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.

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.

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 Court.[12] 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 torture.[13]

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 torture[15] or for an act to constitute inhuman treatment under customary international law.[16]

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 humanity.[17] 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

[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. Zejnil 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.

human rights violations—constituted persecutions as a crime against humanity.[18]

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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.

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