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

Opening Address
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Speech by Síofra O'Leary

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President Sandu,
President Manole,
Presidents of European Constitutional and Supreme Courts,
Judges,
Ladies and Gentlemen

I'm honoured to represent the European Court of Human Rights at this the 19th Congress of European Constitutional Courts.

I'm also particularly pleased, Presidents Manole and Sandu, that the Congress is taking place in Moldova and that the Strasbourg Court is today represented not only by myself, but also by one of your compatriots, Judge Diana Sârcu, as well as Deputy Registrar Abel de Campos.

Many of us have had the pleasure of exchanging at judicial meetings of various types over the course of my Presidency – in Strasbourg, Luxembourg, The Hague and Vienna - to name but a few.

During those meetings, I have emphasised the key characteristics of the Convention system which dictate the nature and quality of the interaction between national constitutional and supreme courts and the Court in Strasbourg.

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Allow me today to reiterate those characteristics once more, this time via concrete illustrations provided by the three recent Grand Chamber rulings on climate change.[1]

Knowing that in some quarters those rulings may have created a little stir, my words seek to reiterate, clarify and, to the extent necessary, reassure.

Firstly, although the Convention system and the Strasbourg Court have undergone some major changes since the 1950s, the principle of subsidiarity is and always has been a *fil conducteur* or guiding principle.[2]

[1] *Duarte Agostinho and others v Portugal and 32 Others* [GC], no 3937/1/20, 9 April 2024; *Carême v France* [GC] (dec.), no. 7189/21, 9 April 2024 and *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [GC], no. 53600/20, 9 April 2024.
[2] See *the Belgian Linguistics Case* (1968)*, Handyside v UK* (1975) and Protocol No. 15.

In *Duarte Agostinho and others v Portugal and 32 Others*, the subsidiary character of the Convention was central to the Court's rejection of the applicants' highly mediatised climate change case.[3] The non-exhaustion of available and effective domestic remedies was the key reason for the Court's decision to declare the applicants' complaints against Portugal inadmissible. As the Court explained:

> "[I]t [is] difficult to accept the applicants' vision of subsidiarity according to which the Court should rule on the issue of climate change *before* the opportunity has been given to the respondent States' courts to do so. This stands in sharp contrast to the principle of subsidiarity underpinning the Convention system as a whole, and, most specifically, the rule of exhaustion of domestic remedies [...]."[4]

Furthermore, the failure to exhaust available domestic remedies rendered it impossible for the Court to assess whether the individual applicants had attained the high threshold which the Court established in the leading case – *Klima* – in relation to victim status in the climate change context.[5]

In a system based on shared responsibilities in which our international court plays an external and subsidiary role,[6] it is only logical that national courts should *always* be the courts of first instance when effective national remedies exist.[7]

Secondly, the Convention, like many if not most of your constitutions, is a living instrument.[8] It is an instrument which is interpreted and applied by Judges who must remain within the constraints of their judicial function, which seeks practical and effective protection of human rights and which proceeds incrementally and much more prudently than some of its critics would concede.

These three characteristics were also on display in the three climate change cases in which the Court carefully delineated the limits of the Convention's relevance, which is to apply only where the rights and freedoms guaranteed therein are seriously affected by the adverse effects of climate change.

Thirdly, the key takeaway from the three rulings is the centrality of access to independent and impartial courts; in other words, we pointed to the centrality of your judicial work.

In the leading case, *Klima*, the Court found a violation of Article 6 § 1 due to the fact that there had been no avenue under Swiss law via which the association's climate change complaints could have been brought before a court.

In contrast, in the *Carême* decision, where the applicant mayor's victim status was denied, leading to the inadmissibility of his case, the Court emphasised that protection of the interests of individuals in his French municipality in relation to climate change had been ensured through successful domestic litigation by the municipality itself in accordance with national law. In other words, all roads do not and should not lead to Strasbourg.

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[3] *Duarte Agostinho and others v Portugal and 32 Others*, cited above, § 215. See also, in the climate change context, *Carême v France* [GC] (dec.), no. 7189/21, 9 April 2024, § 86. In the same vein, in relation to measures taken during the first phase of the Covid pandemic, see *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* [GC], no. 21881/20, §§ 138-146, 27 November 2023.

[4] *Duart*e, cited above, § 228.

[5] Ibid., §§ 229-230.

[6] See the Reykjavik Declaration adopted at the 4th Summit of Council of Europe Heads of State and Government, May 2023.

[7] *Duarte Agostinho,* ibid, § 215. See also President S. O'Leary, Speech at the Opening of the Judicial Seminar 2024, "Revisiting subsidiarity in the age of shared responsibility", 26th January 2024, p. 3. See also, one of my predecessors, President J.-P. Costa, *Dialogue between Judges 2010*: ""The more [national judges] do, the less the [Strasbourg] Court will have to intervene, other than to act as a final rampart, as [the Convention's] founding fathers intended."

[8] See further Bjorge, The Convention as a Living Instrument: Rooted in the Past, Looking to the Future, 36 *Human Rights Law Journal* (2017), 243-255.

Our meeting in Moldova provides us with an additional opportunity to reflect on the importance of our respective work at a time of conflict and change.

As regards the former, the Republic of Moldova is, sadly, no stranger to conflict. Many cases relating to events in Transnistria, including Russian control over the region, have been brought before the Strasbourg Court and have marked the Court's jurisprudence, most notably in relation to issues of jurisdiction under Article 1.[9] Sadly, the ongoing Russian military presence in Transnistria continues to generate applications before the Court as well as many findings of violations.[10]

The Court's case-law in relation to Moldova also highlights one of the major challenges of our times, widely discussed in this electoral year and in the run up to the European Parliament elections. I'm referring to electoral and democratic interference from States, parties or persons for whom the values underpinning the Convention constitute threats rather than ideals.[11]

In 2022, in a case called *NIT v. Moldova*, the Grand Chamber, for the first time, dealt with restrictions imposed on a broadcaster with the aim of enabling diversity in the expression of political opinion and enhancing the protection of the free-speech interests of others in the audio-visual media.[12] Those restrictions ultimately led to the broadcaster's licence being withdrawn.

When considering the obligation on broadcasters to observe the principle of political balance and pluralism, as enshrined in domestic law, the Court examined several factors with reference to Article 10 of the Convention, amongst which the domestic media context and the existence of safeguards to secure the independence of the national media regulatory authority.

As regards the former, it pointed out that, following the post-2001 election of the PCRM as the only governing party and the ensuing media situation - which had been criticised by the Court in 2009 in *Manole and Others v. Moldova*[13] - the national authorities had been under a strong positive obligation to put in place legislation ensuring the transmission of accurate and balanced news and information reflecting the full range of political opinions. The Court found no violation of Article 10 in the particular circumstances of that case.

It is a sign of the times in which we are living that this Grand Chamber judgment was quickly relied on by the General Court of the EU in a case called *RT France v. Council*, regarding the restrictive measures adopted by the EU Council in relation to audio-visual media following the invasion of Ukraine.[14] This is a further example, if one is needed, of both the Convention's reach and impact and of European judicial complementarity.

Conscious of my limited time, of the context (just touched upon) in which we are meeting and of the need to preserve the precious time allocated for your exchanges, allow me to conclude with some observations on the work of the Strasbourg court, published by two commentators immediately after the climate change rulings just referred to.

They wrote:

[9] See, for example, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII.
[10] See, most recently, *Lypovchenko and Halabudenco v. the Republic of Moldova and Russia*, nos. 40926/16 and 73942/17, 20 February 2024.
[11] See, for example, https://www.consilium.europa.eu/en/press/press-releases/2024/04/24/foreign-interference-presidency-reinforces-exchange-of-information-ahead-of-the-june-2024-european-elections/ and https://www.europarl.europa.eu/RegData/etudes/ATAG/2024/759612/EPRS_ATA(2024)759612_EN.pdf.
[12] *NIT S.R.L. v. the Republic of Moldova* [GC], no. 28470/12, 5 April 2022.
[13] No. 13936/02, 17 September 2009.
[14] Case T-125/22 *RT France v. Council*, 27 July 2022, EU:T:2022:483.

> "Rule of law backsliding puts at risk some of the basic rights enshrined in the Convention, from freedom of information and expression to judicial independence. The existential crises that now affect humanity (climate change and the rise of artificial intelligence) demand a response from a fundamental rights perspective. The challenges that the new digital economy brings about come hand in hand with the emergence of new tensions in which societal values demand complex compromises, mostly through the balancing of competing fundamental rights. In sum, the signs of the times are inevitably calling the European Court of Human Rights to play a key role in solving some of the complex challenges now faced by Europeans and the world more generally."[15]

I cite these words, I should stress, not to vaunt the work of the Strasbourg court but as a springboard to emphasise something omitted by the authors; namely your central role in the Convention system, as the primary interlocutors of the European Court of Human Rights, as the drivers of jurisprudential developments under the living instrument doctrine and as the interface between national and European law. This crucial point will be explored in the first panel which I will chair, with interventions from Presidents Grabenwarter, Harbarth and Nihoul and Vice-President Amoroso.

In addition, given the distinguished speaker from the Venice Commission who follows me on this panel, those words allow me to emphasise the importance we attribute in our judicial work to the work of the Venice Commission and other Council of Europe bodies.

We work in tandem with your national authorities and courts, but our judicial work also interacts with and is supported by the indefatigable work of the Council's various statutory and monitoring bodies, which work to tackle some of the most pressing issues of our time from gender-based violence (GREVIO), to corruption (GRECO), ill-treatment in places of detention (CPT), human trafficking (GRETA), racism (ECRI) and the protection of rule of law standards (the Venice Commission).[16]

In the *NIT* judgment just cited, for example, the work of the Venice Commission was front and centre, at a prior stage given the interaction with Moldovan authorities regarding the preparation of the national law which lay behind the contested sanctions, but it also featured in our ex-post proportionality assessment.

The location of this constitutional court exchange in Moldova also highlights another point of relevance.

Just a few weeks ago the EU celebrated the 20th anniversary of the accession of 10 Member States from Central and Eastern Europe. That anniversary event should remind us, in a candidate accession State like Moldova, of the necessary work which must be done on the road to accession and of the major bumps which may emerge post-accession in some new Member States if that work is not done well.

After 1992, the Council of Europe doubled its membership and between 1992 and 1997 the European Convention on Human Rights entered into force in all the Central and Eastern European States which later acceded to the EU.

This was no mere coincidence. With the prospect of the EU more than doubling its own membership, the "Copenhagen criteria", named after the European Council at which they were

[15] See Sarmiento, D. and Iglesias, S. "The Strasbourg Effect", EU Law Live, 14 May 2024, https://eulawlive.com/insight-the-strasbourt-effect-by-daniel-sarmiento-and-sara-iglesias-sanchez/.
[16] See the ECHR's statement on the occasion of the 75th anniversary of the Council of Europe - https://www.echr.coe.int/w/75th-anniversary-of-the-council-of-europe.

agreed, had set out the rules of future accession and subsequent membership of the EU. The criteria firmly anchored conditionality into the accession process.

New EU Member States, and indeed older ones, are required to ensure the stability of institutions guaranteeing democracy, the rule of law and human rights.[17] Membership of the Council of Europe and ratification of the European Convention are key in this regard. Why? Because in the words of one EU legal commentator:

> "it is the key task of the ECHR, among other international institutions, to keep European legal orders in check".[18]

If we have learned one thing since the 2004 accession, it is that the Copenhagen criteria are not of mere historical or pre-accession importance and interest. Mechanisms to protect democracy, fundamental rights and the rule of law remain and will remain as relevant as they are pre-EU accession. So too will the work of the specialised human rights court, and bodies such as the Venice Commission, designed to protect them.

In conclusion, the European Convention remains central to the stability of institutions guaranteeing the three pillars - democracy, the rule of law and respect for human rights – on which the Council of Europe and the European Union are based. The work of your courts within the Convention system remains key to the Strasbourg Court's ability to achieve the Convention's aims in this regard.

I thank our hosts and the organisers most warmly for this opportunity to participate in the Congress.

[17] See further C. Hillion, "The Copenhagen Criteria and their Progeny" in C. Hillion (ed.), *EU Enlargement: A Legal Approach*, Oxford, Hart Publishing, 2004 and D. Kochenov, "The ENP Conditionality: Pre-Accession Mistakes Repeated" in L. Delcour and E. Tulmets (eds.), *Pioneer Europe. Testing EU Foreign Policy in the Neighbourhood*, Baden Baden, Nomos, 2008. The economic Copenhagen criteria called for the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.
[18] See D. Kochenov, "EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?" (2015) 21 *Yearbook of European Law* 1-23, 10. See also C. Closa, D. Kochenov and J.H.H. Weiler, "Reinforcing Rule of Law Oversight in the EU" RSCAS Working Paper 2014/25 on the question whether mechanisms to deal with individual human rights violations are the best way to address rule of law deficiencies.