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

Speech at the National Institute of Justice of the Republic of Moldova

Speech by Síofra O'Leary

Chişinău, 23 May 2024

Judge Sârcu,

Director Cerbu,

Distinguished panel,

Ladies and gentlemen,

I. Introduction

I have been honoured these last few days, to represent the European Court of Human Rights on an official mission to the Republic of Moldova, as well as attending the Congress of the Conference of European Constitutional Courts.

I'm delighted that this mission concludes here, at the National Institute of Justice. This is an institution with which your national Judge, Diana Sarcû, with whom I have had the pleasure to serve at the Strasbourg court, has strong links.

The European Court of Human Rights and the National Institute of Justice strive to achieve the same objective, albeit through different means or at different stages: namely the delivery of justice with a view to safeguarding the rule of law and strengthening the protection of human rights.

Both work on the essential conditions for the preservation and development of free democratic societies.

The National Institute of Justice arose out of a profound desire to establish for the first time in the Republic of Moldova an institution responsible for ensuring the professionalism and training of judges.

Your Parliament expressed this objective clearly and sincerely when it approved the National Human Rights Action Plan more than 20 years ago, declaring that:

"Human rights are a moral and political imperative for any democratic and modern rule of law."[1]

This parliamentary declaration was also an implicit reaffirmation of the universal principles and standards of the European Convention, which had been ratified a few years previously, on 12 September 1997, making Moldova a full member of a European family united around common values.

The protection of human rights and fundamental freedoms as defined by the Convention, and defended by the Strasbourg Court, is not ensured through judgments and decisions alone. It requires constant efforts to inform and train national courts and stakeholders in the High Contracting Parties, to which your Institute, through the tasks it performs, makes an essential contribution.

The future of the project which the Republic of Moldova embraced when it ratified the Convention lies, at least in part, in your hands.

In 2022 your country applied for membership of the European Union and was granted candidate status. The formal opening of accession negotiations was announced in December 2023. Since then, your involvement in what I might term the two great European projects of the 20th and 21st centuries, has acquired a new and ambitious dimension, as I emphasised in my opening words to the Congress of the Conference of European Constitutional Courts (CECC) yesterday.

The two Europes, of the 46 and the 27, were thought of by my generation as being indestructible. However, and I say this both as a Judge with long-standing experience of both Europes and one who has served in Strasbourg during these past nine turbulent years, what they represent and seek to protect are being challenged in old and new ways.

War is not just at our doorstep, something felt more keenly in Moldova than in almost any other State, it has crossed the Dniester River with some missiles and drones falling also on Moldovan territory.

Upheaval resulting from climate change, democratic erosion and the reordering of our societies via new technologies is also not just ahead of us, but sadly in some places it is manifesting itself already in the form of a break down in social cohesion and peaceful coexistence.

In this context, the responsibility that rests on our shoulders as women and men of law - which for some of you is already the case and which for others will soon come - is immense. You will be the guardians of our common values and the architects of Europe's future.

Today, I thought it would be useful to give you a short overview of the Court's judicial work and a taste of some of the major challenges facing this venerable institution.

II. The Court's current situation

As you know, the Court provides subsidiary and external control of respect for the fundamental rights of nearly 700 million people within the jurisdiction of the Convention legal space.

In 2023, more than 38,000 applications were dealt with, of which more than 6,900 concluded in a judgment.

[1] lex.justice.md/index.php?action=view&view=doc&lang=1&id=306857.

Some 65,500 applications are currently pending before the Court.

Five States[2] account for almost three-quarters of the applications: Türkiye, with more than 23,900 cases, followed by Russia, with 9,700, Ukraine, with approximately 7,950, Romania, with 3,950, and Italy, with just over 2,550.

As regards the Republic of Moldova, which is the ninth of the 46 States in terms of applications pending, 536 applications were processed in 2023 and approximately 1160 applications are pending. It is important to note that 93% of the applications dealt with last year were declared inadmissible or struck out of the list. 24 judgments, concerning 40 applications were delivered in 2023, in all of which at least one violation was found. In addition, these judgments addressed some crucial and recurring legal issues, such as judicial independence, gender-based violence or the treatment mentally ill people, a clear sign of where further progress is needed.

The Republic of Moldova currently accounts for 1.8% of the cases pending before the Court. This represents an increase of 14% compared to 1 January 2023.

This increase, while not negligible, is not in itself excessively alarming in that it includes groups of cases on the same issues. But these figures, as well as the questions of judicial independence and fairness of proceedings which lie behind them, do mean that now is not the time to let down our guard, whether in Chișinău or in Strasbourg.

Now is not the time to lower our guard, because the Republic of Moldova's prospects for accession to the European Union and the current geopolitical context, including the tragedy playing out in this corner of Europe, a few hours' drive from here, require the Convention to be given full effect.

Faced with the terrible pressures that our common European values are enduring, both within and outwith the Convention legal space, it is our responsibility to reaffirm and safeguard the Convention's role as an instrument for peace and stability in Europe.

III. The Convention as an instrument for peace and stability in Europe

In its more than 60 years of existence, the Court has dealt with over a million applications and delivered more than 27,000 judgments and thousands of decisions.

In these judgments and decisions it has always sought to defend what the Court referred to in its admissibility decision in *Ukraine and the Netherlands v. Russia* as the "common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law".

The Convention represents the first international system of human rights protection in the world which gave individuals the right to bring a case before an international court.

For their part, the member States have the obligation to effectively protect the rights and freedoms enshrined in the Convention. They must accept the international supervision of the Court

[2] Data updated on 1 May 2024.

and respecting its authority, independence and autonomy and the binding legal force of its judgments and decisions.

The invasion of Ukraine by the Russian Federation on 24 February 2022 radically altered the system of European security and stability that had been in place since the end of the Second World War.

The invasion reminds us that peace and stability cannot be taken for granted and that our societies must never lower their guard against direct and indirect threats that undermine democratic foundations and ultimately lead to political instability and, potentially, war.

Following the 2022 invasion, the Russian Federation, which had been a member of the Council of Europe since 1996, was expelled from the organisation. The Russian authorities subsequently ceased to cooperate with our Court, including in respect of the approximately 17,000 applications that were still pending against Russia at the time, including several inter-State cases.

Following the expulsion, the Court has clarified that, pursuant to Article 58 of the Convention, it retains jurisdiction to deal with applications against Russia concerning actions and omissions that could amount to a violation of the Convention until the date on which Russia legally ceased to be a party to the Convention, that is, 16 September 2022.

This residual jurisdiction ensures that a State cannot unilaterally and retroactively ignore its obligations under international law.

As I speak, a number of international courts and bodies are examining claims in respect of the actions of Russia and its leaders in relation to Ukraine. However, for the time being, the European Court of Human Rights is the only international court to have examined allegations of human rights violations in this context and to have done so on the merits.

To give you an idea of how this is working in practice, on 13 December 2023 the Court held a hearing in the inter-State case of *Ukraine v. Russia* concerning events in Crimea from February 2014. As the Russian Government refused to participate in the adversarial proceedings, the Court heard only the Ukrainian Government and must now rule on the basis of the available evidence. As you can imagine, this is a very delicate exercise. We must be satisfied in fact and in law, to the requisite level, in relation to the allegations made. The latter are not simply accepted as such.

Another hearing will take place on 12 June in *Ukraine and the Netherlands v. Russia*, concerning military operations in Eastern Ukraine, including the invasion launched in 2022, as well as the downing of Malaysia Airlines Flight MH17 in July 2014, which killed nearly 300 people.

But inter-State cases against the Russian Federation are just the tip of the iceberg. As I said earlier, approximately 9,700 individual applications are still pending against that State, the vast majority of which are repetitive cases. The Court's aim is to deal with them as effectively as possible, processing them differently according to their complexity and the legal issues they raise.

The Court continues to examine Russian cases of particular importance from the perspective of Russia's international obligations and its own internal democratic governance. Last year, for example, the Grand Chamber delivered a judgment on the obligation to provide a form of legal

recognition for same-sex[3] couples, and a Chamber found a violation against Russia owing to the lack of an effective investigation into the 2020 poisoning of the late Aleksey Navalnyy.

In the first few months of 2024 alone, almost 1,250 applications were communicated and more than 3,770 were closed by a decision or a judgment. Indeed, from the expulsion to the present date, the Court has disposed, mainly via Committees of three Judges, of almost 8,000 applications.

The Court's judgment of 20th February of this year in the case of *Lypovchenko and Halabudenco v. the Republic of Moldova and Russia*, which concerned the arrest, conviction and detention of a man by the forces of the self-proclaimed "Moldovan Republic of Transdniestria" after he had expressed satirical opinions on that "Republic" on social media, is another example of the very concrete action we are taking, which affects your State directly[4].

War is an extreme example of the challenges we face in Europe. However, we see from the cases on our docket that no State or society, even among the founding members of the Council of Europe, is immune from pressure to deviate from the ideals underpinning the Convention. The pressure or the deviation may be slow and profound or sudden and brutal.

Repeated and vocal attacks on the separation of powers, muzzling and even subordination of the press, violent attacks on democratically elected politicians, criminalisation of the actions of political opposition and any form of countervailing power by democratically elected politicians, and challenges to the judgments and decisions of the European Court of Human Rights, all contribute to "democratic backsliding". These are very real phenomena which we cannot ignore.

IV. The Strasbourg Court as a bulwark against the threat of democratic backsliding

It would take me too long to present here the variety of situations which may be regarded in one way or another as symptoms of democratic erosion and which the Court has dealt with in its case-law.

I will therefore focus on one of the more dangerous aspects, as it weakens our defences against all the others: attacks on the independence of the judiciary and, therefore, on the very essence of the rule of law, which is the thread running through the whole Convention.

A democratic system based on the rule of law is intended to temper the authority of the State and, in essence, to protect the individual against arbitrariness. The essential condition for the proper functioning of such a system is the existence of truly independent and impartial tribunals. In recent years, there has been an increasing number of cases before the Court raising questions in this regard, in particular as regards the safeguards that should be attached to the conditions of appointment and career of and the sanctions imposed on judges and prosecutors.

To give one high profile example, in *Tuleya v. Poland*[5], concerning a Polish judge who had been subjected to disciplinary measures for opposing judicial reforms introduced by the government from 2017 onwards, the Court found a violation of Article 6 § 1 of the Convention, which guarantees the right to a fair trial before independent and impartial judges.

The *Tuleya* case is just one of the many cases in which the Court has found violations of the European Convention in the context of the Polish judicial reform. Hundreds of other cases are still

[3] *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, 17 January 2023.
[4] *Lypovchenko and Halabudenco v. the Republic of Moldova and Russia*, nos. 40926/16 and 73942/17, 20 February 2024.
[5] *Tuleya v. Poland,* nos. 21181/19 and 51751/20, 6 July 2023.

pending. But Poland is not the only country affected by such cases. Some of the cases decided recently also concern Moldova. Unfortunately, this is a trend which can be observed throughout Europe and which requires constant vigilance on the part, firstly, of competent national authorities and, secondly, of the European Court.

In the case-law of the European Court, the authority of the judiciary is a transversal concept, addressed through the prism of different provisions of the Convention, such as Articles 6 (right to a fair trial), 8 (right to respect for private and family life), 10 (freedom of expression), 11 (freedom of association) or even 18 (limitation on use of restrictions on rights). It is protected through applications lodged by different types of applicants: judges themselves, as in many of the Polish cases, parties to national judicial proceedings concerned that they did not receive independent and impartial justice handed down by tribunals established in accordance with law, or other persons or bodies having an interest in those proceedings, such as lawyers or the press.

In these and other cases it is of course not for the Court to assume the sovereign role entrusted to elected parliaments and governments, as some have incorrectly accused it of doing. Our role is not to take the place of individuals and institutions vested with sovereign power, who remain the central players in democratic life and are key to democratic health and renewal.

However, the Court does play a role, as a last resort for the type of litigants just outlined, to ensure that judicial reform – perfectly legitimate in itself – is not used as a pretext to erode respect for the Convention rights of legal subjects or the independence and impartiality of judges to whom it falls to safeguard those Convention rights.

Although I use the example of Poland here before your institution, which is the backbone of Moldovan justice, it is not my intention to single out any particular State. Rather the point is to show the extent to which the Strasbourg Court's case-law is not only an indispensable but also a very effective compass for the vital forces of all our democracies which have to navigate the turbulent waters through which we are passing.

The value of the Polish precedents is that they demonstrate the value of EU and Council of Europe membership. The last judgment on judicial independence and the rule of law to which I will refer – *Wałęsa v. Poland*[6] – marks an important turning point in the trajectory of Polish judicial reforms following the complementary action of the two European Courts.

In *Wałęsa*, the Court had recourse to the pilot-judgment procedure, the dual purpose of which is to reduce the threat to the effective functioning of the Convention system and to facilitate the fastest and most effective resolution of a malfunction affecting the protection of Convention rights in the national legal order.

At issue in the case was a final defamation judgment delivered ten years previously in favour of the applicant, a former leader of *Solidarność*. This judgment was reversed by a Chamber of the Polish Supreme Court following an appeal by the Prosecutor General. The Court in Strasbourg considered that appeal to be an abuse of judicial procedure by the Polish authorities in pursuance of their own political opinions and motives. We found a violation of Articles 6 and 8 of the Convention.

The interrelated systemic problems identified by the Court in that judgment had led to repeated violations of the fundamental principles of the rule of law, the separation of powers and the independence of the judiciary. In deciding to apply the pilot-judgment procedure, the Court stressed that the situation of continued non-compliance with the Convention had been perpetuated by recent

[6] *Wałęsa v. Poland*, no. 50849/21, 23 November 2023.

judgments of the Polish Constitutional Court, which had at the same time challenged the primacy of EU law and the binding effect of judgments of the Court of Justice of the European Union.

The *Wałęsa* judgment reminds us that, when the common values underpinning the Convention are openly called into question, values which derive from the common constitutional heritage of Europe, the two European courts may contribute directly and indirectly to their defence, to the defence of the other European system and to the defence of the national constitutional and supreme courts, which are on the front line.

It is also a judgment that points to the possibility of change. Shortly after its delivery, the Court was informed by the new Polish Government of, and I quote, their "will and determination to implement ECHR judgments, particularly those regarding the principles of the rule of law and independence of the judiciary".

I have just highlighted the complementarity of the work of the two European Courts. However, it should not be forgotten that the central players in the Convention system, which is based on the principles of subsidiarity and shared responsibility, are the national courts themselves. That is why I wish to conclude my speech by referring to a relatively recent mechanism, whose central objective is judicial dialogue, namely the advisory-opinion procedure.

V. The advisory-opinion procedure under Protocol No. 16

Protocol No. 16 entered into force almost six years ago.

The Preamble to the Protocol provides that the extension of the Court's competence to give advisory opinions is intended to enhance the interaction between the Court and national authorities. The objective is to reinforce implementation of the Convention in accordance with the principle of subsidiarity. Advisory opinions are therefore intended to provide assistance to member States in order to prevent future violations, to facilitate the correct interpretation of the Convention in national legal systems and, in this context, to improve judicial dialogue.

The mechanism allows requesting courts to express their own view on the legal issue in question and any concerns about a particular line of case-law or perceived lack of jurisprudential clarity or consistency. In the medium to long term, it was also hoped that these proceedings will contribute to reducing the number of cases pending before the Court.

Currently, 22 States have ratified the Protocol. I welcome the fact that the Republic of Moldova did so on 22 June 2023.

Seven opinions have been delivered so far at the request of: the Armenian Constitutional Court; the Armenian Court of Cassation; the Belgian *Conseil d'État*; the Finnish Supreme Court; the French *Conseil d'État*; the French Court of Cassation; and the Supreme Administrative Court of Lithuania.

Two requests for an advisory opinion were rejected: one requested by a panel of the Criminal Division of the Supreme Court of Estonia and the other by the Supreme Court of Slovakia. A request from the Romanian High Court of Cassation and Justice is currently pending.

I will not go into the details of the Protocol No. 16 procedure here, because we would need a whole session dedicated to this subject.[7] I will therefore confine myself to a general remark on the jurisprudential scope of these opinions.

In its first advisory opinion, which concerned a French case on surrogacy, the Court stressed that the mechanism is not designed to transfer the dispute from the national level to the Strasbourg Court. Rather it provides the requesting court with interpretative guidance on Convention issues when deciding the concrete case before it at a later stage.

In addition, the opinions provided by the Court are limited to matters directly connected to the proceedings pending at national level. In its first advisory opinion, therefore, the Court did not draw any more general conclusions on different types of surrogacy arrangements but focused on the specific type at issue in the case pending before the French requesting court.

As regards the impact of advisory opinions, it is important to recognise that, although they are not binding, they nevertheless have jurisprudential authority and value. After all, they are issued by the Court's highest judicial formation, the Grand Chamber, composed of 17 judges.

Advisory opinions form part of the Court's case-law, alongside its judgments and decisions, and may therefore be relied on by the Court in subsequent[8] proceedings before it

Moreover, there have been examples of the influence of advisory opinions even in States which have not yet ratified the Protocol. In its 2022 annual report, for instance, the Swedish Supreme Court cited a surrogacy case that had been brought before it and in which it had referred to our first advisory opinion in the French case. The Swedish Supreme Court has recognised that advisory opinions can be considered as having "significant value as a legal source in relation to the interpretation" of the Convention.

Other courts, such as the Italian Constitutional Court and the Italian Court of Cassation, have followed the same path and we are looking forward to the first request, in a suitable case, for an advisory opinion from your country because, I repeat, this is an essential and extremely effective aspect of judicial dialogue.

VI. Conclusion

Allow me to conclude by saying that while, as you have seen, the challenges facing the European system for the protection of human rights are numerous and complex, the European Court of Human Rights continues to uphold its duty to defend democracy, human rights and the rule of law. They are the bedrock of the Convention system and on which the community of European States within the Council of Europe is based.

The world is experiencing difficult times and we, as judges, prosecutors, lawyers or other legal professionals, have a duty to keep democracy on course by administering independent, impartial and fair justice.

The judges trained in this Institute are the heralds of these principles, the guardians of these values, the sentinels at the top of the ramparts protecting our democracies. The Strasbourg Court is

[7] A seminar was held at the Court on 13 October 2023, the proceedings of which are available here: Seminar to mark the 5th anniversary of the entry into force of Protocol No. 16 - ECHR - ECHR / ECHR (coe.int).
[8] Protocol No. 16, Explanatory Report, § 27.

here to support you and your work, thanks to its unique experience and through constant and open judicial dialogue.

We have a duty to preserve the legacy of the Convention system for future generations and, as far as we can, to strengthen it.

Thank you for your attention today and for this wonderful invitation to your beautiful country.