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

Moldova and the European Convention on Human Rights:
Insights from Strasbourg on the 20th anniversary of ratification
Speech by Mr Guido Raimondi,
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Mr President of the Constitutional Court,
Mr Speaker,
Minister,
Ladies and Gentlemen,

It is a pleasure indeed to be with you this morning. I am very grateful to my hosts for organising this conference to mark a significant anniversary – 20 years – of an historic event for the Republic of Moldova: ratification of the European Convention on Human Rights.

This country was part of the great extension of the scope of the Convention that came about in the last decade of the previous century. Its first judge elected to the Court, who is of course presiding at this event this morning, arrived at Strasbourg while it was still the "old" Court that was functioning.

President Panțîru, you were the colleague at that time of some of the great figures of Strasbourg – I think of the former President Bernhardt, of Judge Pettiti, of Judge Valticos, of Judge Russo, and so on.

And you were personally and directly involved in the historic transition of the Convention system in November 1998, the metamorphosis from what was (essentially) the original institutional architecture into the European Court as we know it today. Despite the many and various challenges that have faced the European human rights system since then, I want to recall that remarkable moment in European history.

It is often said that the European Convention on Human Rights forms part of the post-War settlement in Europe. I would add that the Convention system, as it was reformed and strengthened by Protocol No. 11, which was negotiated at exactly the time when the new democracies were entering the Convention system and adopting new constitutional orders, reflects a post-Cold War settlement in Europe. That settlement embraced the fundamentals of the Convention as they are proclaimed in its Preamble: the protection of human rights, a commitment to the principles of democratic governance, and respect for the rule of law.

As jurists, we know that these are not merely ornamental words or aspirational sentiments.
Instead, they form the inner core of all of the rights and the safeguards of the Convention. Thus, they guide the judge, whether it is the European judge or the national judge, in the task of interpreting and applying the law of human rights. To be sure, these values have been tested, challenged and defied in different parts of Europe, over the period of two decades that we have in mind at this conference. And the challenges that are in view at the present time are great and many. I have twice used the word "settlement" when speaking of the Convention, but I must also recognise that the effectiveness and the authority of the European system are not yet settled. This demands of us, national and European authorities alike, constant vigilance and a great

determination to uphold the fundamental rights of all those who are under the protection of the Convention.

As reflected in the title of my speech today, the insights that I wish to share with you come from the perspective of Strasbourg. I will speak of the particular position of Moldova as a State Party to the Convention. And from this I will move to more general remarks about the European Court.

Let me reassure you before I go any further that I will not attempt summarise or to survey the whole body of Convention case-law regarding Moldova which has come into being since the first judgment in the case *Metropolitan Church of Bessarabia*, of 13 December 2001.
There have been about 350 judgments since then, and many thousands of individual applications that have been examined in Strasbourg. From these data it can already be said of Moldova that engagement with the Convention mechanism has been intense, and so it remains up to the present time.

Here I will make a first reference to subsidiarity. The implementation of the Convention depends not only on international institutions and procedures, although these are of course vital in ensuring that human rights are ultimately vindicated. Under the principle of subsidiarity, the greater part of the responsibility for enforcing the Convention should rest with the competent domestic authorities. The role of the judicial authorities, at every level and in every branch of the law, is especially important. That is not to minimise the role of the other branches of Government, which of course need to respect the obligations that devolve to them from the Convention. But the domestic courts are uniquely well-placed to ensure respect for rights, to prevent – or to put an end to – breaches, and to apply remedial measures. I will come back to this important issue a little later on.

At this stage, my comment is that, in relation to Moldova, what we see is that the conditions have not yet emerged that would see the European Court move into the subsidiary role.

The point has often been made that in the Court's formative years, when there was a relatively small group of the western democracies subject to its jurisdiction, its task was often limited to examining complaints that did not raise life and death issues, or gross violations of human dignity, or cases of flagrant injustice. That ceased to be true from the 1990s onwards. That is when the full spectrum of human rights violations appeared on the Strasbourg radar. The most serious, the most grievous cases were lodged with the Court:

- loss of life in difference circumstances, and disappearances (Article 2)
- torture and inhuman treatment (Article 3)
- Systematic violations of individual liberty (Article 5)

In this category of cases we find many judgments concerning Moldova.

The articles I have just mentioned are the "first rank" of fundamental rights. They protect the life, the integrity and the physical security of the individual. In view of their obvious and intrinsic importance, cases that raise these issues are treated by the Court as its highest, most urgent priorities. They are the cases of strongest concern across Europe. A common example of this, to be seen in various European States, and also in Moldova, is the violation of Article 3 due to very bad prison conditions, so bad as to undermine the very dignity of the human being.
To my mind, this represents an especially grave violation of human rights in today's Europe. It is a problem that is both chronic and structural in certain countries. By way of response, the Court has developed its judicial practice by using the pilot judgment procedure. It has taken this approach to the problem in Bulgaria, Hungary, Italy, Poland and Russia. A second approach, known as that of

the leading judgment, has been taken in relation to Belgium, Greece, Romania, Slovenia and, as you know, to the Republic of Moldova. I refer here to the *Shishanov* judgment, given in September 2015.

This development of judicial practice is one of the more significant evolutions in Convention jurisprudence of these past 20 years. From being a novelty about 10 or 12 years ago, it has grown to become more frequent. Yet it must stay within the limits set out in the Convention itself. It sets a balance between the judicial authority, which establishes the violation, and the power of the State to choose the means to execute such a judgment, which is carried out under the collective supervision of the Committee of Ministers. The point here is that there are clear limits on the power of the European Court to deal with systemic problems like deplorable conditions of detention. I refer again to subsidiarity, for one can say that where the role of the European Court reaches its limit, that is the point of entry into the reserved domain of the national authorities.

For the Moldovan problem of unacceptable conditions of detention, the Court's judgment spells out the measures that need to be taken, rapidly, to address the situation in a general and systematic way. There is now a strong expectation, shared by the Convention organs, that the national authorities will act in accordance with the detailed indications given in the judgment. The principle of subsidiarity requires, in this situation, that preventive and compensatory remedies be put in place, and that they measure up to the relevant Convention standards regarding accessibility, effectiveness, adequacy and procedural fairness.

Moreover, there is a part of the *Shishanov* judgment that I would draw attention to. It is the reference to the explanatory decision of the Plenary Assembly of the Supreme Court of Justice, of 24 December 2012. The Supreme Court set out the approach for the domestic courts to follow when considering complaints of violation of Articles 3, 5 and 8 of the Convention. The European Court took note of the explanatory decision "with satisfaction", commenting that it took on board most of the relevant principles of Convention case-law. While the Chamber offered a correction on one particular aspect, the point I wish to make is that such guidance addressed to the national judge from the top of the judicial hierarchy points towards subsidiarity in a very concrete form. When the European and the national level act in unison in this way, the judicial protection of human rights and human dignity should be all the more effective.

I note here the superior status in the Moldovan legal order of international human rights treaties, as provided for in Article 4 of the Constitution, giving precedence to international norms in case of conflict with provisions of domestic law.

Furthermore, I have been able, thanks to the various translated materials that are available on the website of your court, President Pantîru, to inform myself about the growing activity of the Constitutional Court in the sphere of human rights. You have published there a recent comparative report of the jurisprudence of your court and the European Court, which is very interesting for the external reader. As noted by the authors of the report, while your system of constitutional justice does not include an individual complaint mechanism (as in the well-known examples of Germany or Spain), proceedings that involve human rights have grown to account for over 70% of decided cases, and making your court a "genuine human rights tribunal".

This leads me to make a few remarks, from the external perspective and under the control of the eminent constitutional scholars present, on the English-language version Judgment No. 2 of 9 February 2016 on the exception of unconstitutionality.

Naturally, my eye is drawn to the reference by the Constitutional Court to subsidiarity in the context of the Convention, and also the reference to the conference declarations of Interlaken, Izmir and Brighton.

Likewise I take note of the phrase "first constitutional judge". It is a resonant form of words that can be faithfully adapted, I believe, to the context of the Convention. I will return to this later on.

I catch a glimpse of the "spirit of Strasbourg" in the reference to the Constitutional Court's evolving interpretation of the provisions that govern its legal powers, consistent with the goal of improving constitutional democracy in this State.

Another feature that draws my attention, and is familiar to me, is the use of selected international texts and reference to the constitutional systems of other European States. That is a methodology which, in relation to the Convention, has been validated by many years of consistent Strasbourg practice. It is the hallmark of a dynamic jurisprudence.

From the comparative report, which comments on this judgment in very positive terms, I note the significant number of times that the procedure was used in its first year – as many as 150 such cases. I note as well the speed with which the Constitutional Court has examined exceptions of unconstitutionality, taking on average 2-3 months to conduct its examination of the matter.

From my perspective as a European judge, this legal development is of great interest. I hope to see its preventive potential fully realised – that is to say, preventing breaches of constitutional rights and the analogous Convention rights within the limits of Article 135 of the Constitution.

Allow me to make reference to a second judgment of the Constitutional Court (Judgment No. 3 of 23 February 2016), also included in the comparative report, and which the authors set side by side with a judgment of the European Court (*Savca v. Moldova,* of 15 March 2016). It is indeed striking to observe the similar analysis of the two courts on the interpretation of Article 25 of the Constitution, guaranteeing the individual freedom and security of the person. The reasoning of the Constitutional Court in this case is particularly rich in references to the Convention case-law, and the direct applicability of the Convention standards by the domestic courts is clearly stated.

I would further comment that the position adopted by the Constitutional Court in this case not only coincided with the *Savca* judgment, but it also anticipated the judgment that was given a few months later by the Grand Chamber of the European Court in *Buzadji v. Moldova*. The complaint in that case arose out of a recurring problem in Moldova, extensive – or more exactly – excessive use of detention on remand.

The prevalence of this practice has been shown by statistics that have been provided to the Court, according to which the rate of detention in criminal investigations is as high as 82%. In numerous cases, our Court has found a violation of Article 5.

In this respect the *Buzadji* case was typical. The applicant brought argued that he was kept in pre-trial detention and under house arrest without the necessary strong justification. The complaint was upheld. The Court found that in the different decisions taken by the domestic courts it had certainly not been convincingly demonstrated that it was necessary to restrict the applicant's liberty during the criminal investigation.

However, beyond the specific facts of the case, the *Buzadji* judgment is of general importance for the interpretation of Article 5. Our Court considered it necessary to reconsider and to clarify the established case-law about the justification of detention on remand. The traditional approach in

our case-law was to accept that the first phase of detention could be justified by a reasonable suspicion against the person. After a certain lapse of time, other relevant and sufficient reasons must be shown if the detention is to remain compatible with Article 5. The time-frame for shifting from the first phase to the second phase was not specified, however. The *Buzadji* judgment acknowledges that this brought vagueness into this fundamental matter.
Using a comparative law approach, the Grand Chamber identified a stricter standard applied by the great majority of 31 European States surveyed. It decided to simplify, to clarify and to bring certainty to the issue. It did this by synchronising the guarantees of both limbs of Article 5 § 3. What is now required under the Convention is that from the outset of the person's detention there must be a reasonable suspicion but also, and already, relevant and sufficient reason to keep the person in detention.

Setting this judgment side by side with the judgment of 23 February 2016, the convergence is very clear, as is the determination of the constitutional judge to ensure robust and effective protection of individual liberty.

We can regard this as a good example of the one of the guiding principles of the Convention reform process, and that is shared responsibility. I think that the term is an excellent way to further explain the meaning of subsidiarity, because it places each arm of the Convention – the national and the international – in its rightful place, and situates them in a constructive mutual relationship. The benefits of this, for the effective protection of human rights, are perfectly clear to see. After all, it is the domestic judge who is the natural Convention judge, or – and I adapt the phrase from Judgment No. 2, the "first Convention judge". They have the opportunity and the power to act, at the right time and place, to uphold Convention rights.
An important means to make a reality of shared responsibility is through a continuing judicial dialogue between national courts and the European Court. In Strasbourg we regard this interaction with our domestic counterparts as both natural and necessary. The European Court is attentive to the manner in which national courts approach the Convention. Their analysis of the relevant principles of the Strasbourg case-law – which may well be a critical analysis – receives close attention when the case is later examined at the European level. Moreover, where the margin of appreciation is relevant, the reasoning of the national judge will be at the centre of the analysis that is done by the European Court.

In a system that has just two official languages, additional efforts are necessary to make the case-law linguistically accessible. In this respect, I wish to express my great appreciation to the Supreme Court of Justice for its work of preparing Romanian-language summaries of Strasbourg judgments. The Supreme Court has produced a huge number of these summaries, and reacts very quickly to new cases. These translations have been integrated in our HUDOC database, and I can tell you that Romanian is presently the second of the non-official languages in the database. This work is of the greatest practical value for making the Convention accessible to the whole legal community in this country (and in Romania too, of course).

Let me mention at this point a most remarkable fact. It is the presence of two former members of the European Court of Human Rights in positions of the highest level of judicial authority in Moldova: Tudor Panțîru, President of the Constitutional Court, and Mihai Poalelungi, now in his second term as the President at the Supreme Court of Justice. I think it should be regarded as an example of best practice that other States would do well to take note of. What better way is there to implant great human rights expertise in the national system?

Another point I want to mention here is how pleased I am that both of these courts have recently become members of the Superior Courts' Network. The Network was created at the suggestion of domestic courts for a structure to provide concrete assistance to Supreme Courts and

Constitutional Courts in terms of access to Convention case-law. In a very short space of time, the network has grown to include the majority of Convention States; there are now 61 courts from 33 States, and several more courts are in the process of joining. It is an arrangement of mutual benefit. In return for proving information about Convention case-law, the European Court receives information from the member courts that it uses for comparative surveys. So you have a two-way system of information sharing that brings practical benefits to all the members.

Judicial dialogue and co-operation will of course move to a new level with Protocol No. 16 to the Convention. The advisory opinion procedure has been conceived as a means to further develop subsidiarity in the Convention system. I do not think there is any need for me to enter into the details of the procedure now. What I will say, however, is that the European Court has made all the necessary preparations as we await the ten ratifications of the Protocol, which will bring it into effect shortly afterwards. I can tell you that the Court is determined to ensure that this new mechanism adds value in terms of implementing the Convention and protecting human rights. We regard this as a major priority for our institution in the coming years. I am delighted to note that Moldova has begun its path to accepting the new procedure, having signed the Protocol in March of this year. There have been 8 ratifications so far, so we are getting very close to seeing the procedure become a reality. I look forward to the day that the highest courts of this country can turn directly to the European Court for guidance on questions of Convention law arising in out of cases before them.

It is with this promising prospect in view that I draw my remarks to a close. I express my gratitude once again, Mr President, for the opportunity to participate in today's proceedings and to share with you some insights from Strasbourg on the 20th anniversary of Moldova's ratification of the Convention.

Thank you for your attention.