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

Exchange of views with GRECO

Speech by Síofra O'Leary

8 June 2023

President Mrčela,
Executive Secretary Juncher,
Honourable members of GRECO,

It is both an honour and a privilege to have this exchange of views with you this morning in my capacity as President of the European Court of Human Rights.

I am happy to follow in my predecessors' footsteps and participate in this important and useful exchange of views between the Court and GRECO. I am accompanied here by Judges Georgios Serghides and Peeter Roosma, whom I thank for their presence.

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The need for regular and fruitful dialogue between the Court and the Council of Europe's institutions and bodies is self-evident.

The Court does not operate in an institutional vacuum, detached from the other areas of work and activity of the Council of Europe. As recently stressed by the Plenary Court in its Memorandum for the 4th Summit of the Council of Europe held last month in Reykjavik, "a strong Court ensures a strong Council of Europe, and vice versa." Council of Europe institutions play a critical role in the overall effectiveness of our Convention system.[1]

The interaction between the activities of the Council of Europe and the judicial work carried out by its independent and autonomous Court can be best observed in practice. The Court's role under Article 19 of the Convention is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. This means in practice dealing with very specific areas of law when interpreting and defining Convention rights and freedoms. In a number of judgments and decisions the Court has therefore referred, when interpreting the Convention, to instruments and standards of Council of Europe organs, including supervisory mechanisms and expert bodies.[2]

Furthermore, as you know, the Court has limited – in practice, very limited – investigative capacities and powers. The process before us is adversarial and we rely on the submissions of parties and third parties and on the decisions of national courts, effective domestic remedies having been exhausted. The work of the Council of Europe's institutions, and in particular of its supervisory mechanisms and expert bodies, is one critical way of keeping the Court informed of the situation in

[1] Memorandum of the European Court of Human Rights, 20 March 2023, para 2.
[2] *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 74-75, ECHR 2008; Glass, The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents, 17(1) HRLR (2017), 97-125.

the field. One could say that the Council of Europe's supervisory mechanisms and expert bodies are the Court's "eyes and ears" as regards the general state of affairs in the legal orders of the Contracting Parties to the Convention.

In this context, it is of course important to be clear about one thing: the institutional interdependence between the Court and the Council of Europe means that in its interpretation and application of the Convention the Court is not bound to follow the developing instruments and standards, or monitoring findings, of the Council of Europe bodies and institutions. As the Court has explained, there is a difference between the contents of the provisions of the Convention and other international instruments and a difference between the role of the Court and that of other advisory bodies.[3] The Court is responsible for judicial interpretation and application in individual cases of the rights and freedoms set out in the Convention, while other Council of Europe institutions and bodies develop general standards in their areas of expertise. These general standards may aim at providing a degree of protection greater than that upheld by the Court when deciding individual cases.[4] This is well explained in a case called *Muršić v. Croatia,* referring to the work of the CPT on prison conditions.

There is therefore a fine line to be drawn and observed when discussing the respective roles of the Court and of the Council of Europe's supervisory mechanisms and expert bodies, whose work is, as I noted earlier, of great importance for the judicial work of the Court.

The relationship between GRECO and the Court is no exception in this respect. I will return shortly to specific examples in which our different work interacts, with due regard for our respective roles.

Allow me for now to say that I am particularly pleased that there is an institutionalised form of cooperation between the Court's Registry and the GRECO Secretariat which allows for an enhanced dialogue and exchange of information between the two bodies. I note some concrete benefits from this institutional cooperation. The GRECO Newsletter for April 2023 contained a list of the Court's judgments of particular interest to the GRECO community[5] and several of GRECO's country-specific reports have been disseminated to the relevant case-processing teams within the Court. I can only encourage this institutional cooperation to continue.

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Is there a link between corruption and the enjoyment of human rights? The answer is perhaps intuitively self-evident but, as you will know, the legal standards affirming the fact that corruption adversely affects the enjoyment of human rights are still developing.[6]

The difficulty perhaps lies in the fact that there is no universally agreed definition of corruption and that the assumed "link" between corruption and human rights is not always easy to demonstrate in a court of law.[7] However, if the usually cited approach to corruption as "the abuse of (entrusted) power for private gain"[8] is taken, and if "corruption" is understood through the diversity of forms in which it materialises, then it becomes clearer that corruption can lead to many violations of human rights, including those recognised under the Convention. The scourge of corruption is also

[3] *Caamaño Valle v. Spain*, no. 43564/17, § 54, 11 May 2021.
[4] *Muršić v. Croatia* [GC], no. 7334/13, §§ 112-113, 20 October 2016.
[5] GRECO Newsletter (sendibm1.com).
[6] European Parliament, Fighting corruption globally: The link with human rights, 2021; see also Oslo Statement on Corruption involving Vast Quantities of Assets, 14 June 2019, Recommendation 31.
[7] Peters, Corruption as a Violation of International Human Rights, 29(4) EJIL (2018), 1251-1287.
[8] EP, Fighting corruption globally: The link with human rights.

a contributor – in some States a major contributor – to democratic erosion and rule of law backsliding.

Global initiatives such as the 2021 Resolution of the UN General Assembly on measures to prevent and combat corruption are particularly important as they clearly affirm "the negative impact that all forms of corruption" have on "the enjoyment of all human rights".[9] The same is true for the activities of the UN Human Rights Council[10] and the UN High Commissioner for Human Rights which insist on a human rights-based approach to corruption and which point to many aspects of the effective enjoyment of human rights being affected by corruption.[11]

In her statement on corruption, Commissioner Mijatović has usefully reminded us that corruption undermines both human rights and the rule of law,[12] and is a "serious threat" to the administration of justice, referring to the case-law of the European Court in this regard. In particular, she cited the case of *Kövesi v. Romania,* where the Court found several violations of the Convention (not least Articles 6 and 10) in relation to the removal of the chief of the national anticorruption prosecutor's office before the end of her mandate, following her criticism of legislative reforms undermining the capacity of her department to fight against corruption.[13]

The Venice Commission in its Rule of Law Checklist has also linked issues of corruption with the independence and impartiality of the judiciary and the proper operation of prosecution services. Moreover, the Venice Commission has categorised corruption and conflict of interests as examples of "particular challenges to the Rule of Law".[14] These remarks are also pertinent as regards the enjoyment of Convention rights given that the principle of the rule of law is inherent in the system of protection established by the Convention and the Protocols thereto, and is expressly mentioned in the Preamble to the Convention.[15]

This brings me to another manifestation of the link between corruption and human rights. In a joint statement issued by Mykola Gnatovskyy, the then President of the CPT and now a Judge at the Court, and Mr Mrčela, the President of GRECO, a link was traced between corruption and torture or inhuman or degrading treatment flowing from, as the statement indicates, "growing evidence" gathered in the context of the respective bodies' monitoring work. This link is logical intuitively but not necessarily legally obvious. They called on member States to take decisive action to implement the recommendations of the CPT and GRECO fully and effectively in order to "eradicate these threats to democracy, human rights and the rule of law."[16]

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Against this background and the growing recognition of the link between corruption and human rights, I return to my opening theme, namely the way in which the work of the Court and GRECO interact.

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[9] Resolution A/RES/S-32/1, Our common commitment to effectively addressing challenges and implementing measures to prevent and combat corruption and strengthen international cooperation, 2 June 2021.

[10] Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, A/HRC/28/73, 2015.

[11] Corruption and human rights | OHCHR.

[12] Corruption undermines human rights and the rule of law - Commissioner for Human Rights (coe.int).

[13] *Kövesi v. Romania*, no. 3594/19, 5 May 2020.

[14] Venice Commission, Rule of law Checklist.

[15] *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 211, 1 December 2020.

[16] Joint statement by Mykola Gnatovskyy, President of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), and Marin Mrčela, President of the Council of Europe's Group of States against Corruption (GRECO) on the occasion of the 40th session of the United Nations Human Rights Council (25 February – 22 March 2019), 25 February 2019.

In a series of cases concerning judicial reforms in the members States, when addressing the risks which these reforms represent to the independence and impartiality of the judiciary – and thus to the rule of law – the Court referred to GRECO standards and evaluations. Let me give some examples.

In *Guðmundur Andri Ástráðsson v. Iceland*[17] the applicant complained that the participation in criminal proceedings of a judge, whose appointment had been vitiated by undue executive discretion, violated his right to a tribunal established by law guaranteed under Article 6 § 1 of the Convention. Referring, *inter alia*, to the GRECO report on the Fourth Evaluation Report on Iceland[18] assessing the developments in domestic law concerning the appointment of judges, the Grand Chamber found that there had been a grave breach of a fundamental rule of the domestic procedure for appointing judges in the case at issue.

This ultimately, in the absence of an effective domestic review and remedy, resulted in the finding of a violation of Article 6 § 1 of the Convention. The Court of Appeal which had heard the applicant's appeal was not a tribunal established by law.

In *Grzęda v. Poland*[19] the Court (again the Grand Chamber) dealt with an aspect of the recent judicial reforms in Poland concerning premature termination *ex lege*, after legislative reform, of a serving judge's mandate as member of the National Council of the Judiciary (NCJ).

The applicant judge complained under Article 6 § 1 of the Convention that he had not had effective judicial review of the termination of his mandate. In its assessment of the complaint, the Court noted the fact that GRECO had decided to apply an *ad hoc* procedure in respect of Poland which could be triggered in exceptional circumstances, such as when GRECO received reliable information concerning institutional reforms, legislative initiatives or procedural changes that could result in serious violations of anti-corruption standards of the Council of Europe.[20]

The Court also cited extensively extracts from the Addendum to the Fourth Round Evaluation Report on Poland concerning the reform of the NCJ and its deficiencies from the perspective of the relevant anti-corruption standards, wherein GRECO criticised the simultaneous dismissal of the judicial members of the NCJ and the fact that it was not possible for judicial members to challenge the dismissals.[21]

The Court noted, however, that GRECO had found in its 2019 and 2021 assessments that its key recommendation concerning the NCJ[22] had not been implemented.[23] It agreed with the findings of GRECO concerning the premature dismissal of the judicial members of the NCJ, which were also consistent with the findings of various other international bodies.[24]

Against this background, and on the facts of the case at issue, the Grand Chamber found a violation of Article 6 § 1 of the Convention due to the fact that the applicant judge did not have access to a judicial review concerning his dismissal.

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[17] *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, §§ 128 and 257, 1 December 2020.
[18] Greco Eval IV Rep (2012)8E), 28 March 2013.
[19] *Grzęda v. Poland* [GC], no. 43572/18, §§ 140-143 and 279-284, 15 March 2022.
[20] GRECO decided at its 78th Plenary Meeting (4-8 December 2017) to apply an *ad hoc* procedure in respect of Poland.
[21] Greco-AdHocRep(2018)3, 18-22 June 2018.
[22] That the provisions on the election of judges to the NCJ be amended, to ensure that at least half of the members of the NCJ are judges elected by their peers.
[23] GrecoRC4(2019)23, 2-6 December 2019; GrecoRC4(2021)18, 20-22 September 2021
[24] The Parliamentary Assembly of the Council of Europe; the Council of Europe Commissioner for Human Rights; the Venice Commission; the CCJE; GRECO; the OSCE/ODIHR; the United Nations Special Rapporteur on the Independence of Judges and Lawyers; and the European Parliament and the European Commission.

Similarly, the Court referred to the mentioned GRECO *ad hoc* procedure concerning Poland in several other cases against that State relating to the appointment of judges in the context of the recent legislative reforms. These cases concerned, in particular, manifest irregularities in the appointment of judges to: the newly established Supreme Court's Disciplinary Chamber (*Reczkowicz v. Poland*),[25] the newly established Supreme Court's Chamber of Extraordinary Review and Public Affairs (*Dolińska-Ficek and Ozimek v. Poland*),[26] and the Supreme Court's Civil Chamber (*Advance Pharma sp. z o.o v. Poland*).[27]

Similar to the cited examples, the Court was guided by GRECO's standards when examining cases concerning comprehensive judicial reform in Albania and, more specifically, the vetting of judges. In the leading case of *Xhoxhaj v. Albania*,[28] when examining under Article 8 the proportionality of the applicant's dismissal from office on the basis of the newly introduced vetting procedure, the Court noted that GRECO had highlighted the pervasive extent of corruption in the judiciary in its reports concerning Albania since 2002. In that case, the Court found no violation of Article 8.[29]

The Court has relied on GRECO's standards in some other areas as well. For instance, in *Samoylova v. Russia*,[30] concerning disclosure of the applicant's personal data by a television report on the criminal case against her husband (who was a retired prosecutor), the Court referred to GRECO's General Activity Report for 2019 relating to financial disclosure obligations as a tool of transparency which, according to these standards, should encompass information on spouses and dependent family members.[31] Under Article 8, the Court differentiated between the disclosure of the applicant's declared income data (in respect of which it found no violation) and the disclosure of the applicant's address, tax ID number and interior house images (in respect of which it found a violation of that provision).

In *Gogitidze and Others v. Georgia*,[32] one of the leading cases on the measures of civil *in rem* confiscation of property in the context of the fight against corruption, the Court had regard to GRECO's evaluation of the measures introduced in the domestic legal order of Georgia allowing for such confiscation. On the facts of the case, the Court considered that having regard to the Georgian authorities' wide margin of appreciation in their pursuit of the policy designed to combat corruption in the public service, and to the fact that the domestic courts had afforded the applicants a reasonable opportunity of putting their case through adversarial proceedings, the requisite fair balance between the general interest of the community and the requirements of the protection of the individual's fundamental rights had not been upset. The Court therefore found no violation of the Convention.

While you certainly know better than I the practice of GRECO monitoring and evaluation, allow me just to note at the end of my intervention that in its work GRECO often refers to the cases before the Court and the Court's case-law.

Thus, for instance, in the recent Interim Compliance Report of the Fourth Evaluation Round on the Republic of Moldova, GRECO stressed the need to ensure that the anti-corruption measures

[25] *Reczkowicz v. Poland*, no. 43447/19, § 146, 22 July 2021.
[26] *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, §§ 174-177, 8 November 2021.
[27] *Advance Pharma sp. z o.o v. Poland*, no. 1469/20, §§ 188-191, 3 February 2022.
[28] *Xhoxhaj v. Albania*, no. 15227/19, § 391, 9 February 2021.
[29] See also, *Sevdari v. Albania*, no. 40662/19, § 78, 13 December 2022, where the Court found a violation of Article 8 in relation to the dismissal.
[30] *Samoylova v. Russia*, no. 49108/11, §§ 32-33, 14 December 2021.
[31] GRECO 2019 General Activity Report.
[32] *Gogitidze and Others v. Georgia*, no. 36862/05, 12 May 2015.

in the judiciary (including vetting) comply with the requirements of the Convention and the Court's case-law.[33]

Similarly, in its Fifth Evaluation Round Report on Malta, GRECO underlined that the necessary use of special investigative techniques (such as wiretaps and other similar measures) in the investigation of corruption offences must be done in compliance with the Court's case-law.[34]

In the Second Compliance Report of Fourth Evaluation Round on Germany, GRECO disagreed with a domestic legal analysis concerning the effects on Convention rights of the duty for members of the Bundestag to disclose significant assets and significant liabilities. GRECO cited *Wypych v. Poland*,[35] where the Court had considered that the obligation on local councillors to disclose their financial and property situation to the public did not run counter to the requirements of Article 8 of the Convention.

I am also pleased to note that when conducting its evaluation of the member States' legal systems, GRECO is attentive to noting any pending or adopted cases against the State concerned before the Court.[36] This is important as it shows the connection between the case-law of the Court and its practical effect on the situation in the member States concerned from the perspective of the relevant anti-corruption measures and policies.

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President Mrčela,

Coming to the end of my intervention today I can only second the statement you have made in the introduction to GRECO's 22nd Activity Report (2021)[37] where you stressed that:

"[W]e must never relent when it comes to preventing and fighting corruption. The reasons are directly linked to the possibility of everyone effectively enjoying the fundamental principles on which the Council of Europe is built, and which are fleshed out in the European Convention on Human Rights and the case law of the European Court of Human Rights. Corruption undermines the rule of law and the protection of human rights. It diverts funds from their intended purposes and erodes trust in democratic institutions. Corruption makes our societies less fair and less equal."

Indeed, I would only add to this statement that the constructive and complementary interaction between the work of GRECO and the Court shows the harmonious functioning of the overall Council of Europe system for the benefit of the development and protection of human rights, democracy and the rule of law in our member States.

I thank you for your attention.

[33] GrecoRC4(2021)22, 09/02/2022, para 42.
[34] See GrecoRC5-2021-5, 24/05/2022, paras 68-70.
[35] *Wypych v. Poland* (dec.), no. 2428/05, 25 October 2005.
[36] See, for instance, Second Interim Compliance Report including Follow-Up To The Ad Hoc (Rule 34) Report Romania, 05/05/2021, footnote 5, referring to *Kövesi v. Romania*; Second Interim Compliance Report Turkey, 18/03/2021, para 115, referring to *Kavala v. Turkey* and *Selahattin Demirtaş No. 2 v. Turkey*; Fifth evaluation round Report Iceland, 12/04/2018, referring in footnote 7 to a pending case before the Court.
[37] GRECO 22nd Activity Report (2021).