

COUR EUROPÉENNE DES DROITS DE L'HOMME

Exchange of views with GRECO

Speech by Síofra O'Leary 20 June 2024

President Mrčela, Deputy Secretary General, Honourable members of GRECO,

It is a pleasure to address you again one year since our last exchange of views. It's also a pleasure to participate in this important milestone – the 25th Anniversary since GRECO's creation in May 1999.

This is my last address to you as President of the European Court of Human Rights and indeed one of my last public interventions in that capacity. I could not have imagined a better place or better context for such an intervention. This is because of the Court's, and my personal, profound attachment to the values of integrity, ethics, transparency and accountability, which are both the cornerstones and the objects of your work.

Anniversaries are moments to look back at what has been achieved, the opportunities which have been seised and perhaps missed, and to clearly chart the road ahead.

We certainly have reasons to celebrate but also a lot to reflect on. On the occasion of the Council of Europe's 75th Anniversary, I stressed the need:

"to reflect on the vital role which [the] organisation must continue to play in maintaining high standards of democracy, human rights and the rule of law across the 46 member States. [Urging us all] not [to] shy away from any necessary reforms."

GRECO has a lot to be proud of. From the initial 17 founding members,² your membership has constantly grown and now consists of 48 members, including States outside the Council of Europe area.³ This makes GRECO one of the landmark bodies of the Council of Europe whose relevance and contribution to the development of international anti-corruption standards and transparent democratic governance are beyond compare.

³ Kazakhstan and the United States of America. Belarus also acceded to GRECO in 2011 but its representation is limited as per the Committee of Ministers <u>decision</u> CM/Del/Dec(2022)1429/2.5, 17 March 2022. Russian Federation ceased to be a member of GRECO with effect from 1 July 2023 following denunciation.



¹ See the Press release <u>ECHR 121 (2024)</u>, 17.05.2024.

² Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Lithuania, Luxembourg, Romania, Slovakia, Slovenia, Spain and Sweden.

In your 25 years of existence, you have launched 5 evaluation rounds⁴ and are now preparing to launch the 6th.⁵ You have conducted *ad hoc* procedures in exceptional circumstances, addressing institutional and structural threats to anti-corruption standards in four member States.⁶ The key findings of your successive 24 annual reports have mapped the anti-corruption failures and developments within the member States. They have guided the work of other bodies and institutions in the area, including that of the Court.⁷ Your anti-corruption outreach has included the organisation and participation in many high-level conferences and side events.⁸ You also contributed with an assessment and advice on the Parliamentary Assembly's integrity framework at a time when the Assembly was going through a serious internal crisis.⁹

These are remarkable achievements. I am sure your anniversary session will offer an excellent opportunity for further reflection on how these achievements can be capitalised and GRECO's work made even more efficient and impactful for the benefit of the rule of law, protection of human rights, and the functioning of stable democracies across the Council of Europe legal space.

In our exchange of views on 8th June last year,¹⁰ I demonstrated the constructive and complementary interaction between the work of your body and the autonomous judicial branch of the Council of Europe.

I am pleased to see that this trend has continued unabated.

In several cases the Court has continued to refer directly to GRECO's work. One recent judgment stands out in particular.

Wałęsa v. Poland¹¹ is the most recent example of how the Court has addressed in a systemic manner multiple violations alleged in a series of cases challenging the impact of judicial reforms initiated in Poland in 2017.¹² The Polish rule of law crisis and the impact of the Court's judgments, whether the violations found rested on Articles 6, 8, 10 or even 18 of the Convention, were discussed at our last meeting in June 2023. The Court's judgments have sought to protect the national judiciary from unlawful external influence, from the executive, the legislature or from within the judiciary itself.

⁴ Concerning (1) independence, specialisation and means available to national bodies engaged in the prevention and fight against corruption and the extent and scope of immunities; (2) identification, seizure, and confiscation of corruption proceeds, public administration and corruption (auditing systems; conflicts of interest), the prevention of legal persons being used as shields for corruption, tax and financial legislation to counter corruption, links between corruption, and organised crime and money laundering; (3) incriminations provided for in the Criminal Law Convention on Corruption (ETS 173), its Additional Protocol (ETS 191) and Guiding Principle 2 (GPC 2), transparency of Party Funding with reference to the Recommendation of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns; (4) Prevention of corruption in respect of members of parliament, judges and prosecutors; and (5) preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies.

⁵ See GRECO Decides to Examine Prevention of Corruption and Promotion of Integrity at the Sub-National Level in Its <u>Sixth Evaluation</u> Round.

⁶ Greece (<u>Greco-AdHocRep(</u>2019)2, 18.12.2019), Poland (<u>Greco-AdHocRep(</u>2018)1, 29.03.2018), Romania (<u>Greco-AdHocRep(</u>2018)2, 11.04.2018) and Slovenia (<u>Greco-AdHocRep(</u>2019)3, 18.02.2020).

⁷ See, for instance, the 24th General Activity Report (2023).

⁸ See further Conferences - Group of States against Corruption (coe.int).

⁹ <u>Assessment</u> of the Code of Conduct for Members of the Parliamentary Assembly of the Council of Europe, Greco(2017)5-fin, 19 June 2017.

 $^{^{10}}$ Speech by Síofra O'Leary, Exchange of views with GRECO, 8 June 2023.

 $^{^{11}}$ Wałęsa v. Poland, no. 50849/21, §§ 118-119 and 234-235, 23 November 2023.

¹²Dolińska-Ficek and Ozimek v. Poland, nos. 49868/19 and 57511/19, 8 November 2021; Advance Pharma sp. z o.o v. Poland, no. 1469/20, 3 February 2022; Xero Flor w Polsce sp. z o.o. v. Poland, no. 4907/18, 7 May 2021, Reczkowicz v. Poland, no. 43447/19, 22 July 2021, Grzęda v. Poland [GC], no. 43572/18, 15 March 2022; Żurek v. Poland, no. 39650/18, 16 June 2022; Tuleya v. Poland, nos. 21181/19 and 51751/20, 6 July 2023; Juszczyszyn v. Poland, no. 35599/20, 6 October 2022.

The Wałęsa case was brought by the former leader of Solidarność. He had suffered the reversal, ten years on, by a Chamber of the Supreme Court, of a final defamation judgment in his favour, following an extraordinary appeal by the Prosecutor General. The Court regarded the appeal as "an abuse of the legal procedure by the State authority in pursuance of its own political opinions and motives". Referring, amongst others, to the addendum to the 2018 GRECO Fourth Evaluation Report on Poland,¹³ which found that an extraordinary appeal was dangerous for the stability of the Polish legal order, the Court's judgment found violations of Articles 6 and 8 of the Convention.

In Wałęsa the Court applied its pilot judgment procedure. 14 Such a procedure pursues a dual purpose: to reduce the threat to the effective functioning of the Convention system and to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of Convention rights in the national legal order.

In this particular case, the judgment addressed the interrelated systemic problems identified by the Court relating to repeated breaches of the fundamental principles of the rule of law, separation of powers and the independence of the judiciary. The same findings have been reached by the Court of Justice of the European Union in infringement actions and preliminary references; in cases in which that Court has also been guided by some of your reports and evaluation concerning Poland.¹⁵

As I noted in January at the solemn hearing to mark the opening of the Strasbourg judicial year, 16 the Wałęsa judgment speaks to the possibility of change. Shortly after its delivery, notice was received by the Court from the respondent State indicating in unequivocal terms its "will and determination to implement ECHR judgments, particularly those regarding the principles of the rule of law and independence of the judiciary."¹⁷

GRECO's work also featured prominently in a Spanish case concerning Parliament's failure to pursue the appointment process of a new General Council of the Judiciary (GCJ).¹⁸ The deadlock in the appointment of the GCJ has been a concern for GRECO for some time. In 2019 you referred to the fact that deadlock contributed to the public perception of politicisation of the judiciary and, in the citizens' eyes, represented "the Achilles' heel of the Spanish judiciary". 19

In Lorenzo Bragado the Court found a violation of Article 6 § 1 of the Convention due to the Constitutional Court's dismissal of an amparo appeal lodged by magistrates who had been on the final candidate list for the appointment to the GCJ and suffered the blockage concerning the latter. The Court's reasoning resonates with the line followed by GRECO, noting that the procedure for selecting members of the GCJ from serving magistrates and judges had not been intended to be "political" or, a fortiori, politicised or instrumentalised for political reasons or ends. The selection process had to comply with certain criteria, such as merit and capacity, which were generally applicable for equal access to public functions or positions and the civil service under the law.

¹³ Addendum to the Fourth Round Evaluation Report on Poland, <u>Greco-AdHocRep</u>(2018)3, 22 June 2018.

¹⁴ See further The Pilot-Judgment Procedure, <u>Information note</u> issued by the Registrar.

¹⁵ See, in particular, the Advocates General opinions and pertaining CJEU's judgements on Polish cases in which GRECO is mentioned as a relevant source of information and used as such : Opinion of advocate general Tanchev, delivered on 6 May 2021, Case C-791/19, European Commission v. Republic of Poland; Opinion of advocate general Tanchev, delivered on 27 June 2021, Joined Cases C-585/19, 624/18 and 625/18 (Request for a preliminary ruling); Opinion of advocate general Campos Sanchez-Bordona, delivered on 2 December 2021, Case C-157/21 Republic of Poland v. European Parliament and Council of the European Union; C-791/19, European Commission v. Republic of Poland, 15 July 2021; C-157/21, Republic of Poland v. European Parliament and Council of Europe, 16 February 2022.

¹⁶ Speech by Síofra O'Leary, Opening of the Judicial Year Strasbourg, 26 January 2024.

¹⁷ See the Statement of 15 December 2023.

¹⁸ Lorenzo Bragado and Others v. Spain. nos. 53193/21 and 5 others, § 60-62, 22 June 2023.

¹⁹ Second Interim Compliance report, Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors, GrecoRC4(2019)12, 13 November 2019, para 32.

Many other cases could be highlighted where the Court's rulings contribute to promoting integrity, fighting corruption and raising awareness about matters of public interest and thus lending judicial support to the work of GRECO.

I can mention, for instance, recent judgments regarding the protection of whistleblowers,²⁰ access to information,²¹ protection of journalists,²² disclosure requirements,²³ or the functioning of independent, impartial and effective Courts established in accordance with law.²⁴ Many other cases addressing these different issues are currently pending before the Court,²⁵ and the future judgments and decisions in those cases will surely be relevant for your future work.

As I said last year, the effective communication between our two institutions is a two-way process. I am pleased to see that in several of your recent reports you have continued referring to the Court's case-law.

Examples include your comments in the context of a compliance report in the Fifth Evaluation round to the authorities of North Macedonia where you noted that oversight of police violence should be addressed in line with the findings made in the Court's judgments concerning the matter. Similarly, in the final evaluation report in the same evaluation round regarding Bosnia and Herzegovina you noted that the electoral process must ensure full compliance with the Court's judgment in Sejdić and Finci.

This mutual application of our respective principles and standards speaks of a fruitful interinstitutional dialogue through which we not only increase the persuasiveness and legitimacy of our findings but also demonstrate the coherence and relevance of the values of human rights, democracy and the rule of law on which the overall Council of Europe system is based.

Our societies and our common European face new and difficult challenges. Let me mention three which I find particularly pressing and critical.

²⁰ Halet v. Luxembourg [GC], no. 21884/18, 14 February 2023.

²¹ For instance Sieć Obywatelska Watchdog Polska v. Poland, no. 10103/20, 21 March 2024, Zöldi v. Hungary, no. 49049/18, 4 April 2024.

²² For instance, Eigirdas and VI "Demokratijos pletros fondas" v. Lithuania, nos. 84048/17 and 84051/17, 12 September 2023.

²³ For instance, *Gashi and Gina v. Albania*, no. 29943/18, 4 April 2023; see also *Thanza v. Albania*, no. 41047/19, 4 July 2023.

²⁴ For instance, *Total S.A. and Vitol S.A. v. France*, nos. 34634/18 and 43546/18, 12 October 2023, *Syndicat National des Journalistes and Others v. France*, no. 41236/18, 14 December 2023.

²⁵ See, for instance, regarding Article 1 of Protocol No. 1: *Gozalov v. Azerbaijan*, no. 21933/19 and 10 others, concerning confiscation of the applicants' properties, in the framework of criminal proceedings conducted against their relative (State official - a former employee of the Ministry of National Security) for bribery and other offences; *Prokopiev and Others v. Bulgaria*, nos. 24585/18 and 47159/20, freezing and forfeiture of assets in relation to the offences of abuse of office and money laundering; *Kacorri v. Albania*, no. 55662/22, functioning of a non-conviction based confiscation regime.

See also, regarding article 6 and 8 of the Convention: (1) Andrias v. the Republic of Moldova, no. 57590/14, Rakic v. France, no. 11231/23, Cavca v. the Republic of Moldova, no. 21766/22, Gerovska-Popchevska v. North Macedonia, no. 30989/20, Nedelkova v. North Macedonia (no. 55602/21), Tosun v. Türkiye, no. 27316/16, concerning simple or severe misconduct of officials or failure to respond to certain ethical standards; (2) Jankovic v. Slovenia, no. 15118/22, Yoncheva v. Bulgaria, no. 39127/19, Dodon v. the Republic of Moldova, no. 29535/23, Selimi v. Albania, no. 27896/19, MSL, TOV v. Ukraine, no. 18049/18, concerning prevention of corruption or effective corruption in respect of members of top officials, parliament, judges and prosecutors; (3) Jinga v. Romania, no. 13563/19 and Bilabud Benna ehf. v. Iceland, no. 44000/22, concerning judges or top officials allegedly involved in conflicts of interests; (4) Fisic v. Croatia, no. 18788/22, Rejting Centar Srbije v. Serbia, no. 15419/17, Journalistic Investigations Centre v. the Republic of Moldova, no. 1467/17, Iravunki Yevropa Miavorum v. Armenia, no. 22685/17 concerning transparency, access to information and accountability; (5) Broci and Others v. Albania, nos 57935/18, 34288/19, 41560/19, Hoxha and Dedja v. Albania, nos. 16701/19 and 32489/19, concerning disclosure requirement of assets, income, liabilities and interest; Yanukovych v. Ukraine, no. 50744/15, for, among others, appropriation of state property and state funds, taking part and managing criminal activities whilst in office as the President of Ukraine.

²⁶ Second Compliance Report, <u>GrecoRC5-2023-1</u>, 18 October 2023, para 123.

²⁷ Final Evaluation Report, <u>GrecoEval5Rep-2022-8</u>, 9 March 2023, para 24, footnote 6.

²⁸ Sejdić and Finci v. Bosnia and Herzegovina [GC], nos. 27996/06 and 34836/06, ECHR 2009.

The United Nations Office on Drugs and Crime (UNODC) has found that corruption hinders the achievement of international commitments to reduce climate change. Lack of regulation makes climate policies vulnerable to corruption and, in turn, corrupt practices enable more greenhouse emissions and undermine the overall efforts to mitigate climate change. Significant challenges in oversight and action stem from the complex and technical nature of climate change mitigation and the many stakeholders involved in addressing it.²⁹

In the recent *Klima* judgment³⁰ the Court stressed that the principles of subsidiarity and shared responsibility take on a particular importance in relation to climate change as national authorities have direct democratic legitimation and are in principle better placed than Strasbourg judges to evaluate the relevant needs and conditions.

The Court recognised that the role of the domestic policy-maker must be given special weight, because measures designed to combat climate change and its adverse effects primarily require legislative action which necessarily depends on democratic decision-making. However, the remit of domestic courts and of the Court is complementary to those democratic processes. The task of the judiciary is to ensure the necessary oversight of compliance with legal requirements.

Measures to combat climate change, including allegations of government inaction, should be subject to public, and where necessary, judicial scrutiny. When seen from the perspective of your field of activity, judicial oversight is an important safeguard to ensure that corruption practices do not undermine democratic processes and that the complexities of policy-making and the interests of multiple stakeholders are not invoked to disguise the corrupting practices which are capable of perpetuating the vicious circle of the effects of climate change.

The second challenge is that of democratic erosion and related rule of law backsliding.

Look at the number of cases that the Court has had before it in recent years which have concerned the autonomy and independence of the judiciary. We have had cases against Albania,³¹ Belgium,³² Bulgaria,³³ Georgia,³⁴ Hungary,³⁵ Iceland,³⁶ the Republic of Moldova,³⁷ Poland,³⁸ Romania,³⁹ Türkiye,⁴⁰ and Ukraine.⁴¹ These cases show how pressure on the judiciary is adopting new forms. Disciplinary or criminal proceedings – which in some cases are perfectly legitimate and necessary - may be pretexts for restraining judicial independence and autonomy.⁴²

²⁹ See UNODC <u>Thematic Areas in Anti-Corruption: Climate Change (unodc.org)</u>; see also, for instance, Chan et al, Corruption and Integrity Risks in Climate Solutions: An Emerging Global Challenge, <u>Grantham Research Institute</u> on climate change and the environment, 2023.

³⁰ Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC], no. 53600/20, 9 April 2024; Carême v. France [GC] (dec.), no. 7189/21, 9 April 2024; and Duarte Agostinho and Others v. Portugal and 32 Others [GC] (dec.), no. 39371/20, 9 April 2024.

³¹ *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021.

³² Loquifer v. Belgium, nos. 79089/13 et al, 20 July 2021.

³³ *Donev v. Bulgaria*, no. 72437/11, 26 October 2021.

³⁴ Gloveli v. Georgia, no. 18952/18, 7 April 2022.

³⁵ Baka v. Hungary [GC], no. 20261/12, 23 June 2016.

³⁶ Guðmundur Andri Ástráðsson v. Iceland [GC], no. 26374/18, 1 December 2020.

³⁷ Catană v. the Republic of Moldova, no. 43237/13, 21 February 2023.

³⁸ Xero Flor w Polsce sp. z o.o. v. Poland, no. 4907/18, 7 May 2021, Reczkowicz v. Poland, no. 43447/19, 22 July 2021, Grzęda v. Poland [GC], no. 43572/18, 15 March 2022 and Zurek v. Poland, no. 39650/18, 16 June 2022.

³⁹ Kövesi v. Romania, no. 3594/19, 5 May 2020.

⁴⁰ Bilgen v. Türkiye, no. 1571/07, 9 March 2021.

⁴¹ Oleksandr Volkov v. Ukraine, no. 21722/11, 9 January 2013.

⁴² See, for instance, *Miroslava Todorova v. Bulgaria*, no. 40072/13, 19 October 2021, where the Court found a violation of Article 18 of the Convention on the grounds that the predominant purpose of the disciplinary proceedings against the applicant, President of the judges' association, had not been to ensure compliance with her judicial duties, but rather to penalise and intimidate her on account of her criticism of the Supreme Judicial Council and the executive.

The overall trend of pressure on the judiciary is not limited to the domestic level. We see challenges to the authority and raison d'être of the European Court itself.⁴³ Parliamentary debates and ministerial speeches in more than one Council of Europe member State paint Strasbourg as a "foreign court" and declare the need to defy interim measures generally and specific Court rulings in particular.

As you noted in the context of your Fourth Evaluation round, entitled "Judges are the guardian of Human Rights and the Rule of Law," this is something about which all levels of government must be concerned. Your work is critical in guiding States in ensuring that judicial institutions enjoy the necessary trust and protection from actions undermining judicial authority. Clearly this implies, first and foremost, that judges must live up to high standards of integrity, independence and impartiality. But it is also for governments to create structures in which the judiciary can work serenely, living up to those standards legitimately expected of them.

The final challenge I want to mention relates to the rapid development of new technologies and its effects on human rights, democracy and the rule of law,⁴⁵ including in the field of anti-corruption activities.

Artificial intelligence and new technologies clearly present opportunities for integrity actors in their fight against corruption.⁴⁶ They can be used both as preventive and discovery tools. Indeed, it has been suggested that the tools furnished by AI tools can serve as "unbiased anti-corruption agents".⁴⁷

The enthusiasm about artificial intelligence and its potential use in this field (and elsewhere) is perhaps understandable. However, such use must be compliant with human rights standards. The Council of Europe's recently adopted Framework Convention on AI makes it clear that the three pillars on which the Convention is based cannot be sacrificed for the sake of technological development or the use of AI technologies.

These will be issues which GRECO will no doubt be called on to address in its evaluation of national systems in the future and in relation to which it will have to develop relevant standards.

The Court has still not dealt with cases concerning, strictly speaking, artificial intelligence. This is perhaps not surprising. The principle of exhaustion of domestic remedies means that challenges to the use of algorithms and artificial intelligence which we see emerging before national courts will take a few years to arrive in Strasbourg.

However, the Court has had a chance to emphasise the necessity of strict compliance with the requirement of lawfulness and the need to achieve proportionality between the various interests at stake in cases concerning the processing of personal data and otherwise interfering with the private and family lives of individuals.⁴⁸ Some judgments have also looked at the use of algorithmic mechanisms⁴⁹ and new technologies.⁵⁰ These judgments will no doubt provide future sources of inspiration.

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⁴³ See Chief D. O'Donnell, "A Court and the World" at a conference on *The Making (and Re-making) of Public Law, UCD*, 6-8 July 2022.

⁴⁴ GRECO, 19th General <u>Activity Report</u> (2018), March 2019, p. 10.

⁴⁵ See further the Council of Europe <u>Framework Convention</u> on Artificial Intelligence and Human Rights, Democracy and the Rule of Law.

⁴⁶ See further OECD, Generative AI for anti-corruption and integrity in government (2024).

⁴⁷ Kobis et al., Artificial Intelligence as an Anti-Corruption Tool (AI-ACT) -- Potentials and Pitfalls for Top-down and Bottom-up Approaches, Cornell University arxiv (2021).

⁴⁸ See <u>Guide</u> to the Case-Law of the of the European Court of Human Rights – Data Protection.

⁴⁹ See *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13 and 2 others, 25 May 2021.

⁵⁰ See *Glukhin v. Russia*, no. 11519/20, 4 July 2023, concerning face recognition technology.

In conclusion, the regular exchanges of views between the Judges of the Court and GRECO, as well as the established institutional cooperation between the Court's Registry and the GRECO Secretariat, contribute to our effective cooperation.

The mutual referencing and harmonious reinforcement of our respective case-law principles and standards speak to the usefulness of such interactions. The timely publication of GRECO's evaluation and compliance reports is also relevant and important for the examination of cases before the Court, as they inform the Court of the reality of the situation in the field.

But the real impact of Court judgments and your reports depend on effective State compliance. This is critical for the legitimacy of our respective monitoring and judicial activities and, in the broader sense, for the development and protection of human rights, democracy and the rule of law within our shared legal space.

I wish you bonne continuation. It has been a pleasure to work with you and I wish President Mrčela the very best on the completion of his own presidency.