

# ***Baka v. Hungary***

*Application no. 20261/12*

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WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION  
OF JURISTS (ICJ)

INTERVENER

*pursuant to the Deputy Grand Chamber Registrar's notification dated 12  
March 2015 that the President of the Court had granted permission under  
Rule 44 § 3 of the Rules of the European Court of Human Rights*

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8 April 2015

## **I. Introduction**

In these submissions, the ICJ addresses (1) the scope of application of article 6.1 ECHR in cases relating to judicial appointments, the judicial career, and security of tenure including removal from office, in light of the Convention jurisprudence and of principles of the rule of law and of the role and independence of the judiciary (2) international standards on security of judicial tenure, freedom of expression of judges, and the role of judges in contributing to debate on questions of judicial independence, which are relevant to protection of article 10 ECHR rights of judges.

It will be argued that: The special and fundamental role of the judiciary as an independent branch of State power, in accordance with principles of the separation of powers and the rule of law, is recognized within the ECHR, both explicitly and implicitly. This special role must accordingly be given significant weight in assessing any restrictions imposed by the executive (and legislative) branches on Convention rights applicable to judges. The two specific manifestations of this argument that are relevant to the present case are, first, that in order to preserve the special role of the judiciary the ECHR should be interpreted in a manner that limits the scope for the executive- or legislative branch to justify the imposition of restrictions on article 6.1 ECHR rights of judges in employment disputes on grounds of legitimate interest. Second, for the same reasons, the ECHR should be interpreted to preclude restrictions of freedom of expression applicable to judges and civil servants that would impair the right and the duty of the judiciary to speak out in protection of judicial independence.

## **II. Application of article 6.1 to employment disputes involving judges**

### *1. Exclusion of article 6.1 protection in employment disputes: objective justification*

In *Eskelinen and Others v. Finland*,<sup>1</sup> the Grand Chamber established criteria for the application of the civil aspect of article 6.1 ECHR to employment disputes concerning employees of the State or public officers. It held that, in order for the protection of article 6.1 to be excluded in such cases, not only must national law have expressly excluded access to a court for the position or category of staff concerned but such exclusion must also be justified on objective grounds in the State's interest.<sup>2</sup>

Under this doctrine, there is a presumption that article 6.1 applies to employment disputes involving public sector workers, in the absence of convincing reasons put forward by the State. Legitimate reasons for such restrictions may relate to the "effective functioning of the State" or "other

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<sup>1</sup> *Vilho Eskelinen and Others v. Finland* [GC], Application no. 63235/00, Judgment of 19 April 2007.

<sup>2</sup> *Ibid.* para. 62.

public necessity ... which might require the removal of Convention protection against unfair or lengthy proceedings.”<sup>3</sup>

It is primarily for the national authorities to identify “those areas of public service involving the exercise of the discretionary powers intrinsic to State sovereignty where the interests of the individual must give way”.<sup>4</sup> However, the mere fact that the applicant’s duties involve the exercise of power conferred by public law is not in itself decisive of the applicability of article 6.1.<sup>5</sup> Applying the *Eskelinen* criteria, this Court has, in a number of cases, found article 6.1 to be applicable to questions of the judicial career and removal of judges from office.<sup>6</sup>

The application of these criteria to employment disputes concerning judges raises particular issues. An independent judiciary, operating within a system that respects the separation of powers, is an essential element of the rule of law and a necessary condition for the effective protection of human rights.<sup>7</sup> The power exercised by a judge, therefore, although quintessentially of a public nature, is both structurally and inherently distinct from that of public servants of the executive or legislature. In light of this, the Inter-American Court of Human Rights has ruled that “judges, unlike other public officials, enjoy specific guarantees due to the independence required of the judiciary, which the Court has understood as ‘essential for the exercise of the judiciary’”.<sup>8</sup>

It is the interveners’ submission that the crucial importance of maintaining judicial independence limits the scope for the executive to seek to justify the imposition of restrictions on article 6 ECHR rights of judges in employment disputes, under the second criterion set out in *Eskelinen*. These considerations mean that it will rarely, if ever, be objectively justifiable in the public interest for the executive or legislative branches to impose measures excluding the application of article 6.1 to employment disputes involving judges, particularly in those cases that affect judicial independence, and, therefore, the separation of powers and the rule of law. This will include cases relating to security of tenure and removal of judges.

## 2. International standards on the security of tenure of judges

International standards affirm that a necessary condition of an independent judiciary is that judges enjoy security of tenure and are not subject to

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<sup>3</sup> Ibid. para. 59.

<sup>4</sup> Ibid. para. 61.

<sup>5</sup> Ibid. para. 62.

<sup>6</sup> *Olujić v. Croatia*, Application no. 22330/05, Judgment of 5 February 2009; *G v. Finland*, Application no. 33173/05, Judgment of 27 January 2009; *Jurčić v. Croatia*, Application no. 58222/09, Judgment of 26 July 2011; *Dzhidzheva-Trendafilova v. Bulgaria*, Application no. 12628/09, decision of 9 October 2012; *Volkov v. Ukraine*, Application no. 21722/11, Judgment of 9 January 2013.

<sup>7</sup> ICJ, Declaration of Delhi, 10 January 1959; *Stafford v. UK* [GC], Application no. 46295/99, Judgment of 28 May 2002, para. 78: “the notion of separation of powers between the executive and the judiciary has assumed growing importance in the caselaw of the Court”; Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), articles 4 and 74; Bangalore Principles, Value 1.

<sup>8</sup> Judgment of 23 August 2013, IACtHR, *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 144 (official translation of the Inter-American Court from the original Spanish).

arbitrary removal from office. The UN Basic Principles on the Independence of the Judiciary state, in principle 12, that “judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.” The Draft Universal Declaration on the Independence of Justice (Singhvi Declaration) stresses that the “term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their disadvantage.”<sup>9</sup> At a Council of Europe level, the Committee of Ministers Recommendation 2010/12 states that “security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists.”<sup>10</sup> Standards developed in other regions also affirm these principles; for example, the Beijing Statement of Principles of Independence of the Judiciary in the LAWASIA Region states that a “judge’s tenure must not be altered to the disadvantage of the judge during his or her term of office.”<sup>11</sup>

Consistent with these standards, the importance of security of tenure of judges, as an element of the right to a fair trial by an independent and impartial tribunal, has been affirmed by this Court<sup>12</sup> as well as by the UN Human Rights Committee,<sup>13</sup> the UN Human Rights Council<sup>14</sup> and the Inter-American Court of Human Rights.<sup>15</sup>

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<sup>9</sup> Singhvi Declaration, article 16(a). Furthermore, it stresses that “[r]etirement age shall not be altered for judges in office without their consent” (Singhvi Declaration, article 18(c)).

<sup>10</sup> Recommendation CM/Rec (2010)12 on judges: independence, efficiency and responsibilities, Chapter VI.49. See further international and regional standards: Universal Charter of the Judge, article 8: “A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered”; International Bar Association’s (IBA) Minimum Standards of Judicial Independence, article 1(b): “Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control” and article 22; Paris Minimum Standards of Human Rights Norms in a State of Emergency, principle B.3(c); Burgh House Principles on the Independence of the International Judiciary, principle 3.1; Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, principles A(4)(n)(2) and A(4)(p); Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, principle IV; Latimer House Guidelines, section II, para. 1; Magna Carta of Judges, principles 4 and 19; European Charter on the Statute for Judges, principle 3.4. Within the jurisprudence of the ECtHR, see, among others, *Campbel and Fell v. UK*, Application nos. 7819/77 and 7878/77, Judgment of 28 June 1984, para. 80; *Incal v. Turkey* [GC], Application no. 22678/93, Judgment of 9 June 1998, para. 65. C.f. Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Annual Report to the Human Rights Council, UN Doc. A/HRC/11/41, 24 March 2009, para. 57; Venice Commission, Report on the Independence of the Judicial System, Part I: the Independence of Judges, CDL-AD(2010)004, para. 38.

<sup>11</sup> Beijing Statement, article 21.

<sup>12</sup> *Kleyn v. Netherlands* [GC], Application no.39343/98, Judgment of 6 May 2003, para. 190: “in order to establish whether a tribunal can be considered “independent” for purposes of Article 6 §1, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressure and the question whether it presents an appearance of independence.”

<sup>13</sup> UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), section III: “The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.”

<sup>14</sup> UN Human Rights Council, Resolution 23/6, U.N. Doc. No. A/HRC/23/6 (13 June 2013), operative para. 3: “Stresses that the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement should be adequately secured by law, and that the security of tenure of judges is an essential guarantee of the independence of the judiciary and that grounds for removal must be explicit with well-defined circumstances provided by

The principle of irremovability of judges entails that a judge must not be subject to removal or transfer without his or her consent and that the terms of office must be prescribed by law.<sup>16</sup> The principle is qualified only in narrow and exceptional circumstances, including where there has been serious misconduct on the part of the judge, where a serious disciplinary or criminal offence has been committed or in cases of the incapacity of the judge to discharge his or her professional duties.<sup>17</sup>

The principle of irremovability applies not only in cases of overt dismissal, but also where there is *de facto* termination of office. The Singhvi Declaration stresses that “[i]n the event a court is abolished, judges serving on that court, except those who are elected for a specified term, shall not be affected, but they may be transferred to another court of the same status.”<sup>18</sup> Similarly, the International Bar Association’s Minimum Standards of Judicial Independence state that “[l]egislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service [and] [i]n case of legislation reorganising courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status.”<sup>19</sup>

In this regard and drawing from the historical experience of Latin American countries, the Inter-American Commission on Human Rights has observed how “formally valid” decisions are sometimes used to accomplish “unstated ends” and amount in fact to a sanction imposed for purposes other than those

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law, involving reasons of incapacity or behaviour that renders them unfit to discharge their functions, and that procedures upon which the discipline, suspension or removal of a judge are based should comply with due process.”

<sup>15</sup> *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, paras. 154-155. See also, IACHR, *Guarantees for the independence of justice operators*, Doc. no. OEA/Ser.L/V/II., 5 December 2013, para. 34.

<sup>16</sup> Council of Europe, Explanatory Memorandum to Recommendation CM/Rec 2010 of the Committee of Ministers on judges: independence, efficiency and responsibilities, CM(2010)147 add1, 21 October 2010, para. 54. See also, European Charter on Statute of the Judge, article 5.1; Magna Carta of Judges, article 19; Universal Charter of the Judge, article 8; Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Annual Report to the Human Rights Council, UN Doc. A/HRC/11/41, 24 March 2009, para. 57; Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers, Report on missions to Mozambique, UN Doc. A/HRC/17/30/Add.2, 21 April 2011, para. 97; Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers, Report on mission to Romania, UN Doc. A/HRC/20/19/Add.1, 4 June 2012, para. 54.

<sup>17</sup> UN Basic Principles, principle 18: “Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.”; UN Human Rights Committee, General Comment No.32, op cit, Part III: “Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law”; Singhvi Declaration, article 30: “A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office”; see further Beijing Statement, article 22; Statute of the Iberoamerican judge, article 14; Latimer House Guidelines, VI.1(a); Commonwealth Principles, IV; African Guidelines, A.4(p); see also Leandro Despouy, op cit, para.57; Gabriela Knaul, Report on missions to Mozambique, op cit, para. 97.

<sup>18</sup> Singhvi Declaration, article 31.

<sup>19</sup> IBA Minimum Standards of Judicial Independence, article 20. See also, Beijing Statement, article 29: “The abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure. Members of the court for whom no alternative position can be found must be fully compensated.”

prescribed by law.<sup>20</sup> The Commission concluded that in cases where “separation from service” may in fact be a disguised attempt to impose a sanction, the true reason for the removal from office “must be examined to determine whether it constituted a misuse of power calculated to punish” a judge for a decision, and that, in this regard, the affected judge must have the right to a review.<sup>21</sup> The Inter-American Commission mentioned in particular the abuse of the practice of impeachment by parliamentary assemblies to influence or attack the independence of the judiciary.<sup>22</sup> Indeed, the Declaration of Delhi of 1959 of the International Commission of Jurists affirmed that, although the legislature has “responsibility for fixing the general framework and laying down the principles of organization of judicial business ... the exercise of such responsibility ... should not be employed as an indirect method of violating the independence of the judiciary in the exercise of its judicial functions.”<sup>23</sup>

### *3. Strict adherence to procedural and institutional safeguards in cases of removal of judges is necessary to uphold security of tenure*

International standards on the independence of the judiciary affirm the right to a fair hearing in proceedings for the removal of a judge.<sup>24</sup> Any decision to discipline, suspend or remove a judge should be subject to an independent review of a judicial character.<sup>25</sup> The procedure adopted must provide the judge with the basic rights for a fair trial: full information on the charges, legal representation at the hearing, the possibility to present a full defence and to be judged by an independent and impartial tribunal.<sup>26</sup>

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<sup>20</sup> IACHR, Guarantees for the independence of justice operators, op cit, para. 230.

<sup>21</sup> Ibid. para. 234. The content of the right of review or appeal is stated in paras. 235 and following.

<sup>22</sup> Ibid. paras. 204 and 205: “vesting the legislative branch with the authority to remove justice operators from their post is at variance with the guarantee of independence that justice operators must have ....” It has recalled that, “[h]istorically speaking, impeachment has been used as a tool in some States, whereby the legislature or parliament exercises control, especially of the highest courts, at times when the courts are deciding cases of enormous national import...”.

<sup>23</sup> ICJ, Declaration of Delhi, 1959, Report of Committee IV, Clause VI.

<sup>24</sup> UN Basic Principles, principle 17; Singhvi Declaration, articles 26, 27, 28 and 29; CoE Committee of Ministers Recommendation (2010)12, article 69; European Charter on the Statute of the Judge, article 5.1; Consultative Council of European Judges (CCJE), Opinion no. 1, para. 60; Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, Art. 26; African Guidelines, A.4(q); Beijing Statement, article 26; Statute of the Iberoamerican Judge, article 14; Latimer House Guidelines, VI.1(A); Commonwealth Principles, VII(b).

<sup>25</sup> European Charter on the Statute for Judges, principle 5.1 (“The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority”); CoE Committee of Ministers Recommendation Chapter CM/Rec(2010)12, VII.69; Magna Carta of Judges, principle 6 (“Disciplinary proceedings shall take place before an independent body with the possibility of recourse before a court”); UN Basic Principles, principle 20 (“Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.”); Beijing Statement, principle 26; African Guidelines, principle A.4(q). See also, Venice Commission, Estudio núm. 494/2008, para 43; Leandro Despuoy, op cit, para. 61; Gabriela Knaul, Report on mission to Turkey (2012), UN Doc. A/HRC/20/19/Add.3, para. 30; Gabriela Knaul, Report on mission to Mexico (2011), UN Doc. A/HRC/17/30/Add.3, para. 14; Gabriela Knaul, Report on mission to Mozambique (2011), op cit, para 98; Gabriela Knaul, Report on mission to the Russian Federation (2009), UN Doc. A/HRC/11/41/Add.2, para. 99.

<sup>26</sup> Singhvi Declaration, article 26(a): “complaint against a judge shall be processed expeditiously and fairly under an appropriate practice and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge”, and article 28: “The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.” See also, IBA

The 1959 Declaration of Delhi of the International Commission of Jurists affirms that the “reconciliation of the principle of irremovability of the judiciary with the possibility of removal in exceptional circumstances necessitates that the grounds for removal should be before a body of judicial character assuring at least the same safeguards of the judge as would be accorded to an accused person in a criminal trial.”<sup>27</sup> The European Charter on the Statute for Judges states that, “[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary”.<sup>28</sup> Any sanction against a judge is to be “open to an appeal to a higher judicial authority”.<sup>29</sup> The UN Special Rapporteur on the Independence of Judges and Lawyers also affirms that bodies for judicial accountability “should preferably be composed entirely of judges, retired or sitting, although some representation of the legal profession or academia could be advisable. No political representation should be permitted.”<sup>30</sup> The Special Rapporteur also concludes that “the right to have disciplinary decisions reviewed by a higher judicial tribunal should be guaranteed for judges”.<sup>31</sup>

The UN Human Rights Committee has found summary removals of judges to be incompatible with the ICCPR,<sup>32</sup> and has affirmed that “judges should be removed only in accordance with an objective, independent procedure prescribed by law”<sup>33</sup> that respects equality of arms.<sup>34</sup> In its General Comment No. 32 on the right to a fair trial, the Committee stressed that “the dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.”<sup>35</sup> The Inter-American Court has held that, in order to preserve the independence of the judiciary, “the authority responsible for the process of removing a judge must act

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Minimum Standards of Judicial Independence, article 27; African Guidelines, articles 4(q) and (r); Beijing Statement, article 26; Latimer House Guidelines, VI.1, para.(a).

<sup>27</sup> ICJ, Declaration of Delhi, 1959, Report of Committee IV, Clause IV.

<sup>28</sup> European Charter on the Statute for Judges, Principle 1.3. See similarly Council of Europe Committee of Ministers Recommendation (2010)12, adopted 17 November 2010, para 46

<sup>29</sup> European Charter on the Statute for Judges, Principle 5.1.

<sup>30</sup> Report of the Special Rapporteur on Independence of Judges and Lawyers, UN Doc A/HRC/26/32 (28 April 2014), para 126.

<sup>31</sup> Ibid, para 129.

<sup>32</sup> Concluding Observations of the Human Rights Committee on the Gambia, UN Doc.CCPR/CO/75/GMB, 12 August 2004, para. 14.

<sup>33</sup> Concluding Observations of the Human Rights Committee on the Republic of Moldova, UN Doc.CCPR/CO/75/MDA, 25 July 2002, para. 12.

<sup>34</sup> *Mundyo Busyo et al v. Democratic Republic of Congo*, Human Rights Committee Communication No.933/2000, Views of 31 July 2003, UN Doc.CCPR/C/78/D/933/2000, para.5.2. See also, *Soratha Bandaranayake v. Sri Lanka*, Human Rights Committee Communication no.1376/2005, Views of 24 July 2008, UN Doc. CCPR/C/93/D/1376/2005, para.7.3; Judgment of 31 January 2001, IACtHR, *Case of the Constitutional Court v. Peru*.

<sup>35</sup> UN Human Rights Committee, General Comment No.32, op cit, Section III.

independently and impartially in the procedure established for that purpose and must allow for the exercise of the right to defense."<sup>36</sup>

#### 4. Conclusion

In light of the above principles, it is the submission of the ICJ that, in cases concerning the employment of judges and their security of tenure, there must be a particularly strong presumption that article 6.1 ECHR applies. In such cases, when assessing the second *Eskelinen* criterion, concerning the objective justification of a restriction on access to court in the interests of the State, particular consideration must be given to the nature of the judicial function as an independent branch of state power. The security of tenure and conditions of service of individual judges are necessary elements of the maintenance of judicial independence. Effective access to justice and fair procedures in resolving disputes on the tenure, removal or conditions of service of judges are important safeguards for judicial independence, and, therefore, for the separation of powers and the rule of law.

When assessing any justification advanced by the State for excluding judges' access to court in regard to their career and security of tenure, therefore, consideration must be given to the strong public interest of upholding the role, independence and integrity of the judiciary in a democratic society under the rule of law. The interveners submit that it can never be in the legitimate interests of the State to deprive judges of access to court or of due process protection in disputes that affect their independence, including in cases that concern their security of tenure or conditions of service. Although the individual judge may be the immediate beneficiary of the full protection of his or her article 6.1 rights, the protection ultimately benefits all persons entitled under article 6.1 to the "independent and impartial tribunal" of which the individual judge is part.

Finally, the interveners recall that the burden of advancing a justification for restrictions on civil servants' article 6.1 rights lies with the State. If restrictions on the article 6.1 rights of individual judges were, contrary to the interveners' submissions, permitted, the interpretive rule in article 17 might become relevant, in so far as restrictions imposed on judges' article 6.1 rights that adversely affect the independence of the judiciary as an institution, would clearly impact on the article 6.1 rights of other persons, i.e. everyone entitled to the "independent and impartial tribunal" of which the affected judge or judges are part. Allowing the ECHR to be read as leaving scope for such restrictions could be seen as allowing an interpretation of the ECHR that, contrary to article 17, implies for the State a right to engage in an activity or perform an act "aimed at the destruction of any of the rights and freedoms

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<sup>36</sup> *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, op cit, para. 145. See also, Ibid. paras.168-169; IACHR, *Guarantees for the independence of justice operators*, op cit, para. 188: "The guarantees of due process are a corollary of the States' obligations with respect to the independence of the judiciary, and follow from the effect that disciplinary action can have on a judge's independence", and paras. 196, 219-221.



set forth herein or at their limitation to a greater extent than is provided for in the Convention”.

### **III. Freedom of expression of judges and the role of judges in contributing to debates on questions of judicial independence**

#### *1. Limitations of the right to freedom of expression of judges*

Judges, like all human beings, have a right to freedom of expression.<sup>37</sup> This right is recognised in international standards on the judiciary including for example the UN Basic Principles,<sup>38</sup> the Bangalore Principles,<sup>39</sup> the Singhvi Declaration,<sup>40</sup> the Burgh House Principles,<sup>41</sup> and the Code of Judicial Ethics for the International Criminal Code.<sup>42</sup>

This Court has held that the protection of freedom of expression under article 10 ECHR extends to civil servants,<sup>43</sup> as well as specifically to judges,<sup>44</sup> including judges at senior levels, such as presidents of supreme courts<sup>45</sup> and presidents of administrative courts.<sup>46</sup>

In the case of *Vogt*, this Court has held that, in assessing whether the interference with a civil servant's right to freedom of expression was proportionate, the “legitimate interest of a democratic State in *ensuring that its civil service properly furthers the purposes enumerated in Article 10 para.2*” has to be taken into account.<sup>47</sup> In this context, the Court attributed a “special significance” to the “duties and responsibilities” of civil servants under article 10.2 ECHR.<sup>48</sup> It held that it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion,<sup>49</sup> of loyalty and reserve,<sup>50</sup> of “moderation and propriety”.<sup>51</sup> Whilst judges are not “part of the ordinary civil service”, the Court has found the principles established in *Vogt* to apply equally to members of the judiciary due to “the prominent place among State organs which is occupied by the judiciary in a democratic society

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<sup>37</sup> ECHR, article 10; ICCPR, article 19. See also, Human Rights Committee, General Comment no. 34, paras. 34-36 and 38.

<sup>38</sup> UN Basic Principles, principle 8, reads that “...members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.”

<sup>39</sup> Bangalore Principles, value 4.6.

<sup>40</sup> Singhvi Declaration, principle 8.

<sup>41</sup> Burgh House Principles, principle 7.1.

<sup>42</sup> Code of Judicial Ethics of the International Criminal Court, ICC-BD/02-01-05, Article 9.

<sup>43</sup> *Vogt v. Germany* [GC], Application no. 17851/91, Judgment of 26 September 1995, para. 53; *Poyraz v. Turkey*, Application no. 15966/06, Judgment of 7 December 2010, para. 56.

<sup>44</sup> *Kudeshkina v. Russia*, Application no. 29492/05, Judgment of 26 February 2009, para. 85; *Albayak v. Turkey*, Application no. 38406/97, Judgment of 31 January 2008, paras. 39-42.

<sup>45</sup> *Harabin v. Slovakia*, Application no. 58688/11, Judgment of 20 November 2012, para. 149.

<sup>46</sup> *Wille v. Liechtenstein* [GC], Application no. 28396/95, Judgment of 28 October 1999, para. 42.

<sup>47</sup> *Vogt* para. 53 (emphasis added).

<sup>48</sup> *Vogt* para. 53.

<sup>49</sup> *Vogt* para. 53.

<sup>50</sup> *Kudeshkina* para. 85.

<sup>51</sup> *Kudeshkina* para. 93 referring to *Wille*, paras 64 and 67. See also, IACHR, *Guarantees for the independence of justice operators*, op cit, paras. 172-173.

... particularly in the case of restriction of freedom of expression of a judge in connection with the performance of his functions".<sup>52</sup>

This Court has found that issues concerning the functioning of the justice system constitute questions of public interest, the debate of which enjoys the protection of article 10 ECHR.<sup>53</sup> Although it has been held that any exercise of the freedom of expression of judges "should show restraint ... *in all cases where the authority and impartiality of the judiciary are likely to be called into question*,"<sup>54</sup> the fact that an issue under debate has political implications does not provide sufficient ground for preventing a judge from making a statement on the matter.<sup>55</sup>

## *2. Judges have a right and a duty to speak out in defence of the rule of law*

Any assessment of the necessity and proportionality of restrictions on the right to freedom of expression of judges must be seen in light of the role of the judiciary in a democratic state under the principle of separation of powers, and the judiciary's "mission to guarantee the very existence of the Rule of Law".<sup>56</sup> International standards recognize that each judge is – alongside the State – "responsible for promoting and protecting judicial independence."<sup>57</sup>

The Act of Athens of the International Commission of Jurists of 1955 affirms that judges "should be guided by the Rule of Law, protect and enforce without fear or favour and resist any encroachment by governments political parties on their independence as judges."<sup>58</sup> The International Commission of Jurists' Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis of 2008 reaffirmed that "[m]embers of the legal profession, including members of the judiciary ..., have a legal and ethical responsibility to uphold and promote the Rule of Law and human rights ... . Judges in time of crisis are under a special duty to resist actions which would undermine their independence and the Rule of Law."<sup>59</sup>

Referring to the freedom of expression of judges, the UN Special Rapporteur on the independence of judges and lawyers has pointed out the importance of ensuring participation of judges "in debates concerning their functions and status as well as general legal debates".<sup>60</sup>

As the Court has acknowledged,<sup>61</sup> in certain contexts, judges may therefore have a responsibility as well as a right to exercise their freedom of association

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<sup>52</sup> *Pitkevich v. Russia*, Application no. 47936/99, decision of 8 February 2001; *Albayrak* para. 42.

<sup>53</sup> See *Kudeshkina* para. 86.

<sup>54</sup> *Kudeshkina* para. 86, referring to *Wille* para. 64 (emphasis added).

<sup>55</sup> *Wille* para. 67 and *Kudeshkina* para. 95; In *Kudeshkina*, the Court found that the applicant's statements were not entirely devoid of any factual grounds and therefore not regarded as personal attacks but as fair comments on a matter of great public importance.

<sup>56</sup> Magna Carta of Judges, para. 1.

<sup>57</sup> Magna Carta of Judges, para. 3. Universal Charter of the Judge, article 1.

<sup>58</sup> ICJ, Act of Athens, 18 June 1955, article 3.

<sup>59</sup> ICJ, Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis of 2008, article 13.

<sup>60</sup> Leandro Despouy, *op cit*, para. 45.

<sup>61</sup> *Baka v. Hungary*, para. 100.

and expression. This arises in particular when the public debate concerns matters affecting the judiciary, such as issues related directly to the operation of the courts, the independence of the judiciary including salaries and benefits, fundamental aspects of the administration of justice or on matters relating to the personal integrity of the judge.<sup>62</sup>

As the maintenance of the impartiality and independence of the judiciary may on occasion demand a judge's exercise of their right to freedom of expression or association, the possibility to effectively exercise this right in the light of a correlating duty must be guaranteed. If judges fear they will face sanctions for speaking in defence of judicial impartiality and independence, the threat of sanction would inevitably have a "chilling effect" that would stand in direct contradiction to the duties and responsibilities of judges to uphold the independence of the judiciary.<sup>63</sup> In any assessment of whether an interference with a judge's freedom of expression is necessary in a democratic society and proportionate to a legitimate aim, therefore, the responsibility of the judge to uphold and defend judicial independence should be a significant consideration.

### 3. Conclusions

The ICJ submits that the possible scope for limitations to the right of freedom of expression of civil servants, as established in *Vogt*, must, when applied to judges, be interpreted in light of the specific role of the judiciary as an independent branch of State power, in accordance with the principles of the separation of powers and the rule of law. Any restriction on the right to freedom of expression must not impair the right and the duty of the judge to "protect and enforce without fear or favour and resist any encroachment ... on their independence as judges."<sup>64</sup> Provided that the dignity of judicial office is upheld and the essence and appearance of independence and impartiality of the judiciary not undermined, the State must therefore respect and protect the right and duty of judges to express their opinions, particularly in matters concerning the administration of justice and the respect and protection of judicial independence and of the rule of law.

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<sup>62</sup> Judicial Integrity Group, Commentary on the Bangalore Principles, paras. 134 and 138. Principle 9 of the UN Basic Principles further affirms that, "Judges shall be free to form and join associations of judges or other organizations to represent their interests ... and to protect their judicial independence"; judges and their associations would not be able to fulfil these roles unless judges' freedom of expression on such matters is fully protected, in line with Principle 8 of the UN Basic Principles. See similarly Magna Carta of Judges, para. 12 and Universal Charter of the Judge, para 12.

<sup>63</sup> *Wille* para. 50 and *Kudeshkina* paras. 98-100.

<sup>64</sup> ICJ, Act of Athens, article 3.