

**ICJ Briefing paper on
on certain decrees of the President of Ukraine (2020-2021)
concerning the removal of the judges of the Constitutional Court of Ukraine**

I. Introduction

This briefing paper has been prepared following the official request of the Constitutional Court of Ukraine (CCU) to the International Commission of Jurists (the ICJ) to provide an assessment of the decrees of the President of Ukraine removing judges of the Constitutional Court from office, in light of relevant international law.¹ The briefing paper considers the following decrees of the President of the Republic of Ukraine:

- On 29 December 2020, the President of Ukraine issued decree (No. 607/2020) to suspend the President of the Constitutional Court of Ukraine, Justice Oleksandr Tupytskyi, from his office of judge for a period of two months.²
- By decree (No. 79/2021) of 26 February 2021, the President of Ukraine extended the suspension of Justice Oleksandr Tupytskyi, from the office of judge for period of one month.³
- On 27 March 2021, the President of Ukraine issued a decree on Certain Issues of Ensuring the National Security of Ukraine (No. 124/2021), revoking the Decree of the President of 14 May 2013 (No. 256) on the appointment of Justice Oleksandr Tupytskyi as a judge of the Constitutional Court of Ukraine and the Decree of 17 September 2013 (No. 513) on appointment of Justice Oleksandr Kasminin as a judge of the Constitutional Court of Ukraine.⁴

These decrees are assessed in terms of their compliance with international law and standards and the national law of Ukraine.

II. Background

On 14 October 2014, the Law of the Republic of Ukraine on Prevention of Corruption was signed by President Poroshenko.⁵ The Law provides, among other things, the legal basis and procedures for the functioning of the corruption prevention system in Ukraine, including the mandate of the National Agency for Corruption Prevention of Ukraine.⁶ The Law also introduced Article 366-1 to the Criminal Code of Ukraine, which provided for criminal liability for knowingly false asset declaration by government officials.⁷ In October

¹ Official letter of the Constitutional Court of Ukraine, No. 001-013-19-97, 25 March 2021.

² The official website of the President of Ukraine, <https://www.president.gov.ua/en/news/prezident-ukrayini-pidpisav-ukaz-pro-vidstonennya-oleksand-65857>.

³ On the dismissal of a judge of the Constitutional Court of Ukraine, President of Ukraine, Presidential Decree No. 79/2021 dated February 26, 2021, http://search.ligazakon.ua/l_doc2.nsf/link1/U079_21.html.

⁴ The official website of the President of Ukraine, <https://www.president.gov.ua/documents/1242021-37701>.

⁵ Law of the Republic of Ukraine on Prevention of Corruption, No. 1700-VII, of 14 October 2014, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2020\)079-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2020)079-e).

⁶ *Ibid.*

⁷ Pursuant to Article 366-1 of the Criminal Code of Ukraine, "submission by a declarant of knowingly unreliable information in the declaration of a person authorized to perform state or local self-government functions provided for by Law on Prevention of Corruption, or intentional failure by the declarant to submit the declaration shall be punished by a fine of two thousand five hundred to three thousand non-taxable minimum incomes or community service for a term of one hundred and fifty to two hundred and forty hours, or imprisonment for a term of up to two years, deprivation of the right to hold certain positions or engage in certain activities for the term up to three years. According to the note to Article 366-1 of the Criminal Code of Ukraine, the subjects of declaration are persons who, in accordance with parts one and two of Article 45 of Law Prevention of Corruption, are obliged to file a declaration of a person authorized to perform state or local self-government functions."; Law of the

2019, further amendments were made to the Law on Prevention of Corruption mainly related to the mandate, structure and accountability mechanisms of the National Agency for Corruption Prevention.⁸

On 8 August 2020, forty-seven members of the Parliament of Ukraine lodged an application with the Constitutional Court of Ukraine (CCU), requesting the Court to declare certain provisions of the Law on Prevention of Corruption, and Article 366-1 of the Criminal Code of Ukraine unconstitutional.⁹ The legal provisions that the members of the Parliament challenged before the Court mainly covered the amendments made to the Law on Prevention of Corruption in October 2019.¹⁰

On 27 October 2020, the CCU issued a decision (No. 13-r/2020) that declared certain provisions of anti-corruption laws unconstitutional.¹¹ Among the provisions declared unconstitutional were Article 366-1 of the Criminal Code of Ukraine,¹² and the provisions of the Law on the Prevention of Corruption concerning the powers of the National Agency for Corruption Prevention of Ukraine to verify the accuracy of the financial declarations submitted by public officials.¹³

On 29 October 2020, following the decision of the CCU, the President of Ukraine submitted a draft law on Restoring Public Confidence in the Constitutional Court to the Ukrainian Parliament, aiming to declare null and void the CCU's decision (13-r/2020) of 27 October 2020 and to terminate the powers of all judges of the CCU.¹⁴

On 2 November 2020, Justice Oleksandr Tupytskyi, the President of the CCU, was summoned for interrogation by the State Investigation Bureau in connection with allegations against him of committing crimes as part of an organized group.¹⁵ The ICJ at the time criticized this action and called on the Ukrainian authorities to abandon the draft law, noting that the attempt to dismiss the CCU judges was being undertaken as a "means of retaliation for a decision adopted by the Court and in order to circumvent the decision."¹⁶

On 29 December 2020, the President of Ukraine issued Decree (No. 607/2020) to suspend the President of the CCU, Justice Oleksandr Tupytskyi, from his office of judge for a period

Republic of Ukraine on Prevention of Corruption, No. 1700-VII, of 14 October 2014, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2020\)079-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2020)079-e); Criminal Code of Ukraine, No. 2341-III, 5 April 2001.

⁸ "Head of State signed the law on ensuring the effectiveness of the activity of the National Agency on Corruption Prevention," <https://www.president.gov.ua/en/news/glava-derzhavi-pidpisav-zakon-shodo-zabezpechennya-efektivno-57897>.

⁹ An application of forty-seven members of the Parliament of Ukraine lodged with the Constitutional Court of Ukraine, 8 August 2020, https://ccu.gov.ua/sites/default/files/3_393_2020.pdf.

¹⁰ Deputies of Parliament of Ukraine requested to declare articles 11.1.8, 12.1.2, 12.1.10¹, 47.1.2, 47.1.3, 50.1, 50.3, 51, 52.2 and 65 of the Law on Prevention of Corruption and article 366¹ of the Criminal Code unconstitutional under the Constitution of Ukraine (articles 3.2, 6.2, 8.1, 8.2, 19.2, 21, 24.1, 24.2, 32.1, 32.2, 61.2, 62.1, 64.1 and 68.1), the decision of the Constitutional Court of Ukraine, No. 13-r/2020, 27 October 2020, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2020\)078](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2020)078).

¹¹ The decision of the Constitutional Court of Ukraine, No. 13-r/2020, 27 October 2020, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2020\)078-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2020)078-e); Constitutional Court of Ukraine: <https://ccu.gov.ua/en/docs/2988?page=1>; Ukraine: proposed law against the Constitutional Court should be withdrawn <https://www.icj.org/ukraine-proposed-law-against-the-constitutional-court-should-be-withdrawn/>;

¹² The decision of the Constitutional Court of Ukraine, No. 13-r/2020, 27 October 2020, paras 17-18, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2020\)078-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2020)078-e)

¹³ Law of the Republic of Ukraine on Prevention of Corruption, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2020\)079-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2020)079-e)

¹⁴ The website of the parliament of Ukraine, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70282.

¹⁵ "Ukrainian prosecutors said in December [2020] they were investigating Oleksandr Tupytskyi in connection with alleged bribery of a witness that had taken place in 2018", <https://www.reuters.com/article/us-ukraine-court-idUSKBN29O1DC>.

¹⁶ The ICJ statement, 16 November 2020, <https://www.icj.org/ukraine-proposed-law-against-the-constitutional-court-should-be-withdrawn/>.

of two months.¹⁷ As justification for suspension of the CCU President, the Decree of the President relied on Article 154.3 (General provisions related to suspension from office) of the Criminal Procedure Code of Ukraine, which reads as follows:

"...The issue of suspension of the persons appointed by the President of Ukraine from office shall be decided by the President of Ukraine on the grounds of the Public Prosecutor's motion in accordance with the procedure set forth by law. Suspension of a judge from office shall be carried out by Higher Qualification Commission of Judges of Ukraine on the grounds of a reasoned motion of the Prosecutor General of Ukraine in accordance with the procedure set forth by law."¹⁸

The representative of the President of Ukraine at the CCU stated the following with respect to the Decree No. 607/2020:

"This is not a dismissal, this is not the termination of his [Oleksandr Tupytskyi's] powers as a judge, this is a temporary measure provided by the Criminal Procedure Code of Ukraine (Article 154). The President of Ukraine issues decrees to implement the Constitution and laws of Ukraine, according to the Constitution. Pursuant to Article 154, a person appointed by the President of Ukraine may be suspended for up to two months during the pre-trial investigation. Hence, the President of Ukraine is acting in full compliance with his constitutional powers suspending Oleksandr Tupytskyi from the post of a Constitutional Court of Ukraine's judge for two months."¹⁹

On 27 January 2021, the President of Ukraine withdrew the draft Law on Restoring Public Confidence in the Constitutional Court.²⁰

By Decree of 26 February 2021 (No. 79/2021), the President extended suspension of the President of the CCU from his office of judge for one month.

On 27 March 2021, the President of Ukraine issued Decree (No. 124/2021) on Certain Issues of Ensuring the National Security of Ukraine (hereinafter "Decree No. 124/2021"). By this Decree, the President cancelled the Decrees issued by the former President of Ukraine (Viktor Ianoukovytch), that is, the Decrees of 14 May 2013 (No. 256) on appointment of Oleksandr Tupytskyi as a judge of the Constitutional Court of Ukraine and of 17 September 2013 (No. 513) on appointment of Oleksandr Kasminin as a judge of the Constitutional Court of Ukraine".²¹

The Decree No. 124/2021 was signed, in particular,

"in order to ensure compliance with the Constitution of Ukraine, human and civil rights and freedoms, ensure state independence and national security ... and also taking into account the statement of the Verkhovna Rada in connection with the seventh anniversary of the beginning of the Euromaidan and the Revolution of Dignity ... in which it is emphasized that the usurpation of power by Viktor Ianoukovytch in 2010-2014 led to undermining of the foundations of national security and defense of Ukraine, violation of human rights and freedoms, despite the fact that individual judges of the Constitutional Court of Ukraine appointed by

¹⁷ The official website of the President of Ukraine, <https://www.president.gov.ua/en/news/prezident-ukrayini-pidpisav-ukaz-pro-vidstoronennya-oleksand-65857>.

¹⁸ The official website of the Office of the President of Ukraine, <https://www.president.gov.ua/en/news/prezident-ukrayini-pidpisav-ukaz-pro-vidstoronennya-oleksand-65857>.

¹⁹ The official website of the Office of the President of Ukraine, <https://www.president.gov.ua/ru/news/prezident-ukrayini-pidpisav-ukaz-pro-vidstoronennya-oleksand-65857>.

²⁰ The official website of the Parliament of Ukraine, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70282.

²¹ The official website of the President of Ukraine, <https://www.president.gov.ua/documents/1242021-37701>

Viktor Ianoukovytch, while continuing to exercise their powers, pose a threat to the state independence and national security of Ukraine."²²

The President further issued the following statement in respect of Decree No. 124/2021:

"At the recent meeting of the National Security and Defence Council, among other things, a decision was made to audit [review] all decrees of Ianoukovytch. Today we have the first results. We are talking about two decrees of Ianoukovytch, of May 14 and September 17, 2013 on the appointment of judges of the Constitutional Court of Ukraine Oleksandr Mykolayovych Tupytskyi and Oleksandr Volodymyrovych Kasminin. I have revoked both of these decrees. These persons may have a well-deserved rest."²³

The two CCU judges concerned, Oleksandr Tupytskyi and Oleksandr Kasminin, lodged an action with the Supreme Court of Ukraine against the Decree No. 124/2021, cancelling their appointment as judges of the CCU.²⁴

Following these Decrees, Oleksandr Tupytskyi and Oleksandr Kasminin reportedly were not allowed to enter the building of the CCU.²⁵ Oleksandr Tupytskyi continues to be under criminal investigation.

The Presidential Decrees Nos. 607/2020 and 79/2021 that concerned suspension of the CCU judge by the President of Ukraine and Decree 124/2021, envisaging removal of the CCU judges by the President of Ukraine *prima facie* raise issues of independence of judiciary vis-à-vis the executive under national and international law. They should be assessed in light of the international law and standards, as well as national law on the independence of the judiciary.

III. International law

Separation of powers

The principle of the separation of powers is fundamental to the rule of law and forms the cornerstone of an independent and impartial justice system.²⁶ The UN Special Rapporteur on the independence of judges and lawyers has underscored that "the principle of the separation of powers [...] is the bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of the separation of powers is a *sine qua non* for a democratic State [...]."

As underlined by the Venice Commission, "[t]he principles of 'separation of powers' and balance of powers' demand that the three functions of the democratic state should not be concentrated in one branch, but should be distributed amongst different institutions. [...]"

²² *Ibid.*

²³ *Ibid.*

²⁴ See for example, <https://www.tellerreport.com/news/2021-03-30-the-supreme-court-of-ukraine-received-a-claim-to-appeal-against-the-decree-on-judges-of-the-constitutional-court.ry4oKc5eSO.html>

²⁵ Statement of the President of the Constitutional Court of Ukraine on committing criminal offences (crimes) by the employees of the Administration of State Guard of Ukraine, <https://ccu.gov.ua/en/novina/statement-chairman-constitutional-court-ukraine-committing-criminal-offences-crimes-employees>; The Constitutional Court of Ukraine statement: **Information on non-admission of the President of the Constitutional Court of Ukraine to the administrative building of the Constitutional Court of Ukraine on January 19, 2021**, <https://ccu.gov.ua/en/novina/information-non-admission-chairman-constitutional-court-ukraine-administrative-building>.

²⁶ The International Commission of Jurists, International principles on the independence and accountability of judges, lawyers and prosecutors – Practitioners' guide, No. 1, page 18.

The concept of the separation of powers is most clearly achieved with respect to the judiciary, which must be independent from the two other branches.²⁷

The relative functions of the three branches of State power are well established under rule of law principles, as stressed by the ICJ on multiple occasions.²⁸

The Consultative Council of European Judges (CCJE) has stressed that the principle of separation of powers does not suggest that the three powers – the legislative, the judicial and the executive – exist in isolation from one another, but rather they should be complementary, with no one power dominating the others.²⁹ This suggests a degree of disagreement or tension in certain cases:

“It has to be accepted [...] that a certain level of tension is inevitable between the powers of the state in a democracy. If there is such “creative tension”, it shows that each power is providing the necessary check on the other powers and thus contributing to the maintenance of a proper equilibrium. If there were no such tension between the three powers, the suspicion might arise that one or two powers had stopped holding the other to account on behalf of society as a whole and thus, that one or more powers had obtained domination over the rest. Thus, the fact of tension between the judiciary and the other two powers of the state should not necessarily be seen as a threat to the judiciary or its independence, but rather as a sign that the judiciary is fulfilling its constitutional duty of holding the other powers to account on behalf of society as a whole.”³⁰

Such tension cannot be resolved in ways which undermine the independence of the judiciary. As the CCJE explained:

“Above all the other powers of the state must recognise the legitimate constitutional function that is carried out by the judiciary and ensure it is given sufficient resources to fulfil it. This function of adjudicating on all legal disputes and of interpreting and applying the law is as fundamental to the well-being of a modern democratic state governed by the rule of law as are the functions of the legislative and executive powers of the state. In a state governed by the principle of separation of powers, interferences between the action of one branch of the State and other branches must be maintained within the bounds of the law and internationally accepted standards. The CCJE considers that, when an unwarranted interference does occur, the powers of the state should loyally cooperate to restore the balance and so the confidence of society in a smooth functioning of public institutions. In all cases of conflict with the legislature or executive involving individual judges the latter should be able to have recourse to a council for the judiciary or other independent authority, or they should have some other effective means of remedy.”³¹

The independence of the judiciary

The principle of judicial independence is a universal general principle of law and the rule of law, also guaranteed under treaty obligations by Ukraine, including Article 14 of the ICCPR,

²⁷ European Commission for Democracy through Law (Venice Commission) Compilation of Venice Commission Opinions and Reports Concerning Separation Of Powers, 8 October 2020, CDL-PI (2020)012, paras. 14-15, <http://www.cepc.gob.es/docs/default-source/comisionveneciadoc/compilation-of-opinions-and-reports-concerning-separation-of-powers.pdf?sfvrsn=0>

²⁸ The Rule of Law and Human Rights, Principles and Definitions, <https://www.icj.org/wp-content/uploads/1967/01/principles-and-definitions-of-human-rights-conference-report-1966-eng.pdf> and 1952-2012: Congresses and major conferences of the International Commission of Jurists, Revised Edition, March 2019, <https://www.icj.org/wp-content/uploads/2019/04/Universal-ICJ-Congresses-Publications-Reports-2019-ENG.pdf> (Act of Delhi, pages 34-42).

²⁹ CCJE Opinion No. 18 (2015) “The position of the judiciary and its relation with the other powers of state in a modern democracy”, para 9.

³⁰ *Ibid.*

³¹ *Ibid.*, para 43.

which binds all organs of the State. Independence of the judiciary requires institutional independence, both in law and practice, as well as the independence of individual judges who enjoy personal independence in their decision making.³² The UN Basic Principles on the Independence of the Judiciary³³ are the minimum universal standard, which have been endorsed by all States at the UN General Assembly. These and numerous other global and regional standards³⁴ affirm that all governmental and other institutions must respect and observe the independence of the judiciary. This must be guaranteed by the State and enshrined in the Constitution or the law of the state.³⁵

According to Principle 1 of the ICJ Declaration and Plan of Action on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (The Geneva Declaration): "[t]he judiciary serves as an essential check on the other branches of the State and ensures that any laws and measurescomply with the Rule of Law, human rights and, where applicable, inter- national humanitarian law..... [T]he principle of judicial review is indispensable to the effective operation of the Rule of Law. Judges must retain the authority within the scope of their jurisdiction as final arbiters to state what the law provides. The judiciary itself must have the sole capacity to decide upon its jurisdiction and competence to adjudicate a case."³⁶

The independence of the judiciary is a requirement of international human rights law and in particular, of the right to a fair trial hearing, as protected by both Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention on Human Rights (ECHR), guaranteeing the right to a hearing by an independent and impartial court or tribunal. The European Court of Human Rights, in interpreting and applying the right to a fair hearing, has specified a number of factors to take into account when assessing whether there has been a hearing by an independent court in accordance with Article 6 ECHR including " the manner of appointment of [the Court's] members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."³⁷ The UN Human Rights Committee, in its authoritative interpretation of the State obligations to ensure the right to a fair trial in its General Comment No.32, has said that: "[t]he requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure [and] the conditions governing promotion, transfer, suspension and cessation of their functions".³⁸

³² E.g. International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, op. cit., pp. 21-27.

³³ Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

³⁴ See e.g., *The Magna Carta of Judges (Fundamental Principles)*, the CCJE, November 2010; Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 13 October 1994, Principle I.2(b); The appendix to Recommendation CM/Rec (2010)12 of the Committee of Ministers of the Council of Europe to member States on judges: independence, efficiency and responsibilities, 17 November 2010, paras. 49 and 50; Opinion no. 1 (2001) of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges, 2001, paras. 57 and 60; the Universal Charter of the Judge, the International Association of Judges, 17 November 1999, Article 8 (Security of office).

³⁵ Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 1.

³⁶ The International Commission of Jurists, *The Geneva Declaration, ICJ Declaration and Plan of Action on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*, 2008, Principle 1, and the International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration, Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*, page xvi, <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>

³⁷ See ECtHR, *Campbell and Fell v. the United Kingdom*, Application No. 7819/77, Judgment of 28 June 1984

³⁸ UN Human Rights Committee General Comment No. 32, para. 19.

As the CCJE has noted therefore, judges' "independence is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice."³⁹ The Universal Charter of the Judge, an instrument approved by judges from all parts of the world, establishes that "[t]he independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence."⁴⁰

Security of tenure and irremovability of judges

The UN Basic Principles set out that a key aspect of the independence of the judiciary, both institutional and personal, is security of judicial tenure. The term of office of judges must be adequately secured by law⁴¹ and judges must have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.⁴²

This is affirmed by the UN Human Rights Committee in its General Comment No. 32 noting that "Independence of a court requires, in particular, that adequate safeguards are put in place to secure such independence relating, amongst other things, to the guarantees relating to the security of tenure of the judges until a mandatory retirement age or the expiry of their term of office, where such exist."⁴³

Importantly, the CCJE highlighted that "Decisions which remove basic safeguards of judicial independence are unacceptable even when disguised. For example, a new parliamentary majority and government must not question the appointment or tenure of judges who have already been appointed in a proper manner."⁴⁴

Moreover, where judges are subject to suspension or removal from office, the UN Basic Principles on the Independence of the Judiciary affirm that this can only be done following fair procedures⁴⁵ and only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.⁴⁶ The same principles are affirmed in various other international instruments and standards concerning judicial independence.⁴⁷ The UN Human Rights Committee has been clear that in order for States to comply with their international legal obligations under the ICCPR, they must ensure that, "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."⁴⁸ The European Court also emphasised importance of the procedural fairness in cases involving the removal or dismissal of judges.⁴⁹

³⁹ CCJE, Opinion No. 1, para. 10.

⁴⁰ The Universal Charter of the Judge, approved by the International Association of Judges (IAJ) on 17 November 1999, Article 1.

⁴¹ Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 11.

⁴² *Ibid.* Principle 12.

⁴³ UN Human Rights Committee General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, para. 19.

⁴⁴ CCJE Opinion No. 18 (2015) "The position of the judiciary and its relation with the other powers of state in a modern democracy", para 44.

⁴⁵ Basic Principles on the Independence of the Judiciary Principle 17.

⁴⁶ *Ibid.* Principle 18.

⁴⁷ E.g. Resolution adopted by the Human Rights Council on 22 June 2017, 35/12, Independence and impartiality of the judiciary, jurors and, assessors, and the independence of lawyers, A/HRC/RES/35/12, para. 3; IBA Minimum Standards of Judicial Independence (Adopted in 1982), para. 30; Mount Scopus International Standards of Judicial Independence, Approved on 19 March 2008, Consolidated 2015, para. 5.5.

⁴⁸ UN Human Rights Committee General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 20.

⁴⁹ The European Court of Human Rights, *Denisov v. Ukraine* [GC], No. 76639/11, 25/09/2018, §§ 38-82; *Baka v. Hungary*, [GC], no. 20261/12, ECHR 2016, 23 June 2016, §§ 62-79.

According to the Council of Europe's European Charter on the Statute for Judges, decisions to terminate the office of a judge should involve an independent authority which is composed of a majority of judges:⁵⁰

"1.3. In 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.

...

5.1. The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. 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. ..."

The well-established principles of separation of powers and the independence of the judiciary outlined above clearly point to an obligation of the States to allow no interference by the executive in the exercise of judicial functions, and require security of tenure of judges with termination of office only on sufficiently justified grounds and through an independent and fair process.

IV. National law

The Constitution of Ukraine is the superior legal authority in the national law.⁵¹ Laws and other normative legal acts, including the decrees of the President, are adopted on the basis of the Constitution of Ukraine and must conform to it.⁵² According to the Constitution of Ukraine, "international treaties in force, agreed to be binding by the Verkhovna Rada of Ukraine [parliament], are part of the national law of Ukraine."⁵³

The principle of the independence of the judiciary is enshrined in the national law of Ukraine. The Constitution of Ukraine, which provides that "independence and inviolability of a judge of the CCU are guaranteed by the Constitution and laws of Ukraine. Any influence on a judge of the CCU is prohibited."⁵⁴

Article 149¹ of the Constitution provides that:⁵⁵

"The authority of a judge of the Constitutional Court of Ukraine shall be terminated in case of:

[...] 5) coming into force of a judgment finding him or her guilty of committing a crime.

The grounds for dismissal of a judge of the Constitutional Court of Ukraine are the following:

⁵⁰ European Charter on the Statute for Judges, Council of Europe, 1998.

⁵¹ The Constitution of Ukraine, 28 June 1996, Article 8: "The Constitution of Ukraine has the highest legal force."; https://ccu.gov.ua/sites/default/files/constitution_2019_eng.pdf

⁵² Article 8 of the Constitution of Ukraine; Article 106 of the Constitution: "The President of Ukraine, on the basis and for the execution of the Constitution and the laws of Ukraine, issues decrees and directives that are mandatory for execution on the territory of Ukraine."

⁵³ The Constitution of Ukraine, Article 9.

⁵⁴ *Ibid.*, Article 149.

⁵⁵ Taking into account that under the Decrees Nos. 607/2020 and 79/2021, the judge was suspended on account of [alleged] criminal charges against him, the provisions of the national law which might have relevance to the criminal proceedings against a judge of the CCU are to be reviewed below.

[...] 2) violation by him or her of incompatibility requirements; 3) commission by him or her of a serious disciplinary offence, flagrant or permanent disregard of his or her duties which to be incompatible with the status of judge of the Court or reveals non-conformity with being in the office.”

Accordingly, the Constitution of Ukraine provides for an exhaustive list of grounds of removal of a judge of the CCU from office. A criminal charge against a judge of the CCU, in the absence of a conviction, is not *per se* a ground to immediately dismiss a judge under the Constitution or the Law on the CCU.⁵⁶

It is only the CCU itself that is competent to decide on the dismissal of a judge of the CCU from his or her office and this requires a decision of at least two-thirds of the judges of the CCU.⁵⁷ Moreover, in the context of criminal proceedings against judges of the CCU, under the Constitution the judges may not be detained or kept in custody or arrested without the consent of the CCU until a judgment finding them guilty is delivered by a competent court, except for detention of a judge caught in the very act of committing a serious or particularly serious crime or immediately after it.⁵⁸ It is the Prosecutor General’s Office that has the powers to seek detention or custody of the CCU’s judge within the framework of criminal proceedings.⁵⁹ A judge must be notified of a suspicion of committing a criminal offence by the Prosecutor General of Ukraine.⁶⁰

Pursuant to the Constitution of Ukraine, bodies of legislative, executive and judicial power exercise their authority within the limits established by the Constitution and in accordance with the laws of Ukraine.⁶¹ A judge of the CCU may not be held liable for voting on decisions or opinions of the Court, except in cases of committing a crime or a disciplinary offence,⁶² nor subjected to any coercive enforcement measures by any authority or institution other than a court.⁶³

The Constitution and the Law on the Constitutional Court does not expressly provide for suspension from office of a judge pending the outcome of criminal proceedings in respect of a judge of the CCU. Such suspension is explicitly envisaged only in respect of a judge of an ordinary court under the Law on the Organisation of Courts and the Status of Judges.⁶⁴ Concerning a judge of the CCU, provision is made only for “termination of power” or “dismissal” on certain limited grounds.⁶⁵ Detention of a judge of the CCU on the basis of the limited grounds permitted under the Constitution may lead to suspension from office pending the outcome of the proceedings.⁶⁶ In such case, it is the CCU that approves the detention of a judge.⁶⁷

Article 154.3 (General provisions related to suspension from office) of the Criminal Procedure Code that the Decrees Nos. 607/2020 and 79/2021 rely on envisages that “an issue of suspension from office of the persons appointed by the President of Ukraine shall be decided by him or her on the grounds of the Public Prosecutor’s motion in accordance

⁵⁶ Law on the Constitutional Court of Ukraine, 13 July 2017, No. 2136-VIII, Article 21, https://ccu.gov.ua/sites/default/files/law_on_ccu_amended_2017_eng.pdf.

⁵⁷ The Constitution of Ukraine, Article 149¹.

⁵⁸ *Ibid.*, Article 149.

⁵⁹ Law on Constitutional Court of Ukraine, Article 24 (Independence and Inviolability of a Judge of the Constitutional Court): [...] 5. A petition for consent to detention, custody or arrest of a judge shall be submitted to the Court by the Prosecutor General or a person performing his or her duties. [...] 9. A Judge shall be notified of suspicion of committing a criminal offence by the Prosecutor General or a person performing his or her duties.”

⁶⁰ *Ibid.*, Article 24.

⁶¹ The Constitution of Ukraine, Article 6.2.

⁶² *Ibid.*, Article 148.

⁶³ Law on Constitutional Court of Ukraine, Article 24 (Independence and Inviolability of a Judge of the Constitutional Court).

⁶⁴ Law on the Organisation of Courts and the Status of Judges, 2016, No. 31, Article 49, [https://venice.coe.int/webforms/documents/?pdf=CDL-REF\(2020\)068-e](https://venice.coe.int/webforms/documents/?pdf=CDL-REF(2020)068-e)

⁶⁵ The Constitution of Ukraine, Article 149¹.

⁶⁶ *Ibid.*, Article 149.

⁶⁷ *Ibid.*, Article 149.

with the procedure set forth by law.” While one-third of the CCU’s judges are appointed by the President of Ukraine,⁶⁸ the law does not vest in the President of Ukraine the powers to decide on their dismissal. Article 154.3 of the Criminal Procedure Code also considers the possibility of dismissal of a judge as follows: “Suspension of a judge from his office shall be carried out by the Higher Qualification Commission of Judges of Ukraine on the grounds of a reasoned motion of the Prosecutor General of Ukraine in accordance with the procedure set forth by law.” Under the national law, including the Constitution, the status of judges of the courts of general jurisdiction and those of the CCU are governed by separate rules and processes. The Law on the Organisation of Courts and the Status of Judges explicitly considers suspension of a judge of an ordinary court from their post. The High Qualification Commission that is mentioned in Article 154.3 of the Criminal Procedure Code is entitled to decide an issue of suspension only with respect to an ordinary court’s judge.

Reliance on Article 154.3 of the Criminal Procedure Code to suspend a CCU judge in the Decrees Nos. 607/2020 and 79/2021 therefore appears to constitute a misapplication of the national law. This Article should be applied and interpreted in compliance with the Constitution, which in addition to the Law on the Constitutional Court, is a legal act regulating the CCU of Ukraine.⁶⁹ Accordingly, reliance on Article 154.3 of the Criminal Procedure Code does not bring the Decrees Nos. 607/2020 and 79/2021 in compliance with the Constitution.

As regards the Decree No. 124/2021, which cancelled the decrees of 14 May 2013 (No. 256) on appointment of Oleksandr Tupytskyi as a judge of the CCU and of 17 September 2013 (No. 513) on appointment of Oleksandr Kasminin as a judge of the CCU, pursuant to Article 106 of the Constitution, the President of Ukraine, on the basis and for the implementation of the Constitution and the laws of Ukraine, issues decrees that are mandatory for execution on the territory of Ukraine. Accordingly, the decree of the President on appointment of a judge, including Decrees of 14 May 2013 (No. 256) and 17 September 2013 (No. 513) are final and binding.

Furthermore, the exhaustive list of grounds to remove a CCU judge under the national law of Ukraine⁷⁰ does not contain general formula such as “posing threat to the state independence and national security” as a ground to remove the judge. The national law provisions referred to in the Decree No. 124/2021, that is, Articles 102 and 106 of the Constitution, as well as Article 3 and 13 of the Law on National Security of Ukraine, do not consider any provisions on removal of judges, but general provisions on the principles and areas of national security and defence and the powers of the President of Ukraine in this field.⁷¹ None of them envisage directly the right of the President to remove a judge. Moreover, the interpretation of the abovementioned legal provisions should be in compliance with the national law, including the Constitution of Ukraine.⁷²

⁶⁸ *Ibid.*, Article 148.

⁶⁹ Law on Constitutional Court of Ukraine, Article 3 (Legal Framework for the Activities of the Court).

⁷⁰ The Constitution of Ukraine, articles 149 and 149¹ Law on the Constitutional Court, articles 20 and 21.

⁷¹ Article 102 of the Constitution of Ukraine provides: “...The President of Ukraine is the guarantor of state sovereignty and territorial indivisibility of Ukraine, the observance of the Constitution of Ukraine and human and citizen’s rights and freedoms.” Article 106 of the Constitution envisages that the President of Ukraine: “1) ensures state independence, national security and the legal succession of the state; [...] 17) administers in the spheres of national security and defence of the State.” Moreover, the articles 3 (Principles of public policy in the areas of national security and defense) and 13 (National Security and Defence Leadership) of the Law on National Security of Ukraine (21 June 2018, No. 2469-VIII) that the Decree relies on, only identifies some general issues such as the principles of public policy in the areas of national security and defense, the aims of the state policy in the areas of national security and defense, which include constitutional order, the fundamental principles, and the fundamental national interests of Ukraine, as well as power of the President in the field of defense and national security.

⁷² This is also requirement of Article 8 of the Constitution of Ukraine, which envisages that the Constitution has the superior legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it.

V. Conclusions

The well-established principles of separation of powers and the independence of the judiciary outlined above unequivocally require that there must be no interference by the executive in the exercise of the judicial functions by the judiciary. This includes disguised means of dismissals of judges duly appointed in accordance with the established procedure.

In light of the international law specified above and the national legal framework of Ukraine, the ICJ concludes that the Decrees of the President of Ukraine in respect of the judges of the CCU undermine the independence of the judiciary in Ukraine and as such fail to comply with international law and standards on the independence of the judiciary as well as Ukraine's own national legal framework.

In particular, a series of measures including the legislative initiative of the President to dismiss the CCU judges, presidential Decrees to withdraw appointment of the CCU judges, followed by a criminal investigation against the CCU president, appear to be linked to a CCU judgment with which the government disagreed. If this is the case, it would amount to retaliation against the CCU and individual judges of the CCU as a result of the legitimate exercise of their judicial powers within their competence. They therefore constitute a violation of the rule of law and the independence of the judiciary.

More precisely, an attempt to dismiss judges of the CCU, by revoking the decrees appointing them seven years after their adoption in a due manner, is not provided for by the law of Ukraine and as such constitute an extra procedural means to dismiss a judge of the CCU. Dismissal of individual judges by Presidential decree outside the existing procedure strips judges of guarantees of security of tenure, contrary to international law and standards on the independence of the judiciary.

Accordingly, the ICJ considers that the Decrees Nos. 607/2020 and 79/2021 are not in compliance with national and international law. Furthermore, Decree No. 124/2021 cancelling the Decrees of 14 May 2013 (No. 256) and 17 September 2013 (No. 513) appears as a disguised form of removal of the judges already selected in a legitimate manner, contrary to the guarantees of security of tenure.

VI. Recommendations

The ICJ therefore recommends the State authorities of Ukraine to take all legal actions to respect and ensure judicial independence in Ukraine, in particular, by providing effective remedies and reparation to the judges of the CCU concerned in line with the principle *restitutio in integrum*⁷³ as recognised in international law, including by revoking their removal and restoring them to their terms of office.

⁷³ ICJ: The Right to a Remedy and Reparation for Gross Human Rights Violations, A Practitioners' Guide Revised Edition, 2018, <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>, pages 159-173.