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11 July 2018

## Forced retirement of 27 Supreme Court Justices

Your Excellency President Duda,

The International Commission of Jurists (ICJ), its Centre for the Independence of Judges and Lawyers (CIJL) and the undersigned sitting and former judges who are Commissioners and Honorary Members of the ICJ, condemn the recent forced retirement of 27 out of 72 Polish Supreme Court justices, including its President Małgorzata Gersdorf, and urge you to act immediately to restore the independence of the judiciary by reinstating them in office.

We have been informed that the effective dismissal of the Supreme Court justices is based on a new law on the Supreme Court that entered into force on 3 July, and which changes the mandatory retirement age of judges of the Supreme Court from 70 to 65 years. The Supreme Court Justices may apply to the President of the Republic to have their mandate extended for a period of three years, renewable once. No criteria for such a decision to extend their term of office are established by the law and there is no possibility for review of this decision.

We are gravely concerned that the effective dismissal of one third of the Supreme Court, coupled with the broad discretion given to your Excellency's office to make exceptions, has taken place in contravention of international human rights law and standards, including the right to a fair hearing, and is contrary to basic principles of the rule of law.

Judicial independence and the separation of powers are the bedrock of the rule of law. International standards such as the *United Nations Basic Principles on the Independence of the Judiciary* stress that judicial independence is a fundamental requirement in promoting human rights and preserving rule of law. The United Nations General Assembly in Resolution 65/213 of 1 April 2011 reaffirmed that an independent and impartial judiciary is essential for the protection of human rights, the rule of law, good governance and democracy.

The irremovability of judges is a main pillar of judicial independence. Judges may be removed only in the most exceptional cases involving serious misconduct or incapacity. And in such exceptional circumstances, any removal process must comport with international standards of due process and fair trial, including the right to an independent review of the decision. Members of the judiciary must never be subject to removal on the basis of judicial decisions rendered in the legitimate exercise of their professional functions. Dismissal procedures that give executive officials, such as the President of the Republic, arbitrary control over deciding whether or not individual judges are or are not able to continue their functions, violate the separation of powers and independence of the judiciary.

We recall that Principle 12 of the UN Basic Principles on the Independence of the Judiciary affirms that "*[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists*" and Principle 18 provides that, "*Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.*" The Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities provides that "*[s]ecurity 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. [Furthermore, a] permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds.*"(paras.49 to 50)

Nothing in these standards contemplates the retroactive imposition of a mandatory retirement age to interrupt an ongoing permanent appointment, especially under the unbounded discretion of an official of the executive branch of government. To the contrary, such a situation additionally runs afoul of other Principles of the UN Basic Principles, including that, "*[i]t is the duty of all governmental and other institutions to respect and observe the independence of the judiciary*" (Principle 1); "*[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*" (Principle 2); and "*[t]here shall not be any inappropriate or unwarranted interference with the judicial process*" (Principle 4).

We furthermore respectfully draw your attention to the similar case *Baka v Hungary*, in which the Grand Chamber of the European Court of Human Rights stressed the "*growing importance which international and Council of Europe instruments, as well as the case-law of international courts and the practice of other international bodies are attaching to procedural fairness in cases involving the removal or dismissal of judges, including the intervention of an authority independent of the executive and legislative powers in respect of every decision affecting the termination of office of a judge*" (para.121). The Court held that the dismissal by law of the President of the Supreme Court "*can hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the irremovability of judges, which – according to the Court's case-law and international and Council of Europe instruments – is a key element for the maintenance of judicial independence.*" (para.172)

We further note that the UN Special Rapporteur on the independence of the judiciary has recently reported, with regard to the new Polish law on the Supreme Court that "*this draconian measure undermines both the security of tenure of sitting judges and the independence of the Supreme Court in general. The forced dismissal of a group of judges for general reasons not related to their individual capacity or behaviour also*

*constitutes a flagrant breach of the principle of security of tenure of judges.*" (Report to the UN Human Rights Council, June 2018, para. 55)

Finally, we note that, as called for by numerous experts and civil society organisations, including the ICJ, the European Commission has recognised the current situation as undermining *"the principle of judicial independence, including the irremovability of judges"* and has triggered a procedure to suspend Poland from its EU voting rights under Article 7 of the Treaty of the European Union.

The undersigned jurists urge your Excellency to act immediately to restore the independence of the judiciary by reinstating the Supreme Court justices forced into retirement, follow the recommendations of the European Commission on judicial reform, and take action to repeal the law on the Supreme Court that strikes at the very core of judicial independence.

Yours Sincerely,

- Justice Adolfo Azcuna, former Associate Justice of the Supreme Court of the Philippines
- Justice Solomy Balungi Bossa, Ugandan Judge on the International Criminal Court
- Justice Ian Binnie, retired Justice of the Supreme Court of Canada
- Justice Azhar Cachalia, Judge of the Supreme Court of Appeal of South Africa
- Dame Silvia Cartwright, former Judge of the High Court in New Zealand and of the Extraordinary Chambers in the Courts of Cambodia
- Justice Moses Chinhengo, Judge of the High Court of Botswana
- Justice Martine Comte, former President of the Orleans Court of Appeal, France
- Justice Radmila Dracigevic-Dicic, Acting President of the Supreme Court of Appeals, Judge of the Supreme Court of Serbia
- Justice Elizabeth Evatt, former Chief Justice of the Family Court of Australia
- Justice Claire L'Heureux-Dubé, former Justice of the Supreme Court of Canada
- Justice Paul J. G. Kapteyn, former Judge of the European Court of Justice
- Justice Michael Kirby, former Justice of the High Court of Australia and former President of the International Commission of Jurists
- Justice Kalthoum Kennou, Judge of the Tunisian Cassation Court
- Justice Ketil Lund, former Justice of the Norwegian Supreme Court
- Justice Qinisile Mabuza, Judge of the High Court of Swaziland
- Justice Egbert Myjer, former Judge of the European Court of Human Rights
- Justice Michèle Rivet, former President of the Quebec Human Rights Tribunal
- Justice Kalyan Shrestha, former Chief Justice of the Nepalese Supreme Court
- Justice Philippe Texier, Judge of the French Court of Cassation
- Justice Lillian Tibatemwa-Ekirikubinza, Justice of the Supreme Court of Uganda
- Justice Stefan Trechsel, former ad litem Judge at the International Criminal Tribunal for the former Yugoslavia
- Dr Rodrigo Uprimny Yepes, former Assistant Justice of the Constitutional Court of Colombia