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## List of supplementary items requested for inclusion in the agenda of the thirteenth session of the Assembly

### Addendum

### Appendix I

#### **Internal memorandum from the Presidency of the Court to the Secretariat of the Assembly of States Parties, dated 5 October 2014**

#### **Subject: Transmission of communications from the ICC Judges' Pensions Committee and submission of agenda item for the forthcoming ninth session of the Assembly of States Parties**

1. The Presidency is pleased to transmit to you the two attached communications on behalf of the ICC Judges' Pensions Committee, established on 19 February 2010 by the judges of the Court (hereinafter "Committee").
2. The Committee was tasked with considering matters related to the amendments to the pension scheme regulations for the judges of the Court as adopted by the Assembly of States Parties on 14 December 2007 (ICC-ASP/6/Res.6).
3. The Presidency wishes to bring the information in the attachments to the attention of the Assembly of States Parties.
4. The first attachment presents the views of the Committee on whether the pension benefits of Judge Daniel David Ntanda Nsereko and Judge Bruno Cotte are governed by the original pension scheme regulations of 10 September 2004 or the amended regulations of 14 December 2007, recommending that they are more appropriately governed by the original scheme.
5. The second attachment presents the views of the Committee on the pension benefits for those judges governed by the amended regulations of 14 December 2007, respectfully requesting that the Assembly of States Parties take steps to review these amendments.
6. The Presidency requests that you give these communications your fullest consideration and, pursuant to rule 11(2)(k) of the Rules of Procedure of the Assembly of States Parties, that you include the issues raised therein on the agenda for the forthcoming ninth session of the Assembly of States Parties.
7. Please do not hesitate to contact the Presidency if any further information is required.

## Report from the Judges' Pension Committee, dated 28 September 2010: Pensions for Replacement Judges

### I. Introduction

1. On the 19 February 2010, at an informal plenary, the judges of the ICC agreed to establish a Committee to study the consequences of the Pension Reform of 2007. Among other things, the Committee was asked to look into the issue of Pensions for Replacement Judges, which also falls under the same Reform.

2. In this memorandum the ICC Judge's Pensions Committee addresses the question whether Judge Daniel David Ntanda Nsereko and Judge Bruno Cotte's pension benefits are administered under the International Criminal Court's original pension scheme regulations of 10 September 2004 (hereinafter: "Original Regulations") or the amended regulations of 14 December 2007 (hereinafter: "Amended Regulations"). The Committee is of the view that Judges Nsereko and Cotte's pensions are more appropriately governed by the Original Regulations.

### II. History of the ICC pension regulations

#### A. Original regulations

3. The Original Regulations are contained in an annex to a resolution from the third session of the Assembly of States Parties ("ASP") and are entitled "Pension scheme regulations for judges of the International Criminal Court".<sup>1</sup> Although no authority is provided for enacting these regulations, they presumably are authorised under article 49 of the Rome Statute of the International Criminal Court (hereinafter: "Statute")<sup>2</sup> and rule 88 of the ASP's Rules of Procedure,<sup>3</sup> which entitle the ASP to determine the judges' salaries, allowances and expenses. The Original Regulations apply to all judges who took office prior to the Amended Regulations, and they take effect when a judge ceases to hold office and attains the age of sixty.<sup>4</sup> All judges who have completed a full nine-year term shall be entitled to a retirement pension equal to half their annual salary.<sup>5</sup> A proportional pension reduction is applied if a judge has not completed the full nine year term but has served for at least three years.<sup>6</sup> The Original Regulations also contain provisions regarding Disability,<sup>7</sup> Spouse Support<sup>8</sup> and Children's Benefits.<sup>9</sup>

4. Following discussions in the year 2005 as to the long-term budgetary implications of the pension scheme for judges,<sup>10</sup> the Committee on Budget and Finance ("CBF")<sup>11</sup> called for a reduction in judicial pension benefits. The CBF determined that the judges' pension scheme "was generous with significant financial implications for States Parties".<sup>12</sup> The CBF suggested that the full pension offered in the Original Regulations "provided the judges

<sup>1</sup> Assembly of States Parties, "Strengthening the International Criminal Court and the Assembly of States Parties", 10 September 2004, ICC-ASP/3/Res.3, appendix 2 (hereinafter: "Original Regulations").

<sup>2</sup> Rome Statute of the International Criminal Court, 17 July 1998, 2187 United Nations Treaty Series 38544, art. 49.

<sup>3</sup> Assembly of States Parties, *Rules of Procedure of the Assembly of States Parties* (ICC, 2005) (hereinafter: "ASP RP"), rule 88, accessed at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP7/ICC-ASP-Rules\\_of\\_Procedure\\_English.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP7/ICC-ASP-Rules_of_Procedure_English.pdf) ("The Assembly shall decide on salaries, allowances and expenses which shall be received by the judges").

<sup>4</sup> Original Regulations, *supra* note 1, at art. 1 (1).

<sup>5</sup> *Id.*, at art. 1 (2).

<sup>6</sup> *Id.*, at art. 1 (3).

<sup>7</sup> *Id.*, at art. 2.

<sup>8</sup> *Id.*, at art. 3.

<sup>9</sup> *Id.*, at art. 4.

<sup>10</sup> Assembly of States Parties, "Report of the Committee on Budget and Finance on the work of its fourth session", 15 April 2005, ICC-ASP/4/2, para. 22; Assembly of States Parties, "Report on the long-term budgetary consequences of the pension scheme regulations for judges", 18 October 2005, ICC-ASP/4/26.

<sup>11</sup> The CBF is the ASP committee responsible for overseeing the financial, budgetary and Administrative operations of the Court,

<sup>12</sup> Assembly of States Parties, "Report of the Committee on Budget and Finance on the work of its fifth session", 21 October 2005, ICC-ASP/4/27 (hereinafter "Fifth Session CBF Report"), para. 91.

with a level of pension income which was excessive and inconsistent with the pensions available to all other Court staff."<sup>13</sup>

5. The CBF concluded that the judicial pension income, rather than being half the annual salary, should rather be commensurate with the proportion of an individual's life spent at the Court.<sup>14</sup>

## B. The amended regulations

6. During the ASP's sixth session on 14 December 2007, the Amended Regulations were adopted and substantially lowered judicial pensions.<sup>15</sup> The pension was reduced from a half salary for a full year term to 1/72<sup>nd</sup> of the judges' annual salary.<sup>16</sup> The pensionable age was also raised from 60 to 62.<sup>17</sup>

7. The 1/72<sup>nd</sup> percentage of the judges' annual salary was designed so that judges would earn a 50% salary pension from their entire working life, as opposed to the Original Regulations which granted a 50% salary pension just from time spent at the ICC.<sup>18</sup> For example, a judge earning 180,000 euros per year and who had a 36 year career would earn 90,000 euros pension per year after 9 or 36 years under the Old and Amended Regulations, respectively. Pensions therefore accrue four times as slowly under the Amended Regulations, giving judges a 22,500 euros pension per year after their 9 year term of office at the ICC. A comparison of the Original and Amended Regulations are summarised in the table below:

**Table: Comparing Original and Amended Regulations**

	<i>Original regulations</i>	<i>Amended regulations</i>
Date enacted	10-sep-04	14-dec-07
Pensionable age	60	62
Pension	50% salary	12.5% salary
Annualized pension	1/18th annual salary per year	1/72 <sup>nd</sup> annual salary per year
Pension per year given salary of 180,000		
Euros and 9 year term served	90,000	22,500
Pension if less than full term	Proportional, but need 3+ years	Proportional

## C. Application of the amended regulations

8. Judges Nsereko and Cotte were elected as replacement judges in the same ASP session at which the Amended Regulations were adopted. Judge Cotte was elected in the first round of voting held on 30 November 2007.<sup>19</sup> Judge Nsereko was elected in the fourth

<sup>13</sup> Assembly of States Parties, "Report of the Committee on Budget and Finance on the work of its sixth session", 4 May 2006, ICC-ASP/5/1, para. 65.

<sup>14</sup> Assembly of States Parties, "Official Records of the Fifth Session", 23 November - 1 December 2006, ICC-ASP/5/32, p. 250 (at para. 91).

<sup>15</sup> Assembly of States Parties, "Amendments to the pension scheme regulations for judges of the International Criminal Court", 14 December 2007, ICC-ASP/6/Res.6 (hereinafter: "Amended Regulations").

<sup>16</sup> *Id.*, at art. 1 (2).

<sup>17</sup> *Id.*, at art. 1 (1).

<sup>18</sup> Assembly of States Parties, "Report of the Committee on Budget and Finance on the work of its eighth session", 29 May 2007, ICC-ASP/6/2 (hereinafter: "Eighth Session CBF Report"), para. 76. At a CBF estimate of 36 years of working life, a judge would accrue approximately 1.38% (1/72<sup>nd</sup>) of his annual salary as pension for each year he/she worked in order to get to a 50% annual salary pension at retirement.

<sup>19</sup> International Criminal Court, "Nominations for judges of the International Criminal Court- Results of the First Round", 30 November 2007, accessed at [http://www.icc-cpi.int/NR/rdonlyres/IA306C85-5B10-486C-8644-9F16E7476C56/277125/Nominations\\_of\\_JudgesResultsFirstRound30Nov2025.pdf](http://www.icc-cpi.int/NR/rdonlyres/IA306C85-5B10-486C-8644-9F16E7476C56/277125/Nominations_of_JudgesResultsFirstRound30Nov2025.pdf).

round of voting held on 3 December 2007.<sup>20</sup> Both judges were officially elected at least eleven days before the adoption of the Amended Regulations.

9. In discussing the application of amended pension regulations, the CBF repeatedly mentions that the provision was intended to apply to *future* judges.<sup>21</sup> The Ninth Session CBF Report is illustrative:

10. 100. The Committee recalled its recommendation at its eighth session that the pension scheme for *future judges* should be amended, and its request that the Court should submit draft amendments to give effect to these proposals and the financial implications of their adoption.<sup>22</sup>

11. Whilst the Amended Regulations themselves are notably silent as to when they enter into force, the ASP's official record of the sixth session indicates that the intention of the ASP was that the Amended Regulations should enter into force as of the sixth session of the Assembly and for the amendments to apply to judges elected at the sixth session:

12. The Assembly endorsed the recommendation of the [CBF] contained in paragraph 100 of its report that the pension scheme for judges be amended, and accordingly adopted the draft amendments to the Pension Scheme Regulations for judges as contained in the report of the Court on the pension scheme for judges, with entry into force as of the sixth session of the Assembly. In accordance with the decision of the Assembly at its second plenary meeting, *these amendments thus apply to the judges elected at the sixth session.*<sup>23</sup>

13. The ASP official record does not refer to "future judges" when setting out the application of the Amended Regulations in the section quoted above, even though it indicates that the intention of the ASP was to endorse the CBF recommendation.

### III. Judges Nsereko and Cotte and the original regulations

14. Despite the stance set out in the ASP official record, in which an intention is evinced to apply the Amended Regulations to Judges Nsereko and Cotte, in the view of the Committee this stance deserves reconsideration because: i) The ASP's Decision is Inconsistent with General Principles of Law, ii) The Application of the Amended Regulations to Judges Nsereko and Cotte is Inconsistent with ASP General Practices and iii) The ASP's Decision is Inconsistent with the ICC's Statutory Framework. Each of these factors will be considered below.

#### A. The ASP's decision is inconsistent with general principles of law

15. To backdate the Amended Regulations to apply to Judges Nsereko and Cotte would be to give them retroactive effect. Retroactive laws are objectionable, on the general principle, that they negate the object of law as a guide for human conduct. They also divest individuals of vested interests in the sense that those individuals may have made decisions on the basis of the existing laws. As stated in two English cases:

16. The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says.<sup>24</sup>

<sup>20</sup> International Criminal Court, "Nominations for judges of the International Criminal Court - Results of the Fourth Round", 30 November 2007, [http://www.icc-cpi.int/NR/rdonlyres/1A306C85-5B10-486C-8644-9F16E7476C56/277134/Nominations\\_of\\_JudgesResultsFourthRound3Dec2030.pdf](http://www.icc-cpi.int/NR/rdonlyres/1A306C85-5B10-486C-8644-9F16E7476C56/277134/Nominations_of_JudgesResultsFourthRound3Dec2030.pdf).

<sup>21</sup> See Assembly of States Parties, "Report of the Committee on Budget and Finance on the work of its ninth session", 28 September 2007, ICC-ASP/6/12 (hereinafter: "Ninth Session CBF Report"), para. 100; Eighth Session CBF Report, *supra* note 18, at para. 75; Assembly of States Parties, "Report of the Committee on Budget and Finance on the work of its seventh session", 1 November 2006, ICC-ASP/5/23 (hereinafter: "Seventh Session CBF Report"), para. 89, Fifth Session CBF Report, *supra* note 12, at para. 98.

<sup>22</sup> Ninth Session CBF Report, *supra* note 21, at para. 100 (emphasis mine).

<sup>23</sup> Assembly of States Parties, "Official Records of the Sixth Session", 30 November - 14 December 2007, ICC-ASP/6/20 (hereinafter: "Sixth Session Official Records"), vol. I, p. 14 (at para. 19) (emphasis mine).

<sup>24</sup> United Kingdom, House of Lords, *Black-Clawson Int. Ltd. V. Papierwerke Waldhof-Aschaffenburg*, 5 March 1975, [1975] A.C. 591, p.638.

17. Retrospective laws are no doubt, prima facie, of questionable policy, and contrary to the principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law [...]. Accordingly the court will not ascribe retroactive force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature.<sup>25</sup>

18. As *Phillips v. Eyre* indicates, the general rule against retroactive legislation can only be circumvented by express legislative language. However, the Amended Regulations themselves are silent as to when they enter into force, and the general presumption that they are prospective and not retroactive should therefore apply.

## **B. The application of the amended regulations to judges Nsereko and Cotte is inconsistent with ASP general practices**

19. In the past the ASP has followed the practice that is consonant with the general principles of law outlined in the preceding paragraphs. Therefore, any decision to apply the Amended Regulations retrospectively to Judges Nsereko and Cotte would constitute a substantial departure from established practice, which is also the practice followed by the United Nations (hereinafter: "UN")

### **1. Expectations created because of other ASP and United Nations practices.**

20. Most amendment provisions to ASP instruments do not take effect until adoption. To list several examples, the "Conditions of service and compensation of judges of the International Criminal Court" (hereinafter: "Conditions of Service") were deemed to "enter into force upon the adoption of this document by the Assembly."<sup>26</sup> Amendments to the ASP's Rules of Procedure "shall enter into force upon adoption by a two-thirds majority of the members of the Assembly."<sup>27</sup> Presidency amendments to the ICC Financial Regulations and Rules only apply provisionally until the day the ASP endorses them; when the ASP adopts new rules on their own initiative they "shall become effective as of the day on which the Assembly of States Parties takes that decision."<sup>28</sup> The ASP's general ICC Staff Regulations indicate that amendments to the regulations shall be made "without prejudice to the acquired rights of staff members."<sup>29</sup> No explanation has been given for departing from this general practice of applying amendments from the date of adoption in this case.

21. Looking at the UN practice in this regard is also instructive, as the Conditions of Service were modelled on the International Court of Justice (hereinafter: "ICJ") provisions.<sup>30</sup> When a major set of amendments to the Pension Scheme Regulations for ICJ judges were passed on 18 December 1998,<sup>31</sup> these Regulations did not apply retroactively and entered into force on 1 January 1999.<sup>32</sup> The United Nations Joint Staff Pension Fund Regulations (hereinafter: "UNJSPF Regulations") also provides that "The Regulations so amended shall enter into force as from the date specified by the General Assembly but without prejudice to the rights and benefits acquired through contributory service prior to

<sup>25</sup>United Kingdom, Court of Exchequer Chamber, *Phillips v. Eyre*, 23 June 1870, (1870-1871) 6 L.R. Q.B. 1, p. 23.

<sup>26</sup> Assembly of States Parties, "Strengthening the International Criminal Court and the Assembly of States Parties", 10 September 2004, ICC-ASP/3/Res.3, annex (hereinafter: "Conditions of Service"), at art. 12.

<sup>27</sup> ASP RP, *supra* note 3, at rules 73-74.

<sup>28</sup> Assembly of States Parties, "Financial Regulations and Rules", 21 November 2008, ICC-ASP/7/5, reg.113.2 (c).

<sup>29</sup> Assembly of States Parties, "Staff regulations for the International Criminal Court", 12 September 2003, ICC-ASP/2/Res.2,annex, reg. 12.1. The regulations are intended to reflect principles that apply in all organs of the court, including Chambers. *See Id*, at p. 206 (scope and purpose of regulations covers the Registry, Presidency, Chambers, and Office of the Prosecutor).

<sup>30</sup> Seventh Session CBF Report, *supra* note 21, at para. 86 ("The Committee recalled that the conditions of service and compensation for the judges of the Court that were adopted at the first session of the Assembly (and partially revised at the second and third sessions) were modeled on the terms of judges of the International Court of Justice").

<sup>31</sup> United Nations General Assembly, Resolution 53/214, 18 December 1998, A/RES/53/214.

<sup>32</sup> *See* United Nations Secretary General, "Conditions of service and compensation for officials other than Secretariat officials", 12 March 2003, A/C.5/57/36, para. 5 (regulations applicable as of 1 January 1999).

that date."<sup>33</sup> The UNJSPF Regulations are especially significant because they apply to non-elected staff at the ICC.<sup>34</sup> As noted above in paragraph 4 the rationale underlying the Amended Regulations is to place judges' pensions more in line with those of the rest of the staff. Ironically, the decision to make the Amended Regulations applicable to Judges Nsereko and Cotte deviate from even the basic protections that are enjoyed by regular staff members of the ICC.

## 2. Expectations created by the way the ASP applied the conditions of service for judges.

22. The Conditions of Service contained in ICC-ASP/3/Res.3 is more consistent with Judges Nsereko and Cotte being covered by the Original Regulations. The Conditions of Service do not have a provision for when amendments to the pension scheme shall take effect, but it is possible to extend by analogy a provision in previous versions of the Conditions of Service that apply to part-time judges. This provision indicates that, as applied to part-time judges, "[o]nce they are called to serve as a full-time judge, the pension benefit provisions of a fulltime judge will be applicable."<sup>35</sup> This provision is no longer explicit in the Conditions of Service in force today,<sup>36</sup> but the ASP effectively maintains this provision elsewhere in resolution ICC-ASP/3/Res.3 by noting that part-time judges "shall be entitled to receive a retirement pension at the end of their term of office, prorated to the length of time that they have served on a full-time basis."<sup>37</sup> It is reasonable to extend the approach to part-time judges' pensions, by analogy, to cover a newly elected replacement judge, suggesting that once Judges Nsereko and Cotte were elected they would likewise be entitled to the pension benefits in force (i.e. the Original Regulations).

23. In the case of Judge Nsereko, a provision of the initial Conditions of Service providing that judges with a net income below 60,000 euros are to be given a supplemental allowance was applied.<sup>38</sup> Presumably, for the purpose of this allowance Judge Nsereko was considered as belonging to the category of judges who were in office prior to the Amended Regulations being adopted. It is inconceivable therefore that Judge Nsereko would now be categorised differently for the purposes of new pension regulations. Judges Nsereko and Cotte relied on the Original Regulations when they accepted their nominations for election to the Court, and therefore had a legitimate expectation of having the Original Regulations apply to them.<sup>39</sup>

<sup>33</sup> United Nations, "Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund", 1 January 2009, art. 49, accessed at [http://www.unjspf.org/UNJSPF\\_Web/pdf/RegRul/RegulationRulesPAS\\_eng\\_09.pdf](http://www.unjspf.org/UNJSPF_Web/pdf/RegRul/RegulationRulesPAS_eng_09.pdf).

<sup>34</sup> See United Nations Joint Staff Pension Fund, "Member organizations", accessed on 9 April 2010, accessed at [http://www.unjspf.org/UNJSPF\\_Web/page.jsp?role=actu&page=Members&lang=eng](http://www.unjspf.org/UNJSPF_Web/page.jsp?role=actu&page=Members&lang=eng).

<sup>35</sup> Assembly of States Parties, "Official Records of the Second Session", 8-12 September 2003, ICC-ASP/2/10, p. 200 (at para. 13) (emphasis mine). Assembly of States Parties, "Report of the first session of the Assembly of States Parties", 3-10 September 2002, ICC-ASP/1/3, annex VI, para. 13.

<sup>36</sup> The most likely reason that the issue is dropped in the operative conditions of service is that after the initial buildup of the Court all the judges were to be employed full time. See Statute, *supra* note 2, at art. 35 (1) ("All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office"); W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), p. 629.

<sup>37</sup> ICC-ASP/3/Res.3, *supra* note 1 and 26, at para. 24.

<sup>38</sup> This provision comes from older conditions of service for judges. Although the operative conditions of service do not include this provision, they were nevertheless applied to Judge Nsereko's situation. See ICC-ASP/2/10, *supra* note 35, at p. 200 (at para. 10) ("a judge who declares, on an annual basis to the President of the Court, that his or her net income, including the annual allowance referred to in paragraph 9 above, is less than the equivalent of 60,000 euros per annum will receive an allowance, payable monthly, to supplement his or her declared net income up to 60,000 euros."), *superseded by* Conditions of Service, *supra* note 26, at art. 12 (2) ("Upon adoption by the Assembly, this document shall supersede the conditions of service and compensation of full-time judges set forth in Part IIIA of document ICC-ASP/2/10").

<sup>39</sup> It should be noted that the judges who were elected in 2006 continued to be covered by the Old Regulations even though by 2006 the ASP was already considering the Amended Regulations. The ASP thus created a legitimate expectation that replacement judges could not reasonably expect their pensions to be reduced prior to adoption of the reduction. See Assembly of States Parties, "Pension scheme for judges", 3 December 2005, ICC-ASP/4/Res.9, para. 5 (judges elected in 2006 provisionally covered by the pension scheme then applicable to currently serving judges).

## C. The ASP's decision is inconsistent with the ICC's statutory

### Framework

24. Judges Nsereko and Cotte's terms of office began prior to the adoption of the Amended Regulations. Regulation 9 (2) of the Court is instructive on the commencement of a replacement judge's term of office:

1. The term of office of judges shall commence on the eleventh of March following the date of their election.

2. The term of office of a judge elected to replace a judge whose term of office has not expired *shall commence on the date of his or her election* and shall continue for the remainder of the term of his or her predecessor.<sup>40</sup> Judges Nsereko and Cotte's terms of office commenced on 3 December and 30 November 2007 respectively; *over a week and half* before the Amended Regulations were adopted.

25. Article 49 of the Statute reads:

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. *These salaries and allowances shall not be reduced during their terms of office.*<sup>41</sup>

26. Article 49, second sentence, reflects a general principle, enshrined in the constitutions of many countries of the world,<sup>42</sup> which aims at safeguarding the independence of judges. It forbids the altering of a judge's salary or emoluments to his or her disadvantage during his or her term of office. It thereby ensures that a judge will not hesitate or desist from making a decision, unpopular to some but for which he or she believes to be correct, for fear of having his or salary or emoluments reduced for making such a decision.<sup>43</sup>

27. Examples of countries that embody this principle in their constitutions include: Australia,<sup>44</sup> Belize,<sup>45</sup> Botswana,<sup>46</sup> Ghana,<sup>47</sup> India,<sup>48</sup> Ireland,<sup>49</sup> Japan,<sup>50</sup> Malawi,<sup>51</sup> Malaysia,<sup>52</sup> New Zealand,<sup>53</sup> The Philippines,<sup>54</sup> Russia,<sup>55</sup> Seychelles,<sup>56</sup> Sri Lanka,<sup>57</sup> South Africa,<sup>58</sup> South Korea,<sup>59</sup> Uganda<sup>60</sup> and the United States of America.<sup>61</sup> Simon Shetreet, a leading

<sup>40</sup> Regulations of the Court, 26 May 2004 ICC-BD/01-01-04, last amended on 14 November 2007, ICC-BD/01-02-07, reg. 9 (2) (emphasis added).

<sup>41</sup> Statute, *supra* note 2 (emphasis added).

<sup>42</sup> However, the Constitutions of many countries in the civil law tradition appear to be silent on the issue of reducing judicial salaries.

<sup>43</sup> See D. Tolbert and M. Karagiannakis, "Article 49", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers's Notes, Article by Article* (Beck et al., 2<sup>nd</sup> ed., 2008), p. 1022 (discussing the rationale for article 49).

<sup>44</sup> Australia, Section 72 (iii) of the Commonwealth Constitution, published on 9 July 1900, last amended 1977.

<sup>45</sup> Belize, Section 118 (3) of the Constitution, published on 21 September 1981, last amended 2002.

<sup>46</sup> Botswana, Section 122 (3) of the Constitution, published on 30 September 1966.

<sup>47</sup> Ghana, Section 127 (5) of the Constitution, published on 28 April 1992.

<sup>48</sup> India, Articles 125 (2) and 221 (2) of the Constitution, published on 26 November 1949 (provisions for Supreme Court and High Court judges, respectively).

<sup>49</sup> Ireland, Article 35 (5) of the Constitution, published on 29 December 1937.

<sup>50</sup> Japan, Articles 79 and 80 of the Constitution, published on 3 November 1946 (with regard to judges of the Supreme Court and inferior courts, respectively).

<sup>51</sup> Malawi, Section 114 (2) of the Constitution, published on 16 May 1994.

<sup>52</sup> Malaysia, Article 125 (7) of the Constitution, published 27 August 1957.

<sup>53</sup> New Zealand, Section 24 of the Constitution Act, published on 13 December 1986.

<sup>54</sup> The Philippines, Article VIII Section 10 of the Constitution, published on February 2, 1987.

<sup>55</sup> Russia, Section 9, Article 4 of the Judges' Status Law, published on 26 June 1992, accessed at <http://www.supcourt.ru/EN/jstatus.htm> (not a constitutional provision, but provides that judicial salaries cannot be diminished "by any other act").

<sup>56</sup> Seychelles, Article 133 (2) of the Constitution, published on 18 June 1993, last amended 2000.

<sup>57</sup> Sri Lanka, Section 108 (2) of the Constitution, published on 7 September 1978.

<sup>58</sup> South Africa, Article 176 (3) of the Constitution, published on 11 October 1996.

<sup>59</sup> South Korea, Article 106 (1) of the Constitution, published on 17 July 1948.

<sup>60</sup> Uganda, Article 128 (7) of the Constitution of Uganda, published on 8 October 1995, last amended 30 December 2005. The provision pointedly prohibits the varying of "the salary, allowances, privileges and retirement benefits [...] to his or her disadvantage."

commentator on judicial independence issues, has gone so far as to say that it is a principle imperative to an independent judicial system that "changes in the terms of judicial office should not be applied to presently sitting judges unless such changes serve to improve the terms of judicial service."<sup>62</sup>

28. There is no obvious distinction between salary and pension in the ICC legal framework to justify excluding pensions from the ambit of article 49 of the Statute. In this regard William Schabas notes that the Preparatory Commission when drafting article 49 "appears to have assumed that a comfortable pension was a necessary corollary of salary."<sup>63</sup> Schabas further presumes that the Amended Regulations "do not apply to judges already elected, because of the second sentence of article 49."<sup>64</sup> It should also be recalled that the ASP once considered applying the Amended Regulations retroactively to all judges. However, relying mainly on article 49, second sentence, the ASP desisted from doing so; it would have been impermissible.

29. There is no evidence that pensions have ever been thought of as being apart from "salaries" in article 49 of the Statute. Pensions are not carefully distinguished in the statutory scheme; there is only one reference to pensions in the Statute, Rules of Procedure and Evidence or Regulations of the Court and it is included in a list of specific kinds of financial income used to determine means for legal assistance payments.<sup>65</sup> The drafting history of Article 49 also does not appear to contain any discussion that pensions were deliberately omitted from the article or that pensions were ever thought of independently from salaries.<sup>66</sup> The relevant second sentence of Article 49 of the Statute changed very little in the drafting history; the sentence itself was not even included until the 1998 Preparatory Committee draft.<sup>67</sup> The only amendment from this draft until adoption was substituting the phrase "may not be decreased" for the final version "shall not be reduced".<sup>68</sup>

30. By virtue of Regulation 9(2) of the Regulations of the Court, Judges Nsereko and Cotte were already serving their term of office when the Amended Pensions Regulations were adopted. Accordingly, they should be afforded the same treatment in respect of their pension benefits as other judges who took office prior to the Amended Regulations. There is no sustainable legal justification for reducing their pensions, and this step in any event contravenes article 49 of the Statute.

#### IV. Conclusion

31. Applying the Amended Regulations to Judges Nsereko and Cotte's pensions is incompatible with general principles of law, contravenes their legitimate expectations that the Original Regulations would be applied to them, and is inconsistent with the Rome Statute. The ASP is therefore asked to amend its decision as regards their position.

<sup>61</sup> See United States, Article 3 Section 1 of the Constitution, published on 17 September 1787 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated times, receive for their Services, a Compensation, *which shall not be diminished during their Continuance in Office.*") (emphasis mine).

<sup>62</sup> S. Shetreet, "The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges", 10 *Chicago Journal of International Law* (2009), p. 275, at pp. 289-94. See also S. Shetreet and J. Deschenes, *Judicial Independence: The Contemporary Debate* (Kluwer Law International, 1985), p. 615.

<sup>63</sup> Schabas, *supra* note 36, at p. 630.

<sup>64</sup> *Id.*, at 631.

<sup>65</sup> Regulations of the Court, *supra* note 40, at reg. 84.

<sup>66</sup> Schabas, *supra* note 36, at 630 ("The issue of pensions for judges and senior officials does not appear to have been addressed at all prior to adoption of the Rome Statute").

<sup>67</sup> 1998 Preparatory Committee, "Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court", U.N. Doc. A/CONF.183/2/Add.1, art. 50.

<sup>68</sup> See M.C. Bassiouni, *The Legislative History of the International Criminal Court*, (Transnational Publishers, vol. 2, 2005), 326-27.

## Appendix II

### Report of the Court on the applicability of the former pension regime to Judges Cotte and Nsereko, dated 21 March 2011<sup>1</sup>

#### I. Factual background

1. At its first session (September 2002), the Assembly of States Parties to the Rome Statute (“the Assembly”) adopted the Conditions of service and compensation of the judges of the Court (hereinafter “the Conditions of Service”).<sup>2</sup>

2. Paragraph 5 of the Conditions of Service provided:

“The judges are entitled to a pension benefit similar to that applicable to judges of the International Court of Justice. The following are the principal features:

[...]

(b) A retirement pension equal to half the annual salary, at the time of retirement, is paid to a judge who has completed a full nine-year term;

(c) A proportional reduction is applied if the judge has not completed a nine-year term, provided the judge has served for at least three years, but no additional pension is paid if the judge has completed more than nine years of service; [...]”

3. At the Assembly’s third session (September 2004), the Conditions of Service were clarified and partly amended.<sup>3</sup> They included draft pension scheme regulations for judges of the International Criminal Court (“the Court”),<sup>4</sup> which inter alia provided:

“1. A judge who has ceased to hold office and who has reached **the age of sixty (60)** \* shall be entitled...to a retirement pension payable monthly provided that he or she:

(a) Has completed at least three (3) years of service;

(b) Has not been required to relinquish his or her appointment for reasons other than the state of his or her health.

2. **A judge who has completed a full nine-year term shall be entitled to a retirement pension equal to half the annual salary.\***

3. A proportional reduction shall be applied if a judge has not completed a full nine-year term, provided that the judge has served for at least three (3) years.

4. No additional pension shall be paid if the judge has completed more than a full nine-year term ... .”

In the body of the relevant resolution, the Assembly “[r]equest[ed] the Committee on Budget and Finance to consider the long-term budgetary consequences of the pension scheme regulations for judges...”<sup>5</sup>

4. At its fourth session (November – December 2005), the Assembly decided

“...that the pension scheme of the judges be accounted for and funded on an accrual basis;”<sup>6</sup> and to

<sup>1</sup> CBF/16/11, later issued as ICC-ASP/10/17.

<sup>2</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 December 2002* (ICC-ASP/1/3 and Corr.1), part III, annex VI.

<sup>3</sup> *Official Records ... Third session ... 2004* (ICC-ASP/3/25), part III, ICC-ASP/3/Res.3, annex.

<sup>4</sup> *Ibid.*, appendix 2.

<sup>5</sup> Emphasis added.

<sup>6</sup> ICC-ASP/3/Res.3. para. 25.

<sup>6</sup> *Official Records ... Fourth session ... 2005* (ICC-ASP/4/32), part III, ICC-ASP/4/Res.9, para. 1.

“refer to the Committee on Budget and Finance for its consideration and report the issue of the pension terms applicable to judges. The Committee on Budget and Finance should thereby have regard to paragraph 98 contained in the report on the work of its fifth session<sup>7</sup> and to the pension regimes applicable to judges in other international courts, in order to provide the Assembly with the tools to make an informed decision...”.<sup>8</sup>

5. At its sixth session (April 2006), the Committee on Budget and Finance (“the Committee”)

“Felt that provision for a full pension in return for nine years’ service provided the judges with a level of pension income which was **excessive and inconsistent with the pensions available to all other Court staff**. It recognised that any change in the pension scheme would be **applicable only to judges elected after the adoption\*** of any decision by the Assembly.”<sup>9</sup>

6. At its seventh session<sup>10</sup> (October 2006), the Committee

“agreed that the pension scheme for future judges should provide a level of pension income **commensurate with the proportion of an individual’s working life spent in the service of the Court.\*** This would resolve both the difference between the judges’ pensions and those of other Court staff and officials and the problem inherent in the fact that the scheme presently took no account of other pensions available to individuals. Moreover, the Committee believed that it was neither desirable nor efficient to maintain a separate set of conditions of service, including a pension scheme, for the small number of judges, which led to, *inter alia*, the difficulty of obtaining an insurer. The Committee recognised that this would require discontinuing the link with the conditions of services of judges of the International Court of Justice”.<sup>11</sup>

The Committee also considered a report on a procurement tender for the pension scheme for judges.<sup>12</sup> In the report, the Court noted that as a result of the tender exercise, only one solution was in full compliance with the Court’s requirements, *i.e.* that all risks should be insured, pensions would be paid on a yearly basis, and there should be minimal administrative involvement of the Court.<sup>13</sup>

7. At its fifth session (November–December 2006), the Assembly endorsed the above paragraph and recommended that the Committee continue considering the issue of the pension terms.<sup>14</sup>

8. At its eighth session (April 2007), the Committee put forward specific recommendations:

“Bearing in mind that most judges would have had earlier professional careers and opportunity to accrue pension entitlements and that the Court’s pension scheme was non-contributory, the Committee recommended that the level of pension for future judges should be based upon 50 percent of the judges salary. Assuming a working life of 36 years in which pension entitlements would be accrued, and that a judge would normally serve for a period of nine years, the **Committee was of the view**

<sup>7</sup> The Committee had suggested that “In view of the high uplift required of the gross judicial salary Budget to meet the pension arrangements provided for the existing judges, the Assembly may wish, for future judges, to satisfy itself whether it wishes to continue with the current scheme and the high level of pension benefits that it provides”.

<sup>8</sup> *Official Records ... Fourth session ... 2005* (ICC-ASP/4/32), part III, ICC-ASP/4/Res.9, para. 6.

<sup>9</sup> *Official Records ... Fifth session ... 2006* (ICC-ASP/5/32), part II.D.6(a), para. 65.

<sup>10</sup> The Committee also considered the report submitted by the Court “Amendments to the conditions of service and compensation for judges of the International Criminal Court, Relocation upon completion of service,” (ICC ASP/5/14); the “Report on the conditions of service and compensation of the Prosecutor and Deputy Prosecutors” (ICC-ASP/5/20) and the “Report on the conditions of service and compensation of the Prosecutor and Deputy Prosecutors: financial costing for pensions,” (ICC-ASP/5/21).

<sup>11</sup> *Official Records ... Fifth session ... 2006* (ICC-ASP/5/32), part II.D.6 (b), para. 91.

<sup>12</sup> ICC-ASP/5/18.

<sup>13</sup> *Ibid.*, paras. 3-4.

<sup>14</sup> *Official Records ... Fifth session ... 2006* (ICC-ASP/5/32), part II.D.3(a), para. 32.

**that for each year served as a judge, pension entitlement based upon 1/72<sup>nd</sup> of salary should accrue\* [...]**.<sup>15</sup>

9. The Committee

“also felt that the pension scheme for future judges should take account of increasing life expectancy and noted that the retirement age of staff was 62. in view of this, the Committee recommended that the pension scheme for future judges should be amended to the effect that **payments commence at age 62\*** instead of 60...”.<sup>16</sup>

10. The Committee further

“requested the Court to submit to the next session of the Committee a report for consideration by the Assembly at its sixth session containing draft amendments to give effect to the proposals”.<sup>17</sup>

11. The Court duly submitted to the Committee’s ninth session (September 2007) its draft amendments to the pension scheme regulations for judges of the Court. Article I provides:

“1. A judge who has ceased to hold office and who has reached the age of **sixty-two (62)\*** shall be entitled during the remainder of his or her life, subject to paragraph 6 below, to a retirement pension payable monthly, provided that he or she has not been required to relinquish his or her appointment for reasons other than the state of his or her health.

2. The amount of retirement pension shall be determined as follows: For each year of service, the amount of the annual pension shall be **1/72<sup>nd</sup>\*** (one seventy-second) of the annual salary”.<sup>18</sup>

12. At its ninth session (September 2007), the Committee

“...thanked the Court for its report on the pension scheme for judges, noted that the draft amendments to the pension scheme regulations for judges would result in considerable future savings and **recommended that the Assembly should approve the draft amendments to the pension scheme regulations for judges** of the International Criminal Court.”<sup>19</sup>

13. Judges Cotte and Nsereko were elected at the 2<sup>nd</sup> meeting of the Assembly’s sixth session on, respectively, 30 November and 3 December 2007.

14. At that same 2<sup>nd</sup> meeting, the Assembly

“decided, on the recommendation of the Bureau, that the judges elected during this session of the Assembly will **hold office subject to the terms and conditions of office to be adopted during the sixth session.**”<sup>20</sup>

15. At its 7<sup>th</sup> plenary meeting, on 14 December 2007, the Assembly, having

“endorsed the recommendation of the Committee contained in paragraph 100 of its report that the pension scheme for judges be amended,”<sup>21</sup>

[...]

“adopted, by consensus, resolution ICC-ASP/6/Res. 6, by which it decided to amend the pension scheme regulations for judges of the Court, effective as of the sixth session of the Assembly”.<sup>22</sup>

\* Emphasis added.

<sup>15</sup> *Official Records ... Sixth session ... 2007* (ICC-ASP/6/20), vol. II, part B.1.II.F, para. 76.

<sup>16</sup> *Ibid.*, para. 77.

<sup>17</sup> *Ibid.*, para. 78.

<sup>18</sup> *Ibid.*, part B.2, annex III.

<sup>19</sup> *Ibid.*, part B.2.II.F, para. 100.

<sup>20</sup> *Ibid.*, vol. I, part I, para. 33.

<sup>21</sup> *Ibid.*, part II, para. 19.

<sup>22</sup> *Official Records ... Sixth session ... 2007* (ICC-ASP/6/20), vol. II, part B.1.II.F, para. 44.

The Assembly further pointed out that the amendments would “thus apply to the judges elected at the sixth session”.<sup>23</sup>

## II. Arguments of the Court’s Judges’ Pensions Committee

### A. The Assembly’s decision is inconsistent with general principles of law

16. Retroactive laws are objectionable, on the general principle that they:

- (a) negate the object of law as a guide for human conduct;
- (b) divest individuals of vested interests in the sense that those individuals may have made decisions on the basis of the existing laws.

17. In *Black-Clawson Int. Ltd. V. Papierwerke Waldhof-Aschaffenburg* (1975), the British House of Lords held that:

“the acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any action, should be able to know in advance what are the legal consequences that will flow from it”.<sup>24</sup>

18. A century earlier, in the landmark decision of *Phillips v. Eyre* (1870), the British Court of Exchequer had stated:

“Retrospective laws are no doubt, prima facie, of questionable policy, and contrary to the principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law”.<sup>25</sup>

19. The rule against retroactive legislation can only be circumvented by express legislative language.<sup>26</sup> Since the amended regulations are silent as to when they are to enter into force, the general presumption that they are prospective and not retrospective should apply.

### B. The application of the amended regulations to Judges Cotte and Nsereko is inconsistent with the Assembly’s general practices

#### 1. Expectations created by other Assembly and United Nations practices

20. Most amending provisions to Assembly instruments do not take effect until adoption. For example:

- (a) The amended Conditions of Service were deemed to “enter into force upon the adoption of this document by the Assembly”;<sup>27</sup>
- (b) Amendments to the Assembly’s Rules of Procedure “shall enter into force upon adoption by a two-thirds majority of the members of the Assembly”;<sup>28</sup>
- (c) A decision by the Assembly on its own initiative to adopt new rules “shall become effective as of the day on which the Assembly of State Parties takes that decision”;<sup>29</sup>
- (d) The Court’s Staff Regulations state that amendments shall be made “without prejudice to the acquired rights of staff members.”<sup>30</sup>

<sup>23</sup> Ibid., para. 19.

<sup>24</sup> United Kingdom, House of Lords, *Black-Clawson Int. Ltd. V. Papierwerke Waldhof-Aschaffenburg*, 5 March 1975, [1975] A.C. 591, p. 638.

<sup>25</sup> United Kingdom, Court of Exchequer Chamber, *Phillips v. Eyre*, 23 June 1870, (1870-1871) 6 L.R.Q.B. 1, p. 23.

<sup>26</sup> As *Phillips v. Eyre* indicates: “Accordingly the court will not ascribe retroactive force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature.” *Idem*.

<sup>27</sup> *Official Records ... Third session ... 2004* (ICC-ASP/3/25), part III, ICC-ASP/3/Res.3, annex, art. XII.1.

<sup>28</sup> Assembly of States Parties, *Rules of Procedure of the Assembly of States Parties*, Rule 73-74.

<sup>29</sup> Assembly of States Parties, *Financial Regulations and Rules*, 21 November 2008, ICC-ASP/7/5, reg. 113.2(c).

21. United Nations practice is instructive as the Conditions of Service were modelled on those of the International Court of Justice (ICJ), the Organization's principal judicial organ.

- (a) Amendments to Pension Scheme Regulations for ICJ Judges passed on 18 December 1998 entered into force on 1 January 1999;<sup>31</sup>
- (b) United Nations Joint Staff Pension Fund Regulations provides that amendments "shall enter into force as from the date specified by the General Assembly but without prejudice to the rights and benefits acquired through contributory service prior to that date".<sup>32</sup>

## 2. Expectations created by the way the Assembly applied the conditions of service for judges

22. It is reasonable to extend the approach to part-time judges' pensions by analogy to cover a newly elected replacement judge (once elected, they are entitled to the pension benefits in force).

23. A provision in previous versions of the Conditions of Service that apply to part-time judges provides: "once they are called to serve as a full-time judge, the pension benefit provisions of a full-time judge will be applicable".<sup>33</sup>

24. Although this provision is no longer explicit in the Conditions of Service in force today, the Assembly maintains this provision elsewhere in ICC-ASP/3/Res.3 by noting that part-time judges "shall be entitled to receive a retirement pension at the end of their term of office, prorated to the length of time that they have served on a full-time basis".<sup>34</sup>

25. In Judge Nsereko's case, a provision of the initial Conditions of Service providing that judges with a net income below €60,000 are to be given a supplemental allowance was applied. For this purpose, Judge Nsereko was considered to belong to the category of judges in office prior to the adoption of the amended regulations.

## C. The Assembly's decision is inconsistent with the Court's statutory framework

### 1. Regulation 9(2) of the Regulations of the Court

26. Regulation 9(2) of the Regulations of the Court provides:

"The term of office of a judge elected to replace a judge whose term of office has not expired shall commence **on the date of his or her election...**"

27. Judges Cotte and Nsereko were elected on 30 November and 3 December 2007 respectively. The amended pension scheme regulations were adopted on 14 December 2007. It follows that the terms of office of Judges Cotte and Nsereko commenced before the new regulations came into force.

### 2. Article 49 of the Rome Statute

28. Article 49 of the Rome Statute provides:

"The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. **These salaries and allowances shall not be reduced during their terms of office.**"<sup>\*</sup>

<sup>30</sup> Assembly of States Parties, "Staff Regulations for the International Criminal Court", 12 September 2003, ICC-ASP/2/Res.2, annex, reg. 12.1.

<sup>31</sup> United Nations Secretary General, "Conditions of service and compensation for officials other than Secretariat officials", 12 March 2003, A/C.5/57/36, para. 5.

<sup>32</sup> United Nations, "Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund", 1 January 2009, art. 49.

<sup>33</sup> *Official Records ... Second session ... 2003* (ICC-ASP/2/10), part III.A., para. 13.

<sup>34</sup> *Official Records ... Third session ... 2004* (ICC-ASP/3/25), part III, ICC-ASP/3/Res.3, para. 24.

\* Emphasis added.

This provision reflects a general principle, enshrined in the constitutions of many countries of the world, which aims at safeguarding the independence of judges.

29. There is no distinction between salary and pension in the Court’s legal framework. There is no evidence that pensions have ever been thought of as being distinct from “salaries” in article 49 of the Statute.

30. William Schabas notes that the Preparatory Commission, when drafting article 49, “appears to have assumed that a comfortable pension was a necessary corollary of salary”.<sup>35</sup>

#### D. Financial Implications

31. If the Court’s position on the matter were to be accepted, the total cost of Judges Cotte and Nsereko’s transfer to the pension scheme preceding the adoption of the amended regulations would amount to €852,493 (see table below).

**Table: Request by the Court for transfer of Judges 18 and 19 to Scheme 1; costs are in Euro.**

<i>Judge</i>	<i>Number</i>	<i>Premium 2011</i>		<i>Additional Premium</i>	<i>Total cost previous years</i>	<i>Total extra cost</i>
		<i>Scheme 2</i>	<i>Scheme 1</i>			
Cotte	18	43,785	168,019	124,234	302,325	426,559
Nsereko	19	44,175	167,784	123,609	302,325	425,934
<b>Total</b>		<i>87,961</i>	<i>335,803</i>	<i>247,843</i>	<i>604,651</i>	<b>852,493</b>

## Appendix III

<sup>35</sup> W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), p. 630.

**118th Session**

**Judgment No. 3359**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr B.L.M. C. and Mr D.D.N. N. against the International Criminal Court (ICC) on 12 March 2012, the ICC's reply of 16 August, the complainants' rejoinder of 4 October 2012 and the ICC's surrejoinder of 7 January 2013;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants, Mr C. and Mr N., were elected judges of the ICC by the Assembly of States Parties to the ICC (hereinafter "the Assembly") during its sixth session on 30 November and 3 December 2007 respectively. They were both elected to fill judicial vacancies, i.e. as replacement judges. Mr N. separated from the ICC on 10 March 2012 while Mr C.'s mandate has been extended to enable him to continue in office to complete proceedings.

The Assembly adopted the Conditions of Service and Compensation of Judges of the ICC at its third session in September 2004. The Conditions of Service included the Pension Scheme Regulations for Judges (hereinafter “the original Pension Scheme Regulations” or “the original Pension Regulations”). During its sixth session, more specifically on 14 December 2007, the Assembly introduced amendments to the original Pension Scheme Regulations for Judges of the ICC, which raised the retirement age from 60 to 62 and significantly lowered the judges’ pension benefits (hereinafter “the amended Pension Scheme Regulations” or “the amended Pension Regulations”).

In a memorandum of 5 October 2010 the Presidency of the Court requested that the Assembly consider at its forthcoming session the question of whether the complainants should be subject to the original Pension Regulations, as suggested by the Judges’ Pensions Committee. At its ninth session held in December 2010 the Assembly decided that the decision to adopt the amendments to the Pension Scheme Regulations should not be reopened. However, it also decided to refer the issue of the regime that should apply to the complainants to the Committee on Budget and Finance for its opinion. The Committee considered the matter at its sixteenth session in April 2011. Noting that the matter was outside its mandate, it concluded that it was not in a position to provide any views on it.

The question of which pension regime would apply to the complainants was not on the agenda of the Assembly’s tenth session, held in December 2011. However, during that session the representative of Uganda observed that the question had not been sufficiently addressed. By a letter of January 2012 the Permanent Mission of the Republic of Uganda to the United Nations invited the Assembly Bureau to take urgent remedial measures in favour of the complainants. At the sixth meeting of the Assembly Bureau, held on 31 January 2012, its President stated that the Bureau “did not have the competence to take decisions concerning budgetary issues”. She added that she would continue consultations and revert to the issue at

a future meeting. By a letter of 5 March 2012, the President of the Assembly Bureau informed the Permanent Mission of the Republic of Uganda that the Bureau did not have the prerogative to modify the Assembly's decision on the matter. On 12 March 2012 the complainants seized the Tribunal. Although in their complaint forms they identify a decision dated 21 December 2011 as the impugned decision, they indicate in their submissions that they are impugning the decision to apply to them the amended Pension Scheme Regulations.

B. The complainants assert that the complaints fall within the Tribunal's competence. They argue that the ICC Headquarters Agreement with the Kingdom of the Netherlands recognises that "officials of the Court" include the judges. Hence, they have *locus standi* before the Tribunal and their complaints are receivable *ratione personae*. Relying on the Tribunal's reasoning in Judgment 2232, they also argue that the ICC Staff Regulations affording officials access to a judicial body must apply to them by analogy, or they will be left with no judicial recourse. They submit that their complaints are also receivable *ratione materiae*, because they concern the non-observance of a fundamental term of their appointment and not the recalculation of their pension.

Moreover, as the Assembly indicated on several occasions that it would reconsider the application of the amended Pension Regulations in their case, but then failed to take a final decision on the matter, the principle of good faith requires that the impugned decision be considered final and the complaints as having been filed within the statutory time limits. The complainants maintain that the internal means of redress must be deemed exhausted, not only because their status as judges elected directly by the Assembly, which is solely competent to reconsider the contested decision, rendered the ICC internal grievance procedure inapplicable in the circumstances, but also because the Assembly's dilatory review of the matter gave grounds to believe that there would not be a final decision within a

reasonable period of time. As their mandates were ending with no resolution of the dispute in sight, direct recourse to the Tribunal was the only reasonable option.

On the merits, the complainants contend that the impugned decision amounted to a breach of their terms of appointment, as specified in the ICC's statutory texts. In particular, they were elected to replace judges who were subject to the original Pension Regulations and who left before the end of their mandate. They effectively "stepped into the shoes" of those judges and by virtue of Regulation 9(2) of the Regulations of the Court, the original Pension Regulations should apply to them. In addition, Article 49 of the Rome Statute prohibits a reduction of the judges' salaries and allowances "during their term of office" – they refer in this connection to the drafting history of Article 49 and assert that pensions are not set apart from salaries and allowances in the ICC statutory scheme. Moreover, the reduction of their pension was significant enough to constitute a breach of an acquired right and was therefore contrary to Regulation 12.1 of the Staff Regulations, which provides that amendments to the Regulations shall be made "without prejudice to the acquired rights of staff members".

Furthermore, the complainants point out that pursuant to Regulation 9(2) of the Regulations of the Court, they began their term of office on the date of their election, i.e. prior to the adoption of the amended Pension Regulations. Consequently, the decision to apply to them the amended pension regime is inconsistent with the rule against retroactivity and in breach of their right to enjoy treatment equal to that afforded to all other judges who took office prior to the adoption of the amended Pension Regulations and are thus subject to the original pension regime. Referring to the practices of the Assembly and the United Nations regarding the entry into force of amendments, the provisions of Article 49 of the United Nations Joint Staff Pension Fund (UNJSPF) Regulations and Article 49 of the Rome Statute, they also contend that the impugned decision breached their legitimate expectation that the original Regulations would apply to them.

The complainants ask the Tribunal to quash the impugned decision and to declare that the original Pension Scheme Regulations of 10 September 2004 govern their pensions. In the event that they have to accept pension payments under the amended Pension Scheme Regulations during the pendency of this matter, they seek material damages in an amount that will place them in the position they would have been in had the impugned decision never been rendered. They claim reimbursement of all fees and expenses related to the lodging of their complaints.

C. In its reply the ICC submits that the Tribunal does not have competence to entertain the complaints. Although the complainants were notified of the impugned decision on 30 November and 3 December 2007 respectively or, at the latest, on 14 December 2007, they failed to file a complaint within the time limit laid down in Article VII, paragraph 2, of the Tribunal's Statute. Hence the complaints are irreceivable *ratione temporis*. In addition, they are irreceivable *ratione personae*, because the complainants are not "staff members" within the meaning of the ICC Staff Regulations and Staff Rules. If indeed they were staff members, they should have availed themselves of the internal grievance procedures before seizing the Tribunal. Moreover, the complaints are irreceivable *ratione materiae*, given that the complainants accepted the terms and conditions of their appointment in full knowledge of the proposed amendments to the original Pension Scheme Regulations and cannot therefore seek retroactive changes to the terms of their appointment. The application of the original Pension Regulations was never a term of their appointment, so they cannot claim non-observance of the terms of their appointment, while the calculation of pension benefits does not fall within the Tribunal's competence.

On the merits, the ICC denies that the impugned decision breached the complainants' terms of appointment. The Assembly's decision that the judges elected during its sixth session would hold office subject to the terms and conditions to be adopted during that session was taken as early as 30 November 2007, i.e. prior to

the complainants' election. Hence, at the time of their election the complainants knew full well that they would be subject to the amended pension regime. In addition, Article 49 of the Rome Statute does not provide a legal basis for the complainants' claim. This is because the Assembly does not consider pension as an "allowance" but rather as a "non-salary benefit" which does not come under the purview of that provision.

The ICC also denies any breach of the complainants' acquired rights. It explains that, although the complainants have a right to a pension, they do not have a right to a specific amount of pension, as this can be subject to variation. In effect, their right to a pension has not been breached since they are entitled to receive a pension for their service with the ICC. It emphasises that the introduction of the amended Pension Regulations was dictated by overarching financial and budgetary considerations and that, contrary to the complainants' allegations, their application was prospective. It notes in this regard that a judge-elect cannot exercise the judicial function and does not have a right to a salary, allowances and pension until he/she has made the solemn undertaking required under Article 46 of the Rome Statute. As the amended Pension Regulations were adopted before the complainants made their solemn undertaking on 17 January 2008 and well before they were called to full-time service on 1 June 2008, the application of said regulations was not retroactive.

According to the ICC, the complainants cannot claim to have had a legitimate expectation that the original Pension Regulations would apply to them. Although at the time of their election they already knew of the Assembly's decision to apply to them the amended pension regime, they accepted their appointment without raising any objection either then or at the time of their solemn undertaking, and they are therefore estopped from raising such objection now. Furthermore, no legitimate expectation may be justified on the basis of the Assembly and United Nations practices, Article 49 of the Rome Statute, or Article 49 of the UNJSPF Regulations. The latter in particular refers to "benefits acquired through contributory service", which is not the case with the complainants. Lastly, the ICC rejects

the allegation of unequal treatment, arguing that the complainants were in a different situation in fact and in law from the judges who took office prior to the adoption of the amended Pension Regulations.

D. In their rejoinder the complainants assert that their complaints are receivable, as they were filed within 90 days from the date of conclusion of the Assembly's tenth session, during which the latter failed to consider and make a final decision on their request.

They reject the contention that the Assembly's decision of 30 November 2007 produced any legal effect with regard to their terms and conditions of office and they point out that at the time of their election they were not aware that their pensions were about to be decreased. In any event, as unelected judicial candidates they could not reasonably have been expected to be familiar with the ICC's internal budgeting discussions. In their opinion, the ICC's financial difficulties cannot justify retroactively amending their terms of appointment, nor can the ICC tenably argue, in view of the clear wording of Regulation 9(2) of the Regulations of the Court, that their term of office did not commence on the date of their election.

E. In its surrejoinder the ICC fully maintains its position. It submits that the Assembly's decision of 30 November 2007 was an actual decision on the applicability to the judges elected at the Assembly's sixth session of the pension regime to be adopted at that same session, and it was therefore a decision that changed the complainants' terms and conditions of office.

#### CONSIDERATIONS

1. The complainants are two former judges of the International Criminal Court (ICC). They raise common issues in their complaints about their pension entitlements and therefore the complaints will be joined. The background is as follows. The Assembly of States Parties of the ICC adopted the Conditions of Service and Compensation for Judges of the ICC at its third session in September 2004. The

Conditions of Service included the Pension Scheme Regulations for Judges.

2. The sixth session of the Assembly was held from 30 November to 14 December 2007. On 30 November and 3 December 2007 at the second meeting of the session, the complainants were elected as replacement judges to fill judicial vacancies. On 30 November the Assembly also decided that the term of office of the replacement judges would run from the date of the election for the remainder of the term of their predecessors and that they would hold office subject to the terms and conditions of office to be adopted at the sixth session. On 14 December 2007, the Assembly adopted amendments to its Pension Scheme Regulations for Judges that lowered the pension benefit payable to ICC judges and increased the retirement age. The Assembly also decided that the amendments would come into force “as of the sixth session of the Assembly” and that “[i]n accordance with the decision of the Assembly at its second plenary meeting, these amendments thus apply to the judges elected at the sixth session”.

3. In February 2010, the judges of the ICC established a Pensions Committee to study the consequences of the 2007 amendments to the Pension Scheme Regulations generally and for replacement judges. In its September 2010 memorandum, the Judges’ Pensions Committee addressed the question of whether the complainants’ pensions should be administered under the original Pension Scheme Regulations or the amended Regulations. The Committee took the view that the complainants’ pensions should be governed by the original Pension Scheme Regulations. In September 2010, the Committee Chairperson wrote to the Presidency pointing out a number of matters that ought to have been considered in relation to the amendments to the Pension Scheme Regulations and the lack of a general investigation into these matters that may have led to a different conclusion. The Committee requested that the Assembly set up “an appropriately qualified body to investigate the current judicial pension arrangements, with a view to reporting to the [Assembly]”.

4. On 5 October 2010, the Presidency sent copies of the Judges' Pensions Committee's September 2010 memorandum and the chairperson's letter to the Assembly's Secretariat. The Presidency drew the Secretariat's attention to the Pension Committee's views regarding the pensions for the complainants and its recommendation "that they are more appropriately governed by the original scheme" and its request that the Assembly take steps to review the amendments. The Presidency asked that these matters, in accordance with rule 11(2)(k) of the Assembly's Rules of Procedure, be placed on the agenda of the Assembly's ninth session.

5. The record of the ninth session held in December 2010 shows receipt of the Presidency's memorandum regarding "a reconsideration of the pension regime for judges", in particular, whether the pension benefits for the two complainants are governed by the original Pension Scheme Regulations or the amended Regulations and the "pension benefits for judges elected after the sixth session of the Assembly". The Assembly decided that the decision adopting the amendments to the Pension Scheme Regulations taken at its sixth session should not be reopened and the issue of the regime that should apply to the complainants be referred to the Committee on Budget and Finance (CBF) for its opinion.

6. In April 2011, at its sixteenth session, the CBF considered the issue of the complainants' pensions. The CBF had before it the "Report of the Court on the applicability of the former pension regime to Judges Cotte and Nsereko". The CBF observed that the report set out legal principles applicable to the issue and in this regard recalled that its mandate was limited to administrative and budgetary questions. The CBF found that it was not in a position to provide any views on the legal basis of the argument presented by the Presidency.

7. The Pension Regulations for Judges were not on the Assembly's agenda at its tenth session held in December 2011. However, the representative of Uganda raised the matter of the pension scheme and remarked that the judges' request as contained in

their report had not been sufficiently addressed by the Assembly. In January 2012, the Permanent Mission of the Republic of Uganda to the United Nations wrote to the President of the Assembly. The Permanent Mission noted that it had made several attempts to raise the pension issue, but no remedial action had been taken. It requested that the Bureau of the Assembly take urgent remedial measures.

8. In March 2012, the President of the Assembly wrote to the Permanent Mission of the Republic of Uganda to inform the latter of the Bureau's view that it did not have authority over the matter of the complainants' pensions. Rather, the Assembly had the requisite authority.

9. On 12 March 2012 the complainants lodged their complaints with the Tribunal. The complaint forms identified the date of the impugned decision as 21 December 2011. Having regard to the pleas, this can be taken to be a reference to a decision, either express or implied, taken by the Assembly at its tenth session. Again, having regard to the pleas, this can be taken to be an implied decision of the Assembly at that session not to continue its reconsideration of the question of whether the amended Pension Scheme Regulations should apply to the complainants rather than the Regulations originally adopted in 2004. However in their brief the complainants refer to the 14 December 2007 decision of the Assembly to apply the amended Regulations to them as the "impugned decision" and the premise that this is the impugned decision permeates much of their pleas. Indeed the principal relief sought by the complainants was that this "impugned decision" be quashed and that the Tribunal declare that the 2004 Pension Scheme Regulations governed the complainants' pensions.

10. The ICC contends that the complainants lack standing to bring the complaints, that the subject matter of the complaints is beyond the Tribunal's jurisdiction as it does not engage the complainants' terms of appointment, and that the complaints are time-barred.

11. Turning first to the question of standing, the complainants submit that they meet the requirements of Article II, paragraph 5, of the Tribunal's Statute. They note that in the ICC Headquarters Agreement with the Kingdom of the Netherlands the term "officials of the Court" is broadly defined and includes the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and the staff of the Court. They also point out that in the Headquarters Agreement there is no attempt to distinguish the staff members from other officials or the judges. Additionally, the ICC has recognised the Tribunal's jurisdiction as required by Article II, paragraph 5, of the Tribunal's Statute and Staff Regulation 11.2 provides that the Tribunal shall "hear and pass judgment upon applications from staff members alleging non-observance of their terms of appointment".

12. The complainants acknowledge that the Staff Regulations do not strictly apply to the judges. However, since there are no regulations applicable to the judges in relation to the terms of their appointment, the Staff Regulations should, so they argue, apply to them by analogy. Moreover, international civil servants must have the right to have an alleged violation of the terms and conditions of their employment adjudicated by a judicial body.

13. The Tribunal rejects the complainants' assertions of standing by reference to the ICC Staff Regulations. It is not disputed that the judges are "officials" of the ICC as stated in the ICC Headquarters Agreement. However, the broad definition of "officials" does not assist the complainants' position in relation to the Staff Regulations. Under the heading "Scope and Purpose" in the ICC Staff Regulations, it is stated that "[f]or the purpose of these Regulations, the expression 'staff member' and 'staff' shall refer to all staff members of the Court within the meaning of article 44 of the Rome Statute". Article 44 deals only with matters in relation to staff of the ICC, such as, the appointment of staff by the Prosecutor and the Registrar and the standards and criteria governing the selection of staff. It also provides for the drafting of Staff Regulations in relation to the terms and conditions of appointment of staff, their remuneration and dismissal. It

is clear from a reading of Article 44 that it has no application to the ICC judges. Indeed, in the Rome Statute, a clear distinction is drawn between the provisions applicable to the judges and other ICC personnel. As the Staff Regulations only refer to “staff members”, they have no application to the judges.

14. However, the above observations do not mean that the ICC judges are without recourse for alleged violations of the terms and conditions of their appointment.

15. Article II, paragraph 5, of the Tribunal’s Statute relevantly provides that the Tribunal is “competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials [...] of any other international organization [...] recognizing [...] the jurisdiction of the Tribunal”.

16. As noted above, the ICC does not dispute that the complainants are officials of the Court and that it has recognised the Tribunal’s jurisdiction. However, the ICC contends that since Staff Regulation 11.2 limits access to the Tribunal to staff members, the complainants do not have standing to bring the present complaint.

17. In effect, the ICC is arguing that the judges are without recourse for alleged violations of the terms and conditions of their appointment. This argument is rejected. The complainants are officials and their rights are not constrained by the Staff Regulations. Their right to access the Tribunal is conferred by the Tribunal’s Statute itself. However Article VII, paragraph 1, of the Tribunal’s Statute provides that a complaint is not receivable unless the impugned decision is a final decision and the complainant “has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations”.

18. The present circumstances are analogous to those in Judgment 2732 where there was no means of internal redress for a

staff member terminated during a probationary period for reasons other than misconduct. The Tribunal held that in the absence of an internal means of redress, the decision to terminate was a final decision and the staff member had direct recourse to the Tribunal. As the ICC Staff Regulations do not apply to the judges and there are no other internal mechanisms available to challenge a decision taken in relation to the terms and conditions of their appointment, the judges will have direct recourse to the Tribunal provided that the complaint is otherwise receivable.

19. As to the subject matter of the complaint and the Tribunal's jurisdiction to consider the complaint, the ICC submits that since the original Pension Scheme Regulations never formed part of the terms and conditions of the complainants' appointment, they cannot now claim non-observance of the terms of their appointment. It is also argued that the complainants accepted the terms and conditions of their appointment with full knowledge of the amendments to the pension regulations and cannot seek retroactive changes to the terms of their appointment. These arguments do not raise issues of receivability. Rather, they are directed at the merits of the central issue which the complaints seek to raise, that is, whether the original or the amended Pension Scheme Regulations apply to the complainants. It is settled that pension entitlement is a term of appointment and clearly within the Tribunal's jurisdiction.

20. Lastly, it remains to consider whether the complaint is time-barred. As noted above, under Article VII, paragraph 1, of the Tribunal's Statute the impugned decision must be a final decision; Article VII, paragraph 2, requires a complaint to be filed within ninety days of the notification of the impugned decision to the complainant; and Article VII, paragraph 3, deals with the circumstance where a final decision has not been taken within sixty days from the notification of a claim, in which case the complaint will be receivable provided that it has been filed within ninety days of the expiration of the sixty days allowed for the taking of a decision.

21. The complainants submit that at its meeting in December 2010, the Assembly agreed to reconsider whether the original or the amended Pension Regulations applied to them. The CBF submitted its opinion before the Assembly's December 2011 session, however, no decision was taken by the Assembly at that session. As it was unlikely that the Assembly would take a decision within a reasonable time, the complaints were filed within the time limits prescribed in Article VII, paragraph 3, of the Statute.

22. The complainants take the position that by officially seeking an opinion from the CBF, the Assembly indicated that it was seized of the matter and unequivocally signalled its agreement and willingness to consider the complainants' matter. The complainants take the position that, consistent with the Tribunal's jurisprudence in the context of settlement discussion, "it is reasonable to say that the [Assembly's] decision from 2007 never became a final decision for the purposes of the time limits in Article VII(2) of the Tribunal's Statute".

23. Turning to the latter point, the complainants' reliance on the Tribunal's jurisprudence regarding the consequences that flow from settlement discussions to show that the 2007 decision never became a final decision is misplaced. That jurisprudence deals with the situation where a decision or a final decision has been taken and the time has started to run for the purpose of filing an internal appeal or a complaint with the Tribunal. As the Tribunal explained in Judgment 2584, under 13, "[i]f an organisation invites settlement discussions or, even, participates in discussions of that kind, its duty of good faith requires that, unless it expressly states otherwise, it is bound to treat those discussions *as extending the time for the taking of any further step*" (emphasis added).

24. In the present case, the decision that the amendments to the Pension Scheme Regulations applied to the complainants was taken in December 2007. No steps were ever taken to challenge that decision

before the Tribunal, or by any other means, within the relevant time limit. Further, there is no evidence of any discussion or invitation to engage in a discussion prior to the expiration of the time limit for bringing a challenge to the decision that could be viewed as extending the time. In these circumstances, it is clear that without more, the complainants' attempt to challenge directly the December 2007 decision is time-barred. However, this does not end the matter. It is not suggested that the complaints were filed out of time insofar as they concern an implied decision of the Assembly in December 2011 and, in particular, a decision not to complete its reconsideration of the position of the complainants. It can reasonably be inferred that such an implied decision was made. Thus there remains to consider whether, in the circumstances, there was an obligation on the part of the Assembly to take any further action in connection with the request for reconsideration.

25. The 14 December 2007 decision of the Assembly concerning the judges' pension contained two discrete elements. The first was the decision to adopt amendments to the Pension Scheme Regulations of general application. The second was a decision to apply those amendments to the judges elected at that session of the Assembly, namely the complainants.

26. These two elements remained a feature of the Assembly's decision-making in its session in December 2010. It is to be recalled that the Assembly then dealt with a memorandum from the Presidency dated 5 October 2010 which brought to the Assembly's attention the views of the Judges' Pensions Committee about, firstly, whether the old or new regime was more appropriate to govern the pensions of the complainants and, secondly, whether the amendments made in December 2007 of general application should be reviewed. The Presidency requested the Assembly to consider these matters. In the result, the Assembly decided in December 2010 that, as to the second matter, the decision to amend the Pension Scheme Regulations would not be reopened. However, as to the first matter (which pension

scheme should apply to the complainants) it did not make a decision in relation to the request for reconsideration. Rather, the Assembly referred the question to the CBF for an opinion. Thus, not only did the Assembly not make a decision, it created an expectation that the position of the complainants might be addressed further once the opinion sought had been given. As noted earlier, the CBF did not address the substantive issue on which its opinion was sought.

27. Accordingly, by the time the Assembly met in December 2011, the request to reconsider whether the complainants' pension entitlements should be governed by the old or new scheme had not been resolved. It remained unresolved by the time the complainants filed their complaints in this Tribunal in March 2012.

28. As the ICC points out in its pleas by reference to Judgment 1528, under 12, a reply to a further request for reconsideration is not a new decision setting off a new time limit for appeal. However the present case is different. There has been an implied refusal by the Assembly to complete its consideration of whether the complainants' pension entitlements should be governed by the old or new pension scheme. The ICC, through the Assembly, was under a duty to act in good faith towards the complainants and this required and continues to require the Assembly to complete its reconsideration of the position of the complainants. This is particularly so given that the Assembly sought an opinion of the CBF as a step in considering the Presidency's 5 October 2010 memorandum, insofar as it concerned the position of the complainants. In the present case the request for reconsideration raises an important and fundamental question about judicial independence. The question arises in the following way.

29. According to Regulation 9(2) of the Regulations of the Court, "[t]he term of office of a judge elected to replace a judge whose term of office has not expired shall commence on the date of his or her election". One issue is whether this is the point in time at which each

of the complainants' terms of appointment is to be ascertained by reference to subsisting applicable normative legal documents and is the point in time at which rights to all the emoluments of office vested in the complainants. This issue raises the question of whether the pension rights of each complainant were derived, at that time, from the original Pension Scheme Regulations promulgated in 2004 that were then the operative regulations. A further issue is whether Article 49 of the Rome Statute protected each complainant in the sense that their "salaries and allowances" established at the time the term of office commenced could not be reduced. Yet another issue is whether the expression "salaries and allowances" in Article 49 should be broadly construed (as including pension rights) having regard to its purpose of protecting the independence of the judiciary.

Having regard to these issues, the final issue is whether, having regard to Article 49 of the Rome Statute, the Assembly could lawfully decide, as it did in its decision of 14 December 2007, that the amended Pension Scheme Regulations applied to the complainants. As the complainants point out in their pleas, fundamental protections of the type in Article 49 are a common feature in many democracies with independent judiciaries. They exist to preserve and protect the independence of the judiciary, they do not exist to benefit individual judges, notwithstanding that they have this effect. Of course the facts of this case may be thought to reveal or raise a technical argument in circumstances where the complainants either were or ought to have been aware that they were being elected as judges in circumstances where their pension entitlements would not be the same as those that applied to then serving judges. However, that is beside the point if, as appears may well be the case, what is in issue is a question of fundamental importance concerning the operation of a provision of the Rome Statute designed to maintain and preserve judicial independence.

30. It is against this background that the complainants are entitled to have the Assembly complete its reconsideration of its December 2007 decision. The most efficacious way of doing so is to

require the ICC to take such steps as are necessary to resubmit the Presidency's 5 October 2010 memorandum to the Assembly for the specific purpose of completing the reconsideration of the particular position of the complainants. The complainants have had some limited success and are each entitled to an order for costs. It appears they have represented themselves. Accordingly those costs are assessed in the sum of 1,000 euros.

### DECISION

For the above reasons,

1. The ICC shall take such steps as are necessary to resubmit the Presidency's 5 October 2010 memorandum to the Assembly of States Parties for the purpose referred to in consideration 30 above.
2. The ICC shall pay each of the complainants 1,000 euros by way of costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

GIUSEPPE BARBAGALLO  
DOLORES M. HANSEN  
MICHAEL F. MOORE  
DRAŽEN PETROVIĆ