

**Tenth session**

New York, 12-21 December 2011

Report of the Court on the applicability of the former pension regime to Judges Cotte and Nsereko***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”).¹

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.² They included draft pension scheme regulations for judges of the International Criminal Court (“the Court”),³ 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.

* Previously issued as CBF/16/11.

¹Official 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.

²Official Records ... Third session ... 2004 (ICC-ASP/3/25), part III, ICC-ASP/3/Res.3, annex.

³Ibid., appendix 2.

*Emphasis added.

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...”⁴

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;”⁵ and to

“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 session⁶ 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...”⁷

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.”⁸

6. At its seventh session⁹ (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”.¹⁰

The Committee also considered a report on a procurement tender for the pension scheme for judges.¹¹ 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.¹²

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.¹³

⁴ ICC-ASP/3/Res.3. para. 25.

⁵ *Official Records ... Fourth session ... 2005* (ICC-ASP/4/32), part III, ICC-ASP/4/Res.9, para. 1.

⁶ 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”.

⁷ *Official Records ... Fourth session ... 2005* (ICC-ASP/4/32), part III, ICC-ASP/4/Res.9, para. 6.

⁸ *Official Records ... Fifth session ... 2006* (ICC-ASP/5/32), part II.D.6(a), para. 65.

⁹ 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).

¹⁰ *Official Records ... Fifth session ... 2006* (ICC-ASP/5/32), part II.D.6 (b), para. 91.

¹¹ ICC-ASP/5/18.

¹² *Ibid.*, paras. 3-4.

¹³ *Official Records ... Fifth session ... 2006* (ICC-ASP/5/32), part II.D.3(a), para. 32.

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 that for each year served as a judge, pension entitlement based upon 1/72nd of salary should accrue** [...]”¹⁴

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...”¹⁵

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”¹⁶.

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 **1/72nd*** (one seventy-second) of the annual salary”¹⁷.

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.”¹⁸

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

14. At that same 2nd 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.**”¹⁹

* Emphasis added.

¹⁴ *Official Records ... Sixth session ... 2007* (ICC-ASP/6/20), vol. II, part B.1.II.F, para. 76.

¹⁵ *Ibid.*, para. 77.

¹⁶ *Ibid.*, para. 78.

¹⁷ *Ibid.*, part B.2, annex III.

¹⁸ *Ibid.*, part B.2.II.F, para. 100.

¹⁹ *Ibid.*, vol. I, part I, para. 33.

15. At its 7th 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,”²⁰
- [...]
- “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”.²¹
- The Assembly further pointed out that the amendments would “thus apply to the judges elected at the sixth session”.²²

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”.²³
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”.²⁴
19. The rule against retroactive legislation can only be circumvented by express legislative language.²⁵ 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:

²⁰ Ibid., part II, para. 19.

²¹ *Official Records ... Sixth session ... 2007* (ICC-ASP/6/20), vol. II, part B.1.II.F, para. 44.

²² Ibid., para. 19.

²³ United Kingdom, House of Lords, *Black-Clawson Int. Ltd. V. Papierwerke Waldhof-Aschaffenburg*, 5 March 1975, [1975] A.C. 591, p. 638.

²⁴ United Kingdom, Court of Exchequer Chamber, *Phillips v. Eyre*, 23 June 1870, (1870-1871) 6 L.R.Q.B. 1, p. 23.

²⁵ 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*.

(a) The amended Conditions of Service were deemed to “enter into force upon the adoption of this document by the Assembly”;²⁶

(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”;²⁷

(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”;²⁸

(d) The Court’s Staff Regulations state that amendments shall be made “without prejudice to the acquired rights of staff members.”²⁹

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;³⁰

(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”.³¹

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”.³²

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”.³³

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...**”

²⁶ *Official Records ... Third session ... 2004* (ICC-ASP/3/25), part III, ICC-ASP/3/Res.3, annex, art. XII.1.

²⁷ Assembly of States Parties, *Rules of Procedure of the Assembly of States Parties*, Rule 73-74.

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

²⁹ Assembly of States Parties, “Staff Regulations for the International Criminal Court”, 12 September 2003, ICC-ASP/2/Res.2, annex, reg. 12.1.

³⁰ 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.

³¹ United Nations, “Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund”, 1 January 2009, art. 49.

³² *Official Records ... Second session ... 2003* (ICC-ASP/2/10), part III.A., para. 13.

³³ *Official Records ... Third session ... 2004* (ICC-ASP/3/25), part III, ICC-ASP/3/Res.3, para. 24.

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.**”

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”.³⁴

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
Total		<i>87,961</i>	<i>335,803</i>	<i>247,843</i>	<i>604,651</i>	852,493

* Emphasis added.

³⁴ W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), p. 630.