



Assembly of States Parties

Distr.: General
18 November 2014

Original: English

Thirteenth session

New York, 8-17 December 2014

Request by Uganda for inclusion of an additional item in the agenda of the thirteenth session of the Assembly

1. Pursuant to rule 13 of the Rules of Procedure of the Assembly of States Parties, the Secretariat received a request by Uganda for inclusion of an additional item “Pension entitlements for former judges Bruno Cotte (France) and Professor Daniel N. Nsereko (Uganda)” in the agenda of the thirteenth session of the Assembly. The proposed additional agenda item has been submitted for consideration by the Bureau.
2. Pursuant to rule 18 of the Rules of Procedure of the Assembly of States Parties, an explanatory memorandum is annexed hereto.

Annex

Explanatory memorandum

A. Introduction

1. This item has been placed on the agenda of the 13th session of the Assembly of State Parties (ASP), following an order by the Administrative Tribunal of the International Labour Organization (“ILO”) to the International Criminal Court (“ICC”) to resubmit to the ASP a certain memorandum by Judges Bruno Cotte and Daniel Nsereko (“the concerned judges”) related to their pension entitlements. The concerned judges submitted the memorandum on 5 October 2010 to the ICC Presidency which, in turn, forwarded it to the ASP. In the memorandum, the concerned judges requested the ASP to reconsider its decision of 14 December 2007 applying to them amended Pension Scheme Regulations (“new pension scheme”) retroactively. The ASP did not conclusively deal with the request. The concerned judges then filed a complaint before the ILO, which, in its judgment of 9 July 2014, ruled that “the complainants are entitled to have the Assembly complete its reconsideration of its December 2007 decision”;¹ hence, the matter is being placed on agenda for that purpose.

B. Election and commencement of term of office

2. Judges Cotte and Nsereko were elected as judges of the ICC on 30 November and 3 December 2007 respectively to replace judges who had resigned from the Court. According to regulation 9 (1) of the Regulations of the Court, “[t]he term of office of judges shall commence on the eleventh of March following the date of their election.” However, according to regulation 9 (2) of the same Regulations, “[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 and shall continue for the remainder of the term of his or her predecessor.” Therefore the terms of office of Judges Cotte and Nsereko began on 30 November and 3 December 2007 respectively; so did their rights, interests and obligations, including existing pension and other entitlements due to judges of the ICC.

C. Retroactive Application of the New Pension Regulations

3. At its third session in September 2004, the ASP adopted the Conditions of Service and Compensation of Judges of the ICC (“Conditions of Service”). The Conditions of Service included the Pension Scheme Regulations for Judges (“the 2004 Pension Scheme”). This was the scheme in place when Judges Cotte and Nsereko were elected and which, according to the law, should govern their pension entitlements. However, during its sixth session, on 14 December 2007, about two weeks after the election of the concerned judges, the ASP adopted the new pension scheme by which it drastically reduced the pension entitlements of the ICC judges.² While exempting other judges who were already serving their terms of office, the ASP backdated the new pension scheme and retroactively applied it to Judges Cotte and Nsereko.

4. The ILO has previously defined retroactivity as an effect which changes a person’s existing legal status, rights, liabilities, or interests from a date prior to its proclamation.³ In the present case, it is the amendment of the Pension Scheme of 2004 introducing a substantial drop in the amount of pension that affects the interests linked to the legal status of the two judges.

¹ ILOAT, 118th Session, Judgment 3359.

² Under the new pension scheme a judge would receive one-eighth of his or her annual salary, instead of one-half under the 2004 scheme.

³ ILOAT, 113th Session, Judgement 3135, para. 19, citing Judgement 2315, para. 23; Judgement 2986, para. 14: “As the Tribunal has often stated, a provision is retroactive only if it effects some change in a person’s existing legal status, rights, liabilities or interests from a date prior to its proclamation, but not if it merely alters the effects of this status or of these rights, liabilities or interests in the future.”

5. While the ASP has power to unilaterally amend the non-fundamental terms and conditions of employment of judges and staff, it is subject to certain limitations, including non-retroactivity of the amendments, lack of abuse in the exercise of this discretionary power and proper consideration of all the relevant facts.⁴ Retroactive effect of regulations has an “adverse effect on the legitimate regard for legal certainty”.⁵

6. In the present case, the application of the 2007 amendment to the existing Pension Scheme of 2004 had retroactive effect on the conditions of employment of Judges Cotte and Nsereko, namely salary and allowances. But article 49 of the Rome Statute explicitly bars such action with respect to judges whose terms of office has already started.

D. Article 49 of the Rome Statute

7. Article 49 states that “[t]he judges [of the ICC] 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.**” The rationale for this provision is the protection of the independence of judges. The ILO, in its judgment at paragraph 29, underscores the importance of this point thus (emphasis added):

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 that 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.**

8. It is true that article 49 does not explicitly make reference to the pension schemes for judges. Nevertheless, its underlying purpose (safeguarding the independence of the judiciary), legislative history and subsequent ICC practice, support the view that it covers pension entitlements.

E. Pension subsumed under “salary and allowances”

9. It is to be noted that a pension forms a part of benefits and allowances linked inextricably to the salary. Further, whilst the issue of pensions of judges and senior officials does not appear to be addressed prior to the adoption of the Rome Statute, except in the context of staff of the Court in general,⁶ the Preparatory Commission had decided specifically that pension benefits were to be similar to that applicable to judges of the International Court of Justice (“ICJ”).⁷

⁴ See Decision No. 1 (5 June 1981): *Louis de Merode et al. v. The World Bank*, where the concerned organization was the World Bank in a case before the World Bank Administrative Tribunal.

⁵ Case Practice in International Administrative Law, LJIL 10: 2995-303, 302 (1997): “Retroactive effect is only accepted if legal certainty is upheld, e.g., by a proper transitory regulation. As a rule, laws amending employment terms apply, unless otherwise explicitly provided, to future situations only.” The ILO has also stated generally, that “[i]t is well settled that an international organization cannot retrospectively alter the rights and obligations of staff members to their detriment, whether by written rule or otherwise.” See, for example, *In re Benyoussef*, ILOAT Judgment 595, paras 5-6; *In re Meyers*, ILOAT Judgment 1669, paras 17-18; *In re Bousquet*, ILOAT Judgment 1979, para. 5(h). The UN Administrative Tribunal in its Judgment No. 1333 relied on *Meron* [UNAT, *Meron v. The Secretary-General of the United Nations*, Judgement No. 1197 (2004)] and affirmed that “[n]o amendment of the regulations may affect the benefits and advantages accruing to the staff member for services rendered before the entry into force of the amendment. Hence, no amendment may have an adverse retroactive effect in relation to a staff member.” See UNAT, *Case No. 1410 against The Secretary-General of the United Nations*, Judgement no. 1333 (2007), AT/DEC/1333, para. XI.

⁶ Establishment of the Court and Relationship with the United Nations, UN Doc.A/AC.249/1998/L.10, para. 22.

⁷ Report of the Preparatory Commission for the International Criminal Court (continued), Addendum, Part I, Draft budget for the first financial period of the Court Annex VI, Conditions of service and compensation of judges of the International Criminal Court, PCNICC/2002/2/Add.1, p. 67.

10. In the Conditions of service and compensation and staff regulations, it is expressly clear that pension forms part of the conditions of service.⁸ The section relating to the conditions of service of full-time judges features four sub-heads, including “salaries”, “special allowance for the President”, “Special allowance for the First or Second Vice-President if acting as President”, and “Non-salary benefits/allowances”.⁹ It categorizes pensions for full-time judges as one of the “non-salary benefits/allowances”.¹⁰

11. Further, when looked at as a whole, it is evident that pension forms part of the term “allowances”. It is telling that in the first draft budget for the first financial year of the ICC, pensions have been referred to as being included in the conditions of service.¹¹ Furthermore, in the report on the relevant components of common costs calculation for the judges of the ICC, the issues relating to pensions also feature in the section relating to salaries and entitlements.¹² The United Nations has assumed the same and has noted that remuneration issues extend beyond salaries to such matters as pension for judges in the Presidency.¹³

12. Further, provisional cost estimates of the ICC judges of the presidency specifically include pensions.¹⁴

F. Discrimination

13. The retroactive application of the new pension scheme is discriminatory, inasmuch as it creates an artificial differentiation between the judges appointed before the amendment came into force on 14 December 2007. With the exception of the affected judges, all other judges who were elected prior to that date enjoy the benefits accrued to them pursuant to the Pension Scheme of 2004. No compelling justifications have been advanced to explain this differentiation; it is arbitrary and discriminatory. It goes against the principle of fairness and equality of treatment at the ICC. The concerned judges should be able to enjoy equality of treatment with the other judges of the ICC appointed before the amendment dated 14 December 2007 came into force.

G. Conclusion

14. The ASP should reconsider its 17 December 2007 decision and apply the new pension scheme prospectively and *not* retroactively. The ASP should honour the principle and spirit enshrined in Article 49 of the Rome Statute. It should permit the affected judges, along with all their brethren who were elected before the adoption of the new scheme, to have their pension entitlements governed by the 2004 Scheme.

⁸ Conditions of service and compensation and staff regulations, ICC-ASP/2/10, Section I.

⁹ Conditions of service and compensation and staff regulations, ICC-ASP/2/10, Section I.

¹⁰ Conditions of service and compensation and staff regulations, ICC-ASP/2/10, para. 4.

¹¹ Draft budget for the first financial year of the Court, Prepared by the Secretariat, PCNICC/2001/WGFYB/L.1, para. 32: “The terms and conditions of service of the ICTR judges are also the same as those of the members of ICJ. The General Assembly, in part VIII of its resolution 53/214, decided that the emoluments, pensions and other conditions of service for the members of ICJ and the judges of ICTY and ICTR shall be reviewed at the fifty- sixth session of the Assembly.”

¹² See Report on the relevant components of common costs calculation for the judges of the International Criminal Court, 13 June 2011, ICC-ASP/10/8.

¹³ Draft budget for the first financial year of the Court, Prepared by the Secretariat, PCNICC/2001/WGFYB/L.1, para. 36.

¹⁴ Draft budget for the first financial year of the Court, Prepared by the Secretariat, PCNICC/2001/WGFYB/L.1, para. 36.