Corte Penal Internacional ICC-ASP/13/35/Rev.1

Asamblea de los Estados Partes

Distr.: General
27 de noviembre de 2014

ESPAÑOL
Original: inglés

Decimotercer período de sesiones
Nueva York, 8 a 17 de diciembre de 2014

Solicitud de inclusión de un tema adicional en el programa del decimotercer período de sesiones de la Asamblea presentada por Uganda

1. De conformidad con el artículo 13 del Reglamento de la Asamblea de los Estados Partes, la Secretaría recibió una solicitud de Uganda para la inclusión de un tema adicional ‘‘Derechos de pensión de los antiguos magistrados Bruno Cotte (Francia) y el Profesor Daniel N. Nsereko (Uganda)”, en el programa del decimotercer periodo de sesiones de la Asamblea. La solicitud se ha sometido a la Mesa para su consideración.

2. De conformidad con lo dispuesto en el artículo 18 del Reglamento de la Asamblea de los Estados Partes, se adjunta al presente documento un memorando explicativo.

Anexo

Memorando explicativo

A. Introducción

1. Este tema se ha incluido en el programa del decimotercer período de sesiones de la Asamblea de los Estados Partes ("Asamblea") tras la recepción de una orden del Tribunal Administrativo de la Organización Internacional del Trabajo ("TAOIT") que instaba a la Corte Penal Internacional ("la Corte") a que se volviera a presentar a la Asamblea un memorando específico de los magistrados Bruno Cotte y Daniel Nsereko ("los magistrados interesados"), relacionado con sus derechos de pensión. Los magistrados interesados presentaron el memorando el 5 de octubre de 2010 a la Presidencia de la Corte que, a su vez, lo transmitió a la Asamblea. En el memorando, los magistrados interesados solicitaban a la Asamblea que reconsiderara la decisión que había adoptado el 14 de diciembre de 2007, con arreglo a la cual se les aplicaría el reglamento del plan de pensiones modificado ("nuevo régimen de pensiones") de manera retroactiva. La Asamblea no abordó la solicitud de forma concluyente. Los magistrados interesados decidieron entonces presentar un queja ante la OIT, cuyo fallo de 9 de julio de 2014 concluía que los demandantes tenían derecho a pedir que la Asamblea reconsiderara cabalmente su decisión de diciembre de 2007"[1]. Es con ese fin que se ha se ha incluido este tema en el programa.

B. Elección y comienzo de su mandato

2. Los magistrados Cotte y Nsereko fueron elegidos como magistrados de la Corte el 30 de noviembre y el 3 de diciembre de 2007, respectivamente, para reemplazar a dos magistrados que habían dimitido de su cargo en la Corte. Según la norma 9.1 del Reglamento de la Corte, "[e]l mandato de los magistrados comenzará el día 11 de marzo siguiente a la fecha de su elección". Sin embargo, según la norma 9.2 del mismo Reglamento, **"[e] l mandato de los magistrados elegidos para sustituir a un magistrado cuyo mandato no haya expirado comenzará en la fecha de su elección** y continuará durante el resto del mandato de su predecesor". Por consiguiente, los mandatos de los magistrados Cotte y Nsereko comenzaron el 30 de noviembre y el 3 de diciembre de 2007, respectivamente, adquiriendo así los derechos, intereses y obligaciones, incluido el plan de pensiones y otros derechos inherentes a la función de magistrado de la Corte

C. Aplicación retroactiva del nuevo reglamento de pensiones

3. En su tercer período de sesiones en septiembre de 2004, la Asamblea adoptó las condiciones de servicio y remuneración de los magistrados de la Corte ("condiciones de servicio"). Las condiciones de servicio incluían el Reglamento del Plan de Pensiones de los magistrados ("el plan de pensiones de 2004"). Ese era el régimen de pensiones que estaba en vigor cuando los magistrados Cotte y Nsereko fueron elegidos y que, según la ley, debía regir sus derechos de pensión. Sin embargo, durante su sexto período de sesiones, celebrado el 14 de diciembre de 2007, es decir, aproximadamente dos semanas después de la elección de los dos magistrados, la Asamblea adoptó el nuevo régimen de pensiones que reducía sustancialmente los derechos de pensión de los magistrados de la Corte[2]. Si bien otros magistrados, que ya estaban cumpliendo su mandato, quedaron exentos, la Asamblea antedató el nuevo régimen de pensiones y lo aplicó retroactivamente a los Cotte y Nsereko.

4. La OIT ha definido previamente la retroactividad como un efecto que da lugar a una modificación de la situación jurídica, los derechos, las obligaciones y los intereses de la persona a partir de una fecha anterior a su promulgación[3]. En el caso examinado, es la

[1] Fallo Nº 3359 del TAOIT (118ª sesión).
[2] En el marco del nuevo régimen de pensiones, los magistrados recibirían un octavo de su salario annual, en vez de la mitad de su salario, como se preveía en el régimen de 2004.
[3] Fallo Nº 3135 del TAOIT, (113ª sesión) párr. 19, citando el Fallo Nº 2315, *párr.* 23; Fallo Nº 2986, *párr.* 14: "Como el Tribunal lo ha señalado, de forma general, una disposicion es retroactiva cuando da lugar a una modificacion de la situación jurídica, los derechos, las obligaciones y los intereses actuales de las personas a partir

modificación del plan de pensiones de 2004, que introducía una reducción significativa de la cuantía de la pensión, que afectaba a los intereses asociados a la situación jurídica de los dos magistrados.

5. Si bien la Asamblea tiene la facultad de modificar unilateralmente las condiciones de empleo no fundamentales de los magistrados y del personal, esa facultad está sujeta a determinadas limitaciones, como la no retroactividad de las enmiendas, la ausencia de abusos en el ejercicio de las facultades discrecionales y la debida consideración de todos los hechos pertinentes[4]. El efecto retroactivo del reglamento tiene una "incidencia negativa en la debida consideración que se debe otorgar a la certidumbre jurídica"[5].

6. En el presente caso, la aplicación de la enmienda de 2007 al plan de pensiones de 2004 vigente tenía efectos retroactivos en las condiciones de empleo de los magistrados Cotte y Nsereko, es decir, en su sueldo y prestaciones. Sin embargo, el artículo 49 del Estatuto de Roma prohíbe expresamente dicha actuación respecto de magistrados cuyo mandato haya ya comenzado.

D. El artículo 49 del Estatuto de Roma

7. El artículo 49 del Estatuto dispone que "[l]os magistrados […] [de la Corte] percibirán los sueldos, estipendios y dietas que decida la Asamblea de los Estados Partes. **Esos sueldos y estipendios no serán reducidos en el curso de su mandato**". La razón de ser de esa disposición es la protección de la independencia de los magistrados. En el párrafo 29 de su fallo, la OIT resalta la importancia de este aspecto en los siguientes términos (énfasis añadido):

> Como los demandantes indican en el texto de su queja, **la protección fundamental a la que se refiere el artículo 49** es una característica común a muchas democracias con poderes judiciales independientes. Fue concebida para **preservar y proteger la independencia del poder judicial, no para beneficiar a determinados magistrados**, pese a que puedan tener ese efecto. **Evidentemente, se puede considerar que los hechos de este caso ponen de manifiesto o plantean un argumento técnico,** a saber, que las circunstancias en las que se les había elegido eran tales que los demandantes sabían o debían saber que sus derechos de pensión no serían los que se aplicaban a los demás magistrados en funciones. **Sin embargo, esa cuestión no es pertinente, dado que, al parecer, se trata aquí de una cuestión de fundamental importancia que atañe a la ejecución de una disposición del Estatuto de Roma, concebida para mantener y preservar la independencia de los magistrados**.

8. Si bien es cierto que el artículo 49 no se refiere explícitamente al régimen de pensiones de los magistrados, su objetivo básico (salvaguardar la independencia de los magistrados), la historia legislativa y la práctica subsiguiente de la Corte, corroboran la opinión de que abarca los derechos de pensión.

---

de una fecha anterior a su promulgación; no es retroactiva cuando solo afecta a los procedimientos que se han de cumplir en el futuro en relación con esa situación, esos derechos, obligaciones e intereses".

[4] Véase la Decisión Nº 1 (5 de junio de 1981): *Louis de Merode et al. c. el Banco Mundial*, en la que la organización de que se trataba era el Banco Mundial en una causa presentada ante el Tribunal Administrativo del Banco.

[5] Case Practice in International Administrative Law, LJIL 10: 2995-303, 302 (1997): "El efecto retroactivo solo se acepta si la certidumbre jurídica la confiere, por ejemplo, una normativa transitoria adecuada. Por regla general, las leyes que modifican las condiciones de empleo se aplican, salvo disposición explícita en contrario, únicamente a las situaciones futuras". La OIT ha afirmado que se ha podido establecer, en general, que una organización internacional no puede, de forma retroactiva, alterar los derechos y obligaciones de su personal en su detrimento, sea mediante una norma escrita o de otra manera". *Véase*, por ejemplo, *In re Benyoussef*, Fallo Nº 595 del TAOIT, *párrs.* 5 y 6; *In re Meyers*, Fallo Nº 1669 del TAOIT, *párrs.* 17 y 18; *In re Bousquet*, Fallo Nº 1979 del TAOIT, *párr.* 5 h). En su Fallo Nº 1333, el Tribunal Administrativo de las Naciones Unidas se basó en la causa *Meron* [UNAT, *Meron c. el Secretario General de las Naciones Unidas*, Fallo Nº 1197 (2004)] y afirmó que ninguna enmienda de los reglamentos podía afectar a las prestaciones y ventajas que corresponden a un funcionario por servicios prestados antes de la entrada en vigor de la enmienda. Así pues, ninguna enmienda podía tener efectos retroactivos adversos para un funcionario". *Véase* TANU, *Causa Nº 1410 contra el Secretario General de las Naciones Unidas*, Fallo Nº 1333 (2007), AT/DEC/1333, *párr.* XI.

E. La inclusión de las pensiones en la partida "sueldos y prestaciones"

9. Cabe señalar que una pensión forma parte de las prestaciones y los estipendios vinculados inextricablemente con el salario. Ahora bien, si bien la cuestión de las pensiones de los magistrados y los funcionarios superiores no parece haber sido abordada antes de la adopción del Estatuto de Roma, salvo en el contexto del personal de la Corte en general[6], la Comisión Preparatoria había decidido específicamente que las pensiones debían ser similares a las de los magistrados de la Corte Internacional de Justicia[7].

10. En las condiciones de servicio y remuneración, y en el Estatuto del personal, se especifica claramente que la pensión forma parte de las condiciones de servicio[8]. La sección relacionada con las condiciones de servicio de los magistrados de dedicación exclusiva comprende cuatro apartados, a saber: "Sueldos", "Estipendio especial para el Presidente", "Estipendio especial para el Vicepresidente primero o segundo que ocupe la Presidencia" y "otra prestaciones"[9]. Las pensiones de los magistrados de dedicación exclusiva se clasifican dentro del apartado "Otras prestaciones"[10].

11. Examinando la cuestión globalmente, es evidente que la pensión forma parte de lo que se entiende por "prestaciones". Es revelador que en el proyecto de presupuesto para el primer ejercicio financiero de la Corte, las pensiones se consideraran como incluidas en las condiciones de servicio[11]. Además, en el informe sobre los elementos pertinentes utilizados como base para el cálculo de los gastos comunes de los magistrados de la Corte, las cuestiones relacionadas con las pensiones también figuran en la sección relativa a los sueldos y prestaciones[12]. Las Naciones Unidas se basan en el mismo supuesto y han observado que las cuestiones relativas a la remuneración engloban no solo los sueldos sino cuestiones como las pensiones de los magistrados en la Presidencia[13].

12. Por otra parte, las estimaciones provisionales de costos de los magistrados de la Corte de la presidencia incluyen específicamente las pensiones[14].

F. Discriminación

13. La aplicación retroactiva del nuevo régimen de pensiones es discriminatoria, en la medida en que generan una diferenciación artificial entre los magistrados nombrados antes de que la enmienda entrara en vigor, el 14 de diciembre de 2007. Con la excepción de los magistrados afectados, todos los demás magistrados que fueron elegidos antes de esa fecha, gozan de las prestaciones que les corresponden en virtud del régimen de pensiones de 2004. No se ha presentado ninguna justificación convincente que explique esa diferenciación. Es arbitraria y discriminatoria. Es contraria al principio de justicia e igualdad de trato en la Corte. Los magistrados interesados deben poder gozar de igualdad de trato respecto de los demás magistrados de la Corte nombrados antes de la entrada en vigor, el 14 de diciembre de 2007, de la enmienda del régimen de pensiones.

---

[6] Establecimiento de la Corte y Relaciones con las Naciones Unidas, Doc. A/AC.249/1998/L.10 de la ONU, *párr.* 22.

[7] Informe de la Comisión Preparatoria de la Corte Penal Internacional (continua), Addendum, Parte I, Proyecto de presupuesto para el primer ejercicio financiero de la Corte, Anexo VI, Condiciones de servicio y remuneración de los magistrados de la Corte Penal Internacional, PCNICC/2002/2/Add.1, pág. 67.

[8] Condiciones de servicio y remuneración y Estatuto del personal, *ICC-ASP*/2/10, Sección I.

[9] Condiciones de servicio y remuneración y Estatuto del personal, *ICC-ASP*/2/10, Sección I.

[10] Condiciones de servicio y remuneración y Estatuto del personal, *ICC-ASP*/2/10, párr. 4.

[11] Proyecto de presupuesto del primer ejercicio financiero de la Corte, elaborado por la Secretaría, PCNICC/2001/WGFYB/L.1, párr. 32: "Las condiciones de servicio de los magistrados del Tribunal Penal Internacional para Rwanda son también las mismas que las de los miembros de la Corte Internacional de Justicia. La Asamblea General, en la parte VIII de su resolución 53/214, decidió que los sueldos, las pensiones y la demás condiciones de servicio de los miembros de la Corte Internacional de Justicia y los magistrados del Tribunal Penal Internacional para la ex Yugoslavia y el Tribunal Penal Internacional para Rwanda se revisarían en el quincuagesimo sexto período de sesiones de la Asamblea".

[12] *Véase* Informe sobre los elementos pertinentes utilizados como base para el cálculo de los gastos comunes de los magistrados de la Corte Penal Internacional, 13 de junio de 2011, *ICC-ASP*/10/8.

[13] Proyecto de presupuesto del primer ejercicio financiero de la Corte, elaborado por la Secretaría, PCNICC/2001/WGFYB/L.1, párr. 36.

[14] Proyecto de presupuesto del primer ejercicio financiero de la Corte, elaborado por la Secretaría, PCNICC/2001/WGFYB/L.1, párr. 36.

G. Conclusión

14. La Asamblea debe reconsiderar su decisión de 17 de diciembre de 2007 y aplicar el nuevo régimen de pensiones prospectivamente y *no* retroactivamente. La Asamblea debe hacer honor al principio y al espíritu del artículo 49 del Estatuto de Roma. Debe permitir que los derechos de pensión de los magistrados afectados, así como los de los colegas que fueron elegidos antes de la adopción del nuevo régimen, se rijan por el régimen de 2004. La Asamblea no debería permitir que durante el examen de esta cuestión las consecuencias financieras de esos derechos tengan prelación o sean el factor determinante a la hora de tomar una decisión. Como ha estipulado el Tribunal Administrativo de las Naciones Unidas (TANU) "los argumentos presupuestarios no pueden utilizarse sistemáticamente como pretexto para no otorgar a los funcionarios los derechos que les corresponden"[15]. El principio enunciado por el TANU se aplica con igual fuerza a los magistrados afectados.

Apéndice

[15] Tribunal Administrativo, *Sabet & Skeldon c. El Secreatrio General de las Naciones Unidas*, Caso Nº 1217, Fallo Nº 1136, 30 de septiembre de 2003, párr. XI.

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 seised 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