UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2016-UNAT-682/Corr.1

Marcussen, Nicholls, Jarvis,
Edgerton, Goy, Reid, Sutherland, Baig
(Appellants/Respondents)

v.

Secretary-General of the United Nations
(Respondent/Appellant)

JUDGMENT

Before:	Judge Rosalyn Chapman, Presiding Judge Sophia Adinyira Judge Deborah Thomas-Felix Judge Inés Weinberg de Roca Judge Luis María Simón Judge Mary Faherty Judge Richard Lussick
Case Nos.:	2016-891 – 2016-898 & 2016-909 – 2016-916
Date:	30 June 2016
Registrar:	Weicheng Lin

Counsel for Appellants/Respondents:	Self-represented
Counsel for Secretary-General:	Rupa Mitra Zarqaa Chohan

Reissued on 1 September 2016

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it the following eight individual appeals against Judgment No. UNDT/2015/116, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 17 December 2015, in the cases of *Sutherland, Reid, Marcussen, Goy, Jarvis, Baig, Edgerton, Nicholls v. Secretary-General of the United Nation*s:

- On 15 February 2016, Mr. Mathias Marcussen appealed and, on 18 April 2016, the Secretary-General answered (Case No. 2016-891);
- On 15 February 2016, Mr. Julian Samuel Nicholls appealed and, on 18 April 2016, the Secretary-General answered (Case No. 2016-892);
- On 15 February 2016, Ms. Michelle Jarvis appealed and, on 18 April 2016, the Secretary-General answered (Case No. 2016-893);
- On 15 February 2016, Ms. Carolyn Edgerton appealed and, on 18 April 2016, the Secretary-General answered (Case No. 2016-894);
- On 15 February 2016, Ms. Barbara Goy appealed and, on 18 April 2016, the Secretary-General answered (Case No. 2016-895);
- On 15 February 2016, Mr. Robert William Reid appealed and, on 18 April 2016, the Secretary-General answered (Case No. 2016-896);
- On 15 February 2016, Ms. Ann Elizabeth Sutherland appealed and, on 18 April 2016, the Secretary-General answered (Case No. 2016-897); and
- On 15 February 2016, Ms. Laurel Baig appealed and, on 18 April 2016, the Secretary-General answered (Case No. 2012-898) (hereinafter Marcussen *et al.*).

2. The Appeals Tribunal also has before it eight appeals filed by the Secretary-General against the same UNDT Judgment. The Secretary-General filed the eight appeals on 1 April 2016 (Case Nos. 2016-909 to 2016-916),[1] and Marcussen *et al*. answered individually on 3 June 2016.

3. On 8 April 2016, the Appeals Tribunal issued Order No. 258 (2016) consolidating all 16 appeals, for all purposes. Any orders and judgment in this consolidated matter are issued under Case No. 2016-891, being the first of the 16 appeals filed, under the title of *Marcussen et al. v. Secretary-General of the United Nations*.

4. The Appeals Tribunal is of the view that the appeals raise significant questions of law. Consequently, they have been referred for consideration by the full bench or whole Appeals Tribunal, pursuant to Article 10(2) of the Statute of the Appeals Tribunal (Statute):

> Where the President or any two judges sitting on a particular case consider that the case raises a significant question of law, at any time before judgement is rendered, the case may be referred for consideration by the whole Appeals Tribunal. A quorum in such cases shall be five judges.

Facts and Procedure

5. The facts established by the Dispute Tribunal in Judgment No. UNDT/2015/116 read as follows:[2]

> ... On 25 May 1993, the Security Council decided, by resolution 827 (1993), to establish ICTY, an *ad hoc* international tribunal, for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed as of 1 January 1991 in the territory of the former Yugoslavia, and requested the Secretary-General to make practical arrangements for the effective functioning of the Tribunal.
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> ... By memorandum dated 20 May 1994 addressed to the Acting Registrar of ICTY, the Under-Secretary-General ("USG") for Administration and Management defined the arrangements for the recruitment and administration of ICTY staff, and delegated to the ICTY Registrar the authority to appoint staff up to the D-1 level on behalf of the Secretary-General.

[1] The Secretary-General's original appeals were filed on 15 February 2016. On 22 February 2016, he filed a motion to refile his appeals. By Order No. 253 (2016), the Appeals Tribunal granted the Secretary-General's motion to refile, no later than 1 April 2016.
[2] The following facts are taken from paragraphs 5–42.

... In accordance with the terms of the above-mentioned delegation of authority, staff members were recruited specifically for service with ICTY. Their letters of appointment provided that their appointments were "strictly limited to service with [ICTY]".

... In November 1995, by Secretary-General's bulletin ST/SGB/280 (Suspension of the granting of permanent and probationary appointments), the Secretary-General announced his decision, effective 13 November 1995, to suspend the granting of permanent appointments to staff serving on 100-series fixed-term appointments in view of "the serious financial situation facing the Organization".

... By its resolution 1503 (2003) dated 28 August 2003, the Security Council endorsed the ICTY completion strategy, and urged ICTY to take all possible measures to complete its work in 2010.

... In June 2006, by Secretary-General's bulletin ST/SGB/2006/9 (Consideration for conversion to permanent appointment of staff members eligible to be considered in 1995), the Secretary-General partially lifted the freeze on the granting of permanent appointments, and conducted an exercise to consider for conversion to a permanent appointment those staff who were eligible as of 13 November 1995. In this exercise, six ICTY staff members were considered and one of them was granted a permanent appointment.

... In 2009, the Organization undertook a one-time Secretariat-wide comprehensive exercise by which eligible staff members under the Staff Rules in force until 30 June 2009 would be considered for conversion of their contracts to permanent appointments. In this context, the Secretary-General's bulletin ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009) was promulgated on 23 June 2009.

... On 29 January 2010, guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 ("Guidelines") were further approved by the [Assistant Secretary-General for Office of Human Resources Management (ASG/OHRM)]. The USG for Management transmitted them on 16 February 2010 to all "Heads of Department and Office", including to ICTY, requesting them to conduct a review of individual staff members in their department or office, to make a preliminary determination on eligibility and, subsequently, to submit recommendations to the ASG/OHRM on the suitability for conversion of staff members found preliminarily eligible.

... By letter dated 17 February 2010, the President of ICTY wrote to the Secretary-General to complain about the position taken by the USG for Management, during a townhall meeting at ICTY two weeks earlier, that ICTY staff were not eligible for conversion because ICTY was an organization with a finite mandate.

... The USG for Management responded to the President of ICTY, by letter dated 10 March 2010, clarifying that "[i]n accordance with the old staff rules 104.12(b)(iii) and 104.13, consideration for a permanent appointment involves 'taking into account all the interests of the Organization'". She further noted that in 1997, the General Assembly adopted resolution 51/226, in which it decided that five years of continuing service did not confer an automatic right to conversion to a permanent appointment, and that other considerations—such as the operational realities of the Organization and the core functions of the post—should be taken into account in granting permanent appointments. Therefore, she added, "when managers and human resources officers in ICTY are considering candidacies of staff members for permanent appointments they have to keep in mind the operational realities of ... ICTY, including its finite mandate".

... On 23 April 2010, ICTY established an online portal on staff eligibility for permanent appointments.

... On 11 May 2010, ICTY transmitted to the Office of Human Resources Management ("OHRM"), at the United Nations Secretariat Headquarters in New York, the list of staff eligible for conversion to a permanent appointment.

... At the XXXIst Session of the Staff-Management Coordination Committee ("SMCC"), held in Beirut from 10 to 16 June 2010, it was "agreed that management [would] consider eligible [ICTY] staff for conversion to a permanent appointment on a priority basis".

... On 12 July and 16 August 2010, the ICTY Registrar transmitted to the ASG/OHRM the names of 448 eligible staff members who had been found suitable for conversion by ICTY, and who were therefore "jointly recommended by the Acting Chief of Human Resources Section" and the Registrar of ICTY.

... On 31 August 2010, the Deputy Secretary-General, on behalf of the Secretary-General, approved the recommendations contained in the Report of the SMCC XXXIst Session (...), including the recommendation that eligible ICTY staff would be considered for conversion to permanent appointments on a priority basis.

... Based on its review of ICTY submissions of 12 July and 16 August 2010, OHRM disagreed with ICTY recommendations and, on 19 October 2010, submitted the matter for review to the New York Central Review ("CR") bodies—namely, the CR *Board* for P-5 and D-1 staff, the CR *Committee* for P-2 to P-4 staff, and the CR *Panel* for General Service staff. In its submission, OHRM stated that "taking into consideration all the interests of the Organization and the operational reality of ICTY, [it was] not in [a] position to endorse ICTY's recommendation for the granting of permanent appointment". As grounds for its position, OHRM sustained that ICTY was "a downsizing entity and [was] expected to close by 2014 as set out in the latest report on the completion strategy of the Tribunal (A/65/5/Add.12) following the Security Council resolution 1503 (2003)".

... In November and December 2010, the New York CR bodies reviewed the recommendations made for ICTY staff, and concurred with OHRM recommendation that ICTY staff members not be granted permanent appointments.

... On 22 December 2010, in anticipation of the closure of ICTY, the Security Council adopted resolution 1966 (2010), establishing the International Residual Mechanisms for Criminal Tribunals ("MICT"), which started functioning on 1 July 2013 for ICTY. Said resolution indicated that MICT should be "a small, temporary and efficient structure, whose functions and size will diminish over time, with a small number of staff commensurate with its reduced functions"; it also requested ICTY to complete its remaining work by no later than 31 December 2014.

... In February 2011, ICTY staff were informed that there had been no joint positive recommendations by OHRM and ICTY on the granting of permanent appointments, and that, accordingly, the cases had been referred "to the appropriate advisory body, in accordance with sections 3.4 and 3.5 of ST/SGB/2009/10".

... Further to her review of the CR bodies' opinion of late 2010, the ASG/OHRM noted that the CR bodies did not appear to have had all relevant information before them. Accordingly, on 4 April 2011, OHRM returned the matter to the CR bodies, requesting that they review the full submissions of ICTY and OHRM and provide a revised recommendation.

... By memorandum dated 27 May 2011, the New York CR bodies reiterated to the ASG/OHRM their endorsement of OHRM recommendation "on [the] non-suitability for conversion of all recommended [ICTY] staff to permanent appointments, due to the limitation of their service to their respective Tribunals and the lack of established posts".

... By memorandum dated 20 September 2011, the ASG/OHRM informed the ICTY Registrar that:

> Pursuant to my authority under section 3.6 of ST/SGB/2009/10, I have decided in due consideration of all circumstances, giving full and fair consideration to the cases in question and taking into account all the interests of the Organization, that it is in the best interest of the Organization to ... accept the CRB's endorsement of the recommendation by OHRM on the non-suitability [for conversion of ICTY staff].

... By letters dated 6 October 2011, the ICTY Registrar informed each of the Applicants of the decision of the ASG/OHRM not to grant them a permanent appointment, stating:

> This decision was taken after review of your case, taking into account all the interests of the Organization and was based on the operational realities of the Organization, particularly the downsizing of ICTY following the Security Council Resolution 1503 (2003).

... After requesting management evaluation of the decisions not to convert their appointments to permanent, and being informed that they had been upheld by the USG for Management, 11 staff members concerned by said decisions, including the eight Applicants in the cases at bar, filed applications before the [Dispute] Tribunal on 16 and 17 April 2012.

... The [Dispute] Tribunal ruled on these applications by Judgment *Malmström et al.* UNDT/2012/129, dated 29 August 2012, finding that the ASG/OHRM was not the competent authority to make the impugned decisions, as the USG had delegated such authority to the ICTY Registrar. On this ground, the [Dispute] Tribunal rescinded the contested decisions and, considering that they concerned an appointment matter, set an alternative compensation in lieu of effective rescission of EUR 2, 000 per applicant.

... On appeal, the Appeals Tribunal vacated *Malmström et al.* UNDT/2012/129, by Judgment No. 2013-UNAT-357 issued on 19 December 2013.[3] The Appeals Tribunal held that the power to decide on the conversion of ICTY staff appointments into permanents ones had not been delegated to the ICTY Registrar and that, hence, the ASG/OHRM was the competent authority to make the decisions at stake.

... The Appeals Tribunal also concluded that placing reliance on the operational realities of the Organization to the exclusion of all other relevant factors amounted to discriminating against ICTY staff members because of the nature of the entity in which they served, and violated their right to be fairly, properly and transparently considered for permanent appointment. Accordingly, it rescinded the decision of the ASG/OHRM, remanded the ICTY conversion exercise to the ASG/OHRM for retroactive consideration of the suitability of the concerned staff members within 90 days of the publication of its Judgment, and awarded to each appellant EUR 3,000 in non-pecuniary damages.

... Following the publication of Judgment No. 2013-UNAT-357, the ASG/OHRM, by email of 14 January 2014, gave the ICTY Registrar specific instructions for the "Implementation of the UNAT Judgment". In fact, this email concerned also Judgment No. 2013-UNAT-[3]59, by which the Appeals Tribunal remanded for reconsideration also the conversion of 262 other ICTY staff members.

... In line with such instructions, each Applicant was invited, by letter of the Human Resources Section, ICTY, dated 29 January 2014, to submit within two weeks any information they deemed relevant for the new review to be undertaken. In response, six of the Applicants submitted further information on or about 13 February 2014.

[3] *Baig, Malmström, Jarvis, Goy, Nicholls, Marcussen, Reid, Edgerton, Dygeus, Sutherland v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357 (Appeals Tribunal Judgment).

... ICTY compiled an individual file for each concerned staff member; it comprised:

> a. A so-called memo P.324—containing the recommendation for conversion to permanent appointment by ICTY management;
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> b. A supplementary fact sheet;
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> c. A personnel action form;
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> d. The results of the ICTY Comparative Review for the staff member's post;
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> e. All performance evaluations since the staff member's appointment with ICTY; and,
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> f. Any additional information that a staff member had elected to provide.

... ICTY reviewed the Applicants' individual files to assess their eligibility and their suitability and, on 14 February 2014, transmitted to OHRM the files, together with its recommendations on each concerned staff member. For all Applicants, ICTY recommended that they be offered a permanent appointment; the recommendation memoranda stated in square brackets "[The appointment should be limited to office/department]". Only four individuals out of all the ICTY staff members under reconsideration were not recommended for conversion, since ICTY considered them ineligible, as explained in the accompanying memorandum of 14 February 2014 transmitting the recommendations to OHRM.

... Between February and May 2014, the Applicants' files were examined by two successive reviewers within OHRM, seeking further information or clarification from ICTY as needed. OHRM recorded its observations on a dedicated standard form and it did not recommend any of the candidates for conversion; the record also shows that although OHRM had initially given a positive recommendation concerning three ICTY staff members other than the Applicants, it later reversed it before transmitting it.

... On 12 March 2014, the Respondent submitted to the Appeals Tribunal a motion for extension of time to execute its judgment's order to consider ICTY staff members for permanent appointments, arguing that, due to the complexity of the review and the high volume of staff members involved, it was not feasible to complete such consideration before 19 June 2014. After seeking and obtaining further information on the implementation steps undertaken thus far, the Appeals Tribunal, by Order No. 178 (2014) of 2 April 2014, extended until 19 June 2014 the Respondent's deadline for completion of the conversion process.

... In May and June 2014, the relevant New York CR bodies reviewed all the files of the Applicants. The CR Committee (staff at the P-2 to P-4 levels) recommended that none of the Applicants be granted permanent appointments, whereas the CR Board recommended that nine staff members at the P-5 level and above, amongst

whom were four of the Applicants, be granted a permanent appointment not limited to ICTY.

... After the CR bodies' recommendation, the ASG/OHRM considered whether or not to grant the Applicants conversion to a permanent appointment. In doing so, the entire group of ICTY staff members that was re-considered for conversion pursuant to the directions of the Appeals Tribunal was divided in six groups of staff considered to be in similar situations in terms of employment status, to wit:

> a. Applicants who were active ICTY staff members as at the date of the contested decisions;
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> b. Applicants who were active ICTY staff members in the General Service category as at the date of the contested decisions;
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> c. Applicants who had transferred to MICT as at the date of the contested decisions;
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> d. Applicants who had separated from ICTY as at the date of the contested decisions;
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> e. Applicants at the P-5 level; and
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> f. Applicants who had separated from ICTY due to downsizing after the contested decisions.

... By individual letters dated 17 June 2014, and received shortly thereafter, all Applicants were informed by the ASG/OHRM of the decisions not to grant any of them retroactive conversion of their respective fixed-term appointment into permanent appointment. Not only the language and structure of these individual letters were remarkably similar but[...] also, they were very much alike the letters sent to the ICTY staff members reconsidered as per Judgment No. 2013-UNAT-359, save for the personal and factual details mentioned, although the wording was adjusted depending on which of the aforementioned six categories of staff the letter's recipient belonged to. All letters stated that the respective Applicants fulfilled three out of the four required criteria and that they did not meet the fourth criteria, namely, that the granting of a permanent appointment be in accordance with the interests of the Organization. Each letter contained one paragraph setting out, in identical terms, the reasons why the last criterion was not considered to be met:

> I have considered that though you may have transferable skills, your appointment is limited to service with the ICTY. Under the legal framework for the selection of staff members, I have no authority to place you in a position in another entity outside of this legal framework. As mandated by the Charter, the resolutions of the General Assembly, and the Organization's administrative issuances, staff selection is a competitive process to be undertaken in accordance with established procedures. All staff members have to apply and compete with other

> staff members and external applicants in order to be selected for available positions with the Organization. Given the finite nature of the Tribunal's mandate, and the limitation of your appointment to service with the ICTY, the granting of a permanent appointment in your case would not be in accordance with the interests or the operational realities of the Organization. Therefore, you have not satisfied the fourth criterion.[4]
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> ... On 4 July 2014, the Applicants filed before the Appeals Tribunal a "Renewed Motion for an Order Requiring Respondent to Execute the Judgment", which was rejected by Judgment No. 2014-UNAT-494, noting that the Appeals Tribunal's orders had been executed inasmuch as payment of moral damages had been effected, and a new conversion process had been completed. The Appeals Tribunal further noted that recourse for complaints regarding the conversion process undertaken subsequent to the Appeals Tribunal's rulings was "*not* to be found in an application for execution but rather in Staff Rule 11.2 ... [that] provides the mechanism whereby the complained-of decisions of the ASG/OHRM [could] be challenged by the affected staff members" (emphasis in the original).
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> ... The Applicants requested management evaluation of the June 2014 decisions (...) on 18 August 2014. By letters dated 29 September 2014, the Applicants were informed that the USG for Management had upheld the contested decisions.

6. Between 28 and 30 December 2014, Marcussen *et al.* filed individual applications with the Dispute Tribunal, seeking, *inter alia*, retroactive conversions to permanent appointments or, alternatively, compensation calculated according to the applicable termination indemnity associated with a permanent appointment, as well as moral damages in the sum of EUR 20,000 per applicant for breaches of due process and excessive delay.

7. The Dispute Tribunal decided to consolidate all eight applications and dispose of them in one single judgment, as they "challenge analogous decisions arising from [the] same context and process, raise similar issues and essentially the same arguments, and share a long procedural history".[5]

8. In Judgment No. UNDT/2015/116, the UNDT held that the contested decisions denying Marcussen *et al.* conversions of their fixed-term appointments to permanent ones were unlawful, primarily because they had not been given individual consideration in light of their proficiencies,

[4] The Secretary-General does not agree to the UNDT's characterization of the 17 June 2014 letters in this paragraph. With this exception, the Secretary-General accepts the facts and procedural history contained in paras. 5-39 and 41-42 of the impugned Judgment.
[5] Impugned Judgment, para. 2.

qualifications, competencies, conduct and transferrable skills and the decisions were "exclusively based on the limited mandate of ICTY, to the exclusion of all other relevant factors".[6] In the UNDT's view, the Administration disregarded the Appeals Tribunal Judgment by launching a new eligibility assessment. The Dispute Tribunal rescinded the contested decisions and remanded the matter to the ASG/OHRM for "retroactive individualized consideration of [Marcussen *et al.*'s] suitability for conversion of their appointments to a permanent one",[7] in conformity with the instructions in the Appeals Tribunal Judgment among others, within 90 days of the issuance of the impugned Judgment. The Dispute Tribunal further awarded moral damages in the sum of EUR 3,000 to each of Marcussen *et al.*

9. Judgment No. UNDT/2015/116 is the subject of the instant appeals.

10. On 9 June 2016, the Appeals Tribunal issued Order No. 263 (2016) advising the parties in this case, as well as the parties in the related cases (Case No. 2016-899 (*Featherstone v. Secretary-General of the United Nations*) and Case No. 2016-900 (*Ademagic et al. v. Secretary-General of the United Nations*), that an oral hearing would be scheduled on 24 June 2016. The hearing took place before the full bench on 24 June 2016, with Ms. Baig and Counsel for the Secretary-General attending in person and the others of Marcussen *et al.* participating via video link.

Submissions

The Secretary-General's Appeals

11. The UNDT erred in finding that the ASG/OHRM failed to give meaningful individual consideration to Marcussen *et al.* and based the contested decisions not to convert their fixed-term appointments into permanent ones solely on the basis of the finite mandate of ICTY in violation of the Appeals Tribunal Judgment. The Administration fully complied with the Appeals Tribunal's instructions by undertaking a detailed multi-step process to ensure that each of Marcussen *et al.* received a "detailed and individualized review" at every step, including the assessment of his or her eligibility and suitability. Contrary to the UNDT's findings, the form on which the OHRM reviewers recorded their remarks and recommendations for each staff member detailed each step of OHRM's reconsideration process and the results of the review for a

[6] *Ibid.*, para. 98.
[7] *Ibid.*, para. 121.

permanent appointment. In this regard, the Secretary-General notes that the Administration requested the UNDT to call witnesses to clarify the details of how it had conducted the individualized re-consideration, but the UNDT declined that request.

12. The UNDT erred in concluding that the ASG/OHRM had authority to place Marcussen *et al.* in posts outside ICTY and to grant them permanent contracts with no limitation of service to ICTY. The UNDT misread Section 11 of ST/AI/2010/3 and paragraph 10 of the Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 (Guidelines), having failed to take into account Staff Rule 9.6(c)(i). Its conclusions are therefore misplaced.

13. The Dispute Tribunal stepped into the shoes of the ASG/OHRM and usurped her discretion to grant or deny a permanent appointment by designating weight and relevance to factors that it considered to be in the interests of the Organization. The granting of a permanent appointment is a matter within the discretion of the Administration. Such exercise of discretion is subject to a limited judicial review. In exercising her discretion, the ASG/OHRM had the prerogative to take into account the relevant resolutions adopted by the General Assembly and all the interests of the Organization. It was for the ASG/OHRM to assign the due and adequate weight to each criterion she considered, including ICTY's finite mandate. If she decided that ICTY's finite mandate should be the predominant factor in her weighing process, or that it should weigh more heavily than other factors, or even that it should override certain factors, such decisions would be well within the bounds of her discretion; they would not violate the applicable legal framework or contravene the Appeals Tribunal Judgment. The UNDT lost sight of the important distinction between a criterion being assigned a certain weight in a decision and a criterion being the sole and exclusive one in a decision. ICTY's finite mandate may be the predominant factor in the ASG/OHRM's weighing process, but it was not the exclusive factor.

14. While it recognized that the ASG/OHRM was entitled to take into consideration the finite mandate and the downsizing situation of a certain entity in making a decision on the conversion of its staff, the UNDT nevertheless concluded that because the weighing process resulted in the same decision in each of the ICTY staff members' cases, the ASG/OHRM had not given them meaningful consideration and must have relied exclusively and solely on ICTY's finite mandate. The Secretary-General stresses that in deciding not to convert Marcussen *et al.*'s appointments into permanent ones, the ASG/OHRM properly exercised her discretion in weighing the fact that

Marcussen *et al.* all held an appointment with service limited to ICTY, which had a finite mandate, against other criteria.

15. The Dispute Tribunal erred in granting moral damages to Marcussen *et al.* The award of moral damages is not warranted as the UNDT has failed to show that the Administration had not complied with the Appeals Tribunal Judgment.

16. The Secretary-General requests that the Appeals Tribunal vacate the impugned Judgment.

Marcussen *et al.*'s Answers

17. The process leading to the 17 June 2014 decisions failed to comply with the Appeals Tribunal Judgment, as it reflected another discriminatory blanket policy of denial of permanent appointments to all ICTY/MICT staff members. During that process, the Administration did not give Marcussen *et al.* individualized, fair or retroactive consideration for conversion to permanent appointment, nor did it give the required consideration to their transferable skills in violation of their right to every reasonable consideration for conversion to a permanent appointment. The ASG/OHRM persisted in denying Marcussen *et al.* and all other ICTY/MICT staff members any prospect of conversion on the ground that they work for ICTY/MICT, by applying the finite mandate of ICTY as the predominant factor that overrode other considerations.

18. The Secretary-General fails to establish that the UNDT erred in finding that Marcussen *et al.* had not been given individualized consideration for conversion. His claim that Marcussen *et al.* have received "meaningful individualized consideration" during the process leading to the June 2014 decisions is disproved by the numerous factual errors on key issues that tainted the ASG/OHRM's decision-making process.

19. The Dispute Tribunal's determination that paragraph 10 of the Guidelines permits conversion of limited fixed-term appointments into Secretariat-wide permanent appointments is the only interpretation that is consistent with the Appeals Tribunal Judgment. Marcussen *et al.* are eligible for permanent appointment without limitation notwithstanding their employment by the ICTY/MICT.

20. The UNDT did not improperly substitute its discretion. It did not step into the shoes of the Administration. Nor did it engage in a weighing of the relevant factors.

21. The Dispute Tribunal was correct to award moral damages. Marcussen *et al.* provided evidence through their submissions to substantiate the harm they suffered in the wake of the discriminatory and arbitrary denial of their conversion to a permanent appointment.

22. Marcussen *et al.* requests that the Appeals Tribunal dismiss the Secretary-General's appeals.

Marcussen *et al.*'s Appeals

23. The Dispute Tribunal erred in finding that there could be a "legally correct outcome" other than to grant Marcussen *et al.* a permanent appointment. On the facts of the present cases, there is only one way that the Administration can exercise its discretion, i.e., by converting the staff members' fixed-term contracts into permanent ones.

24. The UNDT erred in law by failing to order specific performance, as it had the power and duty to do so when faced with the Administration's disregard of the Appeals Tribunal Judgment in its repeated and flagrant abuse of discretion.

25. The UNDT erred in failing to address or remedy the Administration's unilateral breach of Marcussen *et al.*'s employment contracts. The Administration does not have discretion when it comes to giving Marcussen *et al.* every reasonable consideration for a permanent appointment, as it is part of its contractual obligation.

26. The UNDT erred in failing to award damages that reflect the full extent of the moral harm occasioned by the June 2014 decisions. It was an error in law for the UNDT to limit the quantum of damages caused by the June 2014 decisions to the exclusion of the information subsequent to the fall of 2011 in favour of their suitability for conversion; to exclude any harm suffered since the commencement of the conversion exercise on the basis that this was already addressed by the Appeals Tribunal Judgment; to equate the harm with the first breach; and to overestimate the satisfaction from the remanding of their cases for reconsideration. In addition, it was an error for the UNDT not to make an individualized assessment of the special circumstances and the appropriate remedy for each of Marcussen *et al.*

27. Remanding Marcussen *et al.*'s requests for conversion to the Administration for a third time is not a fair or appropriate remedy. The Secretary-General intentionally failed to comply with the Appeals Tribunal Judgment, despite the warnings from its own central review body.

Consequently, Marcussen *et al.* were forced to go through a second set of proceedings, incurring additional costs.

28. Marcussen *et al.* requests that the Appeals Tribunal (i) order the Secretary-General to grant them a permanent appointment or pay them damages equal to the amount of the termination indemnity to which they would have been entitled had they been given a permanent appointment, (ii) increase the quantum of the moral damages awarded by the UNDT, and (iii) order costs against the Secretary-General.

The Secretary-General's Answers

29. The UNDT correctly applied the standard of judicial review in deciding that it did not have jurisdiction to order specific performance granting Marcussen *et al.* a permanent appointment. The Dispute Tribunal did so on the basis that the contested decisions were discretionary in nature. Marcussen *et al.* urged the UNDT to exercise its power to order specific performance because their cases were of "continued abuse of discretion", but did not cite any legal authority. In fact, no such authority exists.

30. The UNDT was not required to individually assess Marcussen *et al.*'s chances of being awarded permanent appointments. It considered their cases on an individual basis exactly as far as it was required to do so, and no further. The fact that the UNDT reached the same conclusion that remand was the proper remedy for all of Marcussen *et al.* does not mean that any of them was deprived of due process in respect of his or her individual application submitted to the Dispute Tribunal.

31. Marcuseen *et al.* failed to establish that the Administration had no choice but to grant them permanent appointments. They have no automatic right to be granted permanent appointments. Their arguments about the rationale behind the granting of permanent appointments and the "excessive" number of fixed-term appointments that they have received are all misplaced and without any legal basis.

32. Marcussen *et al.*'s arguments for additional moral damages are unfounded. The UNDT awarded each of Marcussen *et al.* EUR 3, 000 as non-pecuniary damages, taking into account the fact that their cases were remanded for reconsideration. This approach was the same as that taken in the Appeals Tribunal Judgment. Marcussen *et al.* cannot re-litigate the 2011 decisions along with the June 2014 decisions. The Appeals Tribunal has already adjudicated the 2011

decisions in the Appeals Tribunal Judgment. The Secretary-General recalls that the amended Statutes of the UNDT and the Appeals Tribunal make it clear that each and every award of compensation require specific evidence of harm that justifies the award. Marcussen *et al.*'s arguments for costs are likewise unfounded. Neither the UNDT nor the Appeals Tribunal made any finding that the Administration had intentionally failed to comply with the Appeals Tribunal Judgment.

33. The Secretary-General requests that the Appeals Tribunal dismiss the appeals filed by Marcussen *et al.*

Considerations

The Secretary-General's appeals

34. On appeal, the Secretary-General contends that the UNDT erred:

- In finding that the ASG/OHRM did not give meaningful individual consideration to the staff members' requests for conversion to permanent appointments and instead relied exclusively on ICTY's finite mandate;
- In ruling that the ASG/OHRM could have given the staff members permanent appointments without a limitation of service to ICTY;
- In usurping the discretion of the ASG/OHRM; and
- In awarding moral damages to the staff members for harm which the UNDT found was caused by the contested decisions.

35. Consideration of the Appeals Tribunal Judgment is essential for determining the legality of the conversion exercises that are the subject of the pending appeals. The Appeals Tribunal Judgment stated:[8]

> ... The question before the Appeals Tribunal is not whether the ICTY staff members were *eligible* for conversion but, rather, whether the determination of the

[8] *Baig, Malmström, Jarvis, Goy, Nicholls, Marcussen, Reid, Edgerton, Dygeus, Sutherland v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357, paras. 64-72 (Appeals Tribunal Judgment, emphases in original and internal citations omitted).

ASG/OHRM that they were *not suitable* for conversion can withstand judicial scrutiny.

...

... ICTY staff members - like any other staff member – are entitled to individual, "full and fair" (in the lexicon of promotion cases) consideration of their suitability for conversion to permanent appointment. The established procedures, as well as the principles of international administrative law, require no less. This principle has been recognized in the jurisprudence of the Appeals Tribunal.[...]

... We are not persuaded by the Secretary-General's argument that the staff members received the appropriate individual consideration in the "suitability" exercise. The ASG/OHRM's decision, as communicated to the staff members, provides no hint that their candidature for permanent appointment was reviewed by OHRM against their qualifications, performance or conduct; their proven, or not proven, as the case may be, suitability as international civil servants; or the highest standards of efficiency, competence and integrity, as established in the United Nations Charter. Each candidate for permanent appointment was lawfully entitled to an individual and a considered assessment on the above basis before a permanent appointment could be granted or denied. This was their statutory entitlement and cannot be overridden or disregarded merely because they are employed by the ICTY.

... It is patently obvious that a blanket policy of denial of permanent appointments to ICTY staff members was adopted by the ASG/OHRM simply because the ICTY was a downsizing entity. The ASG/OHRM was not entitled to rely solely on the finite mandate of the ICTY or Security Council Resolution 1503 (2003) as the reason to depart from the principles of substantive and procedural due process which attaches to the ASG/OHRM's exercise of her discretion under ST/SGB/2009/10. We determine that the ASG/OHRM's discretion was fettered by her reliance, to the exclusion of all other relevant factors, on the ICTY's finite mandate. Accordingly, we are satisfied that the staff members were discriminated against because of the nature of the entity in which they were employed. As such, the ASG/OHRM's decision was legally void, being tainted by arbitrariness and the violation of the staff members' due process rights.

... The approach adopted by the ASG/OHRM offended against the provision in former Staff Rule 104.12(b)(iii) that staff members would "be given every reasonable consideration for a permanent appointment". This Rule did no more than give effect to the wish expressed by the General Assembly as far back as 1982 in Resolution 37/126 that "staff members on fixed-term contracts upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment". Thus, the ASG/OHRM was not entitled to place reliance on the "operational realities of the Organization" *to the exclusion of all other relevant*

> *criteria* set out in Resolution 51/226, particularly when section 2 of ST/SGB/2009/10 gave clear and unambiguous instruction on what must be taken into account.
>
> ... The right of the staff members, which was violated by the afore-mentioned discriminatory actions and by the absence of due process, is not to the granting of a permanent appointment but, rather, to be fairly, properly, and transparently *considered* for permanent appointment. Since we find that the ASG/OHRM breached the staff members' rights in this respect, the Appeals Tribunal hereby rescinds the impugned decision.
>
> ... Accordingly, the matter must be remanded.
>
> ... Because the Appeals Tribunal has legal authority to do so, and has sufficient factual information, the matter is hereby remanded to the decision maker, namely the ASG/OHRM (rather than to the UNDT) for the ASG/OHRM to consider, in accordance with the relevant statutory provisions and the principles of substantive due process, whether the staff members' fixed-term contracts should be retroactively converted to permanent appointments. There is a statutory obligation on the Administration, in the context of the best interests of the United Nations, to give "every reasonable consideration" to those ICTY staff members demonstrating the proficiencies, competencies and transferrable skills which render them suitable for career positions within the Organization.

36. It is patently clear the Appeals Tribunal Judgment remanded for *de novo* consideration the staff members' *suitability* for conversion to permanent appointments. We are greatly dismayed that our clear and unambiguous directive was not followed by the Administration. Rather, the ASG/OHRM, in direct contravention of the Appeals Tribunal Judgment, embarked upon a determination of the staff members' *eligibility*, as well as suitability for conversion, whereas there was no remand on the issue of eligibility. Thus, contrary to the Secretary-General's written submissions, the Dispute Tribunal did not err in drawing a sharp distinction between eligibility and suitability.

37. Moreover, we find that the Secretary-General's submissions that the Appeals Tribunal did not "specifically prohibit" the Administration from conducting an eligibility review are entirely disingenuous given our clear directive in the Appeals Tribunal Judgment. Indeed, in his Consolidated Motion for an extension of time to complete the consideration of the conversion exercises, the Secretary-General expressly acknowledged that the Appeals Tribunal had remanded the ICTY conversion exercise to the ASG/OHRM "to consider anew the *suitability* for

permanent appointments of the ICTY staff members" (emphasis added).[9] Similarly, it is entirely disingenuous for the Secretary-General to cite Section 2 of ST/SGB/2009/10 as authority for the Administration's decision to review eligibility in the course of the remand. A plain reading of Section 2 shows that the focus of that section is on the "suitability" of "eligible staff members". The presence of the word "eligible" is no more than an indicator, if a consideration under Section 2 is called for, that the staff member has reached the eligibility threshold as set out in Section 1 for consideration as to his or her suitability for conversion to a permanent appointment.

38. We find that the Administration's willful disregard of the Appeals Tribunal Judgment is not mitigated by the fact that *almost* all of the staff members were considered to have met the eligibility requirements upon remand. As there was conflation of eligibility with suitability, the Administration did not abide by the Appeals Tribunal's clear directive. We are constrained to opine that the Administration's conduct in embarking on an eligibility exercise is unfortunately indicative of an institutional reluctance to follow the instructions which we so clearly gave in the Appeals Tribunal Judgment.

39. The Dispute Tribunal also found that the Administration did not comply with our instruction that the staff members were entitled to "retroactive consideration". The UNDT determined that the remedy ordered by the Appeals Tribunal Judgment was designed to restore the staff members' positions as of the date of the unlawful decisions of 20 September 2011. Thus, the UNDT found that the Administration improperly considered "updated" 2014 information. Accordingly, the UNDT determined that the Secretary-General also did not comply with the Appeals Tribunal Judgment in this regard.

40. We uphold the UNDT's determination. We gave a clear directive to the Administration that, upon remand, it should consider the staff members' suitability for conversion to permanent appointments "by reference to the relevant circumstances as they stood at the time of the first impugned refusal to convert their appointments".[10] Once again, the Administration failed to comply with our directive.

[9] The Central Review Panel similarly acknowledged that it was tasked "with reviewing the staff from a suitability aspect".
[10] Impugned Judgment, para. 75.

41. At the heart of the Secretary-General's appeals is whether the Administration's purported *de novo* consideration gave "every reasonable consideration" to the staff members' "proficiencies, competencies and transferrable skills". In this regard, the Dispute Tribunal concluded that the Administration had failed, stating:[11]

> ... The Respondent avers that the re-consideration exercise comprised an individual consideration and review of the specific qualifications, proficiencies, performance, conduct and transferrable skills of every Applicant. In holding that, he points out that six types of decisions were issued, each tailored to the employment status of the six different categories of similarly situated staff members. The [Dispute] Tribunal, however, is of the view that this in itself does not reveal an individualised consideration of each Applicant, but, at best, their categorisation.
>
> ... The Respondent also asserts that the ASG/OHRM examined the proficiencies, competencies and transferrable skills pertaining to each individual Applicant. Nevertheless, the Tribunal cannot but note that the reasons given for not granting the conversion were identical for all eight Applicants and, as a matter of fact, for approximately 250 ICTY staff members assessed in the same exercise. Not only were the reasons put forward the same, but they were also formulated in exactly the same terms in every decision letter, and, importantly, they were in no way related to the Applicants' respective merits, competencies or record of service.
>
> ... The only time when the expression "transferable skills" appears in said letters is in the sentence[:] "I have also considered that though you may have transferrable skills, your appointment is limited to service with ICTY". Otherwise said, the ASG/OHRM did not address, and even less pronounce herself on, the question of whether the respective Applicants possessed such skills, let alone which ones they possess and to what extent.
>
> ... In view of the foregoing, the [Dispute] Tribunal finds that the contested decisions do not reflect any meaningful level of individual consideration of the Applicants. Even if it were to follow the Respondent's submission that the individualisation transpires from the record of the process (mainly the Applicants' individual files), the [Dispute] Tribunal observes that these records do not contain any indicia of individual consideration [] either. The individual files, and in particular the documents detailing the analysis of each of the Applicants' candidatures for conversion at every step of the review, do not even mention any qualifications or skills, or at least any kind of personalised factors (such as, the role they discharge in ICTY/MICT or their placement in the comparative review exercises conducted in the context of ICTY downsizing); notably, the form on which OHRM reviewers recorded their remarks and recommendations on each candidate refer exclusively to the

[11] *Ibid*., paras. 77-81.

> particulars of the downsizing of ICTY, and the respective dates of the Applicants' expected separation or end of contract.
>
> ... For all the above, the [Dispute] Tribunal considers that no meaningful individual consideration was afforded to the Applicants, in contravention to the Appeals Tribunal's clear instruction to this effect.

42. We agree. As the UNDT properly concluded, the ASG/OHRM's conversion exercise was in essence a reliance on form over substance. The instruction to ICTY to compile extensive dossiers on each of the staff members, while itself a worthy first step, did not meet the "full and fair consideration" mandated by the Appeals Tribunal Judgment in the absence of any substantive consideration of the information contained in the dossiers. There is no evidence of such consideration or in the respective decision letters sent to the staff members in June 2014.

43. The Secretary-General argues, however, that the individuality of the decisions should not be impugned merely because the decision letters use the same format and terminology in finding that none of the staff members was suitable for conversion to permanent appointment. It is not the identical nature of the language or format used by the Administration in the letters that is the determinative factor; rather, it is the patent absence of any reference to, or consideration of, the respective staff member's competencies, proficiencies and transferrable skills. Without such discussion, the lawfulness of the manner in which the exercise was conducted is undermined.

44. We agree with the UNDT that the ASG/OHRM failed to give any consideration whatsoever to what each staff member might offer by way of transferable skills— save the cursory reference in each decision letter that although the staff member "may have transferrable skills, [his/her] appointment [was] limited to service with the ICTY, according to the terms of [his/her] employment contract with ICTY". The "full and fair consideration" in the Appeals Tribunal Judgment mandated that the ASG/OHRM must address the transferrable skills that each staff members possesses in considering the suitability of the staff member for conversion to a permanent appointment. The major reason this Tribunal remanded the cases was for the ASG/OHRM to specifically take into account each staff member's transferrable skills when considering his or her suitability for a permanent appointment. The failure of the Administration to do this, and to give any meaningful consideration to this criterion, of itself, is sufficient to vitiate the contested decisions.

The reasons relied upon in the contested decisions

45. The Administration's reason for not granting permanent appointments was the limitations of the staff members' appointments to service with ICTY and the finite nature of ICTY's mandate. As stated by the Dispute Tribunal, there is no question that the staff members' letters of appointment provide that their services are limited to ICTY. Nevertheless, the UNDT determined that the Administration could have elected to grant the ICTY staff members permanent contracts not limited to service with ICTY/MICT and would then have been free to reassign them without impediment. In coming to its conclusion, the UNDT considered the relevant administrative issuance regarding the staff selection system, namely ST/AI/2010/3 (Staff selection system) and the Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009.

46. First, with regard to ST/AI/2010/3, the Dispute Tribunal considered Section 11.1 thereof, which provides:

> **Placement authority outside the normal process**
>
> 11.1 The Assistant Secretary-General for Human Resources Management shall have the authority to place in a suitable position the following staff members when in need of placement outside the normal process:
>
> (a) Incumbents, other than staff members holding a temporary appointment, of positions reclassified upward for which an applicant other than the incumbent has been selected;
>
> (b) Staff, other than staff members holding a temporary appointment, affected by abolition of posts or funding cutbacks, in accordance with Staff Rule 9.6 (c) (i);
>
> (c) Staff members who return from secondment after more than two years when the parent department responsible concerned has made every effort to place them.
>
> After determining the availability of a suitable position in consultation with the head of department/office and the staff member concerned, the Assistant Secretary-General for Human Resources Management shall decide on the placement, in accordance with staff regulation 1.2 (c).

47. The Dispute Tribunal relied on Section 11.1(b) as the mechanism for the potential reassignment of the ICTY staff in case of abolition of their posts, concluding there was "no absolute legal bar for the ASG/OHRM to move any of [Marcuseen *et al.*] ... to a different entity on the basis of the above-referenced provision if their posts were to be abolished".[12]

48. Paragraph 10 of the Guidelines provides:

> Where the appointment of a staff member is limited to a particular department/office, the staff member may be granted a permanent appointment similarly limited to that department/office. If the staff member is subsequently recruited under established procedures including review by a central review body for positions elsewhere in the United Nations Secretariat, the limitation is removed.

49. The UNDT construed the word "may" as precluding a staff member who previously held a fixed-term appointment from receiving a permanent appointment subject to the same limitation. In this regard, the Dispute Tribunal stated: "If it were mandatory to equally limit the permanent appointment to said department/office upon conversion, the Guidelines would and should have explicitly stated it."[13]

50. The Dispute Tribunal, thus, found that of the two grounds put forward by the Administration for not converting, namely the limitation of the staff members' fixed-term appointments to ICTY and ICTY's finite mandate, the former carried little weight.

51. The Secretary-General contends that the UNDT erred in law and misconstrued Section 11.1(b). He argues that Section 11 does not specify that the ASG/OHRM's exceptional authority extends to the placement of staff members outside of their particular department, rather, it provides only that the ASG/OHRM would have authority to place staff members "outside the normal staff selection process".

52. The Secretary-General further contends that the UNDT erred by failing to take into account Staff Rule 9.6(c)(i), which states:[14]

> (c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or

[12] *Ibid.*, para. 86.
[13] *Ibid.*, para. 88.
[14] The Secretary-General's Bulletin SGB/2010/6 of 2 September 2010.

> continuing appointment in accordance with the terms of the appointment or on any of the following grounds:
>
> (i) Abolition of posts or reduction of staff[.]

53. In other words, the Secretary-General submits that the ICTY staff members, who were on fixed-term appointments with end dates, did not fall into the category of those whose "appointment[s] [were] slated to be *terminated* due to abolition of posts, reduction of staff, funding cutbacks, or on any other grounds" (emphasis in original). Accordingly, the Secretary-General submits that the ASG/OHRM could have properly concluded that she could not place the staff members in another entity outside of ICTY.

54. Insofar as the UNDT relied on the contents of paragraph 10 of the Guidelines in determining that the ASG/OHRM could have given some ICTY staff members permanent appointments limited to service within ICTY and given other ICTY staff members permanent appointments with no service limitations, the Secretary-General argues that the Dispute Tribunal misread paragraph 10. The Secretary-General contends that the word "may" in paragraph 10 of the Guidelines is no more than a reiteration of the language in Section 2 of ST/SGB/2009/10, that "a permanent appointment may be granted" to staff who meet the criteria for such appointments. Furthermore, the Secretary-General relies on the second sentence of paragraph 10 which states "[i]f the staff member is subsequently recruited under established procedures including review by a central review body for positions elsewhere in the United Nations Secretariat, the limitation is removed".

55. The staff members submit that the UNDT's interpretation of paragraph 10 of the Guidelines is the only interpretation that is consistent with the Appeal Tribunal Judgment. They contend that the Administration did not claim that the Guidelines specifically prohibited such conversion. They also submit that, in setting the framework for the re-consideration of the applications for conversion, the Appeals Tribunal considered the Secretary-General's argument as to the staff members' contractual limitations but nevertheless concluded that "[t]here is a statutory obligation on the Administration, in the context of the best interests of the United Nations, to give 'every reasonable consideration' to those ICTY staff members demonstrating the proficiencies, competencies and transferrable skills which render them suitable for career positions within the Organization".[15] Moreover, the staff members submit that

[15] *Baig, Malmström, Jarvis, Goy, Nicholls, Marcussen, Reid, Edgerton, Dygeus, Sutherland v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357, para. 72.

the focus by the Appeals Tribunal on "transferrable skills" re-enforces that the reference in paragraph 72 of the Appeals Tribunal Judgment to "Organization" is to the United Nations Secretariat beyond ICTY/MICT. The staff members also contend that the ASG/OHRM's own policy advisors explicitly considered this issue and recommended that all of the nine P-5 ICTY/MICT staff members be granted permanent appointments not limited to ICTY/MICT, precisely because of their transferrable skills.

56. Once again, we find that the UNDT did not err in law or fact in interpreting the relevant provisions as it did. Furthermore, we find no reason to respond to arguments put forward by the Secretary-General in respect of an issue, namely the staff members' transferrable skills, which we addressed in the Appeals Tribunal Judgment.

Did the Dispute Tribunal improperly substitute its discretion for that of the ASG/OHRM?

57. The Secretary-General contends that, the UNDT usurped the discretion of the ASG/OHRM and, thus, committed an error of law by virtue of its conclusion that the ASG/OHRM placed overwhelming weight on ICTY's finite mandate in her overall consideration of the applications for conversion. We find no merit in this argument. First, we note that the Dispute Tribunal recognised that the ASG/OHRM was entitled to take into consideration ICTY's finite mandate and downsizing situation, and appropriately referenced former Staff Rule 104.13 and Section 2 of ST/AI/2009/10 as the legal bases for giving due weight to "all the interests of the Organization". It also had regard to the General Assembly resolution 51/226, which clearly states that the "operational realities of the organizations" are considerations the Administration may legitimately consider when making administrative decisions such as conversion to permanent appointments. There is no merit to the Secretary-General's claim. In adherence to classic principles of judicial review, the UNDT scrutinized the conduct of the ASG/OHRM to determine whether she properly arrived at her decisions. It did so not only from the perspective of the appropriate statutory provisions but, more particularly, through the prism of the Appeals Tribunal Judgment and our directives upon remand to the ASG/OHRM.

58. In this regard, the Dispute Tribunal properly concluded (for the reasons already set out in this Judgment) that the ASG/OHRM failed to give individualized consideration to the staff members in light of their respective qualifications, competencies, conduct and transferrable skills, and that the ASH/OHRM's decisions were based on ICTY's limited mandate, in direct contravention of the directives set forth in the Appeals Tribunal Judgment. We are of the view

that the Administration's unrelenting reliance on ICTY/MICT's finite mandate constitutes, once again, an unlawful fettering of the ASG/OHRM's discretion such that none of the impugned decisions can be allowed to stand. We note with deep regret that the manner in which the remand for reconsideration was undertaken demonstrates an almost complete disregard of the Appeals Tribunal Judgment. The Administration's reluctance to comply with our clear directives has unduly delayed the administration of justice for the staff members concerned, as well as for the interests of the Organization itself.

59. Although the Administration is entitled to consider "all the interests of the Organization" under Section 2 of ST/SGB/2009/10, when considering staff members' suitability for permanent appointments, we hold that provision cannot be construed as narrowly as the ASG/OHRM interprets it. "[A]ll the interests of the Organization" encompasses the interests of ICTY, as an institution established by the General Assembly, not merely as a downsizing entity. As such, the ICTY has an interest in maintaining in its employ staff members who meet the "highest standards of efficiency, competence and integrity established in the Charter" in order for it to carry out its mandate.[16] Thus, the ASG/OHRM's exclusive reliance on the finite mandate of ICTY—which has been in existence for 20 years and still exists through its successor, MICT—ill-served the ICTY staff members in 2011 and again in 2014 upon remand. As set forth in the Appeals Tribunal Judgment, and here, the ICTY staff members are entitled to "full and fair" consideration of their respective qualifications, competencies, conduct and transferrable skills when determining their suitability for conversion to permanent appointments.

60. Accordingly, the Appeals Tribunal upholds the Dispute Tribunal's finding that the Administration's decisions not to grant permanent appointments to the staff members were flawed and we uphold the UNDT's rescission of the flawed decisions.

Marcussen et al.'s appeal

61. The staff members in their applications before the Dispute Tribunal requested conversion of their appointments into permanent appointments or, in the alternative, the granting of termination indemnities applicable in the case of termination of a permanent appointment.

[16] ST/SGB/2009/10, Section 2.

62. The Dispute Tribunal declined to grant either request, finding effectively that the exercise of the ASG/OHRM's discretion, albeit once again fettered by an unlawful reliance on ICTY's finite mandate, had not been "narrowed down in such a way as to only have one legally correct outcome" such as to merit specific performance.[17] Rather, the UNDT found that the "[the] outcome remains open for each of the [staff members]".[18] Accordingly, the UNDT remanded the matter anew to the ASG/OHRM, "in accordance with the requirements of fairness and due process, as specified by the Appeals Tribunal".[19]

63. The staff members argue that the UNDT wrongly held that the ASG/OHRM must be asked for a third time to conduct a non-discriminatory review. They urge that the fundamental breaches in the present case warrant interference by the Appeals Tribunal with the exercise of administrative discretion and that they should be awarded either permanent appointments or termination indemnities.

64. Although we have determined that the Administration, once again, failed to afford the staff members the full and fair consideration the Appeals Tribunal Judgment directed, we do not find that the Dispute Tribunal erred in again remanding to the ASG/OHRM. We find a remand to be the most effective and equitable of the remedies, although we can understand the staff members' frustration with another remand. While the staff members cite the Appeals Tribunal's jurisprudence in *Aly et al.*[20] in aid of their case against a remand, we are not satisfied that the present cases are sufficiently on par with the particular circumstances in *Aly et al.* for us to find that the UNDT misapplied its discretion in deciding to remand.

65. Accordingly, we uphold the UNDT's remand of the staff members' applications for conversion to permanent appointments to the ASG/OHRM. Upon remand, we expect the Administration to strictly adhere to our directives in the Appeals Tribunal Judgment and to our further instructions herein, where we explicitly instruct the ASG/OHRM to consider, on an individual and separate basis, each staff member's respective qualifications, competencies, conduct and transferrable skills when determining each of Marcussen *et al.*'s applications for conversion to a permanent appointment and not to give predominance or such overwhelming weight to the consideration of the finite mandate of ICTY/MICT so as to fetter or limit the

[17] Impugned Judgment, para. 105.
[18] *Ibid*., para. 106.
[19] *Ibid*., para. 107.
[20] *Aly et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-622.

exercise of discretion in deciding whether to grant a permanent appointment to any individual staff member.

66. The Administration has 90 days from the date of the issuance of this Judgment to reevaluate and reconsider all the staff members' applications for conversion who are part of this case and the companion cases. As the UNDT notes, it should not take the Administration more than 9o days as all pertinent information is readily available.

The UNDT's award of moral damages

67. Both the Secretary-General and the staff members appeal the UNDT's award of moral damages.

68. The Secretary-General contends that the UNDT erred in law by awarding moral damages of EUR 3,000 to each of the staff members in light of the General Assembly's amendment to Article 10(5)(b) of the UNDT Statute, which provides that compensation may only be awarded for harm when supported by evidence. As the amendment was in effect on 17 December 2015, when the UNDT issued the impugned Judgment, the UNDT erred by awarding compensation in the absence of harm suffered.

69. The staff members, on the other hand, submit that the Dispute Tribunal erred in awarding an amount of moral damages which failed to reflect the full extent of the detrimental impact caused to their lives and livelihoods by the Administration's policy of discrimination against ICTY. In answer to the Secretary-General's claim, the staff members contend that the UNDT's award of moral damages was lawful since their applications were filed before the effective date of the amendment to Article 10(5) of the UNDT Statute.

70. We vacate the awards of moral damages, concluding that the UNDT erred in law by not applying the UNDT Statute as it existed at the time the Dispute Tribunal rendered its judgment. As an award of damages takes place at the time the award is made, applying the amended statutory provision is not the retroactive application of law. Rather, it is applying existing law. Since the staff members did not present evidence capable of sustaining an award of moral damages, as now required by the amended statute, the UNDT made an error of law.

Judgment

71. Judgment No. UNDT/2015/116 is affirmed, except for the awards of moral damages, which are vacated.

72. The Secretary-General's appeals of the merits are dismissed; and the Secretary-General's appeals of the awards of moral damages are granted. Marcussen *et al.*'s appeals of the UNDT's remedy of remand to the ASG/OHRM, rather than granting specific performance, and the quantum of the awards of moral damages are dismissed.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Chapman, Presiding	Judge Adinyira	Judge Thomas-Felix
(Signed)	*(Signed)*	*(Signed)*
Judge Weinberg de Roca	Judge Simón	Judge Faherty

(Signed)

Judge Lussick

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar