UNITED NATIONS DISPUTE TRIBUNAL

Cases Nos.: UNDT/GVA/2012/030, 031, 032, 033, 035, 036, 037, 038, 039, 040, 043
Judgment No.: UNDT/2012/129
Date: 29 August 2012
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

MALMSTROM
BAIG
JARVIS
MARCUSSEN
GOY
REID
SUTHERLAND
NICHOLLS
EDGERTON
DYGEUS
WIRTH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicants:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicants, all staff members or former staff members of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), contest the decision whereby the Assistant Secretary-General for Human Resources Management refused to convert their fixed-term appointments into permanent appointments.

2. They request the Tribunal to order the Secretary-General to grant them permanent appointments and to set at two years' salary plus interest the amount of compensation that the Secretary-General may elect to pay as an alternative to the specific performance ordered.

3. Except for Applicant Wirth, they request the Tribunal, in the alternative, to order the Secretary-General to grant them permanent appointments limited to ICTY and to set the amount of compensation that the Secretary-General may elect to pay as an alternative on the basis of the termination indemnity for a permanent appointment of the length of their employment, calculated to the predicted end of ICTY at 31 December 2014, augmented by 50% to compensate them for the loss of recognition, unfair treatment and denial of due process.

4. At the hearing, the Applicants further sought EUR20,000 each as non-pecuniary damages.

Facts

5. On 25 May 1993, the Security Council by resolution 827 (1993) decided to establish ICTY, an *ad hoc* international tribunal, for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia as of 1 January 1991, and requested the Secretary-General to make practical arrangements for the effective functioning of the Tribunal.

6. By memorandum dated 20 May 1994 addressed to the Acting Registrar of ICTY, the Under-Secretary-General for Administration and Management defined the arrangements for the recruitment and administration of ICTY staff and delegated to the Registrar the "authority to appoint staff, in the name of the Secretary-General, up to the D-1 level."

7. In accordance with the provisions of the above-mentioned delegation of authority (see para. 3 of the memorandum), staff members were recruited specifically for service with ICTY, as explicitly reflected in their letters of appointment which provide that "[t]his appointment is strictly limited to service with [ICTY]", on 100-series fixed-term appointments.

8. In November 1995, by Secretary-General's bulletin ST/SGB/280, 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".

9. In 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.

10. In June 2006, by Secretary-General's bulletin ST/SGB/2006/9, 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.

11. On 23 June 2009, the Secretary-General promulgated the Secretary-General's bulletin ST/SGB/2009/10 on the consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009.

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

13. By letter dated 17 February 2010, the President of ICTY wrote to the Secretary-General of the United Nations to complain about the position taken by the Under-Secretary-General 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.

14. By letter dated 10 March 2010, the Under-Secretary-General for Management responded to the above-mentioned letter from the President of ICTY, 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".

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

16. 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.

17. 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 Tribunal staff for conversion to a permanent appointment on a priority basis".

18. On 12 July and 16 August 2010, the ICTY Registrar transmitted to the Assistant Secretary-General for Human Resources Management 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.

19. 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 (see para. 17 above), including the recommendation that eligible ICTY staff would be considered for conversion to permanent appointments on a priority basis.

20. Based on its review of the ICTY submissions of 12 July and 16 August 2010, OHRM disagreed with the ICTY recommendations and on 19 October 2010, it submitted the matter for review to the New York Central Review bodies ("CR bodies")—namely, the Central Review Board for P-5 and D-1 staff, the Central Review Committee for P-2 to P-4 staff, and the Central Review Panel for General Service staff—stating that "taking into consideration all the interests of the Organization and the operational reality of ICTY, OHRM [was] not in the position to endorse ICTY's recommendation for the granting of permanent appointment", as 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)".

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

22. 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, which is to start functioning on 1 July 2013 for ICTY, and 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". The resolution also requested ICTY to complete its remaining work no later than 31 December 2014.

23. 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".

24. Further to her review of the CR bodies' opinion of late 2010, the Assistant Secretary-General for Human Resources Management 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.

25. By memorandum dated 27 May 2011, the New York CR bodies informed the Assistant Secretary-General that they endorsed again the recommendation made by OHRM "on 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".

26. By memorandum dated 20 September 2011, the Assistant Secretary-General for Human Resources Management 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].

27. By letters dated 6 October 2011, the ICTY Registrar informed each of the Applicants of the decision of the Assistant Secretary-General for Human Resources Management not to grant them a permanent appointment. The letter stated that:

> 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).

28. On 5 December 2011, the Applicants requested management evaluation of the above-mentioned decision.

29. By letters dated 17 January 2012, the Under-Secretary-General for Management informed each of the Applicants that the Secretary-General had decided to uphold the decision not to grant him/her a permanent appointment.

30. On 16 and 17 April 2012, the Applicants filed the applications which form the subject of the present Judgment.

31. In May 2012, the Applicants, except Applicants Malmstrom and Wirth, filed motions for the production of documents.

32. Also in May 2012, the Respondent filed and served his reply to the applications.

33. By Order No. 120 (GVA/2012) dated 26 June 2012, the Tribunal informed the parties in the present 11 cases and in 3 other cases filed by 264 other staff members or former staff members of ICTY against the same decision that it had decided to hold a joint hearing on 22 August 2012. While it rejected the Applicants' motions for the production of documents, it requested the Respondent to file, by 12 July 2012, additional submissions in support, *inter alia*, of his

statement that "[t]he ICTY Registrar was not granted discretionary authority to grant permanent appointments. The [Assistant Secretary-General for Human Resources Management] retained this authority".

34. On 11 July 2012, the Respondent submitted, in response to the above-mentioned Order, two documents: a "report" dated 9 July 2012 prepared by the Policy and Conditions of Service Section, Human Resources Policy Service, OHRM, and a memorandum dated 2 July 2012 from the Office of the Registrar of ICTY.

35. By Order No. 127 (GVA/2012) dated 12 July 2012, the Tribunal granted the Applicants three weeks to file and serve observations, if any, on the Respondent's submissions.

36. On 2 August 2012, the Applicants, except Applicant Wirth, filed observations.

37. On 22 August 2012, the Tribunal held a joint hearing as decided by Order No. 120 (GVA/2012). Submissions were made on behalf of the 11 Applicants concerned by this Judgment by Applicants Baig and Jarvis, who attended the hearing in person together with four other Applicants. Counsel for the Respondent appeared by videoconference from New York.

Parties' submissions

38. The Applicants' principal contentions are:

a. The Administration's treatment of ICTY staff undermines the object and purpose of permanent appointments. By denying the Applicants conversion to a permanent appointment because ICTY is downsizing, the Administration is causing the very harm that permanent appointments are intended to alleviate: the inequity of having large numbers of staff members for long periods of time on successive fixed-term appointments without termination indemnities. Fixed-term appointments are suitable to

deal with certain major surges in the volume and type of work, seasonal fluctuations and short-term requirements. It is unfair to maintain staff on fixed-term contracts for long-term programs or projects, such as ICTY which has been in existence since 1993;

b. The Administration abused its discretion by not considering all the factors set out in General Assembly resolutions 37/126 and 51/226, former staff rule 104.13(a), and ST/SGB/2009/10. These factors included the right to be given every reasonable consideration for a career appointment, outstanding performance, the operational realities of the organizations, the core functions of the posts, the needs of the Organization, the staff members' qualifications, performance and conduct. Instead, the Administration only considered the operational realities of the Organization and, even then, only ICTY downsizing. This constitutes an abuse of discretion (see former UN Administrative Tribunal Judgments No. 712, *Alba* et al. (1995), and No. 1040, *Uspensky* (2001));

c. [Applicants Reid, Sutherland and Edgerton only] ICTY was not downsizing when the Applicants became eligible for conversion, but it had an open-ended mandate. The Applicants should not be disadvantaged because the required review was not carried out after five years of good service as mandated by the applicable rules;

d. The Administration misconstrued the "operational realities of the Organization". ICTY staff members are Secretariat staff members, as stipulated in their letters of appointment and in the Secretary-General's report A/65/350, and the Administration should have considered the staffing needs and overall interests of the Secretariat, not just of ICTY. The fact that ICTY staff members' appointments are strictly limited to service with ICTY, as stipulated in their letters of appointment, did not bar conversion to a permanent appointment within the Secretariat. The provision contained in the Guidelines on conversion—which stipulates that "[w]here 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"—is inconsistent with the General Assembly resolutions, the applicable staff rules and ST/SGB/2009/10, and is therefore unlawful;

e. Alternatively, if the Administration was entitled to look only at ICTY, it misconstrued the operational realities of ICTY in that: (i) it acted arbitrarily in finding that the downsizing of ICTY was incompatible with permanent appointments. Financial considerations cannot justify excluding staff members from conversion to permanent appointments (see *Alba* et al. and *Uspensky*). Moreover, the downsizing criterion is not applied equally as shown by the conversion of an ICTY staff member during the 2006 exercise and by the conversion of staff in other work units of the Secretariat where posts are being abolished; (ii) it failed to properly consider the length of the Applicants' past and projected future service in ICTY-related functions; and, (iii) it should have considered the ICTY critical need for staff retention measures;

f. The Administration failed to individually consider the suitability of ICTY staff members for conversion to permanent appointments. Instead, the Administration dismissed all ICTY applications for conversion with the same form letter. The Administration failed to take into account the Applicants' individual circumstances, as required by ST/SGB/2009/10, including individual performance, experience, core functions of the post, education, skills, gender when relevant, and other attributes, which make them capable of absorption into other positions at the Secretariat;

g. If ICTY is not part of the Secretariat, as claimed by OHRM and the Management Evaluation Unit, ICTY staff should have had an independent permanent appointment review under the authority of the ICTY Registrar, as happened for example in the Office of the United Nations High Commissioner for Refugees, where the High Commissioner took the decisions on conversion;

h. ICTY staff had only an illusory prospect of being considered for conversion to permanent appointments. The Administration's overriding objective was to "terminate" ICTY staff *en masse* without severance benefits upon closure of ICTY. The Administration's disregard of the object and purpose of permanent appointments and its failure to follow the required procedure provides unequivocal evidence of its intent. In addition, the Administration's exclusion of all ICTY staff as a group violates the requirement to promulgate and publish any policy of general application to staff members. The Administration was not transparent about its view that ICTY staff members were ineligible for consideration for conversion and failed to publish this view as official policy. In not converting the Applicants, the Administration failed to act fairly and in good faith.

39. The Respondent's principal contentions are:

a. The Applicants did not have any legal expectancy or right, irrespective of the length of their services, to a conversion to a permanent appointment, but only a limited right to reasonable consideration for conversion. The granting of a permanent appointment is discretionary and discretionary decisions are subject to a limited review by the Tribunal;

b. The Administration correctly followed the applicable procedures in considering the Applicants for conversion to a permanent appointment. In accordance with ST/SGB/2009/10 and the Guidelines on conversion, ICTY conducted a review, first of the eligibility of the Applicants, then of their suitability for conversion, and concluded that they met the criteria for conversion. Then, OHRM conducted its own review as provided for in section 3.2 of ST/SGB/2009/10 and disagreed with the ICTY recommendations based on its assessment of the operational realities and best interests of the Organization. The matter was accordingly referred to the CR bodies, pursuant to sections 3.4 and 3.5 of ST/SGB/2009/10, and

the Assistant Secretary-General for Human Resources Management took the final decision;

c. The Applicants received reasonable consideration for conversion. The Organization took into account all factors, including the Applicants' assignments, the limitation of these assignments, the Organization's contractual framework, and the Organization's operational realities and interests. The Applicants served on contracts limited to ICTY, an organization with a specialized and finite mandate. The Administration properly and reasonably concluded that it was appropriate to maintain the Applicants on fixed-term appointments;

d. As the mandate of ICTY does not form part of a core function of the United Nations, its staff members were not appointed against General Assembly established posts. Further, ICTY was granted a delegation of authority in human resources with certain restrictions. In particular, the delegation of authority provides that ICTY staff are recruited specifically for service with the Tribunal rather than with the Secretariat as a whole and their services are limited to the Tribunal;

e. The Applicants' appointments, which are not related to the core functions and continuing needs of the Organization, do not fall within the limited scope of a permanent appointment, but rather within the scope of a fixed-term appointment as determined by the General Assembly and the International Civil Service Commission. Fixed-term appointments are the appropriate contractual instruments for staff members serving in bodies with a limited or finite mandate, such as ICTY;

f. The possible future selection of the Applicants to continuing core functions of the Secretariat was and remains a matter of speculation and it would have been inappropriate and unreasonable for the Organization to grant them permanent appointments on this basis;

g. As the Applicants' appointments are limited to ICTY, the operational realities of ICTY, not of the Organization as a whole, were directly relevant to the consideration of the Applicants' suitability for conversion. There is no basis to conclude that the consideration provided to ICTY staff served to remove the express contractual limitation in their appointments. To the contrary, other staff with appointments limited in service to specific entities, but not subject to downsizing efforts, have been converted to permanent appointments while retaining the service limitation with their respective entities;

h. As there is no expected continuing need for the Applicants' services beyond December 2014, it would have been unreasonable and contrary to the Organization's interest and good management of public funds to grant permanent appointments to the Applicants. The purpose of permanent appointments is not to serve as a staff retention measure in downsizing entities. Using them for such purpose would be arbitrary and contrary to the contractual framework of the Organization. The ICTY staff retention needs have been the subject of distinct decisions by the General Assembly and the Secretary-General;

i. The Applicants did receive individual consideration;

j. The Applicants' claim that the ICTY Registrar should have had authority to grant the Applicants permanent appointments is not receivable *ratione materiae* and *ratione temporis*;

k. OHRM and the New York CR bodies were the appropriate review bodies under, respectively, sections 3.2 and 3.5(c) of ST/SGB/2009/10. As section 3.5(c) does not refer to the ICTY duty station, The Hague, it was appropriate to refer the Applicants' case to the New York CR bodies. This decision is consistent with the limited delegation of authority of ICTY and the advisory nature of the CR bodies. The ICTY CR body is inherently limited to advising the ICTY Registrar on matters over which it has discretionary authority. The ICTY Registrar was not granted discretionary

authority to grant permanent appointments. The Assistant Secretary-General for Human Resources Management retained this authority. Accordingly, the appropriate review body for reviewing recommendations for the conversion of ICTY staff was the body advising her on such cases;

l. The Applicants' claims of discrimination are unfounded. The Organization weighed all relevant factors prior to reaching a decision and two of these factors—the fact that the Applicants were appointed to an organization whose mandate was expected to expire in December 2014 and the fact that the Applicants' appointments were limited to ICTY—were dispositive and led to the contested decision.

Consideration

40. The Applicants, who are all staff members or formers staff members of ICTY, contest the decision whereby the Assistant Secretary-General for Human Resources Management refused to convert their fixed-term appointments into permanent appointments.

41. Since the relevant facts are identical and the 11 Applicants presented similar arguments both in writing and at the hearing, the Tribunal decided to dispose of the cases in a single judgment.

Applicable law

42. For the purposes of the present Judgment, the relevant rules are as follows.

43. In resolution 37/126 of 17 December 1982, the General Assembly decided that:

> [S]taff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment.

44. In resolution 51/226 of 3 April 1997, it further decided that:

> [F]ive years of continuing service as stipulated in its resolution 37/126 of 17 December 1982 do not confer the automatic right to a permanent appointment, and also decides that other considerations, such as outstanding performance, the operational realities of the organizations and the core functions of the post, should be duly taken into account.

45. Pursuant to the above-quoted resolutions, former staff rule 104.12(b) on 100-series fixed-term appointments, which was applicable until 30 June 2009, provided that:

> …
>
> (ii) The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment;
> (iii) Notwithstanding subparagraph (ii) above, upon completion of five years of continuous service on fixed-term appointments, a staff member who has fully met the criteria of staff regulation 4.2 and who is under the age of fifty-three years will be given every reasonable consideration for a permanent appointment, taking into account all the interests of the Organization.

46. In addition, former staff rules 104.13(c) and 104.14(a)(i), which were applicable throughout the relevant period, provided that (emphasis added):

> Rule 104.13
> Permanent appointments
> …
> (c) *Permanent appointments limited to service with one of the* programmes, funds or *subsidiary organs referred to in rule 104.14(a)(i) may be granted by its corresponding heads* with the assistance of such boards as may be established in accordance with the provisions of the last sentence of rule 104.14(a)(i).
>
> Rule 104.14
> Appointment and Promotion Board
> (a) (i) An Appointment and Promotion Board shall be established by the Secretary-General to give advice on the appointment, promotion and review of staff in the General Service and related categories and in the Professional category, and on the appointment and review of staff at the Principal Officer level, *except those specifically recruited for service with any* programme, fund or *subsidiary organ of the United Nations to which the Secretary-General has delegated appointment and promotion*

> *functions … The heads of the organs referred to above may establish boards* whose composition and functions are generally comparable to those of the Appointment and Promotion Board *to advise them in the case of staff members recruited specifically for service with those* programmes, funds or *subsidiary organs*;
> …

47. 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 issued on 23 June 2009 and entered into force on 26 June 2009, prior to the abolition of permanent appointments. It provides in its relevant parts:

> The Secretary-General, for the purposes of implementing staff rules 104.12(b)(iii) and 104.13 on consideration of staff members for permanent appointments who have become or will become eligible for such consideration by 30 June 2009, hereby promulgates the following:
>
> …
>
> **Section 2**
> **Criteria for granting permanent appointments**
> In accordance with staff rules 104.12(b)(iii) and 104.13, a permanent appointment may be granted, taking into account all the interests of the Organization, to eligible staff members who, by their qualifications, performance and conduct, have fully demonstrated their suitability as international civil servants and have shown that they meet the highest standards of efficiency, competence and integrity established in the Charter.
>
> **Section 3**
> **Procedure for making recommendations on permanent appointments**
> 3.1 Every eligible staff member shall be reviewed by the department or office where he or she currently serves to ascertain whether the criteria specified in section 2 above are met. Recommendations regarding whether to grant a permanent appointment shall be submitted to the Assistant Secretary-General for Human Resources Management.
> 3.2 A similar review shall also be conducted by the Office of Human Resources Management or the local human resources office.
> 3.3 In order to facilitate the process of conversion to permanent appointment under the present bulletin, recommendations to grant a permanent appointment that have the joint support of the department or office concerned and of the Office of Human

> Resources Management or local human resources office shall be submitted to the Secretary-General for approval and decision in respect of D-2 staff, and to the Assistant Secretary-General for Human Resources Management for all other staff.
> 3.4 In the absence of joint support for conversion to permanent appointment … the matter shall be submitted for review to the appropriate advisory body designated under section 3.5 below …
> …
> 3.6 The recommendations of the advisory body shall be submitted to the Secretary-General for decision in respect of staff at the D-2 level. Recommendations in respect of all other staff members shall be submitted for decision to the Assistant Secretary-General for Human Resources Management.

48. Finally, in line with the above-quoted staff rule 104.14(a)(i), by memorandum dated 20 May 1994 addressed to the Acting Registrar of ICTY, the Under-Secretary-General for Administration and Management delegated authority to the ICTY Registrar for the "recruitment and administration of staff". The memorandum relevantly provides:

> 1. Consistent with the desire of the Security Council to establish a fully independent judicial body, as a subsidiary organ of the Security Council, the Statute of [ICTY] provides … that the staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar … The purpose of this memorandum is to establish practical and flexible personnel arrangements, compatible with United Nations rules and personnel policies, to give effect to the Statute.
>
> …
>
> 3. Staff of the Tribunal will be recruited specifically for service with the Tribunal rather than with the Secretariat as a whole. Their letters of appointment will indicate that their services are limited to the Tribunal …
>
> …
>
> 4. Given the highly specialized nature of the functions of the Tribunal, and the need for rapid response and flexibility, you are hereby delegated authority to appoint staff, in the name of the Secretary-General, up to the D-1 level, and to terminate appointments up to that level except for terminations under article X of the Staff Regulations … Appointments or terminations above the D-1 level require prior approval by the Secretary-General …
>
> …

> 6. Given the nature of the mandate, appointments should initially be made on a short or fixed-term basis, not exceeding one year …
>
> 7. For reasons of economy and practicality … the Office of Human Resources Management at Headquarters will advise and assist you in such matters as … interpretation of personnel policies, issuance of vacancy announcements should you so request …
>
> 8. The administrative bodies established by the Secretary-General to advise him on staff matters, such as the Joint Appeals Board, the Joint Disciplinary Committee, and the Advisory Board on Compensation Claims, will have jurisdiction as regards staff serving with the Tribunal. The Secretary-General reserves his right to interpret the Staff Rules, and to take final decisions in appeals, disciplinary cases and compensation cases under Appendix D.

49. The cover memorandum dated 24 May 1994 from the Director of Personnel transmitting the above-quoted delegation of authority to the Acting Registrar of ICTY further states:

> 1. Please find attached a delegation of authority from the Under-Secretary-General, Department of Administration and Management, to you as Acting Registrar to appoint staff in the name of the Secretary-General up to the D-1 level, and to administer the Staff Regulations and Rules with respect to staff of the Tribunal … While the responsibility for the recruitment and appointment of staff up to the D-1 level will be exclusively your own, you have full liberty to call on the advice and experience of the Department of Administration and Management …
>
> 2. Given the unique nature of the Tribunal's mandate and Statute, this delegation may need amplification as time goes by in order to clarify those aspects of the Staff Regulations and Rules which you will administer directly and those which should be referred to the Secretary-General for final decision.
>
> 3. … [I]t will be necessary for you to establish certain procedures, in matters such as promotion for example, which parallel those in effect elsewhere in the United Nations system.

Whether the Assistant Secretary-General for Human Resources Management was the competent authority to take the contested decisions

50. Before considering the merits of the contested decisions, the Tribunal must first determine whether the Assistant Secretary-General for Human Resources

Management was the competent authority to take them, in light of the delegation of authority granted to the ICTY Registrar. This Tribunal and other international administrative tribunals have emphasized the outstanding importance of the issues of competence and delegation of authority (see *Gehr* UNDT/2011/178 quoting, among others, Judgment No. 3016 (2011) of the Administrative Tribunal of the International Labour Organization). Competence of the decision-maker is a cornerstone of the legality of an administrative decision. When the exercise by the Administration of its discretionary power is under judicial review, any lack of authority leads inevitably to the rescission of the contested decision.

51. In his reply (see para. 61), the Respondent claimed that "[t]he ICTY Registrar was not granted discretionary authority to grant permanent appointments. The [Assistant Secretary-General for Human Resources Management] retained this authority".

52. By Order No. 120 (GVA/2012) dated 26 June 2012, the Tribunal questioned this assertion by the Respondent. The Tribunal noted indeed that the delegation of authority dated 20 May 1994 stipulates that the Registrar is "delegated authority to appoint staff, in the name of the Secretary-General, up to the D-1 level".

53. Similarly, the cover memorandum dated 24 May 1994 from the Director of Personnel to the ICTY Registrar, transmitting the above-mentioned delegation of authority, states that the ICTY Registrar is delegated authority "to administer the Staff Regulations and Rules with respect to staff of the Tribunal" and that "the responsibility for the recruitment and appointment of staff up to the D-1 level will be exclusively [his] own".

54. Based on the above and on the available records, the Tribunal was of the view that it was unclear what the basis was for the Respondent to, essentially, make a distinction between "the authority to appoint" expressly delegated to the ICTY Registrar and the authority to grant permanent appointments to holders of fixed-term appointments who met the requirements of former staff rule 104.12(b)(iii).

55. On 11 July 2012, the Respondent submitted, in response to Order No. 120 (GVA/2012), a three-page report dated 9 July 2012 prepared by a Human Resources Officer in the Policy and Conditions of Service Section, Human Resources Policy Service, OHRM ("the OHRM Report").

56. The OHRM Report develops three arguments in support of the Respondent's assertion that the Assistant Secretary-General for Human Resources Management retained the authority to grant permanent appointments.

57. First, one of these arguments (see paras. 5 and 6 of the OHRM Report) is that no one, not even the President or the Registrar of ICTY, ever contested or expressed doubts or "concerns over the validity of [the Assistant Secretary-General for Human Resources Management] holding exclusive conversion decision authority".

58. Put otherwise, the argument of OHRM is that the Assistant Secretary-General must have been the competent authority to take the contested decisions since her competence was never contested. However, the fact that her competence to grant permanent appointments to ICTY staff was never contested falls short, to say the least, of establishing that legally she was indeed the competent authority. As this is an essential element for the legality of the contested decisions, the authority of the decision-maker has to be assessed by the Tribunal on its own motion, regardless of the parties' views at any stage of the administrative and judicial proceedings.

59. Second, another argument of the OHRM Report (see para. 2 of the Report) is that the 1994 delegation of authority to the ICTY Registrar must be interpreted to have excluded from his authority "to appoint staff" that to grant permanent appointments. The OHRM Report states in particular that "[w]hile there is a specific reference to short-term and fixed-term appointments, there is no reference to the decision to convert any such appointment to permanent".

60. The Tribunal must reject this argument and finds that the authority "to appoint staff", which was expressly delegated to the ICTY Registrar, necessarily included, absent a clear exception, the authority to grant permanent appointments.

61. The sentence "appointments should initially be made on a short or fixed-term basis, not exceeding one year" cannot be interpreted as limiting the Registrar's authority to grant appointments of other types or longer duration, as indicated by the plain meaning of the words "should" and "initially". As a matter of fact, the record shows that at least some ICTY staff members were regularly granted fixed-term appointments of two years or more.

62. More importantly, and in line with "the desire of the Security Council to establish a fully independent judicial body" recalled in the introduction of the delegation, if the intention had been to exclude from the broad delegation to appoint staff the authority to grant permanent appointments, such an exclusion should have been explicit, as is the case for other matters in the memorandum (see para. 4 excluding from the Registrar's delegation the authority to appoint and terminate staff above the D-1 level and to terminate staff up to the D-1 level under article X of the Staff Regulations; see also para. 8 stipulating *inter alia* that the Secretary-General reserves his right to interpret the Staff Rules, and to take final decisions in appeals, disciplinary cases and compensation cases under Appendix D).

63. This interpretation, which is based on the plain meaning of the expression "to appoint", is further reinforced by the above-quoted former staff rules 104.13(c) and 104.14(a)(i), which were applicable throughout the relevant time, from January 1993 (see ST/SGB/Staff Rules/1/Rev. 7/Amend. 3) through 30 June 2009, and which expressly provide for permanent appointments to be granted by heads of "subsidiary organs". It may be recalled here that ICTY is a subsidiary organ of the Security Council, established in accordance with article 29 of the Charter of the United Nations.

64. Finally, the last argument raised in the OHRM Report (see paras. 3, 4 and 6) is that, "even if one was to consider that the wording of the delegation

manifested in the 1994 memorandum could be interpreted to include the authority to convert fixed-term appointments to permanent"—and indeed, this is the Tribunal's interpretation, for the reasons explained above—"there were a number of relevant subsequent developments that must be considered for such an interpretation to apply to the situation present during the review exercise in 2009[,] some 15 years later". Those "relevant subsequent developments" were, according to the OHRM Report, the Secretary-General's bulletins ST/SGB/280 of 9 November 1995 (Suspension of the granting of permanent and probationary appointments), ST/SGB/2006/9 of 24 August 2006 (Consideration for conversion to permanent appointment of staff members eligible to be considered in 1995), and ST/SGB/2009/10 of 23 June 2009 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009).

65. The OHRM Report asserts that the Secretary-General, through ST/SGB/280, "imposed a global suspension on the granting of appointments …, effectively withdrawing any authority to grant permanent appointments". Regarding ST/SGB/2006/9 and ST/SGB/2009/10, it avers that they contain "no mention of any authority held by officials of the Tribunals" but refer to the "ASG/OHRM as the sole decision-maker for the granting of permanent appointments" to staff up to the D-1 level.

66. However, the same way the Tribunal considers that any exclusion to "the authority to appoint" should have been explicit, it considers that any withdrawal or limitation of the delegation of authority granted in 1994 should also have been explicit. Transparency and legal certainty require that when a delegation of authority is granted, the delegating authority must first clearly and formally revoke the delegation before it can exercise its authority again.

67. Lastly, at the hearing held on 22 August 2012, the Respondent submitted that, even assuming that the ICTY Registrar did have delegated authority to grant permanent appointments, the entry into force on 1 July 2009 of the new Staff Regulations and Rules, which abolished permanent appointments, resulted in the

cancellation of the delegation of authority. It is sufficient for the Tribunal to note that, at all relevant times, consideration of the Applicants' eligibility and suitability for conversion was governed by former staff rules 104.12(b)(iii) and 104.13, as set out in ST/SGB/2009/10, which entered into force prior to the abolition of permanent appointments. The entry into force of the new Staff Regulations and Rules had thus no bearing on the delegation of authority.

68. It follows from the foregoing that the contested decisions were tainted by a substantial procedural flaw—that of the lack of competence of the decision-maker, the Assistant Secretary-General for Human Resources Management.

69. The Tribunal must accordingly rescind the contested decisions. This is without prejudice to the merits or substance of these decisions, which the Tribunal has not addressed in this Judgment. Since the decision to grant a permanent appointment clearly involves the exercise of discretion, it is not for the Tribunal to substitute its own assessment for that of the Secretary-General (see for example *Sanwidi* 2010-UNAT-084 and *Abbassi* 2011-UNAT-110).

70. The rescission of the decisions therefore does not mean that the Applicants should have been granted permanent appointments, but that a new conversion procedure should be carried out.

Compensation in lieu of rescission

71. As the contested decisions—namely, the refusal to grant permanent appointments to the Applicants—concern appointment, the Tribunal must, pursuant to article 10.5(a) of its Statute, set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission.

72. This finding is not inconsistent with the Tribunal's finding in *Rockliffe* UNDT/2012/121 (see paras. 17-18). Whereas *Rockliffe* addresses the Administration's refusal to consider the applicant for conversion, in the present case it is the refusal to grant permanent appointments that is at stake. Accordingly,

it was appropriate in *Rockliffe* to order that the applicant be given full and fair consideration for conversion to a permanent appointment without setting an alternative amount of compensation.

73. In *Solanki* 2010-UNAT-044, the Appeals Tribunal held that the appellant's submission "that compensation ought to be set by the UNDT at a level which would force the Secretary-General to implement the order for rescission [was] without any foundation" and that "compensation must be set by the UNDT following a principled approach and on a case-by-case basis" (see also *Fradin de Bellabre* 2012-UNAT-212).

74. In setting the appropriate amount of compensation in this case, the Tribunal must take into account the nature of the irregularity which led to the rescission, that is, a procedural irregularity as opposed to a substantive one, as well as the prohibition on the award of exemplary or punitive damages set out in article 10.7 of its Statute.

75. Further, it must bear in mind that staff members eligible for conversion have no right to the granting of a permanent appointment but only that to be considered for conversion. The outcome of such consideration is a discretionary decision and in its discretion, the Administration is bound to take into account "all the interests of the Organization" (see former staff rule 104.12(b) and section 2 of ST/SGB/2009/10), as well as "the operational realities" of the Organization (see General Assembly resolution 51/226). As already pointed out, it is established case law that the Tribunal, in conducting its judicial review, may not lightly interfere with the exercise of administrative discretion, nor substitute its judgment for that of the Secretary-General.

76. In light of the foregoing, the Tribunal sets at EUR2,000 the amount of compensation that the Respondent may elect to pay to each Applicant as an alternative to the rescission.

Other compensation

77. The Applicants have sought compensation under article 10.5(b) of the Tribunal's Statute, for non-pecuniary damages. As held by the Appeals Tribunal, "not every violation will necessarily lead to an award of compensation" (*Kasyanov* 2010-UNAT-076). In this case, the Tribunal considers that it would be highly speculative to award compensation under article 10.5(b) considering that it has decided to rescind the contested decisions only because of a procedural irregularity and that it has not addressed the merits of such decisions.

78. Accordingly, the Applicants' claims for compensation are rejected.

Conclusion

79. In view of the foregoing, the Tribunal DECIDES:

a. The decisions whereby the Assistant Secretary-General for Human Resources Management refused to grant permanent appointments to the Applicants are rescinded;

b. The amount of compensation that the Respondent may elect to pay to each Applicant as an alternative to the rescission is set at EUR2,000;

c. The above amount shall bear interest at the US prime rate with effect from the date this Judgment becomes executable until the date of payment. An additional five per cent shall be added to the US prime rate 60 days from the date this Judgment becomes executable;

d. All other pleas are rejected.

(*Signed*)

Judge Thomas Laker

Dated this 29th day of August 2012

Entered in the Register on this 29th day of August 2012

(*Signed*)

René M. Vargas M., Registrar