



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/042

Judgment No.: UNDT/2012/162

Date: 1 November 2012

Original: English

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**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** René M. Vargas M.

SCHOONE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Erol Arduc, OSLA

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant, a former staff member of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in The Hague and current staff member of the United Nations Secretariat in New York, contests the decision whereby the Assistant Secretary-General for Human Resources Management refused to convert his fixed-term appointment into a permanent appointment.

2. He requests that the contested decision be rescinded.

## **Facts**

3. 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.

4. The Applicant entered the service of ICTY in The Hague in November 2002 on a fixed-term appointment in the General Service category.

5. 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.

6. On 23 June 2009, the Secretary-General issued the Secretary-General’s bulletin ST/SGB/2009/10 on “Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009”.

7. “Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as of 30 June 2009” 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.

8. On 21 May 2010, the Applicant was offered a fixed-term appointment at the G-6 level with the United Nations Secretariat in New York. He accepted the offer on 22 June 2010.

9. On 1 July 2010, the Applicant was informed that he was to resign from ICTY to allow his recruitment with the United Nations Secretariat, and on 19 July he informed the relevant officials at ICTY of his resignation effective 31 August 2010.

10. On 12 August 2010, the ICTY Registrar and the Acting Chief of Human Resources recommended to the Assistant Secretary-General for Human Resources Management that the Applicant, as well as other ICTY staff members, be granted a permanent appointment.

11. On 27 August 2010, the Applicant traveled from The Hague to New York and on 2 September 2010, he took up his new functions with the United Nations Secretariat.

12. In February 2011, ICTY staff were informed that there had been no joint positive recommendation 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”.

13. By memorandum dated 27 May 2011, the Central Review 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 [including the Applicant] to permanent appointments, due to the limitation of their service to their respective Tribunals and the lack of established posts”.

14. By memorandum dated 20 September 2011, the Assistant Secretary-General for Human Resources Management informed the ICTY Registrar that:

5. 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 (i) accept the [Central Review bodies]'s endorsement of the recommendation by OHRM on the non-suitability [for conversion of ICTY staff] and (ii) approve the granting of permanent appointments to those eligible ICTY staff who:

(i) have been recommended for conversion by the Tribunal and have already been recruited to established posts within the Secretariat prior to and including 31 December 2010,

and

(ii) joined the Secretariat on a transfer basis and were selected by the Secretariat following the regular staff selection process.

15. By letter dated 6 October 2011, the ICTY Registrar informed the Applicant of the decision of the Assistant Secretary-General for Human Resources Management not to grant him 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).

16. On 5 December 2011, the Applicant requested management evaluation of the above-mentioned decision.

17. By letter dated 17 January 2012, which he received on 19 January 2012, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to uphold the decision not to grant him a permanent appointment.

18. On 18 April 2012, the Applicant filed the application which forms the subject of the present Judgment.

19. On 23 May 2012, the Respondent filed and served his reply to the application.

20. By Order No. 120 (GVA/2012) dated 26 June 2012, the Tribunal informed the parties in the present case, and in 13 other cases filed by 274 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. It further requested the Respondent to file, by 12 July 2012, additional submissions in support, *inter alia*, of his statement in his reply to other applications 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”.

21. As requested by the Tribunal, the Respondent filed on 11 July 2012 additional submissions.

22. By Order No. 127 (GVA/2012) dated 12 July 2012, the Tribunal granted the Applicant three weeks to file and serve observations, if any, on the Respondent’s submissions. The Applicant did not file observations.

23. On 22 August 2012, the Tribunal held a joint hearing as decided by Order No. 120 (GVA/2012). Counsel for the Applicant attended the hearing in person, while the Applicant and Counsel for the Respondent appeared by video-conference from New York.

#### **Parties’ submissions**

24. The Applicant’s principal contentions are:

- a. The downsizing of ICTY does not affect the Applicant’s present functions with the Secretariat. In its one-time consideration for conversion to permanent appointment, the Secretary-General has adopted the approach to take into account the appointment and functions of eligible staff members at the time of consideration rather than at the time of the effective date of conversion, if granted. It follows that, in determining whether the Applicant could be granted a permanent appointment, it was

incumbent on the Secretary-General to take into account his appointment and functions at the time of consideration, i.e., 6 October 2011;

b. In the response to his request for management evaluation, the Applicant was informed that one of the criteria against which his consideration was conducted was the clause in his letters of appointment with ICTY indicating that his service was limited to ICTY. This clause is meaningless in light of the clause in the same letters of appointment subjecting him to staff regulation 1.2(c) and therefore to reassignment to all offices and/or activities of the United Nations without his consent;

c. The memorandum of 20 September 2011 from the Assistant Secretary-General for Human Resources Management to the ICTY Registrar does not have the force of law. Referring to section 1.2 of the Secretary-General's bulletin ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances), the Tribunal held in *Villamorán* UNDT/2011/126 that “[r]ules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General's bulletins and administrative instructions”. There is nothing in the terms of section 3.6 of ST/SGB/2009/10 that suggests that the Assistant Secretary-General for Human Resources Management can introduce policies of general application outside the procedures enshrined in ST/SGB/2009/4. In the alternative, there is no evidence to suggest that the Central Review bodies considered the position of former ICTY staff members who, at the time of consideration, had joined the United Nations Secretariat;

d. Further, the condition contained in the 20 September 2011 memorandum that recruitment with the United Nations Secretariat must have materialized in combination with a transfer excludes all non-international staff from consideration as the (fictional) nature of their recruitment as local staff members precludes a transfer. Such condition further confirms that the “transferred” staff members were considered to be staff members of the United Nations Secretariat as the Secretary-

General has no power to transfer staff members from an institution not part of the Secretariat to the Secretariat; such transfers require the conclusion of an inter-agency agreement;

e. The retroactive nature of the permanent appointment, if granted, entails that the decision-maker should have considered the Applicant's situation on 30 June 2009, including but not limited to the anticipated date ICTY would complete its mandate and whether the functions the Applicant performed at the time were transferable. However, it transpires from the response to his request for management evaluation that his case was not assessed with regard to his situation on 30 June 2009 but at an undetermined point in time thereafter, which amounts to an error in procedure.

25. The Respondent's principal contentions are:

a. As a staff member serving at the General Service level with the Secretariat in New York, the Applicant is a local recruit and could therefore not be transferred from ICTY (staff rules 4.4, 4.5, and 4.6). A transfer to another country presupposes international recruitment status, which is incompatible with the Applicant's current status as a local recruit under staff rule 4.4(a). Accordingly, the exception contained in the 20 September 2011 memorandum is not applicable to the Applicant;

b. The Applicant resigned from ICTY and was re-employed by the Secretariat in New York, which broke the continuity of his service with the Organization pursuant to staff rule 4.17. As a re-employed staff member, the Applicant's prior service with ICTY was not applicable for consideration;

c. The Applicant is time-barred from contesting his current employment status as the effective date of his re-employment was 2 September 2010;

d. The fact that internationally recruited ICTY staff members, who transferred to the Secretariat in New York, may have been granted permanent appointments does not establish discrimination against the Applicant;

e. The Applicant misreads his letter of appointment with the Secretariat in New York regarding staff regulation 1.2(c);

f. The granting of a permanent appointment is discretionary, and discretionary decisions are subject to a limited review by the Tribunal. The Applicant received reasonable consideration. His appointment with ICTY was strictly limited to ICTY, a downsizing entity scheduled for closure on 31 December 2014;

g. The Administration correctly followed the applicable procedures in considering the Applicant for conversion to a permanent appointment. In accordance with ST/SGB/2009/10, ICTY conducted a review, first of the eligibility of the Applicant, then of his suitability for conversion, and concluded that he 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 recommendation. The matter was accordingly referred to the Central Review 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 taking into account the interests of the Organization and the operational realities of ICTY, a downsizing entity;

h. The Secretary-General was not required to consider the Applicant's application for conversion on 30 June 2009, as claimed by the Applicant. The date 30 June 2009 is the deadline by which staff members under consideration must have met the five years of continuous service;

i. The one-time review provided for in ST/SGB/2009/10 was a large scale review of the eligibility and suitability of 5,693 staff members. Accordingly, the period which has transpired in consideration of the



Applicant's case is reasonable and justified. Additionally, any delay in the review of his case would not have had any legal consequences on his conversion.

### **Consideration**

26. The Applicant contests the decision whereby the Assistant Secretary-General for Human Resources Management refused to convert his fixed-term appointment into a permanent appointment.

#### *Applicable law*

27. 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.

28. 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.

29. Former staff rules 104.12(b) and 104.13(c) provided that:

#### Rule 104.12 Temporary appointments

...

#### (b) Fixed-term appointment

...

(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.

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 ...*

30. 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), which was issued on 23 June 2009 and entered into force on 26 June 2009, that is, prior to the abolition of permanent appointments, 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 [R]ecommendations 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 Assistant Secretary-General for Human Resources Management for all ... staff [other than D-2].

3.4 In the absence of joint support for conversion to permanent appointment, including cases where the department or office concerned and the Office of Human Resources Management or local human resources office both agree that the staff member should not be granted a permanent appointment, the matter shall be submitted for review to the appropriate advisory body ...

...

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.

31. 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.

32. 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 decision*

33. In considering applications whereby 274 staff members or former staff members of ICTY challenged the decisions not to convert their fixed-term appointments into permanent appointments, based on similar facts and resting to a large extent on the same arguments, this Tribunal considered that the authority “to appoint staff”, which had been expressly delegated to the ICTY Registrar by memorandum dated 20 May 1994 from the Under-Secretary-General for Administration and Management to the Acting registrar of ICTY, necessarily included, absent a clear exception, the authority to grant permanent appointments. It further considered that any withdrawal or limitation of the delegation of authority granted in 1994 should have been explicit. In the absence of a clear and formal revocation of the delegation by the delegating authority, it found 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—and it accordingly rescinded the contested decisions

(*Malmstrom* et al. UNDT/2012/129, *Longone* UNDT/2012/130 and *Ademagic* et al. UNDT/2012/131).

34. Although the Tribunal is aware of differences between those cases and the case at hand, it sees no reason to depart from the above findings in the instant case.

35. While it is true that the Applicant joined the United Nations Secretariat in New York on 2 September 2010, he was still in the employ of ICTY at the time when his situation was reviewed to ascertain whether or not he met the criteria for conversion. Indeed, the ICTY Registrar and the Acting Chief of Human Resources recommended to the Assistant Secretary-General for Human Resources Management that the Applicant be granted a permanent appointment on 12 August 2010. The Assistant Secretary-General for Human Resources Management informed the ICTY Registrar of her decision not to grant the Applicant a permanent appointment on 20 September 2011 and the Applicant was so informed on 6 October 2011.

36. ST/SGB/2009/10 does not provide for transitional measures in situations, such as the instant case, where an eligible staff member is assigned to a different department or office between the time when he or she is reviewed to ascertain whether he or she meets the criteria for the granting of a permanent appointment and the time when a final decision is taken by the relevant authority. However, legal certainty requires that ST/SGB/2009/10 be applied in a predictable manner and that, once the procedure foreseen in the Secretary-General's bulletin is initiated, it should be followed through.

37. So too, must the Tribunal find in this case that the Assistant Secretary-General for Human Resources Management lacked the authority, in the absence of a clear and formal revocation, to take the contested decision. Accordingly, the decision whereby the Assistant Secretary-General for Human Resources Management refused to convert the Applicant's fixed-term appointment into a permanent appointment must be rescinded.

*Compensation in lieu of rescission*

38. As the contested decision concerns appointment (see *Malmstrom et al.*, *Longone* and *Ademagic et al.*), 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, bearing in mind the relevant principles contained in article 10.7 of the Tribunal's Statute—which prohibits the award of exemplary or punitive damages—and those developed by the Appeals Tribunal, particularly in *Solanki* 2010-UNAT-044 and *Fradin de Bellabre* 2012-UNAT-212.

39. 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. It must also take into consideration 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).

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

**Conclusion**

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

- a. The decision whereby the Assistant Secretary-General for Human Resources Management refused to grant a permanent appointment to the Applicant is rescinded;
- b. The amount of compensation that the Respondent may elect to pay to the 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.

*(Signed)*

Judge Thomas Laker

Dated this 1<sup>st</sup> day of November 2012

Entered in the Register on this 1<sup>st</sup> day of November 2012

*(Signed)*

René M. Vargas M., Registrar