UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2014/082
Judgment No.: UNDT/2015/115
Date: 17 December 2015
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

ADEMAGIC *ET AL.*

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
April L. Carter
Robbie Leighton, OSLA

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

Introduction

1. By joint application filed on 11 December 2014, 246 staff members and former staff members of the International Criminal Tribunal for the former Yugoslavia ("ICTY") contest the Assistant Secretary-General for Human Resources Management ("ASG/OHRM") decisions of June 2014 denying each of them a conversion of their fixed-term appointments into permanent appointments.

2. As remedies, they request the Tribunal to:

a. Rescind the denial of permanent appointment;

b. Find that the Applicants are suitable for conversion to permanent appointment;

c. Retroactively convert their contracts to permanent appointments or, in the alternative, award compensation calculated according to the applicable termination indemnity associated with a permanent contract; and

d. Award moral damages in the amount of EUR20,000 per Applicant for substantive breaches of due process and bias against them, including the requirement of extensive materials used to extend the deadline of a non-retroactive exercise.

Facts

3. 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.

4. 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.

5. 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]".

6. 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".

7. 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.

8. 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.

9. 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.

10. 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 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.

11. 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.

12. 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".

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

14. 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.

15. 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".

16. 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.

17. 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. 15 above), including the recommendation that eligible ICTY staff would be considered for conversion to permanent appointments on a priority basis.

18. 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)".

19. 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.

20. 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.

21. 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".

22. 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.

23. 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".

24. 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].

25. 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).

26. 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, 262 staff members concerned by said decisions, including the 246 Applicants in the case at bar, filed applications before the Tribunal on 16 April 2012, followed by a motion for consolidation of their individual cases, dated 19 April 2012, which was granted by Order No. 80 (GVA/2012) of 4 May 2012.

27. The Tribunal ruled on these consolidated applications by Judgment *Ademagic et al.* UNDT/2012/131, 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 Tribunal rescinded the contested decisions and, considering that they concerned an appointment matter, set an alternative compensation in lieu of effective rescission of EUR2,000 per applicant.

28. On appeal, the Appeals Tribunal vacated Judgment No. UNDT/2012/131, by Judgment No. 2013-UNAT-359 issued on 19 December 2013. 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.

29. 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 EUR3,000 in non-pecuniary damages.

30. Following the publication of Judgment No. 2013-UNAT-359, the ASG/OHRM, by email of 14 January 2014, gave the ICTY Registrar specific instructions for the "Implementation of the UNAT Judgment".

31. 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. Many of the Applicants submitted further information in response.

32. 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;

b. A supplementary fact sheet;

c. A personnel action form;

d. The results of the ICTY Comparative Review for the staff member's post;

e. All performance evaluations since the staff member's appointment with ICTY; and

f. Any additional information that a staff member had elected to provide.

33. ICTY reviewed the Applicants' individual files to assess their eligibility and their suitability and, on 14 February 2014, transmitted the files, together with its recommendations on each concerned staff member, to OHRM. For nearly all the 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 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.

34. 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 two Applicants, it later reversed same before transmitting it.

35. 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.

36. In May and June 2014, the relevant New York CR bodies reviewed all the files of the Applicants, including those of the few among them who had not been recommended by ICTY. Both the CR Committee (Applicants at the P-2 to P-4 levels) and the CR Panel (General Service Applicants) 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 three of the Applicants, be granted a permanent appointment not limited to ICTY.

37. 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 Applicants were 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;

b. Applicants who were active ICTY staff members in the General Service category as at the date of the contested decisions;

c. Applicants who had transferred to MICT as at the date of the contested decisions;

d. Applicants who had separated from ICTY as at the date of the contested decisions;

e. Applicants at the P-5 level; and

f. Applicants who had separated from ICTY due to downsizing after the contested decisions.

38. By individual letters dated between 13 and 19 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 appointments into permanent appointments. The language and structure of the respective letters were remarkably similar, 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.

39. On 30 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 Appeal 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 Appeal 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).

40. The Applicants requested management evaluation of the June 2014 decisions (see para. 38 above) on 13 August 2014. By letters dated 29 September 2014, the Applicants were informed that the USG for Management had upheld the contested decisions.

41. The present application was filed on 11 December 2014.

42. By motion filed on 17 December 2014, 13 of the Applicants moved for the Tribunal to "issue an order suspending their separation from the [ICTY] until it ha[d] ruled on the Ademagic et al. application on the merits". This motion was rejected by Order No. 194 (GVA/2014) of 19 December 2014.

43. After seeking an extension of time, granted by Order No. 1 (GVA/2015) of 5 January 2015, the Respondent filed his reply on 23 February 2015.

44. On 9 March 2015, the Applicants filed a motion requesting that the case be referred to a panel of three judges, which was rejected by Order No. 63 (GVA/2015) of 17 March 2015.

45. By Order No. 201 (GVA/2015) of 16 October 2015, the Respondent was instructed to submit further documents, which he did on 23 October 2015.

46. A joint hearing on the merits on this and nine other cases challenging analogous decisions took place from 27 to 29 October 2015.

Parties' submissions

47. The Applicants' principal contentions are:

a. The second consideration for conversion exercise ("re-consideration exercise") replicates—albeit in a more articulate manner—the first exercise, which the Appeals Tribunal found to have been procedurally unfair, ignored relevant matters and focused on a single unlawful criterion, resulting in discrimination against the Applicants. A blanket policy was again applied effectively taking as an eligibility criterion the fact that the Applicants' served at ICTY. The Applicants have satisfied the criteria for conversion to a permanent appointment according to ST/SGB/2009/10 as applied to staff members outside of ICTY;

b. The re-consideration exercise was conducted in a non-retroactive manner, assessing the Applicants' as per their status in 2014. Memo P.324 (provided in the Guidelines) at the time of the first consideration exercise provides the process and time period that should serve as the basis for a legitimate retroactive review. Instead, the ASG/OHRM imposed a different scheme upon the Applicants, who were directed to supply extensive supplemental information in January 2014, including several documents reflecting their situation in early 2014. Such additional information did not reflect the Applicants' situations in 2009, nor was it required from any other group of staff in the Organization originally under consideration for permanent appointments;

c. To give meaning to the Appeals Tribunal's order that the Applicants be considered retroactively, the reference should have been the P.324 memo as submitted by ICTY to OHRM on 12 July and 16 August 2010. The rescission of the original non-conversion decisions entails that the exercise was never completed; the relevant point is therefore where the Applicants stood in 2010;

d. The new scheme, whereby recent information was requested, delayed the re-consideration exercise; the extension of time to complete it, granted by the Appeals Tribunal, did not amount to sanctioning said new scheme. The Administration has tactically delayed the process and promulgated the new scheme to ensure that more individuals are no longer in the service of ICTY, and to argue that the fact that some of the Applicants were no longer in employment of the Organization supports the lack of organizational need for them. This contravenes the express order to conduct a retroactive review process, applying equally to any litigants who were part of the original conversion exercise but have since left the service of ICTY. It cannot be available to the Administration to rely on changes which occurred during a period of delay of its own making. Additionally, the instant case is distinguishable from those where a staff member resigned mid-process to take over new duties before a decision had been made;

e. Although the Appeals Tribunal framed the re-consideration exercise to a "suitability" consideration, the Administration re-assessed the Applicants' eligibility. In fact, after the issuance of Judgment No. 2013-UNAT-359, the ASG/OHRM expressly instructed the ICTY Registrar to review the Applicants' eligibility for conversion;

f. The Administration failed to consider the individual circumstances of the Applicants and instead considered a single matter which, taken alone, results in discrimination. The Administration provided what amounts to a form letter denying permanent contracts to the entire group of staff. Even if the letters distinguish several categories of staff members according to their current employment status, the basis for rejection is identical for all staff members under consideration. While the Respondent claims that the underlying reasons for each Applicant are to be found in their individual file, the reasons put forward in the decision are exactly the same;

g. The Administration hides behind a laborious process, launched after the ASG/OHRM observed that the aggregation of information in spreadsheets used in the first consideration exercise had proven unhelpful in establishing an individualised review. Yet, regardless of how much paperwork was involved, at no point was any sort of circumstances unique to each staff member looked at. The impugned decisions do not reflect that the Administration took into account any of the extensive additional information requested. To the contrary, they show that the decision-maker turned her mind to a single, impermissible, factor, i.e., ICTY being a downsizing organization. This is further indicated by the fact that the rare staff members that OHRM initially recommended for conversion—even though it later reversed its view—were recommended exclusively because they had in the meantime moved to serve in entities that were not downsizing, as documented in their OHRM forms;

h. Contrary to the Appeals Tribunal's instructions, the Applicants' qualifications, proficiencies, conduct and transferable skills were not analysed; they are not mentioned in their respective OHRM assessment form. The decision letters noted that the Applicants met the threshold for conversion, but the assessment contained therein does not reflect the individualized features of any of their service records; for instance, if the decision letters mention length of service, they merely note that the five-year minimum requirement is met, ignoring the fact that many Applicants had accrued many more years on successive fixed-term contracts over an extended period—which is recognised as an abusive practice;

i. The interest of the Organization was appraised in terms of operational realities only and, in particular, regarding the expected date of the closure of ICTY; the need for the Applicants' services was measured against the expiry date of their fixed-term appointments, which were in turn aligned with the approved budget. This approach is flawed as all fixed-term appointments have by definition an expiration date, and all posts in the Secretariat are subject to similar budget cycles. Such logic was applied to ICTY staff and not to other Secretariat staff, and it was extended to MICT in spite of its different operational realities and foreseeable lifespan;

j. As per para. 36 of document A/62/274 (Secretary General Report on Detailed proposals for streamlining United Nations contractual arrangements), the key issue is not the finite mandate of the institution in which the Applicants serve, but the "continuing need for the services of the staff members in the same department or elsewhere in the Organization". A particular mandate, function or post is irrelevant for purposes of such continuing need. The Applicants perform functions core to the mandate of the Organization;

k. The operational realities of MICT were not given consideration, nor were the needs of the Organization at large. The continuing organizational need for the Applicants in ICTY and MICT was equally ignored, although it is evidenced by the fact that the large majority of the Applicants remain

employed by ICTY and/or MICT five years after the first conversion process. Furthermore, MICT, which has a close institutional relation with ICTY and a workforce made up largely of former ICTY staff, is not a downsizing institution; it has only recently started its operations and no completion date has been set. The appeals of ICTY judgments are not scheduled for completion until 2017 or 2018, and several core functions will continue well beyond that date—and some until the last accused has served his/her life sentence;

l. None of the purported barriers to conversion of ICTY staff relate to the individual situations of the Applicants. Two circumstances were invoked regarding all of them: "the finite nature of the Tribunal's mandate, and the limitation of [the Applicants'] appointment to service with the ICTY". The impugned decisions were based on where the concerned staff members served, in direct contravention of the Appeals Tribunal's Judgment. Other contended barriers were not found during the decision-making process but in preparation of this case's litigation;

m. While the Organization has discretion to ascribe a certain weight to the different relevant factors, its power is not unfettered; the Appeals Tribunal ruled that the finite mandate of ICTY could not be relied upon to the exclusion of any other factors, and also that the proficiencies, qualifications, performance and transferrable skills had to be considered individually. Contrary to the Respondent's submission, conducting an individualised consideration of nearly 300 staff members is a reasonable task, especially in light of the thousands who were considered in the one-time conversion exercise;

n. The ASG/OHRM has authority to reassign staff members notwithstanding that their current appointment is limited to ICTY; in any event, nothing prevented the ASG/OHRM from granting a permanent appointment equally limited to ICTY. In asserting her alleged inability to move ICTY staff, the ASG/OHRM disregarded sec. 11.1 of Administrative Instruction ST/AI/2010/3 (Staff selection system)—which provides for

lateral moves outside the staff selection scheme precisely in cases of abolition of post—as well as the option of transfer on consent. As to national staff, it is not clear that they would have to surrender their permanent appointment to take over different duties, as there are mechanisms to bridge their appointments, including reinstatement under staff rule 4.18. Likewise discounted was the possibility of movement by competitive selection. Generally, the Respondent's stance is inconsistent with staff regulation 1.2(c), the Organization's position on staff mobility and the language of the "special notice" systematically included in vacancy announcements for positions in ICTY and MICT whereby:

> Appointments of staff members in the United Nations are subject to the authority of the Secretary-general. Staff Members are expected to move periodically to new functions in accordance with established rules and procedures, and may in this context be reassigned by the Secretary-General throughout the Organization based on the changing needs and mandates.

o. The Secretary-General's power to deny permanent appointment against the positive recommendation of the CRB, is subject, *inter alia*, to the requirement of giving due weight to the CR bodies' recommendation; in this case, no weight was given to that of the CR Board;

p. In the most recent review exercise, financial liability appears as the sole basis for denying conversion to the Applicants. This is simply a different articulation of the previously used "downsizing organization" factor, clearly rejected by the Appeals Tribunal. As held in *Chen* 2011-UNAT-107, "budgetary considerations may not trump the requirement of equal treatment". Yet, in this case, the possibility of payment of termination indemnities has been placed above the Applicants' due process;

q. On remedies, the Tribunal is requested to order conversion of the Applicants' appointments into permanent as specific performance. In view of the Administration's refusal to abide by the Appeals Tribunal's orders, if the matter were returned to the decision-maker, the Applicants will, again, not receive reasonable consideration. The way in which the contested

decision is articulated makes it clear that all of them have satisfied the suitability test; the Administration acknowledged that all the Applicants met the first three criteria, and that the only reason why they did not meet the fourth was that they work at ICTY. The respective letters certify that each Applicant is eligible (paras. 1 and 2) and suitable (paras. 3 and 4), and operational considerations cannot be separated from other suitability considerations. Staff members across the Organization fulfilling the eligibility and suitability tests as the Applicants do were converted; this is how 85% of staff reviewed in the one-time exercise obtained permanent contracts. Conversion is also appropriate for separated staff members; they were left without the job security provided by a permanent contract at a time where downsizing exercises were ongoing, and such lack of security factored in their decisions on future employment. If it is felt that alternative compensation is necessary, the adequate amount, whether staff members have been separated or remain in employment, is that of the termination indemnities, as this is the value that the Organization itself has placed on permanent appointments;

r. Award of moral damages for the fundamental breach of due process and for stress and anxiety caused is warranted. The Appeals Tribunal already found that the original denial of conversion constituted a fundamental breach of due process rights; the additional years elapsed and the repetition of the exercise has aggravated that breach. This ground for compensation is open to the Tribunal despite the recent amendment to the Tribunal's Statute, as this case was filed prior to the introduction of said rule change. Even if the amendment were to be applied, it is still possible to grant compensation for the stress and anxiety occasioned, as the change to the Statute concerns the fundamental breach of rights aspect of moral damages only.

48. The Respondent's principal contentions are:

a. A staff member has no right to conversion of his/her fixed-term appointment into a permanent one, but only to individual, full and fair consideration to such conversion. The decision in this respect is discretionary—as former staff rule 104.13(c) provides that a permanent appointment "may" be granted under certain conditions—and it is not for the Tribunal to step into the Administration's shoes in making this decision;

b. The ASG/OHRM was required to take into account all the interests and needs of the Organization, which, according to the General Assembly's guidance, include the operational realities. The Tribunal's review is restricted to whether the ASG/OHRM abused her discretionary power or engaged in procedural impropriety. Since this is not a class action, each Applicant bears the burden to prove through clear and convincing evidence that they were deprived of their individual right to full and fair consideration, and none of them has met that burden;

c. The re-consideration of the Applicants for conversion was procedurally correct. The Organization followed the procedures set out in ST/SGB/2009/10 as well as the Guidelines, and accorded each Applicant substantive due process. The Organization undertook a multi-step process to individually consider each Applicant, the rigour of which is reflected in the detailed record kept. This process was far more rigorous than that of any other undertaken for other conversion decisions;

d. The referral of the Applicants' cases to the New York CR bodies is in line with the Secretary-General's bulletin ST/SGB/2011/7 (Central review bodies), which foresees that certain specific functions entrusted to the CR bodies be assigned as per the authority who will make the final determination; in this case, the decision-maker was the ASG/OHRM, based in New York;

e. Each Applicant received individual, full and fair consideration for conversion to a permanent appointment. At the end of the process, each Applicant received a written, reasoned and individual letter informing of the ASG/OHRM resulting decision. The ASG/OHRM gave every reasonable consideration to each Applicant; she reviewed each single case, and the record demonstrates that all relevant criteria were considered. The individualised consideration stems from the files containing the documents that led to the decision. There is no basis for conducting a review of the impugned decisions restricted to the decision letter itself, instead of examining the decision-making process as a whole, as is usually done, e.g., concerning selection decisions. In addition, in *D'Aspremont* UNDT/2013/083, the Tribunal extended its review to the preparatory documents;

f. After carefully considering the four criteria and the weight to be accorded to each of them, the ASG/OHRM decided in each case that conversion of the respective Applicant's fixed-term appointment into a permanent one was not in the interest of the Organization. The ASG/OHRM exercise of discretion was reasonable in view of her assessment of all the relevant criteria, including the operational realities of the Organization;

g. The wording of the decision letters was not the same, but was adapted to six different groups of staff in comparable situations. If the letters have similarities, this is because, given the large number of concerned staff and the monumental task that the Organization had to complete within a tight deadline, it was not realistic to draft a completely different letter for each Applicant. The language and level of detail has to be examined in light of the timeframe of the exercise. Expecting otherwise would amount to setting the Organization for failure, which cannot have been the intention of the Appeals Tribunal. The passage stating that the Applicants "may have transferable skills" may have created some confusion as it might be read as rhetorical; in fact, it intends to state that transferrable skills were considered, and this is showed by the record of the CR bodies;

h. For the different categories of similarly situated staff, the contested decisions were reasonable for the following reasons:

i. Applicants who were current ICTY staff members: Account was taken that ICTY was expected to close within three years (May 2017), and the positions they held were at that point funded, at most, until 31 December 2015. The possibility of continued employment with ICTY or MICT beyond that date was theoretical. ICTY is an *ad hoc* body with a finite mandate, which has implemented gradual downsizing since 2009; in 2013 389 positions (representing nearly half of all ICTY staff) were projected to be abolished by the end of 2015;

ii. Determining the probability of any particular Applicant being selected for a new position in the Organization would be speculative. Moreover, the Applicants cannot be reassigned outside ICTY; due to the limitation of their appointments to ICTY, the ASG/OHRM lacks authority to transfer them elsewhere; this is in keeping with staff rule 4.1. Even assuming that such authority existed, no staff member has a right to be reassigned. Also, locally recruited General Service Applicants cannot be reassigned to another entity, other than MICT; hence, granting them a permanent appointment would be of no practical effect, as they would be required to resign from this appointment to take up a new one in a different entity. The same would apply to the one Applicant holding a National Professional Officer position;

iii. As per document A/60/30 (Report of the International Civil Service Commission for the year 2005), the purpose of permanent appointments is to assist the Organization in maintaining programme continuity in core functions. Being subject to the Organization's continuing needs, permanent contracts are meant for staff members performing functions that are core to its mandate. The International Civil Service Commission has also held that a permanent appointment

should not be granted "where the mandate is finite and there is no expectation of open-ended employment" (cf. A/61/30, Report of the International Civil Service Commission for the year 2006). The Applicants' positions were not core to the mandate of the Organization for they were located in an entity due to complete its mandate in mid-2017. Their prospects of employment beyond December 2015 were theoretical;

iv. The events of 2011 that largely resulted in postponing the closing of ICTY in 2017, rather than in 2014, did not stop its downsizing;

v. Applicant who had transferred to MICT: The fact that an Applicant had been selected for a position in MICT did not establish a continuing need for his or her services. MICT is also an *ad hoc* body with a finite mandate, comprising substantially reduced residual functions, that were to diminish over time and with a limited number of staff. MICT was initially established for four years, with a possibility of extension for two more years. The fact that it is now in a growing phase does not change its nature. MICT staff members, like General Service staff and National Officers, cannot be reassigned outside MICT;

vi. Applicants who had separated due to downsizing of ICTY: Their positions were no longer funded. There was no continuing need for the services of an already separated staff member;

vii. Applicants who had resigned to join another organization: There was no continuing need for the services of Applicants who had decided to work for another organization; granting them a permanent appointment would serve no purpose. Each Applicant's eligibility for permanent appointment in those organizations would have been determined by the receiving organization's rules and procedures;

viii. Applicants who had separated from ICTY for various reasons (including resignation, retirement or health): They were not suitable for conversion as their careers with ICTY had come to an end;

ix. Applicants at the P-5 level: Out of the three P-5 Applicants considered, one had separated from service in September 2010 further to the abolition of his post, and two had been transferred to MICT. The same reasoning described above for staff separated and transferred to MICT applies;

x. Ineligible Applicants: Two Applicants did not meet the criterion of five years of continuous service before 2009, as they had a break-in-service after resigning to change functions. One other resigned on 1 July 2012 to take up a new position at Headquarters, thereby ending her right to consideration for a permanent appointment;

i. The conversion process was not procedurally unfair. The invitation to the Applicants to submit additional information and documents cannot be regarded as adverse to their right to substantive due process;

j. The individual circumstances of the Applicants were taken into account. Some constitute compelling reasons for their conversion. The fact that six broad categories were made should not be seen as a sign that other circumstances were not looked at. The Administration gathered and reviewed records on each Applicant's suitability as an international civil servant and their fulfilment of the highest standards of integrity, competence and efficiency. Also taken into account, were the recommendations made by ICTY, OHRM and CR bodies following their consideration of each Applicant;

k. The fact that Applicants being similarly situated were provided with similar reasons for the non-conversion of their appointments does not indicate any discriminatory intent; the principle of equality requires that those in equal situations be treated equal. The principle of equal treatment was not violated. The Applicants have not identified how staff members in

similar situations were treated differently. The Applicants are not entitled to a notification in a particular form or length. Neither are they entitled to a permanent appointment on the grounds of their length of service, according to former staff rule 104.12(b)(iii) and General Assembly resolution 51/266;

l. The fact that at the end of the re-consideration exercise no ICTY staff member was granted a permanent appointment does not demonstrate any blanket policy of refusing conversion because the work was in a body with a finite mandate, but only that none of them had been competitively selected for a post discharging core functions of the Organization. The impugned decisions took into account a variety of reasons, including the separation or resignation of several Applicants. The ASG/OHRM has recently retroactively granted a permanent appointment to a staff member who had served in a downsizing entity.

m. The ASG/OHRM gave due regard to the CR Board's recommendations concerning P-5 Applicants. The fact that she disagreed with them does not indicate that her decisions were predetermined or constituted an unreasonable exercise of discretion;

n. While the implementation of the decisions had to be retroactive (as already indicated in the Guidelines), the Administration was entitled to consider any facts that occurred until the date the decision was made. The Appeals Tribunal's case law has accepted that subsequent relevant developments pertaining to eligibility and suitability must be taken into account. Had the Appeals Tribunal wished to set a given cut-off date for the review, it would have specified it in its Judgment. Moreover, the Appeals Tribunal did not raise objections to the process when ruling on the Applicants' motions for execution;

o. Since the 2011 decisions were rescinded, and therefore it is as if they had never legally existed, new, fresh decisions were to be made. It would have been absurd and arbitrary to pretend ignoring relevant facts that were known at the time the new decisions at issue were taken;

p. The Applicants' claim that the contested decisions should have been exclusively based on information available as at the date of the original conversion exercise (August 2010) is inconsistent with their position that certain subsequent developments should have been taken into account, such as their length of service after the publication of ST/SGB/2009/10. The Applicants' position would imply that the Administration could not take into account subsequent facts that may be positive for the Applicants, e.g., at the original decisions' time, ICTY was projected to close by December 2014, whereas, at the time of reaching the decisions in 2014, the new projected closing date was May 2017;

q. The ASG/OHRM did not ignore relevant factors or take into account irrelevant factors. The limitation of service to ICTY or MICT, as agreed upon by the Applicants upon signing their letters of appointment, was a relevant factor; a reminder in the vacancy announcements of the Secretary-General's authority to reassign staff members to another post in ICTY/MICT does not change this fact. In contrast, the forthcoming changes in the legal framework for the new mobility policy are irrelevant; they are not yet in effect and will only apply to internationally-recruited Field Service and Professional and higher categories staff, and not to those having appointments limited to a specific department, office or mission. The Applicants' own assessment of their skills and the Organization's need for their services does not demonstrate that the Administration's exercise of discretion was unreasonable;

r. For a career appointment to be granted, a prospect of long term employment should exist. It is incumbent on the Applicants to prove that no reasonable decision-maker would have refused the conversion of their appointments; for that matter, the contested decision must be distinguished from a selection decision, as it was not a comparative review or a comparison of merits of the Applicants. The downsizing of the ICTY was not the controlling factor, even though the ASG/OHRM did take this factor into account, among others. She was in fact bound to consider it and the Tribunal upheld this factor as an appropriate consideration. As recognised in

Balan UNDT/2013/106, "it cannot be in the interest of the Organization nor of its operational activities to grant permanent appointment to staff whose service, by the terms of their letter of appointment, is limited to an entity which is downsizing". Similarly, it is not an unreasonable exercise of discretion to not grant a permanent appointment to a staff member currently serving with MICT, where the mandate is also finite and there is no expectation of open-ended employment;

s. There was no undue delay in completing the re-consideration exercise, which was finalised within the time limits set by the Appeals Tribunal in Judgment No. 2013-UNAT-359 and Order No. 178 (2014). The assertions of tactical delays are baseless. The time elapsed since this matter arose, albeit considerable, is largely due to the scheduling of litigation; as such, it cannot be held against the parties;

t. As to the remedies sought, each one of the Applicants must identify a material or procedural irregularity affecting the respective contested decisions. Considering that staff members have no entitlement to conversion—which is subject to a discretionary decision, that the Applicants' posts could have been downsized whether or not they had a permanent appointment, because their job uncertainty results from the finite nature of ICTY, none of the Applicants has sustained any damage; an award of damages would thus be punitive. As regards the specific performance requested, it is a legal absurdity concerning separated staff members. It is an impossible exercise to have already separated staff to work again in ICTY;

u. The recent amendment to art. 10.5 of the Tribunal's Statute did not bring any substantive change to the provision, but simply clarified its original meaning.

Consideration

Legal framework of the contested decisions

49. Unlike most of the decisions made by the Administration, those challenged in this case stem directly from an order by the Appeals Tribunal in Judgment *Ademagic et al* 2013-UNAT-359. By this Judgment, the highest instance of the internal justice system remanded the decisions on the conversion of the Applicants' fixed-term appointments to permanent, to the ASG/OHRM for re-consideration. In doing so, it provided the Organization with a number of precise instructions on the conduct of such re-consideration.

50. Art. 10.5 of the Appeals Tribunal's Statute provides that "[t]he judgements of the Appeals Tribunal shall be binding upon the parties." It follows that the parties are under the legal obligation to fully implement rulings of the Appeals Tribunal. Their binding effect is not restricted to the orders provided under the "Judgment" section, but also extends to the other operative paragraphs, which set out the major considerations for the determinations made.

51. Relevantly, the operative parts of Judgment *Ademagic et al.* 2013-UNAT-359 prescribed the following with respect to the exercise that led to the contested decisions:

a. ICTY staff members are entitled to full and fair consideration of their *suitability* for conversion to permanent appointment (para. 39 and at page 22 quoting paras. 66 and 67 of Judgment *Malmström et al.* 2013-UNAT-357);

b. The conversion exercise was remanded for *retroactive* consideration of the suitability of the Applicants (para. 39);

c. Each candidate to be reviewed for a permanent appointment was lawfully entitled to an *individual* and considered assessment, or to individual full and fair consideration (at page 22 quoting paras. 66 and 67 of Judgment *Malmström et al.* 2013-UNAT-357), and in doing so, "every reasonable consideration" had to be given to ICTY staff members demonstrating the *proficiencies, competencies and transferrable skills*

rendering them suitable for career positions within the Organization (at page 23 quoting para. 72 of Judgment *Malmström et al.* 2013-UNAT-357); and

d. "The ASG/OHRM was not entitled to rely solely on the finite mandate of the ICTY … [Her] discretion was fettered by her reliance, to the exclusion of all other relevant factors, on the ICTY's finite mandate" (at page 22 quoting para. 68 of Judgment *Malmström et al.* 2013-UNAT-357). "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" (at page 23 quoting para. 69 of Judgment *Malmström et al.* 2013-UNAT-357);

52. This framework necessarily also has an impact on the judicial review of the Dispute Tribunal, which is expected to "recognize, respect and abide by the Appeals Tribunal's jurisprudence" (*Igbinedion* 2014-UNAT-410).

Subject of the judicial review

53. Pursuant to art. 2.1(a) of its Statute, the Tribunal is competent to examine the legality of administrative decisions. The administrative decisions challenged in this case are the respective denials to convert the Applicants' fixed-term appointments into permanent ones, made by the ASG/OHRM in June 2014. These specific decisions are thus the subject of the Tribunal's scrutiny, nothing more and nothing less.

54. These administrative decisions must and do speak for themselves. In particular, the previous refusals of conversion of the Applicants' appointments in the fall of 2011, although factually related, are beyond the scope of review of this application, as are any *post facto* explanations of the decisions at issue. Therefore, the focus of the Tribunal's review will be on ascertaining whether the impugned decisions, as they are couched in the respective June 2014 letters sent to each Applicant, were made in conformity with the directions given by the Appeals Tribunal in Judgment *Ademagic et al.* 2013-UNAT-359.

Procedural legality of the decisions

55. The Secretary-General's bulletin ST/SGB/2009/10 is the key legal instrument governing the conversion exercise launched in 2009. Its sec. 3.2 (Procedure for making recommendations on permanent appointments) requires that "the Office of Human Resources Management or the local human resources office" conduct a review of the candidates for conversion. Surprisingly, neither the bulletin, nor the Guidelines subsequently issued as a complement to the former, contain any indication of which entities or staff members should be reviewed by OHRM and which fall under the remit of their local human resources offices. Manifestly, the choice was made that OHRM would fulfil this function for ICTY staff. While this may well be an adequate choice, it remains not founded on any clear legal basis.

56. Similarly, sec. 3.5. of ST/SGB/2009/10 foresees that, when the recommendations of an eligible staff member's office or department and that of the human resources office in charge do not coincide, the case is to be referred to "the appropriate advisory body" for recommendation. This provision (at subparagraph (a)) determines the relevant CR bodies for P-5 and D-1 staff members:

> For staff at the P-5 and D-1 levels administered by offices located in New York, Geneva, Vienna and Nairobi, the advisory body shall be the Central Review Board established at the location. Staff members serving at other locations shall normally be considered by the Central Review Board in New York, but may be referred to another Board in order to expedite the process.

57. In contrast, subparagraph (b) of the same provision, which concerns P-2 to P-4 staff, reads:

> For staff at the P-2 to P-4 levels administered by offices located in New York, Geneva, Vienna, Nairobi, Addis Ababa, Bangkok, Beirut and Santiago, the advisory body shall be the Central Review Committee established at the location. The Central Review Committee in New York shall also consider eligible staff in the Field Service category.

58. A legal *lacuna* was left with regard to the competent CR bodies for P-2 to P-4 staff not administered by offices at duty stations other than the eight cited or in the field. Indeed, their consideration was not explicitly delegated to the local CR Committee and, at the same time, no other CR Committee (e.g., that of New York) was designated as being competent to review their candidature for conversion.

59. The imprecise and defective drafting of the bulletin leaves excessive room for doubt about the competent human resources office and, as regards P-2 to P-4 staff—which represent a significant portion of the Applicants—the competent CR bodies.

60. After consideration, the Tribunal is of the view that, in entrusting the review of the ICTY staff to OHRM and to the New York-based CR bodies, the Administration adopted a justifiable approach and, in any case, it finds no reason to conclude that the Applicants were prejudiced as a result of this. Nonetheless, the Tribunal cannot but regret the shortcomings of ST/SGB/2009/10, which gave rise to some uncertainty on crucial points of the procedure in such an important matter.

Substantive legality of the decisions

Structure of the decision

61. In accordance with former staff rules 104.12 and 104.13, secs. 1 and 2 of ST/SGB/2009/10 respectively set out the criteria of eligibility and suitability that apply in the consideration of Secretariat staff for conversion to permanent appointment.

62. Sec. 1 of ST/SGB/2009/10 stipulates the eligibility conditions as follows:

> **Eligibility**
>
> To be eligible for consideration for conversion to a permanent appointment under the present bulletin, a staff member must by 30 June 2009:

> (a) Have completed, or complete, five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules; and
>
> (b) Be under the age of 53 years on the date such staff member has completed or completes the five years of qualifying service.

63. Whereas sec. 2 of the bulletin reads:

> **Criteria for granting permanent appointments**
>
> 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.

64. Quite obviously, ST/SGB/2009/10 makes a neat distinction between the two types of criteria, i.e., eligibility-related on the one hand and suitability-related on the other hand. In contrast, the decision letters of June 2014 reformulate the conditions for conversion in such a manner that the line between eligibility and suitability criteria so carefully drawn in the bulletin is blurred. Indeed, the letters enunciate four criteria, to wit:

> a. Completion of five years of continuous service on fixed-term appointments. In fact, under this item, the letters of the ASG/OHRM also address whether this requirement was met at the time the concerned staff member was under the age of 53;
>
> b. Demonstration of the highest standards of efficiency, competence and integrity established in the Charter;
>
> c. Demonstration by qualifications, performance and conduct of suitability as international civil servants; and
>
> d. Determination that the granting of a permanent appointment is in accordance with the interests of the Organization.

65. In sum, criterion (a) above encompasses the two *eligibility* conditions specified in sec. 1 of ST/SGB/2009/10—i.e., five years of continuing service on fixed-term appointments reached before the age of 53—whereas the last three correspond to different components of the *suitability* test as set forth in sec. 2 of the same bulletin.

66. So structured, the letters conveying the impugned decisions create the impression that four criteria of equal nature and importance exist. This is not an accurate framework. In fact, not only eligibility and suitability are distinct, but all relevant provisions—sec. 2 of ST/SGB/2009/10 as well as former staff rule 104.13 and para. 6 of the Guidelines—outline, in similar terms, a *suitability* test where any given staff member is assessed against two major elements, namely:

a. His or her qualifications, performance and conduct; and

b. The highest standards of efficiency, competence and integrity established in the Charter.

67. The foregoing notwithstanding, it should be noted that the interest of the Organization is also explicitly mentioned in the relevant provisions. As such, it is a legitimate consideration to be taken into account when assessing the suitability of a staff member; however, as articulated in the relevant rules, it is ancillary to the two primary suitability criteria and is to be appraised together with, and in relation to, them, as opposed to a fully independent criterion on equal footing with the two others.

Eligibility

68. Judgment *Ademagic et al.* 2013-UNAT-359 repeatedly and explicitly states that the matter in question was remanded to the ASG/OHRM for consideration of the "suitability" of the Applicants for conversion, and not their eligibility. This is, furthermore, entirely consistent with the Appeals Tribunal's finding that the first decision not to convert the Applicants' contracts to permanent, at the outcome of the 2011 exercise, was flawed at the stage of the suitability determination, while no particular problem had been found regarding the assessment of the Applicants'

eligibility; it is only logical, thus, that the matter be remanded for reconsideration as from the step where the process became vitiated, not as from a previous stage.

69. In spite of that, the Administration undertook a new eligibility assessment. This is patent from the voluminous records of the process and was further confirmed by the Respondent in his pleadings; as a matter of fact, the ASG/OHRM, in her email of 14 January 2014, expressly asked the Registrar of ICTY to conduct a fresh review of the Applicants' eligibility, and the new assessment that ensued was reflected in the decision letters, under the criterion referred to in para 64.a above. In re-assessing the Applicants' eligibility, the Administration disregarded the Appels Tribunal's instructions.

70. The Respondent contends that a limited number of those reconsidered in 2014, including six Applicants, were ineligible, either because they had been so since the first round of consideration (although, by mistake, they had undergone the same procedural path as all other Applicants) or because they had lost or relinquished eligibility after the completion of the first exercise.

71. Without entering into the rightfulness of the Administration's eligibility analysis, which the Tribunal does not necessarily share—especially where the only purported disqualifying fact is their leaving ICTY service *after* the first non-conversion decision was rendered, it seems, at any rate, hardly justifiable to declare the concerned Applicants ineligible at this late stage.

72. First, up to the date of filing of the Respondent's reply to the present application, the above-referred concerned Applicants had never been made aware that they were not deemed eligible; moreover, some were considered eligible during most part of a lengthy process and all of them were treated as if they were so in two consecutive conversion exercises. Beyond that, for each of them, the ASG/OHRM plainly stated in their respective decision letter of June 2014—that is, after the Administration had purportedly detected or verified their ineligibility—that they fulfilled all conditions for conversion except that of suiting the interests of the Organization. More specifically, the ASG/OHRM put in writing that each of the Applicants satisfied the first criterion of the four set out in the decision letters, which—as noted above—corresponds to the eligibility criteria

of former staff rule 104.13 and sec. 2 of ST/SGB/2009/10. At no point did their respective letters allude to the alleged ineligibility of any of them.

73. Under the circumstances, the Organization is presently estopped from claiming the ineligibility of the six concerned Applicants.

Retroactivity

74. Although Judgment *Ademagic et al.* 2013-UNAT-359 refers on several occasions to retroactive "conversion" or retroactive "effect" of a potential conversion, at para. 39—the key passage of the "Judgment"—it unambiguously orders the "retroactive consideration" of the suitability of the Applicants. Contrary to what the Respondent holds, implementing the resulting decisions retrospectively is not sufficient to meeting the requirement of retroactive *consideration*. Based on this language, the Tribunal is not satisfied that the re-consideration exercise ought to include new circumstances that were only known when the new decisions were reached, i.e., mid-June 2014, and not be limited to those known at the time of the initial conversion exercise.

75. Such an interpretation would devoid of any meaning the term "retroactive", that the Appeals Tribunal consciously and purposefully chose to use. In addition, Judgment *Ademagic et al.* 2013-UNAT-359 states that the Applicants' entitlement to receive a proper determination of their suitability for retroactive conversion, "applies equally to any litigant staff members who were part of the original conversion exercise at issue, but have since left the service of ICTY"; this further supports that it was the Appeals Tribunal's intention that the changes in employment status that occurred between the first and second exercise do not impact on the Applicants' right to be considered for conversion.

76. Further to concluding that the re-consideration exercise ordered by the Appeals Tribunal needed to be conducted in a retrospective manner, it is necessary to ascertain what is the critical date that should be taken as the reference for this purpose. Whilst the introduction and sec. 1 of ST/SGB/2009/10 clearly set the cut-off date as 30 June 2009 in relation to *eligibility*, the bulletin, like all other

applicable texts, is silent on the critical date for the determination of *suitability*. Neither did the Appeals Tribunal identify such a date in its Judgment.

77. Yet, it is pertinent to recall that the Appeals Tribunal remanded the determination on conversion after reviewing and finding flawed a specific set of administrative decisions issued by the ASG/OHRM on 20 September 2011 and notified to each concerned staff on 6 October 2011. The remedies ordered by the Appeals Tribunal were designed to restore the Applicants' position as it would have been but for the unlawful decisions. Consequently, for the purpose of the re-consideration exercise, the Applicants' suitability should have been appraised by reference to the relevant circumstances as they stood at the time of the first impugned refusal to convert their appointments, i.e., in the fall of 2011.

78. It follows that, inasmuch as the re-consideration exercise took into account, instead, the facts as of the date of the eventual decision (that is, mid-June 2014), the Administration failed to comply with the Appeals Tribunal's direction to carry out a *retroactive* consideration of the Applicants' suitability for conversion.

Individual review giving every reasonable consideration to the Applicants' proficiencies, competencies and transferrable skills

79. 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 Tribunal, however, is of the view that this in itself does not reveal an individualised consideration of each Applicant, but, at best, their categorisation.

80. 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 246 Applicants. 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.

81. The only time when the expression "transferrable 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.

82. In view of the foregoing, the 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 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 particulars of the downsizing of ICTY, and the respective dates of the Applicants' expected separation or end of contract.

83. For all the above, the Tribunal considers that no meaningful individual consideration was afforded to the Applicants, in contravention to the Appeals Tribunal's clear instruction to this effect.

Reasons relied upon in making the contested decisions

84. At the outset, the Tribunal should recall the well-settled principle that whenever the Administration invokes a reason for making a certain decision, this justification has to be supported by the facts (*Syed* 2010-UNAT-061). Likewise, it is trite law that a proper exercise of discretion requires the decision-maker to

adequately weigh all relevant considerations, and not to take any irrelevant, improper or erroneous factors into account.

85. As per the June 2014 letters, the contested decisions were grounded on two reasons: the limitation of the Applicants' appointments to service with ICTY and the finite nature of ICTY mandate.

86. As regards the first ground, there is no question that the Applicants' respective letters of appointment stipulate that their service shall be limited to ICTY. It is noticeable, though, that the legal consequences of such limitation are not properly specified in the contract itself or elsewhere. Since the Respondent claims that, under the staff selection system in place, this limitation prevents the ASG/OHRM to reassign the Applicants outside ICTY and MICT, it is necessary to examine the administrative issuance laying down said staff selection system, namely ST/AI/2010/3.

87. Out of two provisions in ST/AI/2010/3 relating to reassignment, i.e., secs. 2.5 and 11.1, the former is of no value to the present analysis as it concerns exclusively reassignment within an office/department. Instead, sec. 11.1 (Placement authority outside the normal process) of the administrative instruction is relevant, as it provides that:

> 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:
>
> …
>
> (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) (emphasis added).

88. It is noteworthy that abolition of posts or funding cutbacks are exactly the scenarios that could potentially affect the Applicants, as ICTY staff, putting them in need of alternative placement. Since nowhere in the instruction it is suggested that said provision shall not apply to staff holding a contract with service limited to a certain department or office (in the instant case, ICTY), the Tribunal sees no

compelling reason to exclude the possibility for the ASG/OHRM to potentially reassign the Applicants on the basis of sec. 11.1(b) of ST/AI/2010/3, e.g., in case of abolition of their post. Accordingly, although the Tribunal understands that this rule was conceived to be applied on an exceptional basis, and even conceding that locally recruited staff are subject to specific geographical restrictions, it appears that, contrary to the Respondent's contention, there is no absolute legal bar for the ASG/OHRM to move any of the Applicants, who held appointments limited to ICTY, to a different entity on the basis of the above-referenced provision if their posts were to be abolished.

89. In any event, para. 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.

90. Given the use of the word "may", it is the Tribunal's view that this provision allows, but does not oblige, the Administration—when converting a fixed-term appointment limited to a certain office/department—to transfer such contractual limitation to the (newly granted) permanent appointment. Also, neither the Guidelines nor other applicable rules prohibit the granting of a non-limited permanent contract upon conversion of a limited fixed-term appointment. It follows that para. 10 of the Guidelines cannot be interpreted as to mean that for a staff member who previously held a limited fixed-term appointment the only possibility to receive a permanent appointment is that the latter be subject to the same limitation. 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.

91. Hence, although the Applicants' fixed-term appointments were limited to ICTY/MICT, the ASG/OHRM could have elected to grant ICTY staff permanent contracts not limited to service with ICTY/MICT, and would have then been free to reassign them without any impediment.

92. The limitation of service to ICTY/MICT was therefore incorrectly asserted to be an obstacle to the Applicants' reassignment and, ultimately, to the conversion of their appointments to permanent.

93. In this light, it turns that, out of the two grounds put forward by the Administration, the limitation of the Applicants' fixed-term appointments to ICTY has been established to carry little weight. Therefore, the ICTY limited mandate finally stands as the only remaining reason behind the contested decisions.

Exclusive reliance on the downsizing of ICTY

94. The ASG/OHRM is entitled to take a finite mandate and a downsizing situation into consideration in making a decision on the conversion of ICTY staff. Indeed, former staff rule 104.13 and sec. 2 of ST/SGB/2009/10 provide a legal basis for giving due weight to "all the interests of the Organization". In this connection, already in April 1997, General Assembly resolution 51/226 (para. 3, section V) made clear that the "operational realities of the organizations" are considerations that the Organization may legitimately bring into the equation in making decisions such as the ones impugned, in the following terms:

> five years of continuing service … do not confer the automatic right to a permanent appointment, and … other consideration, such as outstanding performance, the *operational realities of the organizations* and the core functions of the post, should be duly taken into account … (emphasis added)

95. The fact that a certain entity is downsizing and expected to end its operations is, without a doubt, a relevant operational reality.

96. Furthermore, the Organization disposes of broad discretion to determine what the interests of the Organization are and in weighting it up together with other circumstances. Also, the Tribunal should not lightly interfere with the Secretary-General's exercise of discretion, although his discretionary power is not unfettered and, notably, may not be exercised in a capricious, arbitrary or abusive manner (see *Sanwidi* 2010-UNAT-084).

97. Against this background, the Tribunal tends to accept the Administration's position that the finite mandate of ICTY as well as of MICT, is a factor that can be validly considered in deciding on the conversion of the Applicants' appointment to permanent. However, although it is acceptable to give adequate weight to the operational realities of ICTY, including its finite mandate, the Appeals Tribunal, nevertheless, specifically ruled in Judgment *Ademagic et al.* 2013-UNAT-359 that relying *exclusively* on this circumstance amounts to an abuse of discretion.

98. On this crucial point, the Tribunal has determined that the motive to refuse to convert to permanent the appointments of each of the 246 Applicants was invariably the same and came down to the finite mandate of ICTY and its downsizing (paras. 84 to 93 above), and, additionally, that no other relevant circumstances, specific to each individual, were considered (paras. 79 to 83 above). It thus appears evident that the predominant factor behind the impugned decisions was, yet again, the finite mandate of ICTY.

99. This is the very same factor on which, as per the Appeals Tribunal's ruling, the Administration had wrongfully relied upon to the exclusion of any other considerations. Hence, by again solely relying on this factor and overriding all others, the Organization failed to abide by the clear and binding instructions contained in Judgment *Ademagic et al.* 2013-UNAT-359.

100. In summary, the impugned decisions are unlawful on several accounts, but primarily on the following two:

a. The Applicants were not considered individually in light of their proficiencies, qualifications, competencies, conduct and transferrable skills; and

b. The decisions were exclusively based on the limited mandate of ICTY, to the exclusion of all other relevant factors.

Remedies

101. Art. 10.5 of its Statute delineates the Tribunal's powers regarding the award of remedies, providing:

> As part of its judgement, the Dispute Tribunal may order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation, and shall provide the reasons for that decision.

102. The Tribunal has to consider the remedies sought by the Applicants—listed in para. 2 above—in light of its competencies as provided for in the above-referenced article of its Statute.

Rescission of the contested decisions

103. Having found that they are tainted with serious flaws, the Tribunal rescinds the impugned decisions in accordance with art. 10.5, subparagraph (a) above.

104. Pursuant to the same provision, the Tribunal must set an amount that the Respondent may elect to pay as an alternative to rescission where the decisions at issue concern appointment, promotion or termination. In this respect, the Tribunal takes note that the Appeals Tribunal, which is bound by an analogous obligation under the terms of art. 9.1(a) of its own Statute, has in no case set an alternative compensation upon rescinding a decision related to conversion to permanent appointment (*O'Hanlon* 2013-UNAT-303, *Malmström et al.* 2013-UNAT-357, *Longone* 2013-UNAT-358, *Ademagic et al.* 2013-UNAT-259, *McIlwraith* 2013-UNAT-360, *Branche* 2013-UNAT-372). This implicitly indicates that the Appeals

Tribunal does not view decisions on conversion to permanent appointment as ones concerning appointment. Therefore, this Tribunal refrains from setting an amount that the Respondent may elect to pay as an alternative to rescission, as it had done in previous judgments on this matter.

Specific performance

105. The Applicants pray the Tribunal to convert their respective appointments into permanent ones, or, in the alternative, to grant them the equivalent to the indemnities that would be applicable in case of termination of a permanent appointment.

106. In support of their request, the Applicants contend that the ASG/OHRM did effectively exercise her discretion and that, in so doing, she acknowledged that the Applicants did in fact meet all the conditions to receive a permanent appointment—notably by stating in the decision letters that each of them had demonstrated the highest standards of efficiency, competence and integrity, as well as their suitability as international civil servants by their qualifications, performance and conduct—and that the one circumstance preventing them from having their contracts converted was the limited mandate of ICTY. They add that, if the matter is again remanded to the Administration, they will not stand a true chance of being fairly considered, as the Administration has unequivocally shown, twice, its unwillingness to grant any of them conversion as long as they serve in a downsizing institution.

107. The Tribunal reiterates that the contested decisions are discretionary in nature, and that it is not for the Tribunal to exercise the discretionary authority vested on the Secretary-General by substituting its own assessment for that of the competent official (*Sanwidi* 2010-UNAT-084, *Abbassi* 2011-UNAT-110). It is part of the concept of discretion that its exercise may lawfully result in decisions that are different from what the Tribunal might have preferred. Therefore, where the judicial review concerns the exercise of discretion, the Tribunal can order specific performance such as the one requested in the present case solely in the rare hypothesis where the result of the exercise of discretion is narrowed down in

such a way as to only have one legally correct outcome. This is not the case in the application at hand.

108. The Tribunal has concluded, precisely, that the ASG/OHRM had at no point conducted an individualised review of each of the 246 Applicants' competencies and merits. As a result, she has not, to date, put each Applicant's individual competencies and merits in the balance together with all other relevant factors, including the ICTY/MICT operational realities. Until this exercise has been properly performed, its outcome remains open for each of the Applicants. If the Tribunal were to grant all of them a permanent appointment, it would be tantamount to prejudging the outcome of their individual consideration for conversion and substituting its review to that of the Secretary-General, something that the Tribunal is neither allowed nor prepared to do.

109. Rather, aware that with the rescission of the contested decisions, the conversion process initiated in 2009 remains uncompleted, the Tribunal considers it appropriate to remand the matter anew to the ASG/OHRM for reconsideration of each of the Applicants for conversion, in accordance with the requirements of fairness and due process, as specified by the Appeals Tribunal. It follows that the Applicants' appointments may still be converted. Hence, the loss of opportunity they suffered may potentially be redressed.

110. The above notwithstanding, mindful of the inordinate length that the process and the litigation have taken so far, it is only fair and necessary that this overdue consideration for conversion be completed and the final decision notified to the Applicants within 90 days of the issuance of this Judgment.

111. In the Tribunal's view, the above deadline is reasonable as it should now be abundantly clear that:

a. no eligibility assessment must be conducted; and

b. the circumstances to be taken into consideration are those of the fall of 2011.

112. It follows that all information and documents needed are already in the Applicants' individual files. In consequence, no time shall be devoted to gather either of them for this would not only be superfluous but, in fact, improper.

Moral damages

113. By resolution 69/203, adopted on 18 December 2014 and published on 21 January 2015, the General Assembly amended art. 10.5 of the Tribunal's Statute to read as follows:

> As part of its judgement, the Dispute Tribunal may *only* order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation *for harm, supported by evidence*, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation, and shall provide the reasons for that decision (emphasis added).

114. The present application was filed on 11 December 2014. Hence, it predates the above amendment to the Statute. The Appeals Tribunal has consistently upheld the well-known principle that changes in law may not be retroactively applied (*Robineau* 2014-UNAT-396, *Nogueira* 2014-UNAT-409, *Hunt-Matthes* 2014-UNAT-444). This principle has been followed in contexts where the amendment, if applied, would have played to the applicants' advantage; it must *a fortiori* prevail where the amendment would be in their disfavour.

115. The Respondent's argument that the amendment did not introduce any actual change but merely clarified the original meaning of art. 10.5 of the Tribunal Statute is at odds with the Appeals Tribunal's ruling in *Asariotis* 2013-UNAT-309. In this judgment, the Appeals Tribunal provided its authoritative

interpretation of the grounds for awarding moral damages, and held that a fundamental breach of a staff member's rights sufficed to justify such an award without further proof of harm.

116. It is, therefore, not tenable to argue that art. 10.5 of the Statute, in its version prior to the above-referenced amendment, did not leave room for granting moral damages based on the sole ground of a violation of the rules.

117. For the reasons outlined above, it follows that the recent amendment to art. 10.5 of the Tribunal's Statute is not applicable to the instant case. Accordingly, the *Asariotis* jurisprudence may be relied upon in setting the appropriate compensation in the present cases. In this connection, the Appeals Tribunal considered in Judgment No. 2013-UNAT-359 that:

> [T]he substantive due process breaches in the ASG/OHRM's decision-making meet the fundamental nature test established in *Asariotis* and, as such, of themselves merit an award of moral damages.

118. Based on this finding by the Appeals Tribunal, and given that the breaches identified in the present case are essentially the same as those that vitiated the first conversion exercise, it is warranted to grant the Applicants compensation for moral injury.

119. In calculating the *quantum*, this Tribunal has to take into account—like the Appeals Tribunal did—the satisfaction granted by remanding the impugned decisions for re-consideration. The Tribunal also deems that for the purpose of the present proceedings, moral damages are meant to compensate only the harm resulting directly from the decisions under review in this very application, and not any harm suffered prior thereto, since the commencement of the conversion process. Indeed, the harm occasioned by, and up until, the first refusal of conversion—in the fall of 2011—was addressed in Judgment *Ademagic et al.* 2013-UNAT-259 and compensated through the damages ordered therein.

120. After carefully pondering the harm caused strictly by the contested decisions, in line with the ruling in *Asariotis*, as well as the outstanding reconsideration of the Applicants for conversion, and in light of the prohibition of punitive damages under art. 10.7 of the Statute, the Tribunal quantifies the moral damages to be awarded at EUR3,000 per Applicant.

Conclusion

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

a. The contested decisions denying each of the Applicants a conversion of their fixed-term appointment to a permanent appointment are hereby rescinded;

b. The contested decisions are, therefore, remanded to the ASG/OHRM for retroactive individualised consideration of the Applicants' suitability for conversion of their appointments to a permanent one as mandated by ST/SGB/2009/10, exercising discretion in conformity with the instructions received in Judgment *Ademagic et al.* 2013-UNAT-359 and the present Judgment. Said individualised consideration must be completed for all Applicants within 90 days of the issuance of this Judgment;

c. Each Applicant shall also be paid moral damages in the amount of EUR3,000;

d. The aforementioned compensations shall bear interest at the United Nations prime rate with effect from the date this Judgment becomes executable until payment of said compensations. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable; and

e. All other claims are rejected.

(*Signed*)
Judge Thomas Laker
Dated this 17th day of December 2015

Entered in the Register on this 17th day of December 2015
(*Signed*)
René M. Vargas M., Registrar, Geneva