UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2014/116
Judgment No.: UNDT/2015/117
Date: 17 December 2015
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

FEATHERSTONE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

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

Introduction

1. By application filed on 29 December 2014, the Applicant, a retired staff member of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), contests the Assistant Secretary-General for Human Resources Management ("ASG/OHRM") decision of 17 June 2014 denying her a conversion of her fixed-term appointment into a permanent appointment.

2. By way of remedies, she requests:

a. Rescission of the 17 June 2014 decision of the ASG/OHRM;

b. Granting of a retrospective conversion to permanent appointment effective June 2009 or, in the alternative:

i. conversion of her fixed-term appointment to a permanent one limited to the ICTY effective June 2009, or

ii. ordering the ASG/OHRM to issue a written declaration to the effect that the Applicant was entitled to conversion to a permanent appointment prior to termination of employment;

c. Compensation equal to the applicable indemnity associated with a permanent appointment, plus the monetary equivalent of any other benefits which would have accrued to her had the permanent appointment been effective as at the end of her service (i.e., 31 December 2011);

d. Compensation for bias and discrimination suffered, unfair treatment and loss of recognition and further career advancement possibilities in the period from June 2009 to 31 December 2011, in an amount to be determined;

e. Compensation for losses caused by the continuing procedural delay occasioned by the ASG/OHRM in failing to observe the relevant procedures and to ensure due process for the second time, in the amount of three

months' net base salary pursuant to art. 20 of the Tribunal's Rules of Procedure;

f. Damages for moral distress and emotional injury occasioned by the denial of due process from 2009 to date, in the amount determined by the Tribunal concomitant with any damages awarded to other applicants in a similar position; and

g. Any other relief that the Tribunal deems just and proper.

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 concerned staff members, including the Applicant, 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. The Applicant took early retirement effective 31 December 2011.

27. After requesting management evaluation of the decision not to convert her appointment to permanent, and being informed that it had been upheld by the USG for Management, the Applicant filed an application before the Tribunal on 16 April 2012, which by Order No. 80 (GVA/2012) of 4 May 2012was

consolidated, at the Applicants' request, with that of other 261 staff members concerned by analogous decisions,.

28. 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.

29. On appeal, the Appeals Tribunal vacated *Ademagic et al.* 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.

30. 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.

31. 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".

32. 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. The Applicant did not submit further information.

33. 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.

34. ICTY reviewed individual files of each of its staff members under re-consideration to assess their eligibility and their suitability and, on 14 February 2014, transmitted to OHRM the files, together with its recommendations on each concerned staff member. For nearly all of them, ICTY recommended that they be offered a permanent appointment; the recommendation memoranda stated in square brackets that "[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.

35. Between February and May 2014, the files of each staff member under re-consideration, including the Applicant, 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 shows that although OHRM had initially given a positive recommendation concerning three ICTY staff members other than the Applicant, it later reversed it before transmitting it.

36. 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.

37. In May and June 2014, the relevant New York CR bodies reviewed all the files of the Applicants. The CR Committee (staff at the P-2 to P-4 levels) recommended that none of the Applicants be granted permanent appointments, whereas the CR Board recommended that nine staff members at the P-5 and above level, amongst whom was the Applicant, be granted a permanent appointment not limited to ICTY.

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

a. Applicants who were active ICTY staff members as at the date of the contested decisions;

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.

39. By individual letters dated 13 to 19 June 2014, and received shortly thereafter, all re-considered staff members 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 Applicant was informed by such a letter dated 17 June 2014. The language and structure of the respective letters were remarkably similar among them, 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 staff members 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.

40. On 4 July 2014, the Applicant, as well as all other applicants affected by Judgments *Malmström et al.* 2013-UNAT-257 and *Ademagic et al.* 2013-UNAT-259, filed before the Appeals Tribunal a "Renewed Motion for an Order Requiring Respondent to Execute the Judgment", which was rejected by Judgment No. 2014-UNAT-494, noting that the Appeals Tribunal's orders had been executed inasmuch as payment of moral damages had been effected, and a new conversion process had been completed. The Appeals Tribunal further noted that recourse for complaints regarding the conversion process undertaken subsequent to the Appeals Tribunal's rulings was "*not* to be found in an application for execution but rather in Staff Rule 11.2 … [that] provides the mechanism whereby the complained-of decisions of the ASG/OHRM [could] be challenged by the affected staff members" (emphasis in the original).

41. The Applicant requested management evaluation of the June 2014 decision (see para. 39 above) on 18 August 2014. By letter dated 29 September 2014, the Applicant was informed that the USG for Management had upheld the contested decision.

42. The present application was filed on 29 December 2014.

43. After seeking an extension of time, granted by Order No. 14 (GVA/2015) of 9 January 2015, the Respondent filed his reply on 2 March 2015.

44. 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.

45. By Order No. 181 (GVA/2015) of 30 September 2015, the Tribunal convened a hearing on the merits of this and nine other cases challenging analogous decisions. On 21 October 2015, the Applicant moved for a postponement of the hearing and the disclosure of submissions filed in the other aforementioned nine cases. This motion was rejected by Order No. 208 (GVA/2015) of 21 October 2015. The scheduled joint hearing took place from 27 to 29 October 2015, with the Applicant participating via video-conference.

Parties' submissions

46. The Applicant's principal contentions are:

a. The Applicant is one of those few who already held appointments at the P-5 level in 2009, and for whom the CR Board recommended conversion into permanent appointment in May 2014. At the time she met the eligibility requirements, namely 19 January 1999, ICTY was not downsizing;

b. The Appeals Tribunal in Judgment No. 2013-UNAT-359 set out overriding principles which were not mere guidelines, but binding requirements upon the ASG/OHRM in making the contested decision, to wit:

i. Retroactive consideration of the Applicant's suitability for conversion to permanent appointment;

ii. Fair, proper and transparent consideration;

iii. To give "every reasonable consideration" to the Applicant as a staff member demonstrating proficiencies, competencies and transferrable skills rendering her suitable for a career appointment; and

iv. Written, reasoned, individual and timely decision.

c. The Appeals Tribunal ordered that the re-consideration of the Applicant's conversion be "retroactive"; this means not merely retrospective implementation but an evaluation based on the information provided and procedures applicable to all qualifying staff as at June 2009 as per ST/SGB/2009/10. The suitability of each staff member for conversion had to be determined based upon the information submitted in a standard memorandum form (P.324) provided for in the Guidelines. Introducing a new procedure and seeking additional information in February 2014 amounts to circumventing the Appeals Tribunal's Judgment and

ST/SGB/2009/10. Staff members in other parts of the Organization had been converted to a permanent contract without having to provide such information years after the original conversion exercise. No additional material was needed or was indeed appropriate to be submitted. The only information relevant for the decision was that which was available to the ASG/OHRM since June 2009;

d. The entire path taken by the Administration was discriminatory, starting with the setting up of the online portal to channel the process and the inclusion in P.324 of a question on whether the staff member was serving in a downsizing organization. Despite the Appeals Tribunal's finding that ICTY staff were discriminated against in the original conversion exercise because of the nature of their entity of employment, in June 2014 the ASG/OHRM repeats and compounds the bias and discrimination;

e. The ASG/OHRM has again relied solely upon the finite mandate of ICTY and the limitation of the Applicant's appointment to service with ICTY. The only reasons given relate to the current anticipated closing date of ICTY (May 2017) and the assertion that the post encumbered by the Applicant had a maximum budgetary duration to 31 December 2013;

f. The "operational realities" requirement stems from General Assembly resolution 51/226 (1996), but is not specifically reiterated in ST/SGB/2009/10, over ten years later, which foresees nonetheless that all interests of the Organization must be taken into account. No explanation has been given as to why this factor was given so such weight as to override all others. Beyond complying with the applicable law, the Administration has a duty to act in good faith to all of its staff. In any case, the assessment places undue reliance upon alleged operational realities by simply asserting them without explanation or support;

g. Superficially, the contested decision was communicated in writing, addressed to the Applicant personally, contains some personal details and some reasoning and was provided within the extended timeframe set by the

Appeals Tribunal. However, on closer examination, identical letters were sent to each and every ICTY staff member considered. This indicates that the concerned staff members were not given any individual consideration, but a standard response that was sent to all of the ICTY staff. The same was made at the stage of the review by MEU;

h. This lack of individual consideration strongly suggests that the ASG/OHRM persisted in her policy of bias and discrimination against all ICTY staff members, and that the CR Board's recommendation was set aside because it did not match the pre-determined decision of the ASG/OHRM;

i. The ASG/OHRM completely disregarded the positive recommendation of the CR Board, concluding without any explanation that this recommendation "must be set aside". This in itself is further indication of pre-existing bias against converting ICTY staff. The ASG/OHRM set aside the CR Board's positive recommendation not only for the Applicant but for all staff members and none of them was granted conversion to permanent appointment;

j. The CR Board positive recommendation means that it was satisfied that the Applicant met the criteria set out in ST/SGB/2009/10, taking into consideration all interests of the Organization. On the value of CRB recommendations, *Corbett* UNDT/2011/195 held that whilst not binding on management, "[t]heir recommendations are not to be lightly set aside and, if they are to be disregarded by management, there should be good and cogent reasons for doing so", and leave an audit trail for transparency and accountability;

k. The 17 June 2014 letter in fact confirms the Applicant's individual suitability for a permanent appointment, inasmuch as it confirms that her qualifications, performance and conduct meet the standards required, although a further requirement is applied in a misguided attempt to justify the decision. ST/SGB/2009/10 does not require demonstration of (unspecified) "transferable skills" for conversion to permanent appointment;

l. In any event, ICTY staff members have repeatedly shown that they possess transferrable skills of considerable benefit to the Organization as a whole. The Applicant, in particular, brought her previously acquired transferrable skills into ICTY, and continued to develop them during her long service there. There is no indication that OHRM reviewed the Applicant's transferrable skills; no mention has been made that already by 2009, the Applicant was one of the longest serving staff members, the longest serving legal officer, possessing unique institutional knowledge of the formation, procedures and processes of ICTY; the information provided to the ASG/OHRM should have included details on relevant matters such as the Applicant's extensive legal background, varied international experience and language skills;

m. The subject-matter of judicial review in this case is the impugned decision, not the whole related file;

n. The matter did not become moot following the Applicant's retirement. While the Respondent in his pleadings relied on her separation from service to justify the contested decision, this fact was put forward as a reason in the decision letter of 17 June 2014. In fact, the first denial of conversion is a major factor in taking early retirement; had she found personal recognition through the granting of her appointment's conversion, she would have stayed until the mandatory retirement age;

o. Art. 20 of the Tribunal's Rules of Procedure may give the Tribunal grounds to award the Applicant compensation prior to its determination of the merits of the case for losses caused by the procedural delay occasioned by failures and improper conduct of the ASG/OHRM;

p. An award of compensation in lieu of effective conversion as specific performance is possible. In non-selection cases, it is necessary to assess the compensable harm to a candidate, to calculate the probability of him or her being recommended for selection but for the breaches, thereby determining the loss of chance. In the present case, the Applicant's chances of being recommended for conversion, absent the breach of due process, were very

high, given the assessment of the CR Board. Moreover, all ICTY staff members have been victims of an internal dispute within the Administration as to the standing of ICTY staff members which has been ongoing since its inception;

q. Since the lengthy and flawed process has been deeply distressing and frustrating, and doubly so given the latest repetition in June 2014 of the abuse identified by the Appeals Tribunal, the Applicant is entitled to damages for stress and anxiety caused by the violations of her rights.

47. The Respondent's principal contentions are:

a. The Applicant has no right to conversion of 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, which the Applicant in the case at hand has not met;

c. The re-consideration of the Applicant for conversion was procedurally correct. The Organization followed the procedures set out in ST/SGB/2009/10 and the Guidelines and accorded the Applicant substantive due process. The Organization undertook a multi-step process to individually consider the 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. The invitation to the

Applicant to submit additional information and documents cannot be regarded as adverse to her right to substantive due process;

d. The Applicant received individual, full and fair consideration for conversion to a permanent appointment. At the end of the process, the Applicant received a written, reasoned and individual letter informing of the ASG/OHRM resulting decision. The ASG/OHRM gave the Applicant reasonable consideration; she reviewed each single case, and the record demonstrates that all relevant criteria were considered. The individualised consideration stems from the file containing the documents that led to the decision. There is no basis for conducting a review of the impugned decision 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;

e. 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. Her exercise of discretion was reasonable in view of her assessment of all the relevant criteria, including the operational realities of the Organization;

f. The individual circumstances of the Applicant were taken into account, including her competencies and skills, which constitute indeed compelling reasons for her appointment's conversion. The fact that six broad categories were made should not be seen as a sign that other circumstances were not looked at. 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 Applicant has not identified how staff members in similar situations were treated differently. The Administration gathered and reviewed records on each Applicant's suitability as an international civil servant and fulfilment of the highest standards of integrity, competence and efficiency, and took into

account the recommendations by ICTY, OHRM and CR bodies following their separate consideration of each Applicant;

g. The form of the letter conveying the decision does not establish that the ASG/OHRM failed to apply the relevant criteria; she did consider if the Applicant had transferrable skills. She also noted that she did not have authority to place the Applicant in a position outside ICTY/MICT. The Applicant is not entitled to a notification in a particular form or length. 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 Applicant "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 shown in the record of the CR bodies;

h. At the time of the contested decision, the Applicant had separated from the ICTY upon early retirement. Accordingly, she was not suitable for conversion. There was no continuing need for the Applicant's services as she had retired and, as such, there was no expectation of open-ended employment for her with the Organization;

i. 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 ("ICSC") has held that a permanent appointment should not be granted "where the mandate is finite and there is no expectation of open-ended employment". The purpose of permanent

appointments, as articulated by the General Assembly and ICSC, would not have been served by granting the Applicant a permanent appointment;

j. While the implementation of the decision 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 Applicant's motions for execution;

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

l. The claim that the Administration relied on the finite mandate of ICTY/MICT to the exclusion of all other criteria is without merit. The fact that at the end of the re-consideration exercise no ICTY staff member was granted a permanent appointment does not demonstrate that a policy of refusing conversion to ICTY staff because they work in a body with a finite mandate, but only that they had not been competitively selected for a post discharging core functions of the Organization. The ASG/OHRM has recently granted retroactively a permanent appointment to a staff member who had served in a downsizing entity;

m. The recommendations of the CR Board were taking into account, but they are not binding on the ASG/OHRM, who has the final say (*Corbett* UNDT/2011/195). The fact that she disagreed with the CR Board's recommendation does not indicate, let alone establish, that her decision was biased or predetermined. The ASG/OHRM provided reasons for her decision not to accept the recommendation. The Applicant's case is distinguishable from *Corbett* in that the latter concerned conversion from

probationary to permanent contract; an exceptional extension of her probationary appointment for performance issues breached the former Staff Rules. The nature and procedure of conversion differs between probationary and fixed-term appointments;

n. The fact that the decision letter provided similar reasons in part to other ICTY staff members who were similarly situated does not prove discriminatory intent. To the contrary, the principle of equality implies that those in equal situations should be treated alike (*McCluskey* UNDT/2012/060). The Applicant was not entitled to receive notification of the contested decision in a particular form or with a particular length;

o. The length of her service does not give the Applicant an entitlement to a permanent appointment. She had no expectancy of conversion under the terms of former staff rule 104.12(b)(iii) and General Assembly resolution 51/266. Neither did her P-5 level confer her a special status with regard to conversion to permanent appointment;

p. It is not for the Tribunal to proceed to an assessment of the Applicant's transferrable skills. In any event, the issue became moot following the Applicant's early retirement;

q. The Organization complied with the time limits to complete the reconsideration process as established by the Appeals Tribunal in Judgment No. 2013-UNAT-359 and Order No. 178 (2014);

r. The Applicant is not entitled to any relief. As she had no expectation of conversion to a permanent appointment, she is not entitled to specific performance, nor to compensation at the amount of a termination indemnity applicable to permanent contracts. The purpose of an award is to place an applicant in the position he or she would have been in had no breach of contractual obligations occurred. Furthermore, the Tribunal is not in a position to assess the Applicant's chances of conversion. She has not sustained any pecuniary damage, since she took retirement;

s. Award of moral damages is only possible if established that the Applicant actually suffered damages, which she has not demonstrated.

Consideration

Preliminary matter

48. The Applicant requested in her application, as a preliminary step, the disclosure of all relevant documents from the meeting of the Central Review Board. After review of the substantive documentation disclosed by the Respondent as annexes to his reply, the Tribunal notes that the above-referred documents constitute the bulk of the record of the re-consideration process. As a result, it is satisfied that the Applicant has been provided with the necessary materials to make her case.

Legal framework of the contested decision

49. Unlike most of the decisions made by the Administration, the one challenged in this case stems 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 decision on the conversion of the Applicant's fixed-term appointment 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 decision:

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 Applicant (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 decision challenged in this case is the denial to convert the Applicant's appointment into a permanent

one, made by the ASG/OHRM in June 2014. This specific decision is thus the subject of the Tribunal's scrutiny, nothing more and nothing less.

54. This administrative decision must and does speak for itself. In particular, the previous refusals of conversion of the Applicant's appointment in the fall of 2011, although factually related, is beyond the scope of review of this application, as are any *post facto* explanations of the decision at issue. Therefore, the focus of the Tribunal's review will be on ascertaining whether the impugned decision, as it is couched in the 17 June 2014 letter sent to the Applicant, was made in conformity with the directions given by the Appeals Tribunal in Judgment *Ademagic et al.* 2013-UNAT-359.

Procedural legality of the decision

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.

56. The imprecise and defective drafting of the bulletin leaves excessive room for doubt about the competent human resources office. After consideration, the Tribunal is of the view that, in entrusting the review of the ICTY staff to OHRM, the Administration adopted a justifiable approach and, in any case, it finds no reason to conclude that the Applicant was prejudiced as a result of this. Nonetheless, the Tribunal cannot but regret the shortcomings of ST/SGB/2009/10, which gave rise to uncertainty on crucial points of the procedure in such an important matter.

Substantive legality of the decision

Structure of the decision

57. 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.

58. 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.

59. 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.

60. 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 letter of 17 June 2014 reformulates 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 letter enunciates four criteria, to wit:

a. Completion of five years of continuous service on fixed-term appointments. In fact, under this item, the letter of the ASG/OHRM also addresses whether this requirement was met at the time the Applicant 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.

61. 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.

62. So structured, the letter conveying the impugned decision creates 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.

63. 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

64. 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 concerned staff members' 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.

65. In spite of that, the Administration proceeded to 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 eligibility of the staff members to be reconsidered, and the new assessment of the Applicant that ensued was reflected in the decision letter, under the criterion referred to in para 60.a above.

66. In re-assessing the Applicant's eligibility, the Administration disregarded the Appeals Tribunal's instructions.

Retroactivity

67. 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 concerned staff members' suitability. Contrary to what the Respondent holds, implementing the resulting decisions

retrospectively is not sufficient to meet 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 decision was reached, i.e., mid-June 2014, and not be limited to those known at the time of the initial conversion exercise.

68. 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 entitlement to receive a proper suitability determination 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 the second exercise do not impact on the right of each concerned individual to be considered for conversion.

69. 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 date in its Judgment.

70. 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 each affected staff member's position as it would have been but for the unlawful decisions. Consequently, for the purpose of the re-consideration exercise, the Applicant's suitability should have been appraised by reference to the relevant circumstances as they stood at the time of the first impugned refusal to convert her appointments, i.e., in the fall of 2011.

71. 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 Applicant's suitability for conversion.

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

72. 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 staff member that underwent such exercise, in particular, of the 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 concerned staff member, but, at best, their categorisation.

73. The Respondent also asserts that the ASG/OHRM examined the proficiencies, competencies and transferrable skills pertaining to the Applicant, as she did for each one of the numerous individuals under review. Nevertheless, the Tribunal cannot but note that the reasons given for not granting the conversion were identical for the other nearly 260 ICTY staff members reviewed following Judgments *Malmström et al.* 2013-UNAT-357 and *Ademagic et al.* 2013-UNAT-259. 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 respective merits, competencies or record of service.

74. The only time when the expression "transferable skills" appears in said letters is in the sentence "I have also considered that though you may have transferrable skills, your appointment is limited to service with ICTY". Otherwise said, like for the numerous other individuals concerned, the ASG/OHRM did not address, and even less pronounce herself on, the question of whether the Applicant possessed such skills, let alone which ones and to what extent.

75. In view of the foregoing, the Tribunal finds that the contested decision does not reflect any meaningful level of individual consideration of the Applicant. Even if it were to follow the Respondent's submission that the individualisation transpires from the record of the process (mainly the individual files), the Tribunal observes that these records do not contain any indicia of individual consideration, either. The Applicant's individual file, and in particular the documents detailing the analysis of her candidature 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 she discharged in ICTY or her placement in the comparative review exercises conducted in the context of ICTY downsizing). This is particularly noticeable from the form on which OHRM reviewers recorded their remarks and recommendations on the Applicant; moreover, when seeing that form not in isolation but in light of those of her numerous colleagues reviewed in the same exercise, it becomes clear that they refer exclusively to the particulars of the downsizing of ICTY, and to the respective dates of end of contract or expected separation.

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

Reasons relied upon in making the contested decision

77. 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.

78. As per the 17 June 2014 letter, the contested decision was grounded on two reasons: the limitation of the Applicant's appointment to service with ICTY and the finite nature of ICTY mandate.

79. As regards the first ground, it is undisputed that the Applicant's letter of appointment stipulated that her service shall be limited to ICTY. However, 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 Applicant outside ICTY and MICT, it is necessary to examine the administrative issuance laying down said staff selection system, namely ST/AI/2010/3.

80. 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).

81. It is noteworthy that abolition of posts or funding cutbacks are exactly the scenarios that could have potentially affected the Applicant, as ICTY staff, putting her 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 reassign the Applicant on the basis of sec. 11.1(b) of ST/AI/2010/3, e.g., in case of abolition of her 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.

82. 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.

83. 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. 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 same.

84. Hence, although the Applicant's fixed-term appointment was limited to ICTY, the ASG/OHRM could have elected to grant her a permanent contract not limited to service with ICTY/MICT, and would have then been free to reassign her without any impediment.

85. The limitation of service to ICTY/MICT was therefore incorrectly asserted to be an obstacle to the Applicant's reassignment and, ultimately, to the conversion of her appointment to permanent.

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

Exclusive reliance on the downsizing of ICTY

87. The ASG/OHRM is entitled to take into consideration the finite mandate and the downsizing situation of a given entity in making a decision on the conversion of its 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 Administration may legitimately bring into the equation in making decisions such as the one 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)

88. It is irrelevant that the "operational realities" consideration was not reiterated in instruments subsequently issued, which, relevantly, were of a much lower legal value in the hierarchy of norms than a General Assembly resolution (*Villamoran* UNDT/2011/126). The fact that a certain entity is downsizing and expected to end its operations is, without a doubt, a relevant operational reality.

89. Furthermore, the Administration disposes of broad discretion to determine what the interests of the Organization are and in weighting them 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).

90. 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 Applicant's 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.

91. On this crucial point, the Tribunal has determined that the motive to refuse to convert to permanent the Applicant's appointment came down to the finite mandate of ICTY and its downsizing (paras. 77 to 86 above), and, additionally, that no other relevant circumstances, specific to each individual, were considered (paras. 72 to 76 above). It thus appears evident that the predominant factor behind the impugned decision was, yet again, the finite mandate of ICTY.

92. 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.

93. In summary, the impugned decision is unlawful on several accounts, but primarily on the following two:

a. The Applicant was not considered individually in light of her proficiencies, qualifications, competencies, conduct and transferrable skills; and

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

Remedies

94. 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.

95. The Tribunal has to consider the remedies sought by the Applicant—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 decision

96. Having found it tainted with serious flaws, the Tribunal rescinds the impugned decision in accordance with art. 10.5, subparagraph (a) above.

97. 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

98. The Applicant prays the Tribunal to grant her a retrospective conversion of her appointment to a permanent effective 2009, or in the alternative, such a conversion limited to the ICTY, or, yet in the alternative, to order the ASG/OHRM to issue a written declaration to the effect that the Applicant was entitled to conversion to a permanent appointment prior to termination of employment.

99. The Applicant stressed that the ASG/OHRM acknowledged that she did in fact meet all the conditions to receive a permanent appointment—notably by stating in the decision letter that she had demonstrated the highest standards of efficiency, competence and integrity, as well as her suitability as international civil servant by her qualifications, performance and conduct—and that the one outstanding stated circumstance preventing her from having her contract converted was the limited mandate of ICTY.

100. The Tribunal reiterates, nevertheless, that the contested decision is 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.

101. The Tribunal has concluded, precisely, that the ASG/OHRM had at no point conducted an individualised review of the Applicant's competencies and merits. As a result, she has not, to date, put the 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. If the Tribunal were to grant the Applicant a permanent appointment, it would be tantamount to prejudging the outcome of her 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.

102. Rather, aware that with the rescission of the contested decision, 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 the Applicant for conversion, in accordance with the requirements of fairness and due process, as specified by the Appeals Tribunal. It follows that the Applicant's appointment may still be converted. Hence, the loss of opportunity suffered may potentially be redressed.

103. Notwithstanding, mindful of the inordinate length that the process and the litigation involved 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 Applicant within 90 days of the issuance of this Judgment.

104. 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.

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

Material damages

106. Regarding the Applicant's request for compensation equal to the termination indemnities applicable to permanent appointment, and any other "benefits which would have accrued to her had the permanent appointment been effective as at the end of her service", the Tribunal is not prepared to award them essentially for the same reasons for which it denied specific performance. Indeed, such an award would amount to prejudging that the Applicant would have had her appointment converted to permanent, a matter which, as noted above, remains open and has been remanded for consideration.

107. No award is to be made either for loss of career advancement possibilities in the period from June 2009 to 31 December 2011. The type of contract held by a given staff member is quite a distinct question from the promotions and job moves that he or she is able to obtain. There is hence no causal link between any absence of career advancement of the Applicant in her last year and a half in service and the contested decision. Last but not least, there could not be any such link, as the impugned decision—not to be confused or conflated with the first denial of conversion—was made more than two years after the Applicant ceased her service upon retirement.

Moral damages

108. 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).

109. The present application was filed on 29 December 2014, in other words, after the General Assembly adopted the above amendment to the Statute, but before the resolution that promulgated it was published; thus, before the Applicant could possibly have had access to it. In this connection, staff members can only be expected to be aware of rules and procedures if and when the latter have been subject to public announcement (*Bastet* UNDT/2013/172, *Liu* UNDT/2015/078). It results, despite the absence of specific rules the entry into force of norms within the Organization, that a given rule, or its amendment for that matter, could not become binding on the Applicant until it was duly published, which in this case was not before 21 January 2015.

110. 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.

111. 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. 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.

112. 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 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.

113. 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 Applicant compensation for moral injury.

114. In calculating the *quantum* of moral damages, 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 decision 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.

115. After carefully pondering the harm caused strictly by the contested decision, in line with the ruling in *Asariotis*, as well as the outstanding re-consideration of the Applicant 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 to the Applicant at EUR3,000.

Art. 20 of the Rules of Procedure

116. No compensation is warranted on the basis of art. 20 of the Tribunal's Rules of Procedure. This provision may apply where a matter is remanded for the

institution or correction of a relevant procedure "[p]rior to the determination of the merits of a case" by the Tribunal, whereas the matter at hand, quite to the opposite, was decided upon by judgment in first instance, and even, on appeal, by the Appeals Tribunal in the aforementioned Judgment No. 2013-UNAT-359.

Conclusion

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

a. The contested decision denying the Applicant a conversion of her fixed-term appointment to a permanent appointment is hereby rescinded;

b. The contested decision is, therefore, remanded to the ASG/OHRM for retroactive individualised consideration of the Applicant's suitability for conversion of her appointment 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 within 90 days of the issuance of this Judgment;

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

d. The aforementioned compensation 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