UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2015/106 UNDT/GVA/2015/107 UNDT/GVA/2015/108 UNDT/GVA/2015/109 UNDT/GVA/2015/110 UNDT/GVA/2015/111 UNDT/GVA/2015/112
Judgment No.:	UNDT/2016/026
Date:	29 March 2016
Original:	English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

GUEBEN

LAMB

LOBWEIN

MATAR

PASTORE STOCCHI

REXHEPI

VANO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Miles Hastie, OSLA

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

Introduction

1. By applications filed on 4 March 2015, the Applicants, seven staff members or former staff members of the United Nations Assistance to the Khmer Rouge Trials ("UNAKRT"), contest the decisions denying each of them conversion of their respective fixed-term appointments into permanent appointments, as notified by letters of the Officer-in-Charge ("O-i-C") Assistant Secretary-General for Human Resources Management ("ASG/OHRM"), dated 24 November 2014.

2. As remedies, they request:

a. A declaration that the contested decision was unlawful in each case;

b. A referral for accountability, given the Administration's persistent non-compliance with Tribunal judgments;

c. Damages, in an amount of USD10,000, for moral injury and as a rough estimate of pecuniary losses caused by persistent job insecurity and its effects;

d. Rescission of the contested decisions and retroactive grant of a permanent appointment to each Applicant; or in the alternative to (d);

e. Payment of an amount equal to the termination indemnity owed to each Applicant upon the years of service accrued at the time of their separation (otherwise than by retirement or future resignation); or in the alternative to (d) and (e); and

f. Payment of an amount equal to the termination indemnity owed to each Applicant based upon the years of service accrued, at the time of the judgment.

Facts

3. In 2001, the Cambodian authorities established the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), to try serious crimes committed during the Khmer Rouge regime in 1975-1979. UNAKRT is an international component of ECCC, created to assist in this endeavour pursuant to an agreement between the United Nations and the Government of Cambodia, that entered into force in 2005. UNAKRT was established as a technical assistance project administered by the Capacity Development Office ("CDO"), Department of Economic and Social Affairs ("DESA").

4. 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.

5. 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 Under Secretary-General ("USG") for Management transmitted them on 16 February 2010 to all "Heads of Department and Office" 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.

6. Having sought to be considered for conversion, in June 2010, each of the Applicants received a letter informing them that, for the purpose of the conversion exercise launched, "[u]pon preliminary review, it appear[ed] that [each of them] could be considered as having met the eligibility requirements".

7. In March 2011, CDO, DESA, submitted a list of eligible UNAKRT staff to OHRM with a negative recommendation on their conversion to permanent appointment on the basis that, although deemed eligible for consideration and having met the human resources requirements, it was not in the best interests of the Organization to convert their fixed-term appointment due to the resulting financial liability.

8. Also in March 2011, OHRM similarly gave a negative recommendation, while stating that the cases would be reviewed by the corresponding Central Review Bodies ("CRBs"), and requesting additional documentation pertaining to the UNAKRT staff members' eligibility with a view to the submission of the cases to the CRBs for review.

9. Upon completion of their review, and noting the recommendations "from the substantive Department and the respective Human Resources Office", as well as the fact "that UNAKRT was a downsizing entity", the CRBs recommended that, in the interests of the Organization and of the operational realities of UNAKRT, the Applicants not be deemed suitable for conversion and not be granted permanent appointments.

10. On 31 January 2012, each of the Applicants received a letter from the Chief, Human Resources Management, DESA, advising them that:

> [F]ollowing the decision of the [ASG/OHRM] pursuant to ST/SGB/2009/10, you will not be granted a permanent appointment.
>
> This decision was taken after a review of your case, taking into account all the interests of the Organization and was based on the operational realities of the Organization, particularly that UNAKRT is a downsizing entity.

11. After requesting management evaluation of the 31 January 2012 decisions and they being upheld, eight UNAKRT staff members who had been denied conversion to permanent appointments in the same exercise, including the seven Applicants, appealed these decisions before the Tribunal.

12. Effective 30 June 2013, Applicant Lamb was separated from service further to her resignation.

13. On 3 July 2014, one of the eight UNAKRT staff under consideration in the same exercise was transferred to the United Nations Logistics Base ("UNLB"), following his selection through the Central Review Committee for a post of Judicial Affairs Officer (P-4).

14. The Tribunal ruled upon these cases by Judgment *Tredici et al.* UNDT/2014/114 of 26 August 2014, whereby it "rescind[ed] the decision of the ASG/OHRM and remand[ed] the UNAKRT conversion exercise to the ASG/OHRM for retroactive consideration of the suitability of each applicant", and awarded the equivalent of EUR3,000 in non-pecuniary damages. Said Judgment, which was not appealed, noted that both parties had "accepted the *ratio decidendi*" of the decisions that the Appeals Tribunal had rendered shortly before with respect to staff of the International Criminal Tribunal for the former Yugoslavia ("ICTY")—having mentioned *Malmström et al.* 2013-UNAT-357 in

particular—and stated that "[t]he pertinent facts and the legal issues in the present cases are on all fours with the ICTY cases". Furthermore, in reaching the outcome quoted above, the Tribunal explicitly relied on "the guidelines set out by the Appeals Tribunal in the matter of *Malmström* 2013-UNAT-357".

15. In October 2014, a Human Resources Officer, CDO, DESA, invited the Applicants to submit any information or statement that each of them wished to have considered during the re-consideration exercise. Two of them did so.

16. DESA reviewed each Applicant's case file with a view to ascertain their eligibility, and to make a recommendation to the ASG/OHRM on the granting or not of a permanent appointment.

17. By memorandum of 11 November 2014, DESA recommended that none of the eight UNAKRT staff members under review receive a permanent appointment. Together with this memorandum, it sent to OHRM an individual fact sheet (containing information on the Applicants' respective contractual status, performance ratings and disciplinary record), a list of personnel actions and the additional information that two of the Applicants had provided.

18. Two different reviewers in OHRM examined each Applicant's eligibility and suitability for conversion, following which they submitted to the ASG/OHRM individual recommendations on the Applicants. They did not recommend any of the Applicants for conversion, on the basis that it was not in the interests of the Organization.

19. On 13 November 2014, OHRM transmitted the Applicants' cases for review by the competent CRB in New York. The Applicants were notified of the status of the re-consideration process by emails of 20 November 2014. By three different memoranda dated 18 November 2014, the Central Review Board (staff at the P-5 level and above), the Central Review Committee (staff at the P-2 to P-4 levels) and the Central Review Panel (staff below P-2 level) recommended that none of

the eight UNAKRT staff members under review be granted a permanent appointment. After that, the above-mentioned cases were forwarded to the O-i-C, ASG/OHRM, for decision.

20. By letters dated 24 November 2014, each of the seven Applicants was separately advised that, after re-consideration, the O-i-C, ASG/OHRM, had decided not to retroactively convert their appointments to permanent ones. 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 the employment status of each Applicant. All letters stated that the respective Applicant fulfilled three out of the four required criteria and that she/he did not meet the fourth criterion, 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, namely:

> I have considered that though you may have transferable skills, your appointment is limited to service with DESA/UNAKRT. 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 UNAKRT's mandate, and the limitation of your appointment to service with DESA/UNAKRT, 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.

21. Also by letter of 24 November 2014, the O-I-C, ASG/OHRM, granted a permanent appointment to the eighth staff member who was under re-consideration pursuant to Judgment *Tredici et al.* UNDT/2014/114. In her letter,

the O-i-C, ASG/OHRM was informed that this conversion was granted "[i]n recognition of the fact that [he was then] holding an appointment with UNLB and that [he had] been selected for the post in UNLB through the standard selection process".

22. On 18 December 2014, all seven Applicants requested management evaluation of the 24 November 2014 decisions, which were upheld by the USG for Management on 23 February 2015.

23. On 4 March 2015, the Applicants filed the present applications.

24. On 31 March 2015, the Applicants filed concurrent motions requesting:

a. Consolidation of all UNAKRT permanent appointment cases (i.e., Cases Nos. UNDT/NY/2012/45 to UNDT/NY/2012/51, regarding which an application for execution of Judgment No. UNDT/2014/114 was still pending, and Cases Nos. UNDT/GVA/2015/106 to UNDT/GVA/2015/112) in New York; and

b. Appointment of a panel of three judges to hear all the UNAKRT permanent appointment cases.

25. These motions were rejected by Order No. 82 (GVA/2015) of 10 April 2015.

26. Following the issuance of a series of Judgments ruling upon ten cases that concerned decisions of the same nature and raised remarkably similar issues (*Ademagic et al.* UNDT/2015/115, *Sutherland et al.* UNDT/2015/116 and *Featherstone* UNDT/2015/117), by Order No. 262 (GVA/2015) of 21 December 2015, the Tribunal asked the parties, in light of the aforementioned Judgments, to file:

a. their respective comments on whether a joint substantive hearing was needed; and

b. in the affirmative, the specific issues—factual and/or legal—to be addressed at such a hearing.

27. Upon the Tribunal's instructions, on 31 December 2015, both parties conveyed their views; in particular, the Applicants wished to provide further submissions—and, possibly, additional evidence—on remedies, whereas the Respondent intended to call witnesses to testify on:

a. The interests of the Organization, in particular the rationale for the negative recommendation by DESA, as administrator of UNAKRT; and

b. The individual consideration given to each of the Applicants by OHRM, and the basis on which the appointment of one former UNAKRT staff member was recommended for conversion to permanent appointment.

28. Pursuant to Order No. 2 (GVA/2016) of 5 January 2016, on 12 January 2016, each of the parties filed additional submissions on the issues that they had respectively identified for further discussion, and the Respondent provided the two witnesses statements, as well as the decision to convert to permanent the fixed-term appointment of one of the UNAKRT staff members that were re-considered further to Judgment *Tredici et al* UNDT/2014/114.

29. By Order No. 19 (GVA/2016) of 14 January 2016, the Tribunal determined that the additional evidence proposed, in particular the two witnesses requested, while related to relevant issues, did not bring to light new information not already contained in the documents and submissions on file. It further decided that no oral hearing was to take place, while giving both parties the chance to file their respective closing statements in writing, which they did on 21 January 2016.

Parties' submissions

30. The Applicants' principal contentions are:

a. As the Appeals Tribunal clearly ruled, the ASG/OHRM is not entitled to rely solely on the finite mandate and/or the operational realities of UNAKRT, to the exclusion of all other relevant factors. The Administration applied each of the criteria in ST/SGB/2009/10—whether stipulated under sec. 1 of said bulletin (eligibility) or under sec. 2 of same (suitability)—as *necessary* criteria, i.e., requiring satisfaction of each independently;

b. The decisions made after re-consideration are, for all intents and purposes, identical to the original ones. The Administration returned exactly the same decision that was overturned by the Tribunal, and did so for the same reasons. A "patently obvious" "blanket policy" has been applied to UNAKRT staff members because they serve in a downsizing entity. Adding text on considerations that were simply ignored does not transform the rationale for a decision;

c. The Administration's assertion that all four criteria were "weighed" is not credible. This is evidenced, *inter alia*, because:

i. There is no demonstration of how any other consideration actually affected the conclusion for any of the Applicants;

ii. An identical decision was reached across not only all of the Applicants—with different job descriptions and personnel record—but across nearly 270 staff of ICTY and the International Criminal Tribunals for Rwanda;

iii. The decisions are identical to the previous ones that the Administration took, and the reason given is intrinsically institutional and impersonal; and

iv. The decision-maker asserts a legally erroneous belief that no other conclusion is possible;

d. There is no indication that the decision-maker weighed anything other than that expressly discussed in the letter. In addition, the documentary records produced by the Respondent contain:

i. No evaluation or weighing of the supplementary documents received for the second round of consideration;

ii. No discussion of retroactive conversion;

iii. No evaluation by OHRM of the possibility of reassignment of staff members based on their transferrable skills (such as describing how many posts matching job description or job family exist within the Organization, for either competitive or non-competitive transfer);

iv. Strings of qualified and unexplained conclusions, e.g., that the distinct skills and profiles of the eight staff do not necessarily match profiles normally required for DESA's core mandated programmes;

e. There is no evidence that any of the Applicants were given a chance, based upon the strength of their records. Nor is there any explanation about how any of the Applicants could even have stood a chance, given their employing office;

f. The facts and decisions in the cases at hand, as well as the legal issues at stake, are indistinguishable from those in Judgments *Ademagic et al.* UNDT/ 2015/115, *Sutherland et al.* UNDT/ 2015/116, *Featherstone* UNDT/2015/117, where the Tribunal found, among other violations, that the applicants were given no meaningful individual re--consideration and that the downsizing nature of the institution where they served was applied as the exclusive and overriding consideration;

g. One of the former UNAKRT staff members that appealed the initial non-conversion decision was ultimately granted a permanent appointment. The only apparent reason for him alone being granted such appointment—rather than one pertaining to his personal qualifications—is that his employing office had changed, as he had been transferred to the United Nations Logistics Base ("UNLB"), in Brindisi, before re-consideration;

h. UNAKRT staff are eligible for full and fair consideration. In the present cases, there is no hint that the Applicants received an individual and considered suitability assessment (qualifications, performance, conduct, suitability as international civil servants, efficiency, competence, integrity). A formula that returns exactly the same result in all of approximately 280 cases, which was the same that the Administration had previously chosen and defended, cannot be characterised as individualised. The transferability of the Applicants' skills, both within DESA and to other offices of the Organization, was not properly assessed. Applicant Rexhepi and the former UNAKRT staff member who had been initially denied and eventually granted conversion were actually transferred to other entities of the Organization; hence, that eventuality played out in two out of eight (25%) of the original UNAKRT cases within the last two years;

i. The evaluations of each Applicant were not performed retroactively. The possibility of granting permanent appointments to former staff members—Applicant Lamb, in particular—should not have been discounted;

j. Regarding the expected closure date of UNAKRT, the ECCC Completion Plan Revision 7 reflects continuing trial operations until the end of 2017, and appeal operations until the third quarter of 2019; this is a decade after the effective date for conversion to permanent appointment as envisaged in the initial one-time conversion exercise. It is unreasonable not

to grant a permanent appointment to a staff member on the supposition that their employing office might not exist a decade after the required consideration. A ten-year span meets the threshold of "continuing need" for a staff member's functions; it was so applied in evaluating the suitability for conversion of the former UNAKRT employee who was eventually granted a permanent appointment upon his transfer to UNLB. It would also meet the higher standard applied to other applicants (albeit not enshrined in any legal instrument) of functions expected to exist for a "prolonged time";

k. The decision letters take note that the Applicants encumber posts with a maximum budgetary duration until 31 December 2015, which coincides with the end of the biennium. Since every regular budget post in the Organization must be renewed at least biennially, by parity of reasoning, no staff member would be eligible for conversion to permanent appointment. None of the Applicants' posts have yet been abolished. Moreover, OHRM should have evaluated the possibility of a transfer within the Organization, not within the office only;

l. All discussion records mention the contract expiry dates of the Applicants. However, the fact that the Administration had, in the past, imposed job insecurity though certain contractual modalities, was no reason to continue doing so in the future by denying a different contractual modality;

m. OHRM and DESA aborted detailed consideration of transferrable skills because they erroneously determined that such transfer was impossible. The ASG/OHRM possesses authority for non-competitive transfers within the staff selection system, according to sec. 11.1 of ST/AI/2010/3. Precisely, if the concern is that the grant of permanent appointments would require the payment of termination indemnities to staff at downsizing entities in case of abolition of their posts, the above-referred

sec. 11.1(b) would apply at that juncture. Even assuming that the ASG/OHRM lacks authority to transfer under sec. 11.1 of ST/AI/2010/3, under staff regulation 1.2(c) the Secretary-General has the power to transfer staff anywhere in the world;

n. The Organization can effect consensual and non-competitive transfers of staff between offices (between 1 July 2012 and 30 June 2013, there were 403 lateral movements of staff involving two departments or offices at one or more duty stations), and before the anticipated closure of UNAKRT, the mobility framework will take effect, requiring movement between posts. Furthermore, the regime on conversion to permanent appointment contemplates that even staff with contracts limited to a certain entity may be granted unrestricted permanent appointments, removing any such obstacle;

o. Even if the Administration were unable to move staff laterally without competition, there is no reason to discount the possibility of a prolonged career with competitive selection to posts in other entities. When both the Appeals and the Dispute Tribunals, in related cases, ordered the Administration to assess the concerned staff member's "transferrable skills", the purpose was ascertaining whether the staff members were suitable as international civil servants in the Organization and their skills could, with reasonable likelihood, be deployed elsewhere. While this evaluation is inherently predictive, it is based upon proven service and prescribed eligibility and suitability criteria. Ostensibly, OHRM's assessment of "transferrable skills" only considered the longevity of the current posts—thus eliminating the "transferrable" element—whereas DESA's cursory evaluation was erroneous, inexplicable and vague or unreasonable;

p. Lastly, the contested decisions failed to even evaluate the possibility (albeit contemplated by the relevant regime) to grant a permanent appointment confined to a particular entity (UNAKRT or DESA);

q. On remedies, the Tribunal is not required to set a compensation alternative to rescission. Moreover, while the conversion or not to permanent appointment is a discretionary decision, where the Administration persistently fails to abide by the Tribunal's directions concerning appropriate discretionary considerations, it leaves the Tribunal no choice but to determine what would have happened had the Administration properly exercised its discretion. The Organization need not to be given limitless opportunities to correct its decisions by remanding them for re-consideration, particularly where its officials have chosen not to comply with binding judicial rulings, and protracted each re-consideration over a period of years; this would reward defiance and render the Tribunal's judgments ineffectual;

r. The Administration can no longer be expected to adhere to the Tribunal's directions upon remand. Given that, on all grounds but the "operational realities", the Applicants were found suitable for permanent appointment, the Tribunal may properly determine the outcome, similarly to what it frequently does in quantifying loss of chance associated with improper promotion exercises, by making counterfactual determinations;

s. Should the Tribunal not award permanent appointments, material damages must be set based on the loss of chance of conversion to permanent appointment and the value of that chance. Two of the Applicants, Lamb and Gueben, were compelled to resign due to job insecurity; the short terms of their fixed-term appointments' renewals (as short as one month), the ill-health of the defendants before UNAKRT and the narrowing of charges in their trial contributed to this insecurity. Although each Applicant was in slightly different situations, the termination indemnity formula is designed to recognise that increased longevity in the Organization's service is likely to result in greater losses following separation and in attempting to find

work. The Applicants have incurred, or foresee to incur, upon separation, pecuniary losses;

t. Applicant Lamb's compelled separation prompted her to first accept an academic position with a remuneration of about one third of her salary with UNAKRT and entailing relocation expenses; she sustained further relocation expenses as she had to subsequently take up a consultancy contract, also with a lower remuneration and benefits. She also had to prematurely liquidate real estate to address the fall-out of the decision;

u. Applicant Matar did not receive payment of the education grant due to the looming non-renewal of his contract;

v. Professionally, Applicants Lobwein and Lamb suffered from an estrangement from national career networks, having committed to UNAKRT, without reciprocal career guarantees, and Applicant Pastore Stocchi refused other professional opportunities, inside and outside the Organization, in expectation of an opportunity to complete work at UNAKRT;

w. As regards moral damages, the amendment to the Tribunal's Statute contained in General Assembly resolution 69/203 does not apply to the contested decisions since:

i. The cause of action arose with administrative decisions predating the resolution;

ii. The Applicants contested these decisions through management evaluation before the amendment took effect;

iii. The moral prejudice may be evidenced by the decision itself if the breach it reflects is sufficiently important or judicial notice or factual inference may be taken of certain manifest harm;

iv. The amendment does not require evidence of the precise *quantum* of the moral damages, which is in fact impossible to adduce;

x. The contested decisions caused professional and emotional harm associated with job insecurity, occasioned by the Administration's failure to properly re-consider their applications for conversion. In the case of Applicant Lobwein, family life was disrupted after the spouse forewent UN employment and attempted, with only partial success, to reintegrate into the national workforce, at great distance, maintaining a separate household and without pension accrual. Applicants Lobwein, Lourdes and Lamb suffered stress and anxiety stemming from the threat of being unable to support aging parents, and in the case of Applicant Lourdes, also dependent children, in the event of separation, and Applicant Lamb had to recall loans granted to family members. Job insecurity brought about stress and anxiety, which caused back and body pains and amplified post-surgical pains to Applicant Vano, had a detrimental impact on Applicant Lamb's physical health and self-confidence, and caused Applicant Gueben to be placed on certified sick leave for burn out, and Applicant Pastore Stocchi to suffer similar sub-clinical harm;

y. An inordinate amount of organizational resources have been expended on the litigation of this matter, which has resulted in clear and repeated pronouncements of the Appeals and Dispute Tribunals. It is required that the responsibility of one or more particular staff members in this regard be the subject of a transparent evaluation at the highest level.

31. 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 for such conversion. The International Court of Justice

(Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1987, para. 81) confirmed that a high standard of efficiency, competence and integrity do not suffice to give rise to an entitlement to conversion. The decision in this respect is discretionary, and it is not for the Tribunal to step into the Administration's shoes in making this decision;

b. In exercising her discretion, the ASG/OHRM was required to take into account all of the interests and needs of the Organization, which, according to the General Assembly's guidance, include its operational realities. The assessment of these factors is reserved to the ASG/OHRM. The Tribunal's review is restricted to whether the ASG/OHRM abused her discretion or engaged in procedural impropriety. Each Applicant bears the burden to prove, through clear and convincing evidence, that the exercise of discretion negatively affected his or her right to full and fair consideration. None of them has met this 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 in the Guidelines, and afforded the Applicants substantive due process, in accordance with the Appeals Tribunal's jurisprudence. At the conclusion of the re-consideration, each Applicant received a written, reasoned and individual letter setting out the decision not to convert their appointments to permanent. The Organization undertook a six-step process to consider each Applicant for retroactive conversion, the rigour of which is reflected in the detailed record kept;

d. The Applicants received individual, full and fair consideration for conversion to a permanent appointment. The evidence of the consideration given to each Applicant is set out in the record of the entire re-consideration process. The Tribunal is not limited to review the decision letter alone. Like

in selection decisions, the documentary evidence relating to the multi-stage process should be taken into account;

e. Both DESA and OHRM provided each of the Applicants individual and meaningful consideration for conversion. The Head, CDO, DESA, in her memorandum of 11 November 2014, addressed the personal circumstances of each of the eight UNAKRT staff that were under consideration. She noted that the "very technical skills and expertise of the concerned staff" made them not "suitable for other DESA programmes". The memorandum specified the factors taken into account for each of them:

i. Legal Officers (Applicant Lamb) were difficult to reassign to another judicial unit of the same court due to conflict of interest;

ii. With respect to Applicants Pastore Stocchi, Lamb, Lobwein and Gueben "their professional competency, past experience and education would be relevant only for a limited number of offices";

iii. With respect to Field Service ("FS") category staff members—Applicants Vano, Matar and Rexhepi—the continuation of their positions was subject to annual review as part of the move towards nationalization of posts and, moreover, they would only have employment opportunities within peace-keeping missions, DESA not having FS positions;

f. As to the review by OHRM, its views on the transferrable skills of each Applicant and any other specific factors considered were documented in an OHRM Review sheet, and further refined in the memorandum dated 13 November 2014 to the Chairpersons of the CRBs. OHRM noted:

i. Concerning Applicant Pastore Stocchi, that there was no demonstrated need for his expertise;

ii. For Applicant Lamb, that she was no longer an active staff member and, naturally, there was no position at UNAKRT for her;

iii. For Applicants Matar, Rexhepi and Vano, that they may be considered to have transferrable skills; however, there was no expectation that their particular functions would exist for a prolonged or indefinite period of time;

iv. For "some of the staff members", that they "have very specialized skills that may not be easily transferrable";

g. The outcome of the review by the CRBs reflected that each UNAKRT staff was separately considered with regard to the particular circumstances of his or her case. Finally, the record demonstrates that the O-i-C, ASG/OHRM, exercised her discretion having regard to each Applicant's individual circumstances. In this connection, she granted conversion to one of the eight UNAKRT staff despite not having been recommended by DESA, OHRM and the Central Review Committee, and Applicant Lamb's letter cited her separation from UNAKRT as one of the factors taken into account;

h. The ASG/OHRM carefully considered the four criteria for conversion and the weight to be given to each of them, and finally decided, for each Applicant, that conversion of their respective appointments to permanent was not in the interests of the Organization; thus, they did not fulfil the fourth applicable criterion. She also considered that the functions performed by the Applicants were not core to the mandate of the Organization;

i. In making the decision, it was taken into account that the positions the Applicants held, or formerly held, were funded until 31 December 2015 and that, according to the ECCC's completion plan (October 2014), the trial phase was anticipated to be completed in 2017 and the appeals phase in

2019, whereas the Co-Investigation Judges and the Pre-Trial Chamber were expected to start downsizing in 2016. At the time of the contested decision regarding Applicant Lamb, she had separated from UNAKRT, therefore, she was not suitable for conversion. There was no continuing need for her services, as she had separated from UNAKRT. Also, ECCC has faced on-going funding challenges since 2012, which led to request for subventions by the Secretary-General to the General Assembly;

j. Determining the probability of any particular Applicant being selected for a new position in the Organization would be speculative. Moreover, the ASG/OHRM cannot reassign the Applicants outside UNAKRT under the staff selection system, as their appointments are limited in service to UNAKRT;

k. As per document A/60/30 (Report of the International Civil Service Commission ("ICSC") for 2005), the purpose of permanent appointments is to assist the Organization in maintaining programme continuity in core functions; ICSC 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/Add.1, Report of ICSC for 2006). The General Assembly resolution 51/226 noted that considerations such as the core functions of the post should be taken into account. The Applicants' positions were not core to the Organization's mandate for they were located in a project with a finite mandate, due to be completed by 2019, with no expectation of open-ended employment with the Organization;

l. In view of the foregoing factors, the exercise of discretion leading to the impugned decisions was reasonable;

m. No blanket policy was adopted to refuse UNAKRT staff members a permanent appointment because they worked in an entity with a finite mandate. A permanent appointment was retroactively granted to one of the eight UNAKRT staff members who were denied conversion in the first round of consideration. This individual was selected through a competitive process in July 2014 for a vacant position in UNLB; therefore, he was not in the same situation as the seven Applicants. Third, as demonstrated by these cases' record, the Administration gathered and reviewed records on the Applicants' suitability as international civil servant, and whether they met the highest standards of integrity, competence and efficiency; it took into account the recommendations by DESA, OHRM and the CRBs and considered if the Applicants had transferrable skills; in the case of Applicant Lamb, however, this matter was moot as she had already separated from UNAKRT. The similarities in the language of the respective decision letters do not establish that the ASG/OHRM failed to apply the relevant criteria or adopted a blanket policy, but only that most of the Applicants were in a similar situation, and that there were common factors in assessing the interests of the Organization. It is not infrequent for the Administration to use standard language in communications for efficiency, economy and clarity, and to reflect impartiality in the process. Fourth, the Applicants' reliance on the outcome of the re-consideration for conversion to permanent of current and former ICTY and ICTR staff is misconceived. The latter, who had not been competitively selected for positions with functions core to the Organization's mandate, were not granted permanent appointments; the Applicants, who were in the same position, were treated alike, in conformity with the principle of equal treatment;

n. The factors taken into account were rational and legal. First, the ASG/OHRM properly assessed the operational realities, which in the case of UNAKRT, include the challenges in securing the required voluntary funding and the winding down of each section of UNAKRT as its closing date approaches. The interests of the Organization are not merely an ancillary factor. The Tribunal cannot substitute the Administration's appreciation of it with its own. Second, the decision letters correctly stated that the ASG/OHRM had no legal authority to place the Applicants in other positions in the Organization. By signing their letters of appointment, they agreed to the express limitation in service to UNAKRT contained therein, recognizing that the ASG/OHRM has no authority to reassign them under sec. 11.1 of ST/AI/2010/3. They do not enjoy the rights accorded to staff on fixed-term appointments who would fall within the scope of sec. 11.1 of ST/AI/2010/3. Furthermore, the mobility policy approved in April 2014 has not yet come into effect, and applies only to internationally-recruited staff members in the Field Service and Professional and higher categories appointed through a competitive selection process reviewed by a CRB, not to staff members who, like the Applicants, had appointments limited to a specific department, office, mission or project. Third, the possibility that the Applicants may apply and be selected for a position core to the Organization's mandate was considered, but the chances of it are speculative. In the case of Applicant Lamb, she resigned from UNAKRT effective 30 June 2013, and it was reasonable to take this fact into consideration in assessing her suitability for conversion to a permanent appointment. Fourth, it is not possible to convert any of the Applicants to a permanent appointment without limitation in service, as this would render redundant the express limitation in service in their letters of appointment. The word "may" in para. 10 of the Guidelines does not confer the ASG/OHRM the authority to override this express limitation. Moreover, staff members with appointments limited to entities not having a finite

mandate may be granted permanent appointments limited to these entities. In contrast, UNAKRT is a project with a finite mandate, and permanent contracts should not be granted where the mandate is finite;

o. The Applicants received retroactive consideration of their suitability. The Administration correctly assessed each Applicant's suitability for conversion based on his or her individual circumstances as at November 2014. The rescission of the original decisions on conversion rendered them void *ab initio*. November 2014 was the most reasonable date for the suitability assessment; it gave the Applicants additional time to demonstrate their suitability, that is, to be selected for positions that were core to the Organization and continuing in nature. Had the date of the original decisions been used, the one UNAKRT staff member who was eventually converted would not have received a permanent appointment. Ignoring undoubtedly pertinent information to the Applicants' suitability would be against the statutory framework. Taking into account events after 30 June 2009 comports with the Appeals Tribunal's case law. This is comforted by the fact that said Tribunal did not make any adverse finding regarding the Respondent's execution of its Judgments, as he disclosed the date that he would use for the re-consideration ordered by the Appeals Tribunal, when it ruled on the non-conversion to permanent appointment of ICTY staff;

p. Even if the contested decisions were to be found unlawful, the Applicants are not entitled to the relief sought. They are not entitled to specific performance because they had no expectation of conversion to permanent appointment. Not having suffered any pecuniary damage, they are not entitled to compensation in the amount of termination indemnities since most of them remained employed with the Organization, and one had resigned. In addition, the Tribunal is not in a position to assess their chances of being granted permanent appointments or that termination indemnities

become payable to each of them. Moral damages may only be awarded if established that the staff member actually suffered damage. The Applicants' alleged job insecurity has no link with the granting of a permanent appointment; like any other type of contract, a permanent one may be terminated in accordance with the Staff Regulations and Rules and, thus, does not guarantee employment until retirement. The uncertainty faced by the Applicants is due to the status of UNAKRT as a technical project and its voluntary funding. These factors are inherent to the employment with the project, and were known by the Applicants before they joined UNAKRT. Lastly, this is not an appropriate case for referral for accountability.

Consideration

Legal framework of the contested decisions

32. Unlike what it is usually the case, the administrative decisions challenged in the instant cases stem directly from a judicial order. Indeed, by Judgment *Tredici et al.* UNDT/2014/114, this Tribunal remanded to the ASG/OHRM for re-consideration the decisions not to convert to permanent the fixed-term appointments of eight UNAKRT staff members, including the seven Applicants whose cases are being adjudicated under the present Judgment.

33. Upon remanding, this Tribunal specifically referred to the "guidelines set out by the Appeals Tribunal in the matter of *Malmström* 2013-UNAT-357", where the Appeals Tribunal awarded an analogous remedy to a number of former and current staff members of ICTY, and provided the Organization with precise instructions on the conduct of the re-consideration. Specifically, the operative parts of Judgment *Malmström et al.* 2013-UNAT-357 prescribed:

a. Each staff member is entitled to receive a "written, *reasoned*, individual and timely decision, setting out the ASG/OHRM's determination

on his or her suitability for retroactive conversion from fixed-term to permanent contract" (para. 73, emphasis added);

b. ICTY staff members are entitled to full and fair consideration of their *suitability* for conversion to permanent appointment (paras. 66, 67 and 83);

c. The conversion exercise was remanded for *retroactive* consideration of the suitability of the Applicants (para. 83);

d. 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 (paras. 66 and 67, emphasis added), 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 (para. 72, emphasis added); and

e. "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" (para. 68). "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" (para. 69, emphasis in original);

34. It follows that *Tredici et al.* UNDT/2014/114 gave, by reference to *Malmström et al.* 2013-UNAT-357, a detailed legal framework concerning how to perform the ordered re-consideration. This framework is binding on the parties—particularly on the Respondent, for that matter—by virtue of art. 10.3 of the Tribunal's Statute, which provides that "[t]he judgments and orders of the Dispute Tribunal shall be binding upon the parties". The legality of the contested decisions must therefore be appraised against the above-cited instructions.

35. In addition, and without prejudice to the above, the Dispute Tribunal is expected to "recognize, respect and abide by the Appeals Tribunal's jurisprudence" (*Igbinedion* 2014-UNAT-410). To this extent, relevant rulings of the Appeals Tribunal will inform the decisions of the Dispute Tribunal. In this case, *Malmström et al.* 2013-UNAT-357 is relevant and must, thus, be taken as a guiding precedent in determining the applications at hand; all the more given that its findings have since been reiterated in several judgments setting out virtually the same reasoning and conclusions (*Longone* 2013-UNAT-358, *Ademagic et al.* 2013-UNAT-359, *McIlwraith* 2013-UNAT-360).

Subject of the judicial review

36. 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 these cases are the respective denials to convert the Applicants' fixed-term appointments into permanent ones, made by the O-i-C, ASG/OHRM, in November 2014. These specific decisions are thus the subject of the Tribunal's scrutiny, nothing more and nothing less.

37. They must and do speak for themselves. Unlike other kinds of administrative decisions, e.g., selection or promotion decisions, those presently at issue were mandatorily motivated, as *Malmström et al.* 2013-UNAT-357 expressly held that the Applicants were entitled to receive a "written *reasoned* individual" decision (emphasis added). Hence, it is legitimate to expect these decision letters to contain a comprehensive explanation of all considerations and motives behind the decision they convey. Accordingly, such considerations and motives would not normally have to be found in the preparatory documents of the process that brought about the decisions. Notwithstanding that, the Tribunal has taken cognisance of each Applicants' individual file, compiled for the re-consideration process, and will take them into account as appropriate.

38. Nevertheless, for the reasons explained above, the focus of the Tribunal's review will be on ascertaining whether the impugned decisions, as they are couched in the letters of 24 November 2014 to each of the Applicants, were made in conformity with the directions given in *Tredici et al.* UNDT/2014/114, which come down to those in *Malmström et al.* 2013-UNAT-357.

Structure of the decision

39. 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.

40. Sec. 1 of the bulletin 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.

41. Whereas its sec. 2 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.

42. 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 November 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. Under this item, the decision letters also address whether this requirement was met at the time each 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.

43. 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 criteria in the letter correspond to different components of the *suitability* test as set forth in sec. 2 of the bulletin.

44. So structured, the letters conveying the impugned decisions create the impression that four criteria of equal nature and importance exist. This is not accurate. 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.

45. The foregoing notwithstanding, it should be noted that the interests of the Organization are 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.

46. The former United Nations Administrative Tribunal emphasised this ancillary character of the operational realities vis-à-vis the two main criteria already decades ago in its Judgment No. 712, *Alba et al.* (1995):

> The Tribunal is of the view that merit of performance combined with length of service are the factors with regard to individual staff members which should be primary in granting reasonable consideration for career appointment. While the general financial framework might ultimately determine whether or not career appointments can be granted, the source of funding for an individual staff member's post cannot justify the failure to even consider him or her for a career appointment after years of good service, if career appointments are being granted by the Organization.

Eligibility

47. Judgment *Malmström et al.* 2013-UNAT-357 explicitly states that the matter in question was remanded to the ASG/OHRM only for consideration of the "suitability" of the Applicants for conversion.

48. In spite of that, the Administration proceeded to a new eligibility assessment. Not only is this patent from the voluminous records of the process but it was further confirmed by the Respondent in his pleadings; besides, the new eligibility assessment conducted is reflected in the decision letters, under the criterion referred to in para. 42.a above. In re-assessing the Applicants' eligibility, the Administration disregarded the specific instructions received from the Appeals and Dispute Tribunals.

Retroactivity

49. *Tredici et al.* UNDT/2014/114 clearly stated that it remanded the UNAKRT conversion exercise to the ASG/OHRM for "*retroactive* consideration" (emphasis added). As to *Malmström et al.* 2013-UNAT-357, although it does refer also to retroactive "conversion" or "effect" of conversion, its key passage (para. 83) unambiguously orders the "retroactive consideration" of the Applicants' suitability. Contrary to what the Respondent suggests, implementing the resulting decisions retrospectively would not suffice to meet the requirement of retroactive *consideration*. Based on this language, the Tribunal considers that the re-consideration exercise needed to be limited to circumstances known at the time of the initial conversion exercise and not, as the Respondent holds, to include new facts that were only known when the new decisions were reached, i.e., in November 2014.

50. Such an interpretation would devoid of any meaning the term "retroactive" that the Appeals and the Dispute Tribunals consciously and purposefully chose to use. In addition, *Malmström et al.* 2013-UNAT-357 states, and *Tredici et al.*

UNDT/2014/114 underscores, 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 occurred between the first and second exercise do not impact on the Applicants' right to be considered for conversion.

51. Having concluded that the re-consideration exercise ordered 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 a cut-off date of 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 any of the Tribunals identify such date in *Malmström et al.* 2013-UNAT-357 or in *Tredici et al.* UNDT/2014/114.

52. Yet, it is pertinent to recall that both Tribunals remanded the determination on conversion after reviewing and finding flawed a specific set of administrative decisions, and that the remedies ordered in this context were designed to restore the concerned staff members' 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 at the time of the first impugned refusal to convert their appointments, which in the present case was 31 January 2012.

53. 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 November 2014, the Administration failed to comply with the Tribunals' direction to carry out a *retroactive* consideration of the Applicants' suitability for conversion. In particular, it was incorrect to consider the resignation of Applicant Lamb after the

first consideration exercise as a factor weighing against granting her a permanent appointment. Indeed, Applicant Lamb's individual file and the Respondent's pleadings in her case leave no doubt that her resignation was taken as a reason not to convert her appointment. The fact that Applicant Lamb left the Organization after January 2014 not only did not disqualify her for a permanent appointment, as per the plain meaning of *Malmström et al*. 2013-UNAT-357, but, also, the Administration was not entitled to take this circumstance into account in any manner or degree. For the foregoing, the Tribunal must reject the claim that her case was moot owing to her resignation.

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

54. The Respondent asserts that DESA, OHRM and the O-i-C, ASG/OHRM, examined the proficiencies, competencies, performance and transferrable skills pertaining to each Applicant on an individual basis. Nevertheless, the Tribunal cannot but observe that the reasons given for not granting the conversion were identical for all seven Applicants. As a matter of fact, they were also identical for the nearly 260 ICTY staff members assessed in a parallel re-consideration exercise conducted further to the remand of their cases to the Administration by order of the Appeals Tribunal (see *Ademagic et al.* UNDT/2015/115, *Sutherland et al.* UNDT/2015/116 and *Featherstone* UNDT/2015/117). 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, such reasons were in no way related to the Applicants' respective merits, competencies or record of service.

55. 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 DESA/UNAKRT". Otherwise said, the O-i-C, 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 possessed and to what extent.

56. From their plain reading, the decision letters do not reflect any meaningful level of individual consideration of the Applicants' transferrable skills.

57. Even if the Tribunal were to follow the Respondent's submission that the individualisation transpires from the record of the process, i.e., the Applicants' individual files, the Tribunal is not satisfied that these records show a substantive and appropriate individual consideration, either.

58. Several documents in the respective files elaborate on the reasoning given by the different bodies involved in the review to not recommend the conversion of the Applicants' appointments, notably, the memorandum of 11 November 2014 from CDO, DESA, the memorandum of 13 November 2014 by Section III, Human Resources Services, Learning, Development and Human Resources Services Division, OHRM, the OHRM review sheets and the memoranda by the competent CRBs.

59. Said documents insist on:

a. The finite mandate of UNAKRT, stressing in this respect that, while the current trials completion plans set the closing date of the project in 2019, in view of the advanced age of the accused individuals, the Tribunal's tasks could come to an end earlier;

b. The continuing funding challenges faced by the project, warning that even if the international component was placed under sound funding, ECCC

still risks to collapse if the national components are unable to address their funding base;

c. The fact that there is no budgetary provision for the Applicants' encumbered posts beyond 31 December 2015. In this connection, the Tribunal agrees with the Applicants' position that relying on the duration of the on-going budget is hardly relevant, and somehow misleading. It is a structural feature of the Organization that budgetary cycles have a two-year duration, after which the new budget is to be approved. Since this concerns all posts in the entire Organization, this is not a factor that may distinguish the Applicants from any other staff members for the purpose of appointment conversion.

60. The above considerations, by far the most elaborated throughout each Applicant's file, concern UNAKRT operational realities which, while relevant for the final decision, are not pertinent for the specific—and mandatory—exercise of apprising the personal merits, competences and transferrable skills of each Applicant.

61. The Tribunal is aware, however, that the Applicants' individual files do make reference to certain personalised factors regarding one or more of the Applicants, to wit:

a. For Applicant Lamb, the fact that she was no longer an active staff member; that factor was profusely relied upon, wrongly, as this is clearly an improper consideration (see para. 53 above);

b. For Applicants Lamb and Pastore Stocchi, it was raised that as Legal Officers their reassignment to another judicial unit of the same court would present a risk of conflict of interest. The Tribunal is surprised that Applicant Pastore Stocchi be described as a Legal Officer, knowing that his functional title is Investigator, but it conceives that an Investigator may also have a similar conflict of interests. This said, their skillset may be useful/suitable for, and transferrable to, numerous other legal or investigatory positions, in UNAKRT (as not all positions necessarily entail a conflict of interest) or, all the more, in the Organization at large (on the possibility of reassigning the Applicants despite the contractual limitation of their service to UNAKRT see paras. 70 to 78 below);

c. For Applicants Matar, Rexhepi and Vano, who belong to the FS category, it was noted that duties discharged by FS staff were being progressively passed over to national posts, with an annual review conducted every year to this end. In this respect, the Tribunal observes that, to date, these posts have not been abolished. Even assuming that these posts are under imminent threat, and that, as also held, DESA has no other posts of the same category, this circumstance does not shed any light on these Applicants' transferrable skills. Besides, on the possibility of having them serve on different positions outside UNAKRT, the 11 November 2014 memorandum explicitly points out that future employment possibilities would only exist within peacekeeping missions, thereby indirectly acknowledging that possibilities exist in the field missions;

d. For Applicant Pastore Stocchi, it was stated that there is no "demonstrated need for his expertise". However, this vague statement falls short to establish that there is no continuing need for his services. Nor does it show any accrued difficulty for him to be placed against another post.

62. Concerning all seven Applicants, some of the aforementioned documents detailing the analysis of their candidatures for conversion (particularly, the memoranda of 11 and 13 November 2014) state that their professional profiles are so technical and specialised, that only relatively few positions match their experience and expertise. The Tribunal notes that the same conclusion was reached for all of them, despite having extremely different profiles and service and performance records. More importantly, while this statement is repeated at different stages of the review, it is not backed by any explanation whatsoever—let alone evidence—substantiating this proposition. On the contrary, the Tribunal notices that the Applicants comprise a French Reviser, a Senior Legal Officer, a Witnesses/Experts Support Coordinator, a Finance Assistant/Cashier, an Investigator, a Deputy Chief of Security and Safety, and a Human Resources Assistant. Thus, it rather appears that their domains of expertise are present and very much required in numerous United Nations offices.

63. From the foregoing, it is noticeable that even the factors that could be considered as individual-specific—and were examined as such in paras. 61 and 62 above—revolved mostly around purely institutional factors (e.g., the move towards the nationalization of posts), instead of relating to their individual capabilities and service record. Furthermore, the one argument unquestionably hinged on the Applicants' qualifications—i.e., that their profiles were hardly "transferrable", being highly technical and specialised—is unsubstantiated.

64. After analysis, thus, the actual consideration afforded to the Applicants' transferrable skills reveals to have been minimal and inadequate. It was not, in the Tribunal's view, a meaningful consideration of their skills in keeping with *Tredici et al.* UNDT/2014/114 and *Malmström et al.* 2013-UNAT-357.

65. In spite of this unsatisfactory review, the OHRM review sheets admitted that five of the Applicants "ha[d]" (Applicants Lamb and Pastore Stocchi) or—using a fairly inconclusive expression—"may have" (Applicants Matar, Rexhepi

and Vano) transferrable skills. At the same time, the respective OHRM review sheets were silent on the same point regarding Applicants Gueben and Lobwein. In all cases, whether there was a positive, an open or no finding reached, no discussion or details were provided on each Applicant's transferrable skills, or lack thereof. Moreover, these different conclusions by OHRM were not reflected, or even mentioned, in the decision letters of these five Applicants, as they all contained the generalised formula "though you may have transferable skills".

66. Lastly, after reading the record, the Tribunal is concerned that the consideration of the Applicants' "transferability" seems to a large extent confined to the chances of them serving in other posts within UNKART, or at best, within DESA. For instance, the memorandum from the Head, CDO, DESA of 11 November 2014 reads in relevant parts that: "the very technical skills and expertise of the concerned staff … are not suitable for other DESA programmes", "DESA itself has no field service positions", "the distinct skills and profiles of the eight staff … do not necessarily match the profiles normally required for DESA's core mandated programmes". As a result, it is unclear if the possibilities for the Applicants to be either reassigned or competitively recruited elsewhere in the Organization were sufficiently explored (on the possibility of reassigning the Applicants despite the contractual limitation of their service to UNAKRT see paras. 70 to 78 below).

67. For all the above, the Tribunal considers that, while minimal consideration of some individual circumstances could be found, the qualifications, skills, competencies, experience and performance of the various Applicants were not adequately examined. At any rate, the consideration of factors specific to each Applicant appears partial and selective and, therefore, insufficient to fulfil the requirement of offering each Applicant an "individual full and fair consideration", and giving them "every reasonable consideration" based on proficiencies, competencies and transferrable skills rendering them suitable for career positions within the Organization, as instructed by the Tribunal.

Reasons relied upon in making the contested decisions

68. At the outset, the Tribunal should recall the 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.

69. As per the 24 November 2014 letters, the contested decisions were grounded on two reasons: the limitation of the Applicants' appointments to service with UNAKRT, and the finite nature of UNAKRT's mandate.

70. As regards the first ground, there is no question that, according to their respective letters of appointment, the Applicants' service shall be limited to UNAKRT. It is noticeable, though, that the legal consequences of such limitation are not properly specified in the contract itself or elsewhere.

71. Since the Respondent claims that this limitation prevents the ASG/OHRM to reassign the Applicants outside DESA/UNAKRT under the staff selection system in place, it is necessary to examine the administrative issuance laying down said staff selection system, namely ST/AI/2010/3. Out of two provisions in this instruction 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) 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).

72. It is noteworthy that abolition of posts or funding cutbacks are exactly the scenarios that could potentially affect the Applicants, as staff of a downsizing entity, putting them in need of alternative placement. Since nowhere in the instruction is it 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, UNAKRT), 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, 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 UNAKRT, to a different entity on the basis of the above-referenced provision if their posts were to be abolished.

73. In addition, staff regulation 1.2(c) confers broad powers to the Secretary-General to assign staff to any function within the Organization at large, as it stipulates that:

> Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations.

74. Therefore, even assuming that, as the Respondent argues, the ASG/OHRM lacks authority to transfer the Applicants under the staff selection system, this would still be without prejudice to the broad powers of the Administration—at the appropriate level—to reassign any of them to a position outside UNAKRT by virtue of the Staff Regulations and Rules.

75. 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.

76. 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.

77. Hence, although the Applicants' fixed-term appointments were limited to UNAKRT, the O-i-C, ASG/OHRM, could have elected to grant them contracts not limited to service with UNAKRT, and would have then been free to reassign them without any impediment.

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

79. 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 service in UNAKRT has been established to carry little weight. Therefore, the

UNAKRT finite mandate finally stands as the only remaining reason behind the contested decisions.

Exclusive reliance on the downsizing of UNAKRT

80. The ASG/OHRM is entitled to take into consideration the finite mandate and downsizing situation of a certain entity in reaching a determination 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 it clear that the "operational realities of the organizations" are considerations that the Administration may legitimately bring into the equation when 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 considerations, 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)

81. The fact that a certain entity is downsizing and expected to end its operations is, without a doubt, a relevant operational reality, as is the precarious funding of UNAKRT, financed solely through voluntary contributions.

82. Furthermore, the Administration disposes of broad discretion determining what the interests of the Organization are and in weighting them up together with other circumstances. 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).

83. Against this background, the Tribunal tends to accept the Administration's position that the finite mandate of UNAKRT 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 UNAKRT operational realities, including its finite mandate, the Appeals Tribunal specifically ruled in Judgment *Malmström et al.* 2013-UNAT-357, and iterated in *Ademagic et al.* 2013-UNAT-359, *Longone* 2013-UNAT-358 and *McIlwraith* 2013-UNAT-360, that relying *exclusively* on this circumstance amounts to an abuse of discretion.

84. On this crucial point, the Tribunal has determined that the motive to refuse to convert to permanent the appointments of each of the seven Applicants was invariably the same: it came down to the finite mandate of UNAKRT and its downsizing (paras. 68 to 79 above); additionally, it has found that each Applicant's competencies and skills were not meaningfully considered, and other circumstances specific to each individual only inadequately assessed (paras. 54 to 67 above). It thus appears evident that the predominant factor behind the impugned decisions was, yet again, the finite mandate of UNAKRT.

85. This finding is further comforted by the conditions of the decision to grant conversion to the eighth staff re-considered together with the Applicants. Indeed, like the Applicants, this former UNAKRT staff member was denied conversion in January 2012 and not recommended for conversion all through the second review exercise up until its last steps; however, unlike the Applicants, some months before the final decision was issued, he was competitively selected for a post with a different entity, not scheduled to close within a foreseeable future. This was the only difference vis-à-vis his former colleagues, as well as the only change in his status between the first negative decision in 2012 and the positive final determination in November 2014. Even more telling is the wording of said staff member's decision letter, where the O-i-C made explicit that he was granted a permanent appointment "[i]n recognition of the fact that [he was then] holding an appointment with UNLB and that [he had] been selected for the post in UNLB through the standard selection process".

86. The finite mandate of the entity where the Applicants serve is, precisely, the very same factor on which, as per the above-referred Appeals Tribunal's rulings, the Administration had wrongfully relied upon to the exclusion of other considerations. Consequently, by again relying solely on this factor and overriding all others, the Organization failed to abide by the clear and binding instructions enunciated in Judgment *Malmström et al.* 2013-UNAT-357 and incorporated by reference into *Tredici et al.* UNDT/2014/114.

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

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

b. The decisions were based on the finite mandate of UNAKRT alone, to the exclusion of all other relevant factors.

Remedies

88. The Tribunal shall consider the remedies sought by the Applicants—listed in para. 2 above—in light of art. 10.5 of its Statute, which delineates its powers regarding the award of remedies.

Declaration of unlawfulness of the contested decisions

89. Throughout its considerations, this Judgment has discussed and made findings of a number of breaches of the applicable legal framework tainting the contested decisions, to finally declare, at para. 87 above, that these decisions were unlawful on several grounds.

Rescission of the contested decisions

90. Having found that they are beset by serious flaws, the Tribunal rescinds the impugned decisions in accordance with art. 10.5, subparagraph (a).

91. 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 or compensation for material damage

92. The Applicants ask for the retroactive grant of a permanent appointment to each of them, or, in the alternative, the payment, at the time of their separation (otherwise than by retirement or future resignation), or, alternatively, at the time of issuance of this judgment, of an amount equal to the termination indemnity owed to each of them based upon the years of service accrued to that point.

93. In support of their request, the Applicants contend that having persistently chosen not to comply with judicial rulings, and protracted each re-consideration over a period of years, the Administration can no longer be expected to adhere to the Tribunal's directions upon remand. They hold that the Tribunal may and should determine what would have been the outcome of the conversion exercise

had the Administration rightly exercised its discretion, knowing that, as asserted in the decision letters, the Applicants were found suitable on all grounds but on the "operational realities".

94. The Tribunal reiterates that the contested decisions are discretionary in nature, and that it is not its role 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 cases, 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 applications at hand.

95. The Tribunal has concluded that the O-i-C, ASG/OHRM, did not conduct a meaningful individualised review of each of the Applicants' competencies and merits. As a result, to date, the competent decision-maker has not put each Applicant's individual competencies and merits in the balance together with all other relevant factors, including the UNAKRT operational realities. Until this exercise is 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 assessment to that of the Secretary-General, something that the Tribunal is neither allowed nor prepared to do.

96. 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 re-consideration of each of the Applicants for conversion, in accordance with the requirements of fairness and due process, as specified by the Appeals Tribunal.

97. It follows that the Applicants' appointments may still be converted. Hence, the loss of opportunity they suffered may potentially be redressed.

98. As to the losses in terms of salary and household costs alleged by Applicant Lamb, they are not directly linked or reasonably attributable to the contested decision as such. Indeed, this financial impairment was not the necessary result of the denial of the contractual conversion itself, but arose from a number of distinct and posterior professional choices imputable exclusively to Applicant Lamb. While bearing in mind the influence that job insecurity may have had on her decision-making, the causal link with the material loss described is far too hypothetical and tenuous to trigger compensation.

99. The above 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 Applicants within 90 days of the issuance of this Judgment. In the Tribunal's opinion, 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 as of 31 January 2012.

100. 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

101. 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).

102. Although the instant applications were filed after the adoption and the publication of resolution 69/203, it is debatable whether the amendment thereby introduced applies to the present cases, given the well-settled principle that changes in law may not be retroactively applied (*Robineau* 2014-UNAT-396, *Nogueira* 2014-UNAT-409, *Hunt-Matthes* 2014-UNAT-444). In this respect, in *Dia* UNDT/2015/112 the Tribunal considered that any changes to the right to compensation for harm resulting from an unlawful decision "apply to *decisions made after the promulgation of the amendment* but do not have retrospective effect" (emphasis added), whereas the impugned decisions, dated

24 November 2014, were issued prior to the adoption of the Statute's amendment; in fact, they were even submitted for management evaluation before the amendment was published and could, thus, enter into force (on entry into force of the amendment see *Sutherland et al.* UNDT/2015/116, *Featherstone* UNDT/2015/117).

103. The Respondent's claim that the amendment merely clarified the original meaning of art. 10.5 of the Tribunal's Statute is not tenable in light of *Asariotis* 2013-UNAT-309, where the Appeals Tribunal held that a fundamental breach of a staff member's rights sufficed to justify an award of moral damages without further proof of harm.

104. In any event, regardless of the applicability of the amended art. 10.5 of the Statute, it is warranted to grant the Applicants compensation for moral injury, as the Tribunal deems sufficiently substantiated that they suffered moral harm as a result of the decisions at issue.

105. As held in *Dahan* UNDT/2015/053,

> The Tribunal does not consider that evidence establishing the existence of moral injury must compulsorily be *viva voce* evidence. Such fact can be gathered and/or inferred from the pleadings and documents produced by a party.
>
> ... if the pleadings contain a clear showing of "harm"… that is evidence enough to grant an award for moral damages.

106. The Applicants submit that they suffered professional and emotional harm associated with job insecurity, occasioned by the Administration's failure to properly re-consider their candidacies for conversion, which for many of them caused or amplified health issues. From these averments it can be reasonably inferred that the Applicants sustained stress, anxiety and frustration, as well as a sense of unfairness and discrimination, arising from the breach of their fundamental right to substantive due process (see *Dahan* UNDT/2015/053, *Mutiso*

UNDT/2015/059). The Tribunal understands that the Organization's failure to give them proper consideration for conversion to permanent appointments was not the only cause of the Applicants' job insecurity, the project nature of UNAKRT and its funding challenges being more significant ones. However, it certainly was a factor compounding or contributing to such insecurity and the related distress for the Applicants.

107. To calculate the *quantum* of compensation, this Tribunal must take into account—like the Appeals Tribunal did, notably, in *Malmström et al.* 2013-UNAT-357 and *Ademagic et al.* 2013-UNAT-359—the satisfaction granted by remanding the impugned decisions for re-consideration. Also, in the context of the present proceedings, moral damages are meant to compensate only the harm resulting directly from the decisions under review in the applications, and not any harm suffered prior thereto since the commencement of the conversion process; this is so, because, the harm occasioned by, and up until, the first refusal of conversion—in January 2012—was addressed in *Tredici et al.* UNDT/2014/114 and compensated through the damages ordered therein. Similarly, stress deriving from job insecurity merits compensation exclusively insofar as it originated from the above-mentioned failure to properly re-consider the Applicants for conversion, as opposed to other factors.

108. After carefully pondering the harm caused strictly by the contested decisions, as well as the outstanding re-consideration 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 non-pecuniary damages to be awarded at the equivalent of EUR3,000 per Applicant.

Referral for accountability

109. In the Tribunal's view, the present cases are not appropriate to be referred to the Secretary-General to enforce accountability under art. 10.8 of its Statute.

Conclusion

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

a. The contested decisions denying each of the seven 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 given in Judgment *Malmström et al.* 2013-UNAT-357, 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 an amount equivalent to EUR3,000;

d. The aforementioned compensations shall bear interest at the United States 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 29th day of March 2016

Entered in the Register on this 29th day of March 2016

(*Signed*)

René M. Vargas M., Registrar, Geneva