UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2014/085 UNDT/GVA/2014/086 UNDT/GVA/2014/087 UNDT/GVA/2014/113 UNDT/GVA/2014/114 UNDT/GVA/2014/115 UNDT/GVA/2014/122 UNDT/GVA/2014/147
Judgment No.:	UNDT/2015/116
Date:	17 December 2015
Original:	English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

SUTHERLAND

REID

MARCUSSEN

GOY

JARVIS

BAIG

EDGERTON

NICHOLLS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

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

Introduction

1. By separate applications filed between 28 and 30 December 2014, eight staff members and former staff members of the International Criminal Tribunal for the former Yugoslavia ("ICTY") contest the Assistant Secretary-General for Human Resources Management ("ASG/OHRM") decisions of June 2014 denying each of them a conversion of their fixed-term appointments into permanent appointments.

2. Said applications were registered under Case Nos. UNDT/GVA/2014/085 (Sutherland), UNDT/GVA/2014/086 (Reid), UNDT/GVA/2014/087 (Marcussen), UNDT/GVA/2014/113 (Goy), UNDT/GVA/2014/114 (Jarvis), UNDT/GVA/2014/115 (Baig), UNDT/GVA/2014/122 (Edgerton), UNDT/GVA/2014/147 (Nicholls). Given that all eight cases challenge analogous decisions arising from one same context and process, raise similar issues and essentially the same arguments, and share a long procedural history, the Tribunal will dispose of them in one single judgment.

3. As remedies, they request:

a. A permanent appointment or, alternatively, compensation calculated on the basis of the termination indemnity applicable to a permanent appointment in the Applicants' cases; and

b. Moral damages in the sum of EUR27,000 for repeated, substantive and fundamental breaches of due process, including discrimination and excessive delay.

4. The Applicants likewise seek the award of costs to the Respondent under art. 10.6 of the Tribunal's Statute.

Facts

5. 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.

6. 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.

7. 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]".

8. 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".

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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".

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

16. On 11 May 2010, ICTY transmitted to the Office of Human Resources Management ("OHRM"), at the United Nations Secretariat Headquarters in New York, the list of staff eligible for conversion to a permanent appointment.

17. At the XXXIst Session of the Staff-Management Coordination Committee ("SMCC"), held in Beirut from 10 to 16 June 2010, it was "agreed that management [would] consider eligible Tribunal staff for conversion to a permanent appointment on a priority basis".

18. On 12 July and 16 August 2010, the ICTY Registrar transmitted to the 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.

19. On 31 August 2010, the Deputy Secretary-General, on behalf of the Secretary-General, approved the recommendations contained in the Report of the SMCC XXXIst Session (see para. 17 above), including the recommendation that eligible ICTY staff would be considered for conversion to permanent appointments on a priority basis.

20. Based on its review of 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)".

21. 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.

22. On 22 December 2010, in anticipation of the closure of ICTY, the Security Council adopted resolution 1966 (2010), establishing the International Residual Mechanisms for Criminal Tribunals ("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.

23. In February 2011, ICTY staff were informed that there had been no joint positive recommendations by OHRM and ICTY on the granting of permanent appointments, and that, accordingly, the cases had been referred "to the appropriate advisory body, in accordance with sections 3.4 and 3.5 of ST/SGB/2009/10".

24. Further to her review of the CR bodies' opinion of late 2010, the 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.

25. 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".

26. 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].

27. By letters dated 6 October 2011, the ICTY Registrar informed each of the Applicants of the decision of the ASG/OHRM not to grant them a permanent appointment, stating:

> This decision was taken after review of your case, taking into account all the interests of the Organization and was based on the operational realities of the Organization, particularly the downsizing of ICTY following the Security Council Resolution 1503 (2003).

28. After requesting management evaluation of the decisions not to convert their appointments to permanent, and being informed that they had been upheld by the USG for Management, 11 staff members concerned by said decisions, including the eight Applicants in the cases at bar, filed applications before the Tribunal on 16 and 17 April 2012.

29. The Tribunal ruled on these applications by Judgment *Malmström et al.* UNDT/2012/129, 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.

30. On appeal, the Appeals Tribunal vacated *Malmström et al.* UNDT/2012/129, by Judgment No. 2013-UNAT-357 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.

31. 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.

32. Following the publication of Judgment No. 2013-UNAT-357, the ASG/OHRM, by email of 14 January 2014, gave the ICTY Registrar specific instructions for the "Implementation of the UNAT Judgment". In fact, this email concerned also Judgment No. 2013-UNAT-259, by which the Appeals Tribunal remanded for reconsideration also the conversion of 262 other ICTY staff members.

33. 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. In response, six of the Applicants submitted further information on or about 13 February 2014.

34. 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.

35. ICTY reviewed the Applicants' individual files 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 all Applicants, ICTY recommended that they be offered a permanent appointment; the recommendation memoranda stated in square brackets "[The appointment should be limited to office/department]". Only four individuals out of all the ICTY staff members under reconsideration 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.

36. Between February and May 2014, the Applicants' files were examined by two successive reviewers within OHRM, seeking further information or clarification from ICTY as needed. OHRM recorded its observations on a dedicated standard form and it did not recommend any of the candidates for conversion; the record also shows that although OHRM had initially given a positive recommendation concerning three ICTY staff members other than the Applicants, it later reversed it before transmitting it.

37. 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.

38. 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 level and above, amongst whom were four of the Applicants, be granted a permanent appointment not limited to ICTY.

39. After the CR bodies' recommendation, the ASG/OHRM considered whether or not to grant the Applicants conversion to a permanent appointment. In doing so, the entire group of ICTY staff members that was re-considered 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.

40. By individual letters dated 17 June 2014, and received shortly thereafter, all Applicants were informed by the ASG/OHRM of the decisions not to grant any of them retroactive conversion of their respective fixed-term appointment into permanent appointment. Not only the language and structure of these individual letters were remarkably similar but, also, they were very much alike the letters sent to the ICTY staff members reconsidered as per Judgment No. 2013-UNAT-359, save for the personal and factual details mentioned, although the wording was adjusted depending on which of the aforementioned six categories of staff the letter's recipient belonged to. All letters stated that the respective Applicants fulfilled three out of the four required criteria and that they did not meet the fourth criteria, namely, that the granting of a permanent appointment be in accordance

with the interests of the Organization. Each letter contained one paragraph setting out, in identical terms, the reasons why the last criterion was not considered to be met:

> I have considered that though you may have transferable skills, your appointment is limited to service with the ICTY. Under the legal framework for the selection of staff members, I have no authority to place you in a position in another entity outside of this legal framework. As mandated by the Charter, the resolutions of the General Assembly, and the Organization's administrative issuances, staff selection is a competitive process to be undertaken in accordance with established procedures. All staff members have to apply and compete with other staff members and external applicants in order to be selected for available positions with the Organization. Given the finite nature of the Tribunal's mandate, and the limitation of your appointment to service with the ICTY, the granting of a permanent appointment in your case would not be in accordance with the interests or the operational realities of the Organization. Therefore, you have not satisfied the fourth criterion.

41. On 4 July 2014, the Applicants filed before the Appeals Tribunal a "Renewed Motion for an Order Requiring Respondent to Execute the Judgment", which was rejected by Judgment No. 2014-UNAT-494, noting that the 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).

42. The Applicants requested management evaluation of the June 2014 decisions (see para. 40 above) on 18 August 2014. By letters dated 29 September 2014, the Applicants were informed that the USG for Management had upheld the contested decisions.

43. The present applications were filed between 28 and 30 December 2014.

44. After seeking an extension of time in seven of the present cases, granted by Orders No. 8 to 15 (GVA/2015) of 9 January 2015, the Respondent filed his replies between 27 February and 2 April 2015.

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

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

Parties' submissions

47. The Applicants' principal contentions are:

a. In looking at the circumstances as of the time of the second exercise, the Administration failed to re-consider the Applicants in a retroactive manner, in violation of the Appeals Tribunal's directions. The circumstances taken into account to determine their suitability for conversion should have been those at the time at which each of them became eligible, by meeting the conditions under para. 2(c) of the Guidelines. This is in line with the exigencies of fairness, since the fact that the granting of permanent appointments was frozen for many years should not affect the consideration for conversion of staff members that became eligible years before the one-time exercise. In the alternative, and at a

minimum, the date of reference should be 30 June 2009, as the cut-off date laid down in para. 21 of the Guidelines. On the other hand, precisely because of the delay in bringing the process to an end, the Applicants should have enjoyed all benefits derived from any circumstances that came into being subsequently and that were to their advantage (e.g., the fact that the estimated closing date of ICTY was postponed from the end of 2014 to 2017); otherwise, the Administration would be rewarded for its delay, and the Applicants prejudiced;

b. ICTY/MICT staff were discriminated against based on the finite mandate of these entities. In contravention of the Appeals Tribunal's instructions in Judgment No. 2013-UNAT-357, the Applicants were denied permanent appointments based solely on their employment in an entity with a finite mandate;

c. For the second time, the Applicants' long service, extensive qualifications, outstanding performance and exemplary conduct, as well as their transferrable skills and role in the completion of ICTY/MICT mandate were overridden by the ASG/OHRM's singular focus on purported "operational realities" associated to the finite mandate of ICTY/MICT. The decisions were based on a blanket policy rejecting all ICTY/MICT staff members as a group, which fundamentally infringes the Appeals Tribunal's Judgment;

d. The only feature looked at was whether each concerned individual served at ICTY. The Administration created an additional requirement for conversion consisting in showing that the concerned staff member did not serve in an entity that is downsizing. The one case cited by the Respondent of a staff member from an entity with a finite mandate (not ICTY/MICT) having received a permanent appointment confirms the policy to the extent

that the employee in question had ceased working with such entity. It is no coincidence that all of the ICTY staff were denied conversion. The process was a pre-determined sham in which no ICTY/MICT could possibly succeed;

e. There was no individualised full and fair consideration of the Applicants in the substance; the Administration conducted a lengthy process to create such an appearance, but carried out only a *pro forma* review, with a flawed assessment. While purporting to have weighed all criteria for conversion, no weight was given to the factors in the Applicants' favour, which were rendered irrelevant due to the singular focus placed on the ICTY/MICT finite mandate. As regards the three first criteria cited in the contested decision, the ASG/OHRM focused on whether the minimum threshold was met, failing to assess them to their full extent; for instance, the Applicants' over ten to 20 years of service were not properly considered, as the Administration limited itself to verify that they had the minimum five. The Administration focused on the positions encumbered by the Applicants as opposed to their personal profile. Only possibilities of employment within ICTY/MICT were envisaged, not within the Organization at large, although many of them are included in the Secretariat roster further to their competitive recruitment to their current positions. The ASG/OHRM explicitly refused to consider their transferrable skills to assess the Applicants' suitability for a career appointment within the broader Organization, and called the possibility of them being employed in MICT "theoretical", ignoring that some of them had in the meantime moved to MICT;

f. While the CR Panel and CR Committee gave rubber-stamped advice, the CR Board warned that OHRM was failing to follow the Appeal's Tribunal's instructions. No reasons were given for disregarding the CR Board's advice;

g. The impugned decisions were justified on flawed legal grounds. The contractual limitation of service to ICTY/MICT, would not necessarily apply once the Applicants be granted permanent appointments. The approach adopted conflates the terms of the current fixed-term appointments with those that might apply once they are converted into permanent ones;

h. The alleged inability to transfer ICTY/MICT staff to posts in other entities contradicts the notice of condition of service routinely included in vacancy announcements for positions in ICTY and MICT, stating that one may be "reassigned by the Secretary-General throughout the Organization based on the changing needs and mandates", as well as former staff regulation 1.2(c), which provides for the Secretary-General's authority to assign staff members to any of the activities or offices of the Organization; it also runs counter staff rules 4.8 and 4.9, as well as sec. 11.1 of Administrative Instruction ST/AI/2010/3 (Staff selection system), on change of official duty stations and inter-organization movements respectively. It is also inconsistent with their letters of appointment, which specify that they are Secretariat staff, and conflicts with the Organization's operational requirements and mobility needs. As stated by the Secretary-General (A/62/274):

> It would not be consistent with the Organization's operational requirements and mobility policy to assess continuing need by reference to a particular mandate, function or post. Since a fundamental principle of the organizational mobility policy is that staff members are not tied to their posts, the characteristics of a

> particular post should not have a definitive impact on career prospects or job security. If all staff who work in project or entities with finite mandates were to be ineligible for consideration for continuing appointment, staff would be unwilling to assume posts in projects or entities with finite mandates, thereby undermining the capacity for programme delivery.

i. Even assuming that the Secretary-General lacks authority to transfer ICTY/MICT staff outside of these entities, he could at least have considered granting them permanent contracts limited to ICTY/MICT, as catered for in para. 10 of the Guidelines, specifying that this limitation would be removed if any of the staff members were recruited for a position elsewhere in the Secretariat;

j. The interest of the Organization was wrongly assessed by reference to the end date of the Applicants' fixed-term appointment. Based on the fact that two of the Applicants were no longer in service, and that the current appointments of six of them expire on December 2015, the ASG/OHRM concluded that there was no continuing need for their services. Under this rationale, no fixed-term contract, having by definition a limited duration, would ever be converted into permanent;

k. Only the potential costs of permanent appointments were considered. As MEU explicitly stated, the key explanation for refusing the Applicants conversion to permanent contracts was that they would have been entitled to termination indemnities if their posts in ICTY/MICT were abolished before obtaining other posts in the Organization. This rationale defeats the object and purpose of permanent appointments. Moreover, it is erroneous because the Applicants may be transferred to another post when their services are no longer needed in ICTY/MICT, and no assessment was made of their

prospects of finding new posts in the Organization based on their individual skills and qualifications;

l. The assessment failed to consider the net financial benefits for the Organization of awarding permanent appointments to ICTY/MICT staff. The Secretary-General evaluated the financial impact of offering retention incentives to ICTY staff members based on the termination indemnity scale, taking into account the savings stemming from retaining high-performing core staff and the costs of high turnover, including recruitment, training, loss of productivity, and concluded that it would have resulted in net savings estimated at USD36.6 million (see A/62/681, Table 3, pg. 13);

m. It was an error to ignore the critical need of ICTY/MICT to retain the Applicants' services. The Administration failed to make any inquiries on the key role each of them was playing in completing the mandate of ICTY/MICT, whereas all eight fulfil(ed) critical posts. Some of the Applicants even submitted formal statements by their respective supervisors on the on-going need for their combination of skills as part of the additional information provided to the Organization. The post of the Applicant in Case No. UNDT/GVA/2014/087 was placed as the very last to be cut in his group in the comparative review exercise carried out in the context of the ICTY downsizing process. The ASG/OHRM ignored that many of the Applicants had moved to MICT in the meantime and that some are involved in handling the last appeal in the current schedule, which is not expected to be ruled upon before 2017. Even if evaluated as of 30 June 2009, there was a need for their services for many years to come. In May and July 2011, two indicted individuals were arrested, opening two new major trials; hence, with the knowledge of the fall of 2011, the Organization could already estimate that the ICTY could not end its tasks before 2020 or 2021. MICT,

far from being downsized, is in a growing phase; many of its functions, including archiving and maintaining records, protection of witnesses or overview of sentences, constitute long term needs;

n. The fact that the General Assembly did not approve new retention bonuses is irrelevant for the conversion process. In rejecting them, it called upon OHRM to resolve the staff retention issues within existing contractual frameworks; this includes permanent contracts;

o. The decisions in Cases Nos. UNDT/GVA/2014/113 and 115 were procedurally flawed because the ASG/OHRM relied on the recommendation of the wrong central review body. Having been promoted to the P-5 level respectively in March and June 2014, i.e., during the protracted conversion process, these Applicants' situations should have been reviewed by the CR Board, which, contrary to the CR Committee, recommended granting the conversion;

p. Under the correct framework—that is, one that does not render the permanent contract clause effectively meaningless for the entire category of ICTY/MICT staff—the Applicants would have been granted a permanent appointment. Also, the Administration must exercise its discretion in a manner that takes account of the object and purpose of the permanent appointment regime, which was adopted to address the inequity of having large numbers of staff members serving for long periods on successive fixed-term appointments without indemnity benefits. It thus provides labour protection for staff members in line with those of many national jurisdictions;

q. When discretion is exercised in the proper framework, the only reasonable outcome is to grant the Applicants a permanent appointment, because possibility of having to pay them termination indemnities is the only factor weighting against it, whilst many others weigh heavily in favour of the conversion:

i. The Applicants each have demonstrated qualifications, performance and overall suitability as international civil servants. The ASG/OHRM has accepted that (although failing to accord these factors appropriate weight) and the Respondent has conceded that they possess transferrable skills. They are highly qualified professionals in different domains structurally needed in any entity of the Organization (legal affairs, investigations, etc.), trained to work in a variety of roles, with significant expertise in core areas for the United Nations (as shown by the numerous requests for technical assistance form national and international offices) and with considerable managerial experience. Many of them have participated in the United Nations Management Development Programme, can work in English and French and some are on the Secretariat rosters for various levels;

ii. There is a continuing need for their services. This does not come down to whether the Organization has a need to employ them forever in their current functions, but rather whether there is a long-term need for their services at ICTY/MICT or within the Organization generally. It should be assessed if their employment could be more appropriately described as being for a short-term purpose or for a long term one. The *prima facie* demarcation between the two is five years—as reiterated in the Secretary-General's bulletin ST/SGB/2011/9 (Continuing appointments)—and the longer a staff member has served

beyond this threshold, the more pressing the claim for a permanent contract becomes. The Applicants have served for between over ten and twenty years; they are already *de facto* career staff. Further, based on current information, the Applicants will be required for several more years to complete appeals in ICTY and MICT;

iii. Other relevant organizational interests and realities, which were not considered in arriving at the contested decisions, such as the need to ensure the successful completion of ICTY/MICT mandates, as well as the need to correct poor representation of women at the senior level, since five of the Applicants are female staff members on P-4 and above positions;

r. The United Nations internal dispute mechanism would be rendered meaningless if the Tribunal did not step in when the Administration repeatedly abuses its discretion despite clear corrective instructions from the Appeals Tribunal. In order to put the Applicants in the position they would be in but for the impugned decisions, the conversion of their appointments should be ordered, as a specific performance, or in the alternative, payment of compensation based on the termination indemnities, as this is the value the Organization placed on such type of appointment. For the sake of judicial economy, the cycle of litigation should be brought to an end by ordering said remedies;

s. The Applicants were not entitled to mere consideration, but to "every reasonable consideration". On a balance of probabilities, they suffered a loss, as, indeed, the record shows that their chances of conversion, if properly considered, were almost certain. In any case, the ASG/OHRM waived the chance to assess the Applicants' transferrable skills, as she declined to do so when she was directed to;

t. The Applicants have suffered moral harm for the fundamental breach of their contractual entitlements and the continuing breach of procedural due process rights, including subjecting them to another sham process, discrimination based on their entity of employment, continuing uncertainty and prejudice to their employment and personal situation as a result of the lengthy delay in resolving the issues, and the deliberate additional delay caused by the extension of the timeframe for the second review. The Appeals Tribunal explicitly stated that the compensation granted in Judgment No. 2013-UNAT-357 was reduced in light of the satisfaction achieved by remanding the matter and the Applicants' subsequent reconsideration. Instead of correcting the substantive due process breaches recognised by the Appeals Tribunal, the second exercise compounded them. The Applicants allow that each of them already received EUR3,000 as moral damages, which leads them to reduce their claim from EUR30,000 to EUR27,000;

u. No distinction should be made between staff members that remain in ICTY, those who moved to MICT and those who retired. The Tribunal ought to take into account the impact of the contested decisions on the career choices made by those that retired or separated.

48. The Respondent's principal contentions are:

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

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

c. The re-consideration of the Applicants for conversion was procedurally correct. The Organization followed the procedures set out in ST/SGB/2009/10 as well as the Guidelines, and accorded each Applicant substantive due process. The Organization undertook a multi-step process to individually consider each Applicant, the rigour of which is reflected in the detailed record kept. This process was far more rigorous than that of any other undertaken for other conversion decisions. The invitation to the Applicants to submit additional information and documents cannot be regarded as adverse to their right to substantive due process;

d. Had the Applicants in Cases No. UNDT/GVA/2015/113 and 115 been considered as a P-5 staff member of MICT and recommended by the CR Board, the outcome would not have been any different. Holding a P-5 post does not provide any special consideration or allow the Secretary-General to transfer the staff member to a position outside MICT. Furthermore, the ASG/OHRM gave due regard to the CR Board's recommendations concerning P-5 and D-1 Applicants. The fact that she disagreed with them does not indicate that her decisions were predetermined or constituted an unreasonable exercise of discretion;

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

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

g. The individual circumstances of the Applicants were taken into account, including their competencies and skills, which constitute indeed compelling reasons for their conversion. The fact that six broad categories were made should not be seen as a sign that other circumstances were not looked at. The 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 Applicants have not identified how staff members in similar situations were treated differently. The

Administration gathered and reviewed records on each of the Applicants' suitability as international civil servants 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 consideration of each of the Applicants;

h. 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 Applicants had transferrable skills. She also noted that she did not have authority to place the Applicants in a position outside ICTY/MICT. The Applicants are 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 Applicants "may have transferable skills" may have created some confusion as it might be read as rhetorical; in fact, it intends to state that transferrable skills were considered, and this is shown in the record of the CR bodies;

i. Eight of the Applicants served in an entity with finite mandate and one had separated at the time of the contested decision. They had no expectation of open-ended employment with the Organization. The fact that some were selected to a MICT position during the reconsideration process would not have led to a different outcome. MICT is an *ad hoc* body with a finite

mandate, comprising substantially reduced residual functions that are to diminish over time, and with a limited number of staff. The fact that it is in a growing phase does not change its nature, and this circumstance may well change shortly;

j. Determining the probability of the Applicants being selected for a new position in the Organization was speculative. Moreover, they hold an appointment limited to ICTY/MICT and, under the staff selection system, cannot be reassigned outside these entities. The indication in the Applicants' letters of appointment that they are Secretariat staff is erroneous;

k. The purpose of permanent appointments is to assist the Organization in maintaining programme continuity in core functions. Being subject to the Organization's continuing needs, permanent contracts are meant for staff members performing functions that are core to its mandate. The International Civil Service Commission has held that a permanent appointment should not be granted "where the mandate is finite and there is no expectation of open-ended employment". The Applicants' positions were not core to the mandate of the Organization;

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

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

o. The Applicants' claim that the contested decisions should have been based exclusively on information available as at the date of the original conversion exercise (August 2010) is inconsistent with their position that certain subsequent developments should have been taken into account, such as their length of service after the publication of ST/SGB/2009/10;

p. The ASG/OHRM did not ignore relevant factors or take into account irrelevant factors. The limitation in service to ICTY or MICT, as agreed upon by the Applicants by signing their letter of appointment, was a relevant factor; a reminder, in vacancy announcements, of the Secretary-General's authority to reassign staff members to another post in ICTY/MICT does not change this fact. In contrast, the forthcoming changes in the legal framework for the new mobility policy are irrelevant; they are not yet in effect and will only apply to internationally-recruited Field Service and Professional and higher categories staff, and not to those having

appointments limited to a specific department, office or mission. The Applicants' own assessment of their services does not demonstrate that the Administration's exercise of discretion was unreasonable;

q. The need for continuing service was taken into account and not only the potential cost of granting a conversion was considered. The purpose of permanent appointments is not to reward staff based on length of service. The Applicants are not entitled to a permanent appointment on the grounds of their length of service, according to former staff rule 104.12(b)(iii) and General Assembly resolution 51/266;

r. The argument that a permanent appointment ought to have been granted as a cost saving measure for the Organization has not merit. Further, the Tribunal is not the proper forum to discuss policy matters. The General Assembly, in its resolution 63/256, rejected a proposal to pay a financial incentive as a retention measure. It requested the Secretary-General to "use the existing contractual frameworks to offer contracts to staff, in line with dates of planned post reductions in accordance with the relevant prevailing trial schedules … as recommended by the International Civil Service Commission in paragraph 21 *(b)* of its report", which specifically recommended that fixed-term contracts be offered to ICTY/MICT staff. Also, General Assembly resolution 65/247 (para. 53(c)) excludes ICTY/MICT staff from eligibility for career (continuing) appointment;

s. Regarding the contention that granting the five female Applicants permanent appointments would contribute to the goal of gender parity in senior posts, the contested decisions do not impact on gender balance, as the Applicants continue to be employed with the Organization. Moreover, the legal framework on conversion to permanent appointment does not provide

for consideration of gender; considering gender would rather have been arbitrary;

t. As to the remedies sought, each one of the Applicants must identify a material or procedural irregularity respectively affecting the contested decisions. Considering that staff members have no entitlement to conversion (which is subject to a discretionary decision), that the Applicants remain in employment with the Organization or have retired, that their posts could have been downsized whether or not they had a permanent appointment, and because their job uncertainty results from the finite nature of ICTY, none of the Applicants has sustained any damage. Accordingly, they are not entitled to specific performance, nor to compensation at the amount of a termination indemnity applicable to permanent contracts, as 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; any award of damages would thus be punitive. The specific performance requested is a legal absurdity concerning separated staff. Furthermore, the Tribunal is not in a position to assess the Applicants' chances of conversion;

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

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

w. There is no basis to find that the Respondent manifestly abused the proceedings, hence, to award costs under art. 10.6 of the Tribunal's Statute. The Applicants cannot seek to recover the costs of their previous challenge of the 2011 decision, as no such award was made in those proceedings.

Consideration

Legal framework of the contested decisions

49. Unlike most of the decisions made by the Administration, those challenged in these cases stem directly from an order by the Appeals Tribunal in Judgment *Malmström et al.* 2013-UNAT-357. By this Judgment, the highest instance of the internal justice system remanded the decisions on the conversion of the Applicants' fixed-term appointments to permanent to the ASG/OHRM for re-consideration. In doing so, it provided the Organization with a number of precise instructions on the conduct of such re-consideration.

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

51. Relevantly, the operative parts of Judgment *Malmström et al.* 2013-UNAT-357 prescribed the following with respect to the exercise that led to the contested decisions:

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

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

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 (paras. 66 and 67), 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); 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" (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);

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

Subject of the judicial review

53. Pursuant to art. 2.1(a) of its Statute, the Tribunal is competent to examine the legality of administrative decisions. The administrative decisions challenged in these cases are the respective denials to convert the Applicants' appointments fixed-term appointments into permanent ones, made by the ASG/OHRM in June

2014. These specific decisions are thus the subject of the Tribunal's scrutiny, nothing more and nothing less.

54. They must and do speak for themselves. In particular, the previous refusals of conversion of the Applicants' appointments in the fall of 2011, although factually related, are beyond the scope of review of this application, as are any *post facto* explanations of the decisions at issue.

55. Therefore, the focus of the Tribunal's review will be on ascertaining whether the impugned decisions, as they are couched in the respective June 2014 letters sent to each Applicant, were made in conformity with the directions given by the Appeals Tribunal in Judgment *Malmström et al.* 2013-UNAT-357.

Procedural legality of the decisions

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

57. Similarly, sec. 3.5. of ST/SGB/2009/10 foresees that, when the recommendations of an eligible staff member's office or department and that of the human resources office in charge do not coincide, the case is to be referred to "the appropriate advisory body" for recommendation. This provision (at

subparagraph (a)) determines the relevant CR bodies for P-5 and D-1 staff members:

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

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

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

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

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

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

62. Lastly, the contention specific to Cases No. UNDT/GVA/2014/113 and 115 that these Applicants' candidacies for conversion should have been reviewed by the CR Board, instead of the CR Committee, further to their respective promotion through competitive selection to the P-5 level cannot be entertained. Indeed, both promotions occurred in 2014, that is, well after the initial decisions of denial of conversion. For the reasons that will be developed in detail in paras. 72 to 76 below76 below, changes in employment status that occurred after the time of the original non-conversion decisions are not to be taken into account for the purpose of the exercise of re-consideration for conversion under review. It was therefore procedurally correct to submit these cases to the CR Committee for review and recommendation.

Substantive legality of the decisions

Structure of the decision

63. 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.

64. 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.

65. 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.

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

a. Completion of five years of continuous service on fixed-term appointments. In fact, under this item, the letters of the ASG/OHRM also

address whether this requirement was met at the time the concerned staff member was under the age of 53;

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

c. Demonstration by qualifications, performance and conduct of suitability as international civil servants; and

d. Determination that the granting of a permanent appointment is in accordance with the interests of the Organization.

67. 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.

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

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

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

69. 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

70. Judgment *Malmström et al.* 2013-UNAT-357 repeatedly and explicitly states that the matter in question was remanded to the ASG/OHRM for consideration of the "suitability" of the Applicants for conversion, and not their eligibility. This is, furthermore, entirely consistent with the Appeals Tribunal's finding that the first decision not to convert the Applicants' contracts to permanent, at the outcome of the 2011 exercise, was flawed at the stage of the suitability determination, while no particular problem had been found regarding the assessment of the Applicants' eligibility; it is only logical, thus, that the matter be remanded for re-consideration as from the step where the process became vitiated, not as from a previous stage.

71. 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 Applicants' eligibility, and the new assessment that ensued was reflected in the decision letters, under the criterion referred to in para 66.a above. In re-assessing the Applicants' eligibility, the Administration disregarded the Appeals Tribunal's instructions.

Retroactivity

72. Although Judgment *Malmström et al.* 2013-UNAT-357 refers on several occasions to retroactive "conversion" or retroactive "effect" of a potential conversion, at para. 83—the key passage of the "Judgment"—it unambiguously orders the "retroactive consideration" of the Applicants' 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 decisions were reached, i.e., mid-June 2014, and not be limited to those known at the time of the initial conversion exercise.

73. Such an interpretation would devoid of any meaning the term "retroactive", that the Appeals Tribunal consciously and purposefully chose to use. In addition, Judgment *Malmström et al.* 2013-UNAT-357 states that the Applicants' entitlement to receive a proper determination of their suitability for retroactive conversion, "applies equally to any litigant staff members who were part of the original conversion exercise at issue, but have since left the service of ICTY"; this further supports that it was the Appeals Tribunal's intention that the changes in employment status occurred between the first and second exercise do not impact on the Applicants' right to be considered for conversion.

74. 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.

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

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

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

77. The Respondent avers that the re-consideration exercise comprised an individual consideration and review of the specific qualifications, proficiencies, performance, conduct and transferrable skills of every Applicant. In holding that, he points out that six types of decisions were issued, each tailored to the employment status of the six different categories of similarly situated staff members. The Tribunal, however, is of the view that this in itself does not reveal an individualised consideration of each Applicant, but, at best, their categorisation.

78. The Respondent also asserts that the ASG/OHRM examined the proficiencies, competencies and transferrable skills pertaining to each individual Applicant. Nevertheless, the Tribunal cannot but note that the reasons given for

not granting the conversion were identical for all eight Applicants and, as a matter of fact, for approximately 250 ICTY staff members assessed in the same exercise. Not only were the reasons put forward the same, but they were also formulated in exactly the same terms in every decision letter, and, importantly, they were in no way related to the Applicants' respective merits, competencies or record of service.

79. 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, the ASG/OHRM did not address, and even less pronounce herself on, the question of whether the respective Applicants possessed such skills, let alone which ones they possess and to what extent.

80. In view of the foregoing, the Tribunal finds that the contested decisions do not reflect any meaningful level of individual consideration of the Applicants. Even if it were to follow the Respondent's submission that the individualisation transpires from the record of the process (mainly the Applicants' individual files), the Tribunal observes that these records do not contain any indicia of individual consideration, either. The individual files, and in particular the documents detailing the analysis of each of the Applicants' candidatures for conversion at every step of the review, do not even mention any qualifications or skills, or at least any kind of personalised factors (such as, the role they discharge in ICTY/MICT or their placement in the comparative review exercises conducted in the context of ICTY downsizing); notably, the form on which OHRM reviewers recorded their remarks and recommendations on each candidate refer exclusively to the particulars of the downsizing of ICTY, and the respective dates of the Applicants' expected separation or end of contract.

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

Reasons relied upon in making the contested decisions

82. 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.

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

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

85. 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).

86. It is noteworthy that abolition of posts or funding cutbacks are exactly the scenarios that could potentially affect the Applicants, as ICTY staff, putting them in need of alternative placement. Since nowhere in the instruction it is suggested that said provision shall not apply to staff holding a contract with service limited to a certain department or office (in the instant case, ICTY), the Tribunal sees no compelling reason to exclude the possibility for the ASG/OHRM to potentially reassign the Applicants on the basis of sec. 11.1(b) of ST/AI/2010/3, e.g., in case of abolition of their post. Accordingly, although the Tribunal understands that this rule was conceived to be applied on an exceptional basis, and even conceding that locally recruited staff are subject to specific geographical restrictions, it appears that, contrary to the Respondent's contention, there is no absolute legal bar for the ASG/OHRM to move any of the Applicants, who held appointments limited to ICTY, to a different entity on the basis of the above-referenced provision if their posts were to be abolished.

87. 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.

88. 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.

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

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

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

Exclusive reliance on the downsizing of ICTY

92. The ASG/OHRM is entitled to take into consideration the finite mandate and downsizing situation of a certain 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 it 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 ones impugned, in the following terms:

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

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

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

95. Against this background, the Tribunal tends to accept the Administration's position that the finite mandate of ICTY, as well as of MICT, is a factor that can be validly considered in deciding on the conversion of the Applicants' appointment to permanent. However, although it is acceptable to give adequate

weight to the operational realities of ICTY, including its finite mandate, the Appeals Tribunal, nevertheless, specifically ruled in Judgment *Malmström et al.* 2013-UNAT-357 that relying *exclusively* on this circumstance amounts to an abuse of discretion.

96. On this crucial point, the Tribunal has determined that the motive to refuse to convert to permanent the appointments of each of the eight Applicants was invariably the same and came down to the finite mandate of ICTY and its downsizing (paras. 82 to 91 above), and, additionally, that no other relevant circumstances, specific to each individual, were considered (paras. 77 to 81 above). It thus appears evident that the predominant factor behind the impugned decisions was, yet again, the finite mandate of ICTY.

97. 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 relying solely on this factor and overriding all others, the Organization failed to abide by the clear and binding instructions contained in Judgment *Malmström et al.* 2013-UNAT-357.

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

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

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

Remedies

99. 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.

100. The Tribunal has to consider the remedies sought by the Applicants—listed in para. 3 above—in light of its competencies as provided for in the above-referenced article of its Statute.

Rescission of the contested decisions

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

102. 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

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

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

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

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

107. 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. It follows that the

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

108. 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 of the fall of 2011.

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

Moral damages

110. 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).

111. The present applications were filed between 28 and 30 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. It follows that none of the Applicants could have possibly been aware of the amendment at the time of filing their respective applications.

112. This Tribunal has ruled in the past that staff members can only be expected to be aware of any regulations introduced if and when the latter have been subject to public announcement (*Bastet* UNDT/2013/172, *Liu* UNDT/2015/078). Despite the absence of specific rules on the procedures for the entry into force of norms within the Organization, it results from the foregoing that the amendment of art. 10.5 of the Tribunal's Statute could not become binding on the Applicants until it was duly published, which was not before 21 January 2015.

113. 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.

114. 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.

115. It is, therefore, not tenable 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.

116. 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 cases. 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-357 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.

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

118. In calculating the *quantum*, this Tribunal has to take into account—like the Appeals Tribunal did—the satisfaction granted by remanding the impugned decisions for re-consideration. The Tribunal also deems that for the purpose of the present proceedings, moral damages are meant to compensate only the harm resulting directly from the decisions under review in these very applications, 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 *Malmström et al.* 2013-UNAT-257 and compensated through the damages ordered therein.

119. After carefully pondering the harm caused strictly by the contested decisions, in line with the ruling in *Asariotis*, 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 EUR3,000 per Applicant.

Costs

120. The Tribunal is not of the view that the Respondent engaged in any manifest abuse of the proceedings before it. Consequently, it finds no basis to award costs against him under art. 10.6 of its Statute.

Conclusion

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

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

b. The contested decisions are, therefore, remanded to the ASG/OHRM

i. for retroactive individualised consideration of the Applicants' suitability for conversion of their appointments to a permanent one as mandated by ST/SGB/2009/10, exercising discretion in conformity with the instructions received in Judgment *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 the amount of EUR3,000;

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

e. All other claims are rejected.

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

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