



# **UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2016-UNAT-683

**Featherstone  
(Respondent/Applicant)**

**v.**

**Secretary-General of the United Nations  
(Appellant/Respondent)**

## **JUDGMENT**

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**Before:** Judge Rosalyn Chapman, Presiding  
Judge Sophia Adinyira  
Judge Deborah Thomas-Felix  
Judge Inés Weinberg de Roca  
Judge Luis María Simón  
Judge Mary Faherty  
Judge Richard Lussick

**Case No.:** 2016-899

**Date:** 30 June 2016

**Registrar:** Weicheng Lin

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**Counsel for Ms. Featherstone:** Self-Represented

**Counsel for Secretary-General:** Zarqaa Chohan  
Rupa Mitra

*Reissued for technical reasons on 25 August 2016*

**JUDGE ROSALYN CHAPMAN, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations of Judgment No. UNDT/2015/117, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 17 December 2015, in the case of *Featherstone v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 15 February 2016, and Ms. Yvonne Margaret Owen Featherstone answered on 18 April 2016.

**Facts and Procedure**

2. The facts established by the Dispute Tribunal in Judgment No. UNDT/2015/117 read as follows:<sup>1</sup>

... 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.

... 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.

... 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]”.

... 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”.

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<sup>1</sup> The following facts are taken from paragraphs 3–41.

... 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.

... 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.

... 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.

... 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 [Assistant Secretary-General for Office of Human Resources Management (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.

... 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.

... 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".

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

... 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.

... 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”.

... 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.

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

... 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)”.

... 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.

... 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.

... 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”.

... 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.

... 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”.

... 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].

... By letters dated 6 October 2011, the ICTY Registrar informed each of the concerned staff members, including the Applicant, of the decision of the ASG/OHRM not to grant them a permanent appointment, stating:

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

... The Applicant took early retirement effective 31 December 2011.

... After requesting management evaluation of the decision not to convert her appointment to permanent, and being informed that it had been upheld by the USG for Management, the Applicant filed an application before the [UNDT] on 16 April 2012, which by Order No. 80 (GVA/2012) of 4 May 2012 was consolidated, at the Applicant[']s request, with that of other 261 staff members concerned by analogous decisions[...].

... The [UNDT] ruled on these consolidated applications by Judgment *Ademagic et al.* UNDT/2012/131, dated 29 August 2012, finding that the ASG/OHRM was not the competent authority to make the impugned decisions, as the USG had delegated such authority to the ICTY Registrar. On this ground, the [UNDT] rescinded the contested

decisions and, considering that they concerned an appointment matter, set an alternative compensation in lieu of effective rescission of EUR 2, 000 per applicant.

... On appeal, the Appeals Tribunal vacated *Ademagic et al.* UNDT/2012/131, by Judgment No. 2013-UNAT-359 issued on 19 December 2013.<sup>[2]</sup> The Appeals Tribunal held that the power to decide on the conversion of ICTY staff appointments into permanent[...] 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.

... 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 EUR 3,000 in non-pecuniary damages.

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

... In line with such instructions, each Applicant was invited, by letter of the Human Resources Section, ICTY, dated 29 January 2014, to submit within two weeks any information they deemed relevant for the new review to be undertaken. The Applicant did not submit further information.

... 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.

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<sup>[2]</sup> *Ademagic et al. & McIlwraith v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-359 (Appeals Tribunal Judgment).

... ICTY reviewed individual files of each of its staff members under re-consideration to assess their eligibility and their suitability and, on 14 February 2014, transmitted to OHRM the files, together with its recommendations on each concerned staff member. For nearly all of them, ICTY recommended that they be offered a permanent appointment; the recommendation memoranda stated in square brackets that “[The appointment should be limited to office/department]”. Only four individuals were not recommended for conversion, since ICTY considered them ineligible, as explained in the accompanying memorandum of 14 February 2014 transmitting the recommendations to OHRM.

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

... 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.

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

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

- a. Applicants who were active ICTY staff members as at the date of the contested decisions;
- b. Applicants who were active ICTY staff members in the General Service category as at the date of the contested decisions;
- c. Applicants who had transferred to MICT as at the date of the contested decisions;

- d. Applicants who had separated from ICTY as at the date of the contested decisions;
- e. Applicants at the P-5 level; and
- f. Applicants who had separated from ICTY due to downsizing after the contested decisions.

... By individual letters dated 13 to 19 June 2014, and received shortly thereafter, all re-considered staff members were informed by the ASG/OHRM of the decisions not to grant any of them retroactive conversion of their respective fixed-term appointments into permanent appointments. The Applicant was informed by such a letter dated 17 June 2014. The language and structure of the respective letters were remarkably similar [...], save for the personal and factual details mentioned, although the wording was adjusted depending on which of the aforementioned six categories of staff the letter's recipient belonged to. All letters stated that the respective staff members fulfilled three out of the four required criteria and that they did not meet the fourth criteria, namely, that the granting of a permanent appointment be in accordance with the interests of the Organization. Each letter contained one paragraph setting out, in identical terms, the reasons why the last criterion was not considered to be met:

I have considered that though you may have transferable skills, your appointment is limited to service with the ICTY. Under the legal framework for the selection of staff members, I have no authority to place you in a position in another entity outside of this legal framework. As mandated by the Charter, the resolutions of the General Assembly, and the Organization's administrative issuances, staff selection is a competitive process to be undertaken in accordance with established procedures. All staff members have to apply and compete with other staff members and external applicants in order to be selected for available positions with the Organization. Given the finite nature of the Tribunal's mandate, and the limitation of your appointment to service with the ICTY, the granting of a permanent appointment in your case would not be in accordance with the interests or the operational realities of the Organization. Therefore, you have not satisfied the fourth criterion.<sup>[3]</sup>

... On 4 July 2014, the Applicant, as well as all other applicants affected by Judgments [*Baig*] *et al.* 2013-UNAT-[3]57 and *Ademagic et al.* 2013-UNAT-[3]59, 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

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<sup>3</sup> The Secretary-General does not agree to the UNDT's characterization of the 17 June 2014 letter in this paragraph. With this exception, the Secretary-General accepts the facts and procedural history contained in paragraphs 3-38 and 40-41 of the impugned Judgment.



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).

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

3. On 29 December 2014, Ms. Featherstone filed an application with the Dispute Tribunal seeking, *inter alia*, rescission of the 17 June 2014 decision of the ASG/OHRM; retroactive conversion to a permanent appointment effective June 2009, with or without limitation of service to ICTY; compensation calculated according to the applicable termination indemnity associated with a permanent appointment plus the monetary equivalent of any other benefits which would have accrued to her; and compensation for bias and discrimination, delay and moral distress.

4. In Judgment No. UNDT/2015/117, the UNDT held that the contested decision denying Ms. Featherstone a conversion of her fixed-term appointment to a permanent one was unlawful, primarily because her case was not given individual consideration in light of her proficiencies, qualifications, competencies, conduct and transferrable skills and the decision was "exclusively based on the limited mandate of ICTY, to the exclusion of all other relevant factors".<sup>4</sup> In the UNDT's view, the Administration disregarded the Appeals Tribunal Judgment by launching a new eligibility assessment. The Dispute Tribunal rescinded the contested decision and remanded the matter to the ASG/OHRM for "retroactive individualised consideration of [Ms. Featherstone's] suitability for conversion of her appointment to a permanent one",<sup>5</sup> in conformity with the instructions in the Appeals Tribunal Judgment among others, within 90 days of the issuance of the impugned Judgment. The Dispute Tribunal further awarded moral damages in the sum of EUR 3,000 to Ms. Featherstone.

5. Judgment No. UNDT/2015/117 is the subject of the instant appeal.

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<sup>4</sup> Impugned Judgment, para. 93.

<sup>5</sup> *Ibid.*, para. 117.

6. On 9 June 2016, the Appeals Tribunal issued a Scheduling Order No. 263 (2016) advising Ms. Featherstone, as well as the parties in the related cases, (Case No. 2016-891, *Marcussen et al. v. Secretary-General of the United Nations*) and (Case No. 2016-900, *Ademagic et. al. v. Secretary-General of the United Nations*), that an oral hearing would be scheduled on 24 June 2016. The hearing took place before the full bench on 24 June 2016, with counsel for the Secretary-General attending in person and Ms. Featherstone attending by video-conference.

### **Submissions**

#### **The Secretary-General's Appeal**

7. The UNDT erred in finding that the ASG/OHRM failed to give meaningful individual consideration to Ms. Featherstone and based the contested decision not to convert her fixed-term appointment into a permanent one solely on the basis of the finite mandate of ICTY in violation of the Appeals Tribunal Judgment. The Administration fully complied with the Appeals Tribunal's instructions by undertaking a detailed multi-step process to ensure that Ms. Featherstone received a "detailed and individualized review" at every step including the assessment of her eligibility and suitability. Contrary to the UNDT's findings, the form on which the OHRM reviewers recorded their remarks and recommendations for Ms. Featherstone detailed each step of OHRM's reconsideration process and the results of the review for a permanent appointment. In this regard, the Secretary-General notes that the Administration requested the UNDT to call witnesses to clarify the details of how it had conducted the individualized re-consideration, but the UNDT declined that request.

8. The UNDT erred in concluding that the ASG/OHRM had authority to place Ms. Featherstone in a post outside ICTY and to grant her a permanent contract with no limitation of service to ICTY. The UNDT misread Section 11 of ST/AI/2010/3 and paragraph 10 of the Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 (Guidelines), having failed to take into account Staff Rule 9.6(c)(i). The UNDT's conclusions are therefore misplaced.

9. The Dispute Tribunal stepped into the shoes of the ASG/OHRM and usurped her discretion to grant or deny a permanent appointment by designating weight and relevance to factors that she considered to be in the interests of the Organization. The granting of a

permanent appointment is a matter within the discretion of the Administration. Such exercise of discretion is subject to a limited judicial review. In exercising her discretion, the ASG/OHRM had the prerogative to take into account the relevant resolutions adopted by the General Assembly and all the interests of the Organization. It was for the ASG/OHRM to assign the due and adequate weight to each criterion she considered, including ICTY's finite mandate. If she decided that ICTY's finite mandate should be the predominant factor in her weighing process, or that it should weigh more heavily than other factors, or even that it should override certain factors, such decisions would be well within the bounds of her discretion; they would not violate the applicable legal framework or contravene the Appeals Tribunal Judgment. The UNDT lost sight of the important distinction between a criterion being assigned a certain weight in a decision and a criterion being the sole and exclusive one in a decision. ICTY's finite mandate may be the predominant factor in the ASG/OHRM's weighing process, but it was not the exclusive factor.

10. While it recognized that the ASG/OHRM was entitled to take into consideration the finite mandate and the downsizing situation of a certain entity in making a decision on the conversion of its staff, the UNDT nevertheless concluded that because the weighing process resulted in the same decision in each of the ICTY staff members' cases, including in Ms. Featherstone's case, the ASG/OHRM had not given them meaningful consideration and must have relied exclusively and solely on ICTY's finite mandate. The Secretary-General stresses that in deciding not to convert Ms. Featherstone's appointment into a permanent one, the ASG/OHRM properly exercised her discretion in weighing the fact that Ms. Featherstone held an appointment with service limited to ICTY, which had a finite mandate, against other criteria.

11. The Dispute Tribunal erred in granting moral damages to Ms. Featherstone. The award of moral damages is not warranted as the UNDT has failed to show that the Administration had not complied with the Appeals Tribunal Judgment. The award of moral damages is also unwarranted because the UNDT misapplied Article 10(5) of its Statute and awarded damages in the absence of evidence.

12. The Secretary-General requests that the Appeals Tribunal vacate the impugned Judgment.

**Ms. Featherstone's Answer**

13. The Secretary-General's argument that the UNDT erred in finding that the ASG/OHRM had not given meaningful individual consideration to Ms. Featherstone and exclusively relied upon ICTY's finite mandate is a challenge to findings of fact, not of law. The Secretary-General has failed to show the manifest unreasonableness of the resulting decision in compliance with Article 2(e) of the Statute of the Appeals Tribunal.

14. In any event, the presumption of regularity which applies to the contested decision has been rebutted. Ms. Featherstone points to the fact that the ASG/OHRM set aside the Central Review Board's positive recommendation that she should be granted a permanent appointment not limited to ICTY, without explanation. The lack of explanation and the lack of the audit trail required to be provided in the interests of transparency and accountability is in breach of the UNDT jurisprudence on this point.

15. Moreover, identical letters were sent to each and every one of the approximately 250 ICTY staff members subject to the Appeals Tribunal Judgment. This precludes any possibility of individual consideration.

16. The UNDT did not err in ruling that the ASG/OHRM could have granted Ms. Featherstone a permanent appointment without a limitation of service to ICTY. The Secretary-General's argument ignores the realities of budget and appointment cycles in an *ad hoc* institution with a finite mandate. Each of the fixed-term appointments within ICTY was expected to be renewed at the end of each budget period until such time as it was ultimately slated to be terminated due to abolition of posts, reduction of staff, funding cutbacks, or on any other grounds. The phrase "any other grounds" must include the completion of the ICTY mandate which would clearly lead to the "termination" of all posts at ICTY. Moreover, the Secretary-General accepted that there was no legal bar to the conversion of Ms. Featherstone's appointment to permanent, under the Guidelines.

17. Ms. Featherstone asks the Appeals Tribunal to reject the Secretary-General's arguments that the UNDT usurped the discretion of the ASG/OHRM to grant or deny permanent appointments.

18. The UNDT properly awarded moral damages. Ms. Featherstone concurs with the UNDT's analysis of the amendment to the Statute of the UNDT and the precedential value of the decision in *Asariotis*.<sup>6</sup>

19. Ms. Featherstone requests, *inter alia*, that the Appeals Tribunal dismiss all of the grounds of appeal and uphold the decision of the UNDT. If the Appeals Tribunal accepts the appeal in so far as it relates to issues of law, the challenge to the UNDT's factual determination must fail and the UNDT's award of damages for moral injury should stand, or it should be "concomitant with any damages awarded to other P5 applicants".

### **Considerations**

#### *The Secretary-General's appeal*

20. On appeal, the Secretary-General contends that the UNDT erred:

- In finding that the ASG/OHRM did not give meaningful individual consideration to Ms. Featherstone's request for conversion to permanent appointment and instead relying exclusively on ICTY's finite mandate;
- In ruling that the ASG/OHRM could have granted Ms. Featherstone a permanent appointment without a limitation of service to ICTY;
- In usurping the discretion of the ASG/OHRM; and
- In awarding moral damages to Ms. Featherstone for harm which the UNDT found was caused by the contested decision.

21. Consideration of the Appeals Tribunal Judgment is essential for determining the legality of the conversion exercises that are the subject of the pending appeal. In the Appeals Tribunal Judgment (*Ademagic et al.*), which was applied *mutatis mutandis* in *Baig et al.*,<sup>7</sup> the Appeals Tribunal stated:<sup>8</sup>

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<sup>6</sup> *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.

<sup>7</sup> *Baig, Malmström, Jarvis, Goy, Nicholls, Marcussen, Reid, Edgerton, Dygeus, Sutherland v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-357.

<sup>8</sup> *Ademagic et al. & McIlwraith v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-359, pages 21-23 (Appeals Tribunal Judgment, emphases in original and internal citations omitted).

... The question before the Appeals Tribunal is not whether the ICTY staff members were *eligible* for conversion but, rather, whether the determination of the ASG/OHRM that they were *not suitable* for conversion can withstand judicial scrutiny.

...

... ICTY staff members - like any other staff member – are entitled to individual, “full and fair” (in the lexicon of promotion cases) consideration of their suitability for conversion to permanent appointment. The established procedures, as well as the principles of international administrative law, require no less. This principle has been recognized in the jurisprudence of the Appeals Tribunal.

... We are not persuaded by the Secretary-General’s argument that the staff members received the appropriate individual consideration in the “suitability” exercise. The ASG/OHRM’s decision, as communicated to the staff members, provides no hint that their candidature for permanent appointment was reviewed by OHRM against their qualifications, performance or conduct; their proven, or not proven, as the case may be, suitability as international civil servants; or the highest standards of efficiency, competence and integrity, as established in the United Nations Charter. Each candidate for permanent appointment was lawfully entitled to an individual and a considered assessment on the above basis before a permanent appointment could be granted or denied. This was their statutory entitlement and cannot be overridden or disregarded merely because they are employed by the ICTY.

... It is patently obvious that a blanket policy of denial of permanent appointments to ICTY staff members was adopted by the ASG/OHRM simply because the ICTY was a downsizing entity. The ASG/OHRM was not entitled to rely solely on the finite mandate of the ICTY or Security Council Resolution 1503 (2003) as the reason to depart from the principles of substantive and procedural due process which attaches to the ASG/OHRM’s exercise of her discretion under ST/SGB/2009/10. We determine that the ASG/OHRM’s discretion was fettered by her reliance, to the exclusion of all other relevant factors, on the ICTY’s finite mandate. Accordingly, we are satisfied that the staff members were discriminated against because of the nature of the entity in which they were employed. As such, the ASG/OHRM’s decision was legally void, being tainted by arbitrariness and the violation of the staff members’ due process rights.

... The approach adopted by the ASG/OHRM offended against the provision in former Staff Rule 104.12(b)(iii) that staff members would “be given every reasonable consideration for a permanent appointment”. This Rule did no more than give effect to the wish expressed by the General Assembly as far back as 1982 in Resolution 37/126 that “staff members on fixed-term contracts upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment”. 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, particularly when section 2 of ST/SGB/2009/10 gave clear and unambiguous instruction on what must be taken into account.

... The right of the staff members, which was violated by the afore-mentioned discriminatory actions and by the absence of due process, is not to the granting of a permanent appointment but, rather, to be fairly, properly, and transparently *considered* for permanent appointment. Since we find that the ASG/OHRM breached the staff members’ rights in this respect, the Appeals Tribunal hereby rescinds the impugned decision.

... Accordingly, the matter must be remanded.

... Because the Appeals Tribunal has legal authority to do so, and has sufficient factual information, the matter is hereby remanded to the decision maker, namely the ASG/OHRM (rather than to the UNDT) for the ASG/OHRM to consider, in accordance with the relevant statutory provisions and the principles of substantive due process, whether the staff members’ fixed-term contracts should be retroactively converted to permanent appointments. There is a statutory obligation on the Administration, in the context of the best interests of the United Nations, to give “every reasonable consideration” to those ICTY staff members demonstrating the proficiencies, competencies and transferrable skills which render them suitable for career positions within the Organization.

22. It is patently clear that the Appeals Tribunal Judgment remanded for *de novo* consideration the staff members’ suitability for conversion to permanent appointment. We are greatly dismayed that our clear and unambiguous directive was not followed by the Administration. Rather, the ASG/OHRM, in direct contravention of the Appeals Tribunal Judgment, embarked upon a determination of the staff members’ *eligibility* as well as suitability for conversion, whereas there was no remand on the issue of eligibility. Thus, contrary to the Secretary-General’s submissions, the Dispute Tribunal did not err in drawing a sharp distinction between eligibility and suitability.

23. Moreover, we find that the Secretary-General’s submissions that the Appeals Tribunal did not “specifically prohibit” the Administration from conducting an eligibility review are entirely disingenuous given our clear directive in the Appeals Tribunal Judgment. Indeed, in his Consolidated Motion for an extension of time to complete the consideration of the conversion exercises, the Secretary-General expressly acknowledged that the Appeals Tribunal had remanded the ICTY conversion exercise to the ASG/OHRM “to consider anew the *suitability* for permanent appointments of the ICTY staff members” (emphasis added).

Similarly, it is entirely disingenuous for the Secretary-General to cite Section 2 of ST/SGB/2009/10 as authority for the Administration's decision to review eligibility in the course of the remand. A plain reading of Section 2 shows that the focus of that section is on the "suitability" of "eligible staff members". The presence of the word "eligible" is no more than an indicator, if a consideration under Section 2 is called for, that the staff member has reached the eligibility threshold as set out in Section 1 for consideration as to his or her suitability for conversion to a permanent appointment.

24. We find that the Administration's wilful disregard of the Appeals Tribunal Judgment is not mitigated by the fact that *almost* all of the staff members were considered to have met the eligibility requirement upon remand. As there was a conflation of eligibility with suitability, the Administration did not abide by the Appeals Tribunal's clear directive. We are constrained to opine that the Administration's conduct in embarking on an eligibility exercise is unfortunately indicative of an institutional reluctance to follow the instructions which we so clearly gave in the Appeals Tribunal Judgment.

25. The Dispute Tribunal also found that the Administration did not comply with our instruction that the staff members were entitled to "retroactive consideration". The UNDT determined that the remedy ordered by the Appeals Tribunal Judgment was designed to restore the staff members' position as of the date of the unlawful decisions on 20 September 2011. Thus, the UNDT found that the Administration improperly considered "updated" 2014 information. Accordingly, the UNDT found that the Secretary-General also did not comply with the Appeals Tribunal Judgment in this regard.

26. We uphold the UNDT's determination. We gave a clear directive to the Administration that, upon remand, it should consider staff member's suitability for conversion to a permanent appointment "by reference to the relevant circumstances as they stood at the time of the first impugned refusal to convert her appointment[]".<sup>9</sup> Once again, the Administration failed to comply with our directive.

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<sup>9</sup> Impugned Judgment, para. 70.



27. At the heart of this appeal is whether the Administration's purported *de novo* consideration gave "every reasonable consideration" to the staff member's "proficiencies, competencies and transferrable skills". In this regard, the Dispute Tribunal concluded that the Administration had failed, stating:<sup>10</sup>

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

... The Respondent also asserts that the ASG/OHRM examined the proficiencies, competencies and transferrable skills pertaining to the Applicant, as she did for each one of the numerous individuals under review. Nevertheless, the [Dispute] Tribunal cannot but note that the reasons given for not granting the conversion were identical for the other nearly 260 ICTY staff members reviewed following Judgments [*Baig*] *et al.* 2013-UNAT-357 and *Ademagic et al.* 2013-UNAT-[3]59. Not only were the reasons put forward the same, but they were also formulated in exactly the same terms in every decision letter, and, importantly, they were in no way related to the respective merits, competencies or record of service.

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

... In view of the foregoing, the [Dispute] Tribunal finds that the contested decision does not reflect any meaningful level of individual consideration of the Applicant. Even if it were to follow the Respondent's submission that the individualisation transpires from the record of the process (mainly the individual files), the [Dispute] Tribunal observes that these records do not contain any indicia of individual consideration, either. The Applicant's individual file, and in particular the documents detailing the analysis of her candidature for conversion at every step of the review, do not even mention any qualifications or skills, or at least any kind of personalised factors (such as, the role she discharged in ICTY or her placement in the comparative review exercises conducted in the context of ICTY downsizing). This is particularly noticeable from the form on which OHRM reviewers recorded their

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<sup>10</sup> *Ibid.*, paras. 72-76.

remarks and recommendations on the Applicant; moreover, when seeing that form not in isolation but in light of those of her numerous colleagues reviewed in the same exercise, it becomes clear that they refer exclusively to the particulars of the downsizing of ICTY, and to the respective dates of end of contract or expected separation.

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

28. We agree. As the UNDT properly concluded, the ASG/OHRM's conversion exercise was in essence a reliance on form over substance. The instruction to ICTY to compile extensive dossiers on each of the staff members, while itself a worthy first step, did not meet the "full and fair consideration" mandated by the Appeals Tribunal Judgment in the absence of any substantive consideration of the information contained in the dossiers. There is no evidence of such consideration in the decision letter that went out to the staff member on 17 June 2014.

29. The Secretary-General argues, however, that the individuality of the decisions should not be impugned merely because the decision letters used the same format and terminology in finding that none of the staff members were suitable for conversion to a permanent appointment. It is not the identical nature of the language or format used by the Administration in the letters that is the determinative factor; rather, it is the patent absence of any reference to, or consideration of, the respective staff member's competencies, proficiencies and transferrable skills. Without such discussion, the lawfulness of the manner in which the exercise was conducted is undermined.

30. We agree with the UNDT that the ASG/OHRM failed to given any consideration whatsoever to what each staff member might have to offer byway of transferable skills—save the cursory reference in each decision letter that although the staff member "may have transferrable skills, [her] appointment [was] limited to service with the ICTY". For the "full and fair consideration", the Appeals Tribunal Judgment mandated that the ASG/OHRM must address the transferable skills that each staff member possesses in considering the suitability of the staff member for conversion to a permanent appointment. The major reason this Tribunal remanded the case was for the ASG/OHRM to specifically take into account each staff member's transferrable skills when considering his or her suitability for a permanent appointment. The failure of the Administration to do this, and to give any meaningful consideration to this criterion, of itself, is sufficient to vitiate the contested decisions.

*The reasons relied upon in the contested decisions*

31. The Administration's reasons for not granting permanent appointments was the limitation of the staff member's appointment to service with ICTY and the finite nature of ICTY's mandate. As stated by the Dispute Tribunal, there is no question that the staff member's letter of appointment provides that her service shall be limited to ICTY. Nevertheless, the UNDT determined that the Administration could have elected to grant Ms. Featherstone a permanent contract not limited to service with ICTY/MICT and would then have been free to reassign her without impediment. In coming to this conclusion, the UNDT considered the relevant administrative issuance regarding the staff selection system, namely ST/AI/2010/3 (Staff selection system) and the Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009.

32. First, with regard to ST/AI/2010/3, the Dispute Tribunal considered Section 11.1 thereof which provides:

**Placement authority outside the normal process**

11.1 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:

(a) Incumbents, other than staff members holding a temporary appointment, of positions reclassified upward for which an applicant other than the incumbent has been selected;

(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);

(c) Staff members who return from secondment after more than two years when the parent department responsible concerned has made every effort to place them.

After determining the availability of a suitable position in consultation with the head of department/office and the staff member concerned, the Assistant Secretary-General for Human Resources Management shall decide on the placement, in accordance with staff regulation 1.2(c).

33. The Dispute Tribunal relied on Section 11.1(b) as the mechanism for the potential reassignment of the ICTY staff in case of abolition of their posts, concluding that there was “no absolute legal bar for the ASG/OHRM to move any of the [ICTY staff members] ... to a different entity on the basis of the above-referenced provision if their posts were to be abolished”.<sup>11</sup>

34. Paragraph 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.

35. The UNDT construed the word “may” as precluding a staff member who previously held a fixed-term appointment from receiving a permanent appointment subject to the same limitation. In this regard, the Dispute Tribunal stated: “If it were mandatory to equally limit the permanent appointment to said department/office upon conversion, the Guidelines would and should have explicitly stated same”.<sup>12</sup>

36. The Dispute Tribunal, thus, found that of the two grounds put forward by the Administration for not converting, namely the limitation of the staff members’ fixed-term appointment to the ICTY and ICTY’s finite mandate, the former carried little weight.

37. The Secretary-General contends that the UNDT erred in law and misconstrued Section 11.1(b). He argues that Section 11 does not specify that the ASG/OHRM’s exceptional authority extends to the placement of staff members outside of their particular department, rather it provides only that the ASG/OHRM would have authority to place staff members “outside the normal staff selection process”.

38. The Secretary-General further contends that the UNDT erred by failing to take into account Staff Rule 9.6(c)(i), which states:<sup>13</sup>

(c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing

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<sup>11</sup> *Ibid.*, para. 81.

<sup>12</sup> *Ibid.*, para. 83.

<sup>13</sup> The Secretary-General’s Bulletin SGB/2010/6 of 2 September 2010.

appointment in accordance with the terms of the appointment or on any of the following grounds:

- (i) Abolition of posts or reduction of staff[.]

39. In other words, the Secretary-General submits that the ICTY staff members, who were on fixed-term appointments with end dates, did not fall into the category of those whose “appointments [were] slated to be *terminated* due to abolition of posts, reduction of staff, funding cutbacks, or on any other grounds” (emphasis in original). Accordingly, the Secretary-General submits that the ASG/OHRM could have properly concluded that she could not place the staff members in another entity outside of ICTY.

40. Insofar as the UNDT relied on the contents of paragraph 10 of the Guidelines in determining that the ASG/OHRM could have given some ICTY staff members a permanent appointment limited to service within ICTY and given other ICTY staff members permanent appointments with no service limitations, the Secretary-General argues that the Dispute Tribunal misread paragraph 10. He contends that the word “may” in paragraph 10 of the Guidelines is no more than a reiteration of the language in Section 2 of ST/SGB/2009/10, that “a permanent appointment may be granted” to staff who meet the criteria for such appointments. Furthermore, the Secretary-General relies on the second sentence of paragraph 10 which states “[i]f 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”.

41. Ms. Featherstone submits that the UNDT was correct to find that the ASG/OHRM could place her in a position outside of ICTY. She contends that the Administration seeks to cast her as an individual who merely has a fixed-term appointment that will expire, as opposed to a person affected by the abolition of posts, leaving her to fall outside of those persons who can be placed outside of the normal process. She submits there is nothing in ST/AI/2010/3 or Staff Rule 9.6 which bars the ASG/OHRM from placing her in a suitable position outside of ICTY regardless of the fact that her fixed-term contract indicates a limitation to her services.

42. Once again, we find that the UNDT did not err in law or fact in interpreting the relevant provisions as it did.

*Did the Dispute Tribunal improperly substitute its discretion for that of the ASG/OHRM?*

43. The Secretary-General contends that the UNDT usurped the discretion of the ASG/OHRM and, thus, committed an error of law by virtue of its conclusion that the ASG/OHRM placed overwhelming weight on ICTY's finite mandate in her overall consideration of the applications for conversion. We find no merit in this argument. First, we note that the Dispute Tribunal recognised that the ASG/OHRM was entitled to take into consideration ICTY's finite mandate and downsizing situation and appropriately referenced former Staff Rule 104.13 and Section 2 of ST/AI/2009/10 as the legal basis for giving due weight to "all the interests of the Organization". It also had regard to General Assembly resolution 51/226 which clearly states that the "operational realities of the organizations" are considerations the Administration may legitimately consider when making administrative decisions such as conversion to permanent appointments. There is no merit to the Secretary-General's claim. In adherence to classic principles of judicial review, the UNDT scrutinized the conduct of the ASG/OHRM to determine whether she properly arrived at her decisions. It did so not only from the perspective of the appropriate statutory provisions but, more particularly, through the prism of the Appeals Tribunal Judgment and our directives upon remand to the ASG/OHRM.

44. In this regard, the Dispute Tribunal properly concluded (for the reasons already set out in this Judgment) that the ASG/OHRM failed to give individualized consideration to the staff member in light of her specific qualifications, competencies, conduct and transferrable skills and that the ASG/OHRM's decision was based on ICTY's limited mandate, in direct contravention of the Appeals Tribunal's directive. We are of the view that the Administration's unrelenting reliance on ICTY/MICT's finite mandate constitutes, once again, an unlawful fettering of the ASG/OHRM's discretion such that none of the impugned decisions can be allowed to stand. We note with deep regret that the manner in which the remand for reconsideration was undertaken demonstrates an almost complete disregard of the Appeals Tribunal Judgment. The Administration's reluctance to comply with our clear directives has unduly delayed the administration of justice for Ms. Featherstone, as well as for the interests of the Organization itself.

45. Although the Administration is entitled to consider "all the interests of the Organization" under Section 2 of ST/SGB/2009/10, when considering staff members' suitability for permanent appointments, we hold that provision cannot be construed as narrowly as the ASG/OHRM interprets it. "[A]ll the interests of the Organization" encompasses the interests of ICTY, as an

institution established by the General Assembly, not merely as a downsizing entity. As such, ICTY has an interest in maintaining in its employ staff members who meet the “highest standards of efficiency, competence and integrity established in the Charter” in order for it to carry out its mandate.<sup>14</sup> Thus, the ASG/OHRM’s exclusive reliance on the finite mandate of ICTY—which has been in existence for 20 years and still exists through its successor, MICT—ill-served the ICTY staff members in 2011 and again in 2014 upon remand. As set forth in the Appeals Tribunal Judgment, and here, the ICTY staff members are entitled to “full and fair” consideration of their respective qualifications, competencies, conduct and transferrable skills when determining their suitability for conversion to permanent appointments.

46. Accordingly, the Appeals Tribunal upholds the Dispute Tribunal’s finding that the decision made with respect to the staff member was flawed and we uphold UNDT’s rescission of said decision.

*The UNDT’s award of moral damages*

47. The Secretary-General contends that the UNDT erred in law by awarding moral damages of EUR 3,000 to the staff member in light of the General Assembly’s amendment to Article 10(5)(b) of the UNDT Statute, which provides that compensation may only be awarded for harm when supported by evidence. As the amendment was in effect on 17 December 2015, when the UNDT issued the impugned Judgment, the UNDT erred by awarding compensation in the absence of evidence capable of proving harm suffered.

48. Ms. Featherstone submits that the UNDT did not err in granting moral damages. She argues that “the finding by the UNDT that the Administration has not complied with the UNAT Judgment is a factual finding in respect of which the [Secretary-General] has failed even to mention the statutory requirement that the alleged error resulted in a manifestly unreasonable decision and this ground of appeal must fail on that basis alone”.

49. Ms. Featherstone points out that it has been more than two years since the Appeals Tribunal Judgment was issued and almost five years since the first unlawful decision of the Secretary-General was communicated to her in October 2011. She is still waiting for a proper implementation of the Appeals Tribunal Judgment and a final resolution of these matters. She claims that this “lengthy and flawed process” has been deeply distressing and frustrating,

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<sup>14</sup> ST/SGB/2009/10, Section 2.

rendered more so by the latest ASG/OHRM decision of 17 June 2014 and, in the circumstances, an award of moral damages is clearly warranted.

50. We vacate the award of moral damages, concluding that the UNDT erred in law by not applying the UNDT Statute as it existed at the time the Dispute Tribunal rendered its judgment. As an award of damages takes place at the time the award is made, applying the amended statutory provision is not the retroactive application of law. Rather, it is applying existing law. Since the staff member did not present evidence to sustain an award of moral damages, as required by the amended statute, the UNDT made an error of law.

### **Judgment**

51. Judgment No. UNDT/2015/117 is affirmed, except for the award of moral damages, which is vacated.

52. The Secretary-General's appeal of the merits is dismissed; and the Secretary-General's appeal of the award of moral damages is granted.



Original and Authoritative Version: English

Dated this 30<sup>th</sup> day of June 2016 in New York, United States.

*(Signed)*

Judge Chapman, Presiding

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Thomas-Felix

*(Signed)*

Judge Weinberg de Roca

*(Signed)*

Judge Simón

*(Signed)*

Judge Faherty

*(Signed)*

Judge Lussick

Entered in the Register on this 24<sup>th</sup> day of August 2016 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar