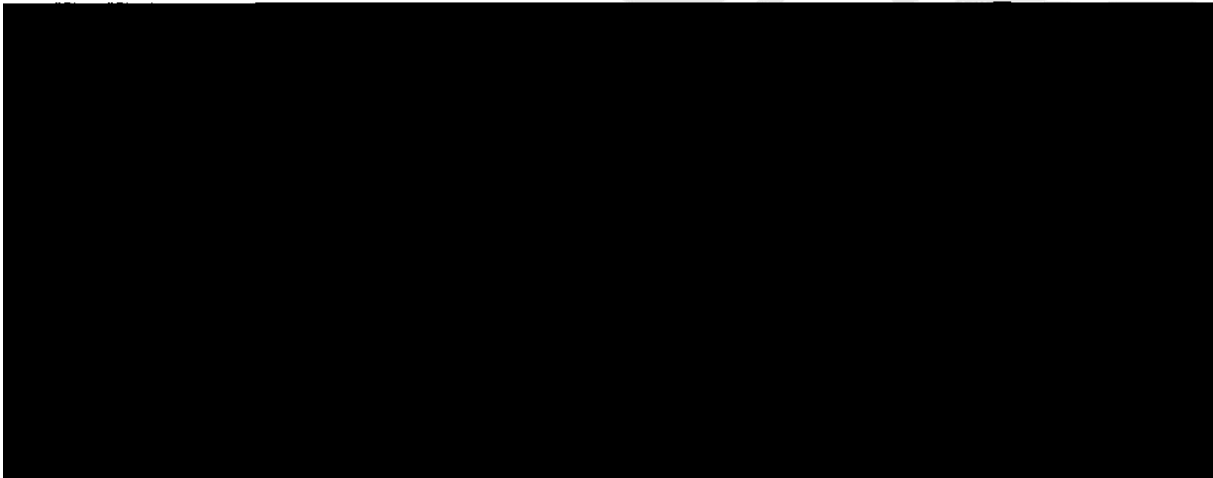


Judgment No. 2013-UNAT-358



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1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2012/130, Longone v. Secretary-General of the United Nations, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 29 August 2012. The Secretary-General appealed on 1 November 2012 and Mr. Miguel Longone filed an answer on 7 January 2013 (Case No. 2012-384).

2. The Appeals Tribunal also has before it an appeal filed against the same UNDT Judgment by Mr. Longone on 29 October 2012, which was answered by the Secretary-General on 31 January 2013 (Case No. 2012-397).

#### Facts and Procedure

3. The facts established by the Dispute Tribunal in Judgment No. UNDT/2012/130 (which are not disputed by the parties) read as follows:<sup>1</sup>

... On 25 May 1993, the Security Council by [R]esolution 827 (1993) decided to establish [the International Criminal Tribunal for the former Yugoslavia (ICTY)], an  
ad hoc Tribunal for the former Yugoslavia (ICTY) established by the Security Council in its resolution 827 (1993) of 25 May 1993, which established the International Criminal Tribunal for the former Yugoslavia (ICTY) in the form of a hybrid court, with the United Nations and the former Yugoslavia contributing to its establishment and functioning.

... In [R]esolution 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, 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.

... On 23 June 2009, the Secretary-General issued the Secretary-General's  
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they have to keep in mind the operational realities of ... ICTY, including its finite mandate”.

... On 23 April 2010, ICTY implemented 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 [ICTY] 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 the ICTY submissions of 12 July and 16 August 2010, OHRM disagreed with the ICTY recommendations and on 19 October 2010, it submitted the matter for review to the New York Central Review bodies (“CR bodies”) — namely, the Central Review Board for P-5 and D-1 staff, the Central Review



4. On 22 August 2012, the Dispute Tribunal conducted a joint oral hearing in this case together with several other cases filed by ICTY staff members, or former staff members, against the common decision not to grant them permanent appointments.

5. In Judgment No. UNDT/2012/130, the Dispute Tribunal took note of the fact that, on 20 May 1994, the Under-Secretary-General for Administration and Management granted the Acting Registrar of the ICTY the delegated authority “to appoint staff, in the name of the Secretary-General, up to the D-1 level, and to terminate appointments up to that level except for terminations under article X of the Staff Regulations”. The UNDT held that “the authority ‘to appoint staff’, which was expressly delegated to the ICTY Registrar, necessarily included, absent a clear exception, the authority to grant permanent appointments”, and that “in line with ‘the desire of the Security Council to establish a fully independent judicial body’ recalled in the introduction of the delegation, if the intention had been to exclude from the broad delegation to appoint staff the authority to grant permanent appointments, such an exclusion should have been explicit”.

6. Accordingly, in view of this broad discretionary authority (which, the UNDT found, had not been subsequently withdrawn or limited), the Dispute Tribunal fo

General Assembly [R]esolution 51/226)", the UNDT set the compensation to be paid as an alternative to specific performance at 2,000 Euros.

9. It is this decision of the UNDT which forms the basis of the instant appeals.

10. In Order No. 139 (2013), the Appeals Tribunal took note of the fact that, on 29 August 2012, the Dispute Tribunal in Geneva had rendered three similar Judgments: Judgment No. UNDT/2012/129, Malmström et al. v. Secretary-General of the United Nations , the above-referenced Judgment No. UNDT/2012/130, Longone v. Secretary-General of the United Nations , and Judgment No. UNDT/2012/131, Ademagic et al. v. Secretary-General of the United Nations , each of which had been appealed by the Secretary-General (Secretary-General's appeals} as well as by the affected individuals (individual appeals).<sup>3</sup>

11. The Appeals Tribunal further noted that all sixteen cases were related and that the panels assigned thereto had referred the cases to the full bench for consideration, having determined that they raised "a significant question of law" that warranted consideration by the

12. In Order No. 158 (2013), the Appeals Tribunal noted that as Judge Weinberg de Roca had recused herself from the cases and Judge Coutin would not attend the Fall session, the Appeals Tribunal “as a whole” would comprise five Judges for the purposes of these cases. In view of the time difference between New York and The Hague, the Appeals Tribunal scheduled the oral hearing as follows: the Secretary-General’s appeals on the morning of 9 October 2013; and the individual appeals on the morning of 10 October 2013.

#### Submissions

##### The Secretary-General’s Appeal

13. The Secretary-General submits that the UNDT erred in law and in fact, and reached an unreasonable result in Judgment No. UNDT/2012/130.

14. He explains that the delegation of authority granted to the ICTY Registrar in 1994 did not include the authority to grant permanent appointments. The memorandum in question was an inter-office memorandum, to be construed as such, and made reference to the ICTY’s restricted mandate and lifespan. No express exclusion of permanent appointments was required, because the authority granted was already limited in term, function and level. Moreover, the delegation of authority was never expanded to include granting permanent appointments and could not have been, given the “freeze” on permanent appointments then in force. Furthermore, ICTY staff were never intended to be offered permanent appointments, in view of the non-continuing nature of their functions.

15. The Secretary-General argues that the UNDT relied on obsolete rules, which had been revised in 2004 to make express mention of the “executive head” of programmes, funds and subsidiary organs having the authority to grant permanent appointments within such





22. He contends that the UNDT erred in law in Judgment No. UNDT/2012/130, when it determined that it was required to order alternative compensation to specific performance, pursuant to Article 10(5)(a) of the UNDT Statute. Relying upon Judgment No. UNDT/2012/121, *Rockcliffe v. Secretary-General of the United Nations*, he argues that cases of conversion to permanent appointment do not fall under Article 10(5)(a), which requires alternative

28. With respect to the quantum of the alternative compensation, however, the Secretary-General contends that it was “overly generous”, that the argument that Mr. Longone deserved more is not sustainable, and that, in fact, it should be vacated or reduced.

29. Furthermore, he argues that the UNDT was correct in not ordering compensation for pecuniary or non-pecuniary losses resulting from the impugned decision.

30. In sum, the Secretary-General requests that the Appeals Tribunal dismiss Mr. Longone’s appeal.

### Considerations

#### Procedural matters

31. As a matter of judicial economy, the Appeals Tribunal has decided to issue one Judgment in the two cases listed in the headnote of this Judgment, namely the Secretary-General’s appeal of Judgment No. UNDT/2012/130 as well as that of Mr. Longone (the staff member).

32. The Appeals Tribunal notes that Mr. Longone did not submit briefs in either case, relying

instead on the written responses to his oral submissions (and

The Secretary-General's Appeal

... The question for determination is whether the UNDT erred in law in concluding that the authority to grant appointments that was delegated to the ICTY Registrar in 1994 included the authority to grant permanent appointments.

... For the purpose of determining this issue, it is necessary:

- i. to set out in some detail the evolution within the United Nations' statutory framework of the entitlement of staff members on fixed-term contracts to be converted to permanent appointments; and
- ii. to conduct an analysis of the authority delegated to the ICTY Registrar in 1994.

The United Nations' statutory framework

... In 1982, the General Assembly adopted Resolution 37/126 which provided that "staff members on fixed-term contracts upon completion of five years' continuous good service shall be given every reasonable consideration for a career appointment".<sup>4</sup>

... By Resolution 51/226 of 3 April 1997, the General Assembly modified the permanent appointment scheme by resolving that "five years of continuing service as stipulated in its Resolution 37/126 of 17 December 1982 do not confer the automatic right to a permanent appointment, and also decides that other considerations, such as outstanding performance, the operational realities of the organizations, and the core functions of the post, should be duly taken into account".

... These criteria for conversion from a fixed-term contract to a permanent appointment were duly reflected in the Staff Regulations and Rules and, in particular, were reflected in former Staff Rule 104.12(b) (applicable as at 30 June 2009), which provided:

...

- (ii) The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment;
- (iii) Notwithstanding subparagraph (

(a) The permanent appointment may be granted, in accordance with the needs of the Organization, to 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 high standards of efficiency, competence and integrity established in the Charter, provided that:

...

(iii) They have completed five years of continuous service under fixed-term appointments and have been favourably considered under the terms of rule 104.12 (b) (iii).

... Invariably, with regard to the [ICTY] staff members, their respective successive letters of appointment stated, *inter alia*

Appointment of Staff Members of the Secretariat Eligible to be Considered by 30 June 2009", as follows:

Section 1

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.

Section 2

Criteria for granting permanent appointments

In accordance with staff rules 104.12 (b) (iii) and 104.13, 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.

Section 3

Procedure for making recommendations on permanent appointments

3.1 Every eligible staff member shall be reviewed by the department or office where he or she currently serves to ascertain whether the criteria specified in section 2 above are met. Recommendations regarding whether to grant a permanent appointment shall be submitted to the Assistant Secretary-General for Human Resources Management.

3.2 A similar review shall also be conducted by the Office of Human Resources Management or the local human resources office.

3.3 In order to facilitate the process of conversion to permanent appointment under the present bulletin, recommendations to grant a permanent appointment that have the joint support of the department or office concerned and of the Office of Human Resources Management or local human resources office shall be submitted to the Secretary-General for approval and decision in respect of D-2 staff, and to the Assistant Secretary-General for Human Resources Management for all other staff.



considered as at 30 June 2009”, which were subsequently transmitted to all “Heads of Departments and Office” within the United Nations, including the ICTY, on 16 February 2010, for a review of their staff members to determine eligibility and make recommendations to the ASG/OHRM, for consideration for conversion.

The ICTY exercise

... On 11 May 2010, the ICTY Chief of Administration sent OHRM a list of the ICTY staff members deemed eligible for conversion to permanent appointment pursuant to Section 1 of ST/SGB/2009/10. Thereafter, the ICTY conducted a “suitability review” of the eligible staff members and, on 12 July 2010 and 16 August 2010, respectively, the ICTY Registrar duly submitted to the ASG/OHRM, “for consideration and review”,<sup>8</sup> two lists of ICTY staff members who had been found suitable and were recommended for conversion to permanent appointment.

... None of the ICTY Registrar’s recommendations was ultimately approved by the ASG/OHRM and her decision not to grant permanent appointments to [Mr. Longone], or to any other recommended ICTY staff members, was duly upheld by the Secretary-General following the management evaluation process.

The proceedings before the UNDT

... In [his application] to the UNDT, [Mr. Longone] challenged the substance of the ASG/OHRM’s decision not to grant [him a] permanent [appointment].

... In the course of his respective replies to the [various ICTY staff members’] applications [before the UNDT], the Secretary-General, inter alia, stated that “the ICTY



2. Staff of [the ICTY], selected in accordance with the provisions of Article 101, paragraph 3, of the Charter after an appropriate selection procedure, shall have the status of officials of the United Nations under Articles V and VII of the Convention on the Privileges and Immunities of the United Nations. The Rules and Regulations of the United Nations, and the administrative issuances promulgated by the Secretary-General pursuant thereto, will apply to staff serving with [the ICTY] in the same manner as they do to the staff of the Secretariat.

3. Staff of the Tribunal will be recruited specifically for service with [the ICTY] rather than with the Secretariat as a whole. Their letters of appointment will indicate that their services are limited to [the ICTY], and they will be regarded as external candidates should they apply for vacant posts elsewhere in the United Nations.

4. Given the highly specialized nature of the functions of the Tribunal, and the need for rapid response and flexibility, you are hereby delegated authority to appoint staff, in the name of the Secretary-General, up to the D-1 level, and to terminate appointments up to that level except for terminations under article X of the Staff Regulations, but including terminations for unsatisfactory services. Appointments or terminations above the D-1 level require prior approval by the Secretary-General. ...

5. The recruitment of the selected candidates should be based in the same policies and procedures followed for all candidates for United Nations posts at the same level. Geographic distribution would not apply, although the principle of recruitment on as wide a geographic basis as possible should be observed. ...

6. Given the nature of the mandate, appointments should initially be made on a short or fixed-term basis, not exceeding one year ...

7. For reasons of economy and practicality ... the Office of Human Resources Management at Headquarters will advise and assist you in such matters as ... interpretation of personnel policies, issuance of vacancy announcements should you so request ...

8. The administrative bodies established by the Secretary-General to advise him on staff matters, such as the Joint Appeals Board, the Joint Disciplinary Committee, and the Advisory Board on Compensation Claims, will have jurisdiction as regards staff serving with the Tribunal. The Secretary-General reserves his right to interpret the Staff Rules, and to take final decisions in appeals, disciplinary cases and compensation cases under Appendix D.

... Following consideration of the delegation memorandum, and a cover note dated 24 May 1994 (the cover note) from the Director of Personnel Training to the Acting ICTY

Registrar, the Dispute Tribunal found that “the authority ‘to appoint staff’, which was expressly delegated to the ICTY Registrar, necessarily included, absent a clear exception, the authority to grant permanent appointments”.

... The UNDT found that this delegated authority was never expressly limited or subsequently revoked. Accordingly, it concluded that the ASG/OHRM lacked the competence to make the impugned decisions in respect of [Mr. Longone’s and the other ICTY] staff members’ conversion to permanent appointment and, thus, rescinded the decisions.

Did the UNDT err in finding that the ASG/OHRM lacked competence?

... The Appeals Tribunal finds that the UNDT erred. In matters of delegation of authority, the legal instrument delegating authority must be read carefully and restrictively. The delegation memorandum makes no mention of permanent appointments and, having regard to the contents of the memorandum as a whole, such serious authority cannot be read into its use of the term “appoint”. We hold that the delegation memorandum does not allow for creative interpretation, setting out as it does in a clear and unambiguous manner, the powers delegated to the Registrar, as well as several restrictions - temporal, geographic and even with respect to appointment and termination. Our finding in this regard is reinforced by the provisions of the cover note, which transmitted and explained the delegation of authority memorandum to the ICTY Registrar. The cover note made reference to “the unique nature of the [ICTY’s] mandate and Statute” and anticipated that the delegation of authority granted to the ICTY Registrar “may need amplification as time goes by in order to clarify those aspects of the Staff Regulations and Rules which you will administer directly and those which should be referred to the Secretary- General for final decision ”. (Emphasis added.)

... It is apparent from the foregoing that the delegated authority did not envisage that every aspect of the recruitment and administration of staff was to be the preserve of the ICTY Registrar. The Appeals Tribunal’s understanding in this regard is further enhanced by paragraph 3 of the cover note, which provides, inter alia , that “[ICTY staff members] are also entitled to the procedural protections of the Staff Rules so it will be necessary for you to establish certain procedures, in matters such as promotion for example, which parallel those in effect elsewhere in the [United Nations] system”.

... The fact that the delegation memorandum, at paragraph 2 thereof, provides that

... While the Dispute Tribunal placed reliance on the provisions of former Staff Rule 104.13(c) and 104.14(a)(i) in that they “expressly provide for permanent appointments to be granted by heads of ‘subsidiary organs’” (and the ICTY is a subsidiary organ of the Security Council), the Appeals Tribunal nonetheless finds that even if it could be argued that as the “head” of a subsidiary organ, the ICTY Registrar could convert fixed-term contracts to permanent appointments, it remains the case that the authority delegated to the ICTY Registrar in 1994 was that “appointments should initially be on a short or fixed-term basis, not exceeding one year”. Whilst this time limit was extended to two years in 1999,<sup>9</sup> the authority of the Registrar was never extended beyond that two-year limit.

... Assuming a delegation of authority to the ICTY Registrar to convert did exist (and for the reasons set out above, we find it did not), the Appeals Tribunal is satisfied that such authority could not have survived the “freeze” imposed in 1995. Even when the “freeze” was lifted, it is abundantly clear that the conversion regime provided for in ST/SGB/2006/9 and ST/SGB/2009/10 became a radically different conversion exercise. Without any ambiguity, the ASG/OHRM became the decision-maker on the conversion exercises provided for in these Bulletins. The grantor of delegated authority always retains the inherent power to act or, of course, to alter, limit or revoke the delegated power. Thus, even had there been a delegated authority to convert in 1994, it was superseded by the provisions of the 2006 and 2009 Bulletins which had greater legal force than an inter-office memorandum.

... The Appeals Tribunal determines, therefore, that the UNDT erred in law in finding that the authority to grant permanent appointments to ICTY staff members vested in the ICTY Registrar and, accordingly, vacates the UNDT decision on that basis. The Secretary-General’s appeal on this issue is upheld.

The substance of [Mr. Longone’s application] before the Dispute Tribunal

... The Dispute Tribunal rescinded the contested [decision] “without prejudice to [its] merits or substance ...”, and opined that “[s]ince the decision to grant a permanent appointment clearly involves the exercise of a discretion, it is not for the [Dispute] Tribunal to substitute its own assessment for that of the Secretary-General”. It went on to state: “The rescission of the [decision] therefore does not mean that [Mr. Longone] should have been granted [a] [permanent appointment], but that a new

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particularly when section 2 of ST/SGB/2009/10 gave clear and unambiguous instruction on what must be taken into account.

... [Mr. Longone's right], 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 [his] 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

and argue[s] that it should have been calculated on the basis of [his] foreseeable chance to obtain [a] permanent [appointment] – which chance, [he] contend[s], was virtually certain.

... As the Appeals Tribunal has vacated the decision of the Dispute Tribunal, for the reasons set out above, [Mr. Longone's] appeal on this issue has been rendered moot. The

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award<sup>1</sup>



Original and Authoritative Version: English

Dated this 17<sup>th</sup> day of October 2013 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Simón

(Signed)

Judge Lussick

(Signed)

Judge Chapman

Entered in the Register on this 19<sup>th</sup> day of December 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar