UNITED NATIONS APPEALS PPEALS

Judgment No. 2016-UNAT-684

[redacted]

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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/2015/115, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 17 December 2015 in the cases of *Ademagic et al. v. Secretary-General of the United Nation*s. The Secretary-General filed the appeal on 15 February 2016, and Ademagic *et al.* answered on 14 April 2016.[1] Also on 14 April 2016, Ademagic *et al*. filed a cross-appeal. The Secretary-General timely filed an answer to the cross appeal on 2 June 2016.[2]

2. The Appeals Tribunal is of the view that the appeal and cross-appeal raise significant questions of law. Consequently, they have been referred for consideration by the full bench or whole Appeals Tribunal, pursuant to Article 10(2) of the Statute of the Appeals Tribunal (Statute):

> Where the President or any two judges sitting on a particular case consider that the case raises a significant question of law, at any time before judgement is rendered, the case may be referred for consideration by the whole Appeals Tribunal. A quorum in such cases shall be five judges.

Facts and Procedure

3. The facts established by the Dispute Tribunal in Judgment No. UNDT/2015/115 read as follows:[3]

> ... On 25 May 1993, the Security Council decided, by resolution 827 (1993), to establish ICTY, an *ad hoc* international tribunal, for the sole purpose of prosecuting

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".

... 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

... 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

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

> 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).

... 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, 262 staff members concerned by said decisions, including the 246 Applicants in the case at bar, filed applications before the [Dispute] Tribunal on 16 April 2012, followed by a motion for consolidation of their individual cases, dated 19 April 2012, which was granted by Order No. 80 (GVA/2012) of 4 May 2012.

... The [Dispute] Tribunal ruled on these consolidated applications by Judgment *Ademagic et al.* UNDT/2012/131, dated 29 August 2012, finding that the ASG/OHRM was not the competent authority to make the impugned decisions, as the USG had delegated such authority to the ICTY Registrar. On this ground, the [Dispute] Tribunal 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 Judgment No. UNDT/2012/131, by Judgment No. 2013-UNAT-359 issued on 19 December 2013.[4] 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, 5d applicatio.lt9.10641TJel7ture183t9.6.9(.lt9o)6conclud d2.00073t9.604.1(t)4(-6(7 Twsg TThisAai cisiis(ake.SG)6.8( )341. -1.4f2 Tc.0883.5(b)-2.848 compen lst theyion of aexfor co0 TDnvt(on).3(n)-2c.05M( )9T

> 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.[5]
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> ... On 30 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 Appeal 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 Appeal 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).
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> ... The Applicants requested management evaluation of the June 2014 decisions (...) on 13 August 2014. By letters dated 29 September 2014, the Applicants were informed that the USG for Management had upheld the contested decisions.

4. On 11 December 2014, Ademagic *et al.* filed a joint application with the Dispute Tribunal seeking, *inter alia*

10. 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 it 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.

11. 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, the ASG/OHRM had not given them meaningful consideration and must have relied exclusively and solely on -21e2fy inlevant re

Ademagic *et al.*'s Answer

14. In his appeal, the Secretary-General repeats arguments that have already been rejected by the Appeals Tribunal Judgment, makes statements in opposition to his prior pleadings before the Appeals Tribunal, and ignores the ASG/OHRM's failure to comply with the instructions in the Appeals Tribunal Judgment. This is a manifest abuse of the legal process.

15. The UNDT was correct in finding that the ASG/OHRM had fettered her discretion and that she had failed to give individualized consideration to Ademagic *et al.*'s requests for conversion. The Administration did not at any time make an assessment of Ademagic *et al.*'s individual proficiencies, competences and transferrable skills.

16. The Dispute Tribunal was correct in finding that the ASG/OHRM could place Ademagic *et al.* in positions outside ICTY in accordance with ST/AI/2010/3 (Staff selection system). Neither ST/AI/2010/3 nor Staff Rule 9.6 contains any language that would bar the ASG/OHRM from placing Ademagic *et al.* in suitable positions outside of ICTY, regardless of the fact that his or her fixed-term contract indicates a limitation of service to ICTY. In fact, no such barrier exists.

17. The UNDT properly awarded moral damages as Ademagic *et al.* filed their application with the Dispute Tribunal on 11 December 2014, before there was a statutory change requiring evidence for an award of moral damages.

18. Ademagic *et al.* request that the Appeals Tribunal dismiss the present appeal, award costs to Ademagic *et al.* for abuse of the legal process, and hold the former ASG/OHRM and her advisors in contempt.

Ademagic *et al.*'s Cross-appeal

19. The UNDT erred in failing to order specific performance and granting Ademagic *et al.* permanent appointments. It is an error on the part of the UNDT to remand the cases back to the ASG/OHRM for a third time to conduct another exercise. Doing so would undermine the integrity of the system of checks and balances of the administrative justice system by continuing an infinite loop - ordering the ASG/OHRM not to discriminate, remanding the decisions back to the ASG/OHRM, the ASG/OHRM discriminating again, and then starting over as if this were a

case of first impression — all to the increasing detriment of Ademagic *et al.* Specific performance or a termination indemnity is the only just result.

20. The ASG/OHRM's June 2014 decisions demonstrate unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality. In these circumstances, the Appeals Tribunal may intervene.

21. The Dispute Tribunal erred in granting an insufficient amount of moral damages. "The harm to [Ademagic *et al.*] has gone unabated since 2010. ... The ASG-OHRM's flagrant disregard for [Ademagic *et al.*'s] fundamental rights and the [the Appeals Tribunal] Judgment has left [Ademagic *et al.*] with compounding stress that uncertain contract situations impose." The injury to Ademagic *et al.* in 2014 is not the same as that prior to 2014, but greater.

22. Ademagic *et al.* request that the Appeals Tribunal bring this litigation to an end by ordering specific performance of converting their fixed-term contracts into permanent ones or the payments of the value 0f termination indemnities, and by increasing the quantum of moral

26. Contrary to Ademagic *et al.*'s claim, the award of an increased amount of moral damages is not warranted, as they failed to show that the Administration did not comply with the Appeals Tribunal Judgment.

27. The Secretary-General requests that the Appeals Tribunal dismiss the present cross-appeal in its entirety.

Considerations

The Secretary-General's Appeal

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

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

29. Consideration of the Appeals Tribunal Judgment is essential for determining the legality of the conversion exercises that are the subject of the pending appeal and cross-appeal. In the Appeals Tribunal Judgment (*Ademagic et al*

... 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

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.

... 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 [Dispute] Tribunal, however, is of the view that this in itself does not reveal an individualised consideration of each Applicant, but, at best, their categorisation.

... 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 246 Applicants. 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.

... The only time when the expression "transferrable skills" appears in said letters is in the sentence[:] "I have also considered that though you may have transferrable skills, your appointment is limited to service with 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.

... In view of the foregoing, the [Dispute] 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

36. 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 respective decision letters sent to the staff members in June 2014.

37. 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.

38. We agree with the UNDT that the ASG/OHRM failed to give any consideration whatsoever to what each staff member might have to offer by way of transferable skills -- save the cursory reference in each decision letter that although the staff member "may have transferrable skills, [his/her] appointment [was] limited to service with the ICTY". The "full and fair consideration" the Appeals Tribunal Judgment mandated that the ASG/OHRM must address the transferrable 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 cases was for the ASG/OHRM to specifically take into account each staff member's transferable 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

39. The Administration's reason for not granting permanent appointments was the limitation of the staff members' appointments to service with ICTY and the finite nature of ICTY's mandate.

not limited to service with ICTY/MICT and would then have been free to reassign them 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.

40. First, with regard to ST/AI/2010/3, the Dispute Tribunal considered Section 11.1, 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).

41. 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 there was "no absolute legal bar for the ASG/OHRM to move any of the [Ademagic *et al.*] ... to a different entity on the basis of the above-referenced provision if their posts were to be abolished".[13]

42. 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

[13] Impugned Judgement, para. 88.

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.

52. 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 members in light of their respective qualifications, competencies, conduct and transferrable skills, and that the ASG/OHRM's decisions were based on ICTY's limited mandate, in direct contravention of the Appeals Tribunal Judgment directives. 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 the staff members concerned, as well as for the interests of the Organization ir dv7322 TDf.

52.

54. Accordingly, the Appeals Tribunal upholds the Dispute Tribunal's finding that the Administration's decisions not to grant permanent appointments to the staff members were flawed and we uphold the UNDT's rescission of the flawed decisions.

Ademagic et al.'s cross-appeal

55. The staff members' applications before the Dispute Tribunal requested conversion of their appointments into permanent appointments or, in the alternative, the granting of termination indemnities applicable in the case of termination of a permanent appointment.

56. The Dispute Tribunal declined to grant either request, finding effectively that the exercise of the ASG/OHRM's discretion, albeit once again fettered by an unlawful reliance on ICTY's finite mandate, had not been "narrowed down in such a way as to only have one legally correct outcome" such as to merit specific performance.[17] Rather, the UNDT found that "[the] outcome remains open for each of the [staff members]".[18] Accordingly, the UNDT remanded the matter anew to the ASG/OHRM "in accordance with the requirements of fairness and due process, as specified by the Appeals Tribunal".[19]

57. The staff members argue that the UNDT wrongly held that the ASG/OHRM must be asked for a third time to conduct a non-discriminatory review. They urge that the fundamental breaches in the present case warrant interference by the Appeals Tribunal with the exercise of

respective qualifications, competencies, conduct and transferrable skills when determining each of Ademagic *et al.*'s applications for conversion to a permanent appointment and not to give

Since the staff members 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

64. Judgment No. UNDT/2015/115 is affirmed, except for the awards of moral damages, which are vacated.

65. The Secretary-General's appeal of the merits is dismissed; and the Secretary-General's appeal of the awards of moral damages is granted. The staff members' cross-appeal of the

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