Cases Nos.:	UNDT/GVA/2012/030, 031, 032, 033, 035, 036, 037, 038, 039, 040, 043
Judgment No.:	UNDT/2012/129
Date:	29 August 2012

Introduction

1. The Applicants, all staff members or former staff members of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), contest the decision whereby the Assistant Secretary-General for Human Resources Management refused to convert their fixed-term appointments into permanent appointments.

2. They request the Tribunal to order the Secretary-General to grant them permanent appointments and to set at two years' salary plus interest the amount of compensation that the Secretary-General may elect to pay as an alternative to the specific performance ordered.

3. Except for Applicant Wirth, they request the Tribunal, in the alternative, to order the Secretary-General to grant them permanent appointments limited to ICTY and to set the amount of compensation that the Secretary-General may elect to pay as an alternative on the basis of the termination indemnity for a permanent appointment of the length of their employment, calculated to the predicted end of ICTY at 31 December 2014, augmented by 50% to compe

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6. By memorandum dated 20 May 1994 addressed to the Acting Registrar of ICTY, the UnderoT…6hRHHFMdnoen

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16. On 11 May 2010, ICTY transmitted to the Office of Human Resources

21. In November and December 2010, the New York CR bodies reviewed the recommendations made for ICTY staff and concurred w

and fair consideration to the cases in question and taking into

department/office, the staff member may be granted a permanent appointment similarly limited to that department/office"—is inconsistent with the General Assembly resolutions, the applicable staff rules and ST/SGB/2009/10, and is therefore unlawful;

e. Alternatively, if the Administration was entitled to look only at ICTY, it misconstrued the operational realities of ICTY in that: (i) it acted arbitrarily in finding that the downsizing of ICTY was incompatible with permanent appointments. Financial considerations cannot justify excluding staff members from conversion to permanent appointments (see Alba et al. and Uspensky). Moreover, the downsizing criterion is not applied equally as shown by the conversion of an ICTY staff member during the 2006 exercise and by the conversion of staff in other work units of the Secretariat where posts are being abolished; (ii) it failed to properly consider the length of the Applicants' past and projected future service in

h. ICTY staff had only an illusory prospect of being considered for conversion to permanent appointments. The Administration's overriding objective was to "terminate" ICTY staff en masse without severance benefits upon closure of ICTY. The Administration's disregard of the object and purpose of permanent appointments and its failure to follow the required procedure provides unequivocal evidence of its intent. In addition, the Administration's exclusion of all ICTY staff as a group violates the requirement to promulgate and publish any policy of general application to staff members. The Administration was not transparent about its view that ICTY staff members were ineligible for consideration for conversion and failed to publish this view as official policy. In not converting the Applicants, the Administration failed to act fairly and in good faith.

39. The Respondent's principal contentions are:

a. The Applicants did not have any legal expectancy or right, irrespective of the length of their services, to a conversion to a permanent appointment, but only a limited right to reasonable consideration for conversion. The granting of a permanent appointment is discretionary and discretionary decisions are subject to a limited review by the Tribunal;

b. The Administration correctly followed the applicable procedures in considering the Applicants for conversion to a permanent appointment. In accordance with ST/SGB/2009/10 and the Guidelines on conversion, ICTY conducted a review, first of the eligibility of the Applicants, then of their suitability for conversion, and concluded tha

the Assistant Secretary-General for Human Resources Management took the final decision;

c. The Applicants received reasonable consideration for conversion. The Organization took into account all factors, including the Applicants' assignments, the limitation of these assignments, the Organization's contractual framework, and the Organization's operational realities and interests. The Applicants served on contracts limited to ICTY, an organization with a specialized and finite mandate. The Administration properly and reasonably concluded that it was appropriate to maintain the Applicants on fixed-term appointments;

d. As the mandate of ICTY does not form part of a core function of the United Nations, its staff members were not appointed against General Assembly established posts. Further, ICTY was granted a delegation of authority in human resources with certain restrictions. In particular, the delegation of authority provides that ICTY staff are recruited specifically for service with the Tribunal rather than with the Secretariat as a whole and their services are limited to the Tribunal;

e. The Applicants' appointments, which are not related to the core functions and continuing needs of the Organization, do not fall within the limited scope of a permanent appointment, but rather within the scope of a fixed-term appointment as determined by the General Assembly and the International Civil Service Commission. Fixed-term appointments are the appropriate contractual instruments for staff members serving in bodies with a limited or finite mandate, such as ICTY;

f. The possible future selection of the Applicants to continuing core functions of the Secretariat was and remains a matter of speculation and it would have been inappropriate and unreasonable for the Organization to grant them permanent appointments on this basis;

g. As the Applicants' appointments are limited to ICTY, the operational realities of ICTY, not of the Organization as a whole, were directly relevant to the consideration of the Applicants' suitability for conversion. There is no basis to conclude that the consideration provided to ICTY staff served to remove the express contractual limitation in their appointments. To the contrary, other staff with appointments limited in service to specific entities, but not subject to downsizing efforts, have been converted to permanent appointments while retaining the service limitation with their respective

44. In resolution 51/226 of 3 April 1997, it further decided that:

> [F]ive years of continuing service as stipulated in its resolution 37/126 of 17 December 1982 do not confer the automatic right to a permanent aut

> functions … The heads of the organs referred to above may establish boards whose composition and functions are generally comparable to those of the Appointment and Promotion Board to advise them in the case of staff members recruited specifically for service with those programmes, funds or subsidiary organs;
> …

47. The Secretary-General's bulletin ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible

Resources Management or local human resources office shall be

> 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

Management was the competent authority to take them, in light of the delegation of authority granted to the ICTY Registrar. This Tribunal and other international administrative tribunals have emphasized the outstanding importance of the issues of competence and delegation of authority (see Gehr UNDT/2011/178 quoting, among others, Judgment No. 3016 (2011) of the Administrative Tribunal of the International Labour Organization). Competence of the decision-maker is a

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manifested in the 1994 memorandum could be interpreted to include the authority to convert fixed-term appointments to permanent"—and indeed, this is the Tribunal's interpretation, for the reasons explained above—"there were a number of relevant subsequent developments that must be co

cancellation of the delegation of authority. It is sufficient for the Tribunal to note that, at all relevant times, consideration of the Applicants' eligibility and suitability for conversion was governed by former staff rules 104.12(b)(iii) and 104.13, as set out in ST/SGB/2009/10, which entered into force prior to the abolition of permanent appointments. The entry into force of the new Staff Regulations and Rules had thus no bearing on the delegation of authority.

68. It follows from the foregoing that the contested decisions were tainted by a substantial procedural flaw—that of the lack of competence of the decision-maker, the Assistant Secretary-General for Human Resources Management.

69. The Tribunal must accordingly rescind the contested decisions. This is without prejudice to the merits or substance of these decisions, which the Tribunal has not addressed in this Judgment. Since the decision to grant a permanent appointment clearly involves the exercise of discretion, it is not for the Tribunal to substitute its own assessment for that of the Secretary-General (see for example Sanwidi 2010-UNAT-084 and Abbassi 2011-UNAT-110).

70. The rescission of the decisions therefore does not mean that the Applicants should have been granted permanent appointments, but that a new conversion procedure should be carried out.

Compensation in lieu of rescission

71. As the contested decisions—namely, the refusal to grant permanent appointments to the Applicants—concern appointment, the Tribunal must, pursuant to article 10.5(a) of its Statute, set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission.

72. This finding is not inconsistent with the Tribunal's finding in Rockliffe UNDT/2012/121 (see paras. 17-18). Whereas Rockliffe addresses the Administration's refusal to consider the applicant for conversion, in the present case it is the refusal to grant permanent appointments that is at stake. Accordingly,

it was appropriate in Rockliffe to order that the applicant be given full and fair consideration for conversion to a permanent appointment without setting an alternative amount of compensation.

73. In Solanki 2010-UNAT-044, the Appeals Tribunal held that the appellant's submission "that compensation ought to be set by the UNDT at a level which would force the Secretary-General to implement the order for rescission [was] without any foundation" and that "compensation must be set by the UNDT following a principled approach and on a case-by-case basis" (see also Fradin de Bellabre 2012-UNAT-212).

74. In setting the appropriate amount of compensation in this case, the Tribunal must take into account the nature of the irregularity which led to the rescission, that is, a procedural irregularity as opposed to a substantive one, as well as the prohibition on the award of exemplary or punitive damages set out in article 10.7 of its Statute.

75. Further, it must bear in mind that staff members eligible for conversion have no right to the granting of a permanent appointment but only that to be considered for conversion. The outcome of such consideration is a discretionary decision and in its discretion, the Administration is bound to take into account "all the interests of the Organization" (see former staff rule 104.12(b) and section 2 of ST/SGB/2009/10), as well as "the operational realities" of the Organization (see General Assembly resolution 51/226). As already pointed out, it is established case law that the Tribunal, in conducting its judicial review, may not lightly interfere with the exercise of administrative discretion, nor substitute its judgment for that of the Secretary-General.

76. In light of the foregoing, the Tribunal sets at EUR2,000 the amount of compensation that the Respondent may elect to pay to each Applicant as an alternative to the rescission.

Entered in the Register on this 29th day of August 2012

(Signed)

René M. Vargas M., Registrar