Introduction

1.

17. On 31 August 2010, the Deputy Secretary-General, on behalf of the Secretary-General, approved the recommendations contained in the Report of the SMCC XXXIst Session (see para. 15 above), including the recommendation that eligible ICTY staff would be considered for conversion to permanent appointment appointments on a priority basis.

18. 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 Committee for P-2 to P-4 staff, and the Central Review Panel for General Service staff—stating that "taking into consideration all the interests of the Organization and the operational reality of ICTY, OHRM [was] not in the position to endorse ICTY's recommendation for the granting of permanent appointment", as 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)".

19. In November and December 2010, the New York CR bodies reviewed the recommendations made for ICTY staff and concurred with the OHRM recommendation that the staff members not be granted permanent appointments.

20. On 22 December 2010, in anticipation of the closure of ICTY, the Security

Parties' submissions

34. The Applicant's principal contentions are:

a. Since mid-2009, the Administration intentionally engaged in a series of unlawful administrative acts to disregard the acquired rights of the Applicant and other eligible ICTY staff. It failed to conduct the required consultations with staff representatives on the initial draft Guidelines on conversion, which explicitly excluded ICTY staff from the conversion exercise;

b. After recognizing that ICTY staff were eligible for

35. The Respondent's principal contentions are:

a. The Applicant did not have any legal expectancy or right, irrespective of the length of his service, 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 Applicant 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 Applicant, then of his suitability for conversion, and concluded that he met the criteria for conversion. Then, OHRM conducted its own review as provided for in section 3.2 of ST/SGB/2009/10 and disagreed with the ICTY

for service with the Tribunal rather than with the Secretariat as a whole and their services are limited to the Tribunal;

e. The Applicant's appointment, which is not related to the core functions and continuing needs of the Organization, does 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 Applicant 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 him a permanent appointment on this basis;

g. The Organization respected the Applicant's acquired rights to consideration for conversion to a permanent appointment under the former Staff Rules since he was considered for conversion;

h. The one-time review provided for in ST/SGB/2009/10 was a large

39. 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 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.

40. Pursuant to the above-quoted resolutions, former staff rule 104.12(b) on 100-series fixed-term appointments, which was applicable until 30 June 2009, provided that:

> …
>
> (ii) The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment;
> (iii) Notwithstanding subparagraph (ii) above, upon completion of five years of continuous service on fixed-term appointments, a staff member who has fully met the criteria of staff regulation 4.2 and who is under the age of fifty-three years will be given every reasonable consideration for a permanent appointment, taking into account all the interests of the Organization.

41. In addition, former staff rules 104.13(c) and 104.14(a)(i), which were applicable throughout the relevant period, provided that (emphasis added):

> Rule 104.13
> Permanent appointments
> …
> (c) Permanent appoi(6 9RtM0O7 0 5 2 0 3RhMB3O8 1 7 4 3 1 5O9 6O9 5 8 9 2.

establish boards whose composition and functions are generally comparable to those of the Appointment and Promotion Board to

> 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

interpretation to apply to the situation present during the review exercise in 2009[,] some 15 years later". Those "relevant subsequent developments" were, according to the OHRM Report, the Secretary-General's bulletins ST/SGB/280 of 9 November 1995 (Suspension of the granting of permanent and probationary appointments), ST/SGB/2006/9 of 24 August 2006 (Consideration for conversion to permanent appointment of staff members eligible to be considered in 1995), and ST/SGB/2009/10 of 23 June 2009 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009).

60. The OHRM Report asserts that the Secretary-General, through ST/SGB/280, "imposed a global suspension on the granting of appointments …, effectively withdrawing any authority to grant permanent appointments". Regarding ST/SGB/2006/9 and ST/SGB/2009/10, it avers that they contain "no mention of any authority held by officials of the Tribunals" but refer to the "ASG/OHRM as the sole decision-maker for the granting of permanent appointments" to staff up to the D-1 level.

61. However, the same way the Tribunal considers that any exclusion to "the authority to appoint" should have been explicit, it considers that any withdrawal or limitation of the delegation of authority granted in 1994 should also have been explicit. Transparency and legal certainty require that when a delegation of authority is granted, the delegating authority must first clearly and formally revoke the delegation before it can exercise its authority again.

62. Lastly, at the hearing held on 22 August 2012, the Respondent submitted that, even assuming that the ICTY Registrar did have delegated authority to grant permanent appointments, the entry into force on 1 July 2009 of the new Staff Regulations and Rules, which abolished permanent appointments, resulted in 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.

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

64. The Tribunal must accordingly rescind the contested decision. This is without prejudice to the merits or substance of this decision, 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).

65. The rescission of the decision therefore does not mean that the Applicant should have been granted a permanent appointment, but that a new conversion procedure should be carried out.

Compensation in lieu of rescission

66. As the contested decision—namely, the refusal to a grant permanent appointment to the Applicant—concerns 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.

67. 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 a permanent appointment that is at stake. Accordingly, it was appropriate in

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).

69. 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.

70. 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.

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

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73. Accordingly, the Applicant's claim for compensation is rejected.

Conclusion