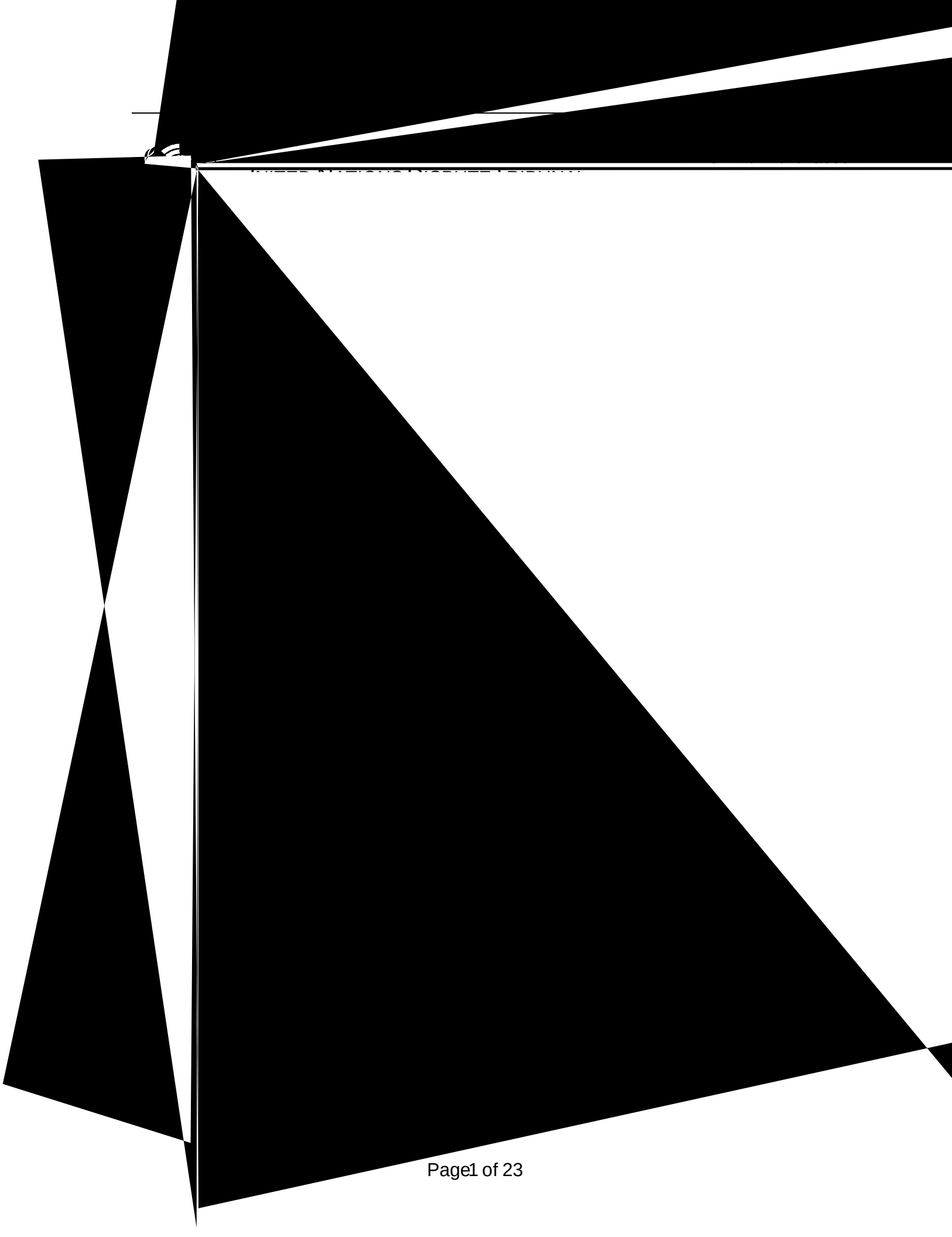

et al cases, which were based on the same set of facts and involved the same legal issues[3].

7. In light of the UNAT judgment, the Tribunal, by its Order No. 099 (NBI/2021), invited the parties to amend their pleadings and distinguish their cases from the *Abd Al-Shakour et al.* and *Aksioutine et al.* cases, if they wished, by 27 May 2021. The Tribunal i

10. In September/October 2016, the ICSC conducted comprehensive cost-of-living

measures would not be implemented as originally proposed. Instead, the decrease would commence from February 2018 and it would be significantly less than originally expected.[19]

17. The reduction in post adjustment for professional and higher categories, including the Applicants, was reflected in the February 2018 pay slips, leading to a decrease of net take-home pay of approximately 3.5%, hence the contested decision.[20]

18. On 10 April 2018, separately, the Applicants requested management evaluation of the contested decision.[21] On 10 July 2018, the Under-Secretary-General for Management responded declining the request.

relation to individual staff members by way of a concrete decision, such as through a pay slip or personnel action form. Accordingly, every pay slip received by a staff member is an expression of a discrete administrative decision, even where it only repetitively applies a more general norm in the individual case.

21. In the present case, just as it was held by this Tribunal in *Abd Al-Shakour et al*[24], an individual decision, namely to apply the new post adjust

Nations administrative tribunals, already marred by inconsistent and *ad hoc* pronouncements. The Tribunal recalls that the doctrine of administrative law distinguishes discretionary decisions and constrained decisions, the latter denoting situations wherein an administrative organ only subsumes facts concerning an individual addressee under the standard expressed by a rule of a general order. Constrained decisions, as a rule, are reviewable for legality, i.e., their compliance with the elements of the controlling legal norm. Whereas state systems may conventionally determine that constrained decisions are to be challenged not before an administrative but rather before a civil or labour court, the applicants challenging decisions of the Secretary General have no such option available. To exclude *limine* judicial review of constrained decisions would unjustly restrain the staff members' right to a recourse to court.

25. The most recent position of the Respondent seems to yield to the holding by the majority of UNAT in *Lloret-Alcañiz et al,* which, in response to similar arguments, held:

> The majority of the Judges accept that the Secretary-General had little or no choice in the implementation of the General Assembly resolutions. The power he exercised was a purely mechanical power, more in nature of a duty. However, such exercises of duty are administrative in nature and involve a basic decision to implement a regulatory decision imposing the terms and conditions mandated by it. They are thus administrative decisions that may adversely affect the terms of employment. However, importantly, given that mechanical powers entail little choice, they are rarely susceptible to review on the grounds of reasonableness. A review on grounds of reasonableness typically involves examination of the decision-maker's motive, the weighing of competing considerations and the basis for, and effects of, any choice made. An exercise of a purely mechanical power normally does not require the administrator to formulate an independent purpose or basis for action. Nevertheless, purely mechanical powers are still accompanied by implied duties to act according to the minimum standards of lawfulness and good administration: purely mechanical

powers are hence reviewable on grounds of legality.[28]

26. It is noted that the most recent and substantively more pertinent UNAT judgment in *Abd Al-Shakour et al* and *Aksioutine et al*[29] addressed the issue by noting that "the parties did not contest the receivability of the applications". Given, however, that non receivable applications cannot be adjudged on the merits, which is what *Abd Al-Shakour et al* and *Aksioutine et al* ultimately did, receivability of the applications seems to have been confirmed.

27. The Respondent concedes that the present case concerns a "mechanical and quasi-automatic implementation of a post-adjustment multiplier, issued on a monthly basis by the ICSC through a post-adjustment classification memo".[30] The Tribunal holds that applications directed against such decisions are receivable. So are the present applications.

Merits

Submissions

28. The Applicants contest the legality of the impugned decision on the basis that it implemented an illegal decision of the ICSC. Fundamentally, they submit, after ILOAT Judgment 4134, that the competence norm has been breached because under the ICSC statute, the ICSC did not have the authority to decide on the post adjustment multiplier for Geneva.[31]

29. Moreover, the Applicants seek to demonstrate numerous procedural and substantive flaws regarding the ICSC decision, *i.e.*, that it a) lacks adequate reasoning as to the applied methodology and the choices made wit q BT /F2p[(c)[(de)3(k)-20(s)8Q622(h)13

Geneva statisticians and, since, largely confirmed by the independent expert engaged by the ICSC; c) infringes the acquired rights of staff members; d) inflicts excessive harm on the staff members affected; e) violates the requirements of stability, predictability and transparency by its arbitrary and *ad hoc* nature; f) results from the application of operational rules which are themselves unlawful; g) results from a procedural irregularity on the interface of the ICSC and its Advisory Committee on

considered *manifestly* unlawful, requiring the decision-maker to suspend the implementation of the decision and seek direction from the legislative authority. The Secretary-General implemented ICSC's decision as it was not manifestly unlawful or based on a manifest error of law or fact.

34. The Respondent demonstrates that after the General Assembly approved certain changes concerning methodology of the PA calculation by the Commission, the establishment of a PA multiplier is a proper exercise of the ICSC authority under Article 11 of its Statute and that the Secretary-General was bound by law to implement it. The Respondent, furthermore, develops arguments about a lack of any bias or manifest error of fact in the modification of the PA multiplier, the methodology, or the data used.

35. In conclusion, the Respondent asks the Tribunal to dismiss the applications.

Considerations

36. It is not contested that the impugned decision of the Secretary-General complies with the ICSC-calculated post adjustment for Geneva. It was also not disputed that the Secretary-General is bound to implement the ICSC decisions. Contrary to the Respondent's argument, however, in addition to having no bearing on receivability, as discussed *supra*, the matter has a limited bearing on the scope of substantive review of the impugned decision. The Respondent's proposition that the Secretary-General might refrain from implementing an ICSC decision only where it would be manifestly unlawful is doctrinally sound, but not relevant for the issue at bar. The claim before the UNDT

37. As concerns difficulties in access to facts and evidence, such as may be attendant to the fact that the Secretary-General did not author the controlling decision himself, they may be pertinent, there is, however, no basis to treat them as insurmountable. While the Counsel for the Respondent indeed represents the Secretary-General and not any other organs of the United Nations, they however represent the Secretary-General in his functions as guardian of the rule of law for the Secretariat and not in the area of personal or corporate interests. As such, the Tribunal assumes that the Respondent may count on cooperation from the ICSC and the General Assembly for the provision of data where necessary, and that it is his role to establish avenues for such cooperation in the event they do not exist. In the present case, however, the need for information concerning the internal functioning of the ICSC does not arise as the Tribunal does not deem it relevant for the question of legality of the impugned decision.

38. Moving onto discussing unlawfulness, the Tribunal will first address the claim that the ICSC decision on post adjustment was ultra vires for the lack of statutory competence.

39. In the argument on ICSC's statutory competences, the central issue appears to lie in the fact that art. 10 of the ICSC statute *prima facie* confirms the competence of the General Assembly to decide post adjustment akin to the way it decides salaries. That the General Assembly has a role in post adjustment results from the plain language. What the ICSC ultimately decide upon, however, is conditioned by the meaning ascribed to the terms "scales" in art. 10 and "classification" in art. 11. The ordinary meaning of these terms is not informative; rather, they are particular to certain technical assumptions underpinning the ICSC Statute. The Statute itself does not stipulate what is meant by "scales" in art. 10 and "classification" in art. 11. In explaining the relevant competencies, therefore, it is necessary to examine the meaning of these terms as intended and accepted by the parties, as evidenced by practice.

40. As demonstrated by the documents submitted by the Respondent[33] as well as reports available on the ICSC website, the delineation of the relevant competencies was along the lines that the General Assembly decided legal parameters of the post adjustment and the ICSC decided its methodological parameters and applied both to calculating post adjustment at different duty stations. The ICSC, however, has always, *ab initio* and notwithstanding changes concerning post adjustment schedules, determined the cost of living index as a step in the process of classification and, after abolition of scales in 1989 and subsequent changes in methodology, assigned post adjustment multipliers to duty stations.[34] Thus, the ICSC's decisory powers under art. 11(c) have always involved determination of post adjustment in the quantitative sense without the General Assembly's approval. The General Assembly, on the other hand, until 1985 determined, under its art. 10 powers, two prerequisites for transition from one post adjustment class to another: the required percentage variation in the cost of living index and required period for which it had to be maintained, the so-called schedules for post adjustment.[35]

41. Moreover, until 1989 the General Assembly determined regressivity scales. The latter involved a "precise financial calculation" in terms of United States dollars per index point for each grade and step; the calculations, however, were related to the salary scales only and not to post adjustment. The exercise of the General Assembly powers under art. 10 did not involve either confirming the determination of index points for duty stations or the calculation of post adjustment for each grade and step per duty station.

42. While the General Assembly gradually relinquished determining scales and

[33] Reply, annexes 12 and 14.

[34] See e.g., A/74/30, paras, 19, 35 and 43 (Report of the International Civil Service Commission for the year 2019).

[35] It would seem that the General Assembly in its resolution 40/244 conferred on the Commission the power to "take steps to prevent the rules relating to a post adjustment increase" from adversely affecting the margin defined by the same resolution and thus, effectively authorised it to depart from the rules in case where post adjustment calculation indicated that it could be decreased.

that have been abolished is confusing and non-transparent, and is partially responsible for the present disputes.

46. Further on the authority behind the ICSC decisions, and before discussing them in substance, it is useful to record that the ICSC, as a subsidiary organ of the United Nations General Assembly, is subject to its supervision. When the ICSC recommends the content of regulatory decisions under art. 10, the ultimate regulatory decision emanates from the General Assembly. Such a decision is binding on the Tribunals and may only be reviewed incidentally and narrowly for the conflict of norms between the acts of the General Assembly.[38] On the other hand, where the ICSC exercises a delegated regulatory power under art. 11, its decisions, while undisputedly binding on the Secretary-General, may be subject to incidental examination for legality, including that where the contested matter belongs in the field of discretion, the applicable test will be that pertinent to discretionary decisions i.e., the *Sanwidi* test. This is confirmed by the Appeals Tribunal in *Pedicelli*, where, followi

Assembly, in paragraph 1(c) of its resolution 39/27 of 30 November 1984,[42] requested the ICSC to maintain the level of the post adjustment and not to introduce the new one. The power of the General Assembly to intervene in the implementation of the post adjustment was confirmed by the former United Nations Administrative Tribunal.[43] The ICSC recalled this precedent in its report for 2012.[44]

48. Intervention of the General Assembly largely removes the matter from the purview of the Tribunals. This is confirmed in *Ovcharenko*, where the Appeals Tribunal confirmed legality of the implementation of the post adjustment freeze because the ICSC decision, subject to implementation by the Secretary-General, had been based on the General Assembly's resolution recommending the freeze.[45] In such cases, the regulatory decision is attributed directly to the General Assembly. Thus, in accordance with *Lloret-Alcañiz*, the Tribunals' review becomes limited to the question of a normative conflict between the acts of the General Assembly such as in *Lloret-Alcañiz* where the question was whether the impugned decision (one of a general order and, consequently, the individual decision taken by the Secretary-General) violated staff members'

6. *Notes with serious concern* that some organizations have decided not to implement the decisions of the Commission regarding the results of the cost-of-living surveys for 2016 and the mandatory age of separation;

7. *Calls upon* the United Nations common system organizations and staff to fully cooperate with the Commission in the application of the post adjustment system and implement its decisions regarding the results of the cost-of-living surveys and the mandatory age of separation without undue delay; [...].

50. In reference to this Resolution, the Appeals Tribunal stated in *Abd Al-Shakour et al* and *Aksioutine et al*:

> In the present case, however, *there is no need to investigate whether or not the ICSC acted on its own behalf or on delegation by the General Assembly* [emphasis added]
>
> [..] As there is a direct order of the General Assembly to the Secretary

> to take decisions on the number of post adjustment multiplier points per duty station, under article 11 (c) of its statute;
>
> 3. Urges the member organizations of the United Nations common system to cooperate fully with the Commission in line with its statute to restore consistency and unity of the post adjustment system as a matter of priority and as early as practicable;
>
> 4. Recalls its resolution 41/207 of 11 December 1986, and reaffirms the importance of ensuring that the governing organs of the specialized agencies do not take, on matters of concern to the common system, positions conflicting with those taken by the General Assembly;
>
> 5. Also recalls its resolution 48/224, reiterates its request that the executive heads of organizations of the common system consult with the Commission in cases involving recommendations and decisions of the Commission before the tribunals in the United Nations system, and once again urges the governing bodies of the organizations to ensure that the executive heads comply with that request.

51. In reference to this Resolution, the Appeals Tribunal found in *Abd Al-Shakour et al* and *Aksioutine et al*:

> Therefore, by means of General Assembly resolution 74/255, issued a few months after a similar case had been [settled] with by the ILOAT, the General Assembly, even though well aware of the arguments put forward against it, approved of the methodology for calculating the post adjustment, as well as its financial impact on staff remuneration in Geneva. This alone would be sufficient grounds for dismissing the appeal, in light of the restricted scope of competence of the United

Geneva, had it been intended. However, accepting, after the Appeals Tribunal, that the General Assembly stepped in to confirm the disputed post adjustment in Geneva, thus endorsing the ICSC decision as its own, there still remains the question of the alleged normative conflict.

55. The Tribunal feels compelled to clarify certain elements of terminology involved. A normative conflict contemplated in *Lloret-Alcañiz* and one relevant for the issue at bar, concerns a putative conflict of an impugned regulatory decision originating from, or confirmed by, the General Assembly with other acts emanating from the General Assembly.[52] The normative conflict relevant for the present discourse has not been about the compliance of the constellation of individual decisions issued by the Secretary-General with the controlling act of the General Assembly. The latter, albeit arguably possible to be subsumed under the problem area of conflict of norms, boils down to the propriety of the calculation of the post adjustment in an individual case in accordance with the superior normative act. That issue has not arisen in the relevant disputes, neither does in the present case.

56. As regards the normative conflict *proprio sensu*, one question raised is whether the impugned decision violates acquired rights as per staff regulation 12.1. In this area, the Appeals Tribunal responded in *Lloret-Alcañiz* by pronouncing that the question of acquired rights does not arise where modification to emoluments has no retroactive effect[53] and that, in principle, norms established by the General Assembly should be reconciled in accordance with the established conflict principle of *lex posterior*.[54] *Lloret-Alcañiz* did not pronounce whether, apart from non-retroactivity, there would be any fetter on legislative power in introducing

in the principles laid down in the Charter of the United Nations art. 101 para. 3, *i.e.*, that economic measures must not be allowed to lead, cumulatively, to the deterioration of the international civil service, which is verified through the test of reasonability

JUDGMENT

59. The applications are dismissed.

(Signed)
Judge Agnieszka Klonowiecka-Milart
Dated this 26th day of July 2021

Entered in the Register on this 26th day of July 2021

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi