5. In 2009 the Organization undertook an exercise within the Secretariat by which eligible staff members would be considered for conversion of their contracts to permanent appointments. To this end, on 23 June 2009 the Secretary-General promulgated 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).

6. The preamble of ST/SGB/2009/10 stated that the Bulletin was being promulgated for the purposes of implementing former Staff Rules 104.12(b)(iii) and 104.13 on consideration of staff members for permanent appointments. The scope of the Bulletin was limited to staff members who were eligible for such consideration by 30 June 2009. Section 1 of ST/SGB/2009/10, read with former Staff Rules 104.12(b)(iii) and 104.13, provided that to be eligible for consideration for conversion to a permanent appointment, a staff member had to have completed five years of continuous service on fixed-term appointments under the former 100 Series of the Staff Rules, and be under the age of 53.

7. Section 2 of ST/SGB/2009/10 specified the criteria for granting permanent appointments. It provided that 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".

8. In May 2010 and in accordance with the provisions of ST/SGB/2009/10, the ICTY submitted to the Office of Human Resources Management (OHRM) at the United Nations Headquarters in New York a list of staff eligible for conversion to a permanent appointment. In July and August 2010, the ICTY Registrar transmitted to the Assistant Secretary-General, OHRM (ASG/OHRM) the names of 448 eligible ICTY staff members, including the Appellants in this case, who had been found suitable for conversion by the ICTY. Upon review, OHRM disagreed with the ICTY's recommendations and referred the cases to the New York Central Review ABi by t1ihe I

permanent appointment be in accordance with the interests of the Organization. Each letter contained one paragraph setting out, in identical terms, the reasons why the last criterion was considered not to have been met.

12. On 4 July 2014, the staff members concerned filed before the Appeals Tribunal a motion seeking execution of the Appeals Tribunal Judgment, which was rejected by Judgment No. 2014-UNAT-494, noting that the Appeals 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 held further that recourse for complaints regarding the conversion process undertaken subsequent to the Appeals 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

within 90 days from the publication of the 2016 Judgment, i.e., by 22 November 2016. The Appeals Tribunal noted:[4]

> ... ... Upon remand, we expect the Administration to strictly adhere to our directives in the Appeals Tribunal Judgment and to our further instructions herein, where we explicitly instruct the ASG/OHRM to consider, on an individual and separate basis, each staff member's 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 predominance or such overwhelming weight to the consideration of the finite mandate of ICTY/MICT so as to fetter or limit the exercise of discretion in deciding whether to grant a permanent appointment to any individual staff member.

15. Following a third round of the conversion exercise reconsidering 255 former ICTY staff members for permanent appointments in light of the situation in 2011, the ASG/OHRM granted permanent appointments limited to the ICTY to 45 professional staff members. Thirty-five professional staff and 175 general service staff, including the 20 Appellants in the present case, were denied permanent appointments.

16. Seven of the Appellants in the professional category, all language staff, were denied retroactive conversion of their fixed-term appointments into permanent appointments on the ground that they did not have "transferrable skills". Each of these language staff was found to lack the required language skills to be suitable for language positions within the Secretariat as at September 2011. That was either because they had not passed the LCE and/or they possessed skills in unneeded language combinations such as BCS. It was thus considered unlikely that the staff members' services would be required by the Organization beyond the end of 2014 or early 2015, when the ICTY was scheduled to close, and a career appointment was considered unjustified.

17. In turn, the 13 Appellants in the general service category were informed by individual letters that they had been denied a permanent appointment. Four of the 13 general service non-language Appellants were found to have the qualifications and background that would make them suitable for positions in duty stations outside The Hague. However, they were denied a permanent appointment on the ground that they could not be transferred to any of these

[4] *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-684, para. 58.

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they had not passed the required LCE. For some Appellants who had professional experience other than in language services, such as Mr. Popovic who had experience as a media analyst, their additional experience was considered to be insufficient to qualify them for alternative positions at the same level. Similarly, the administrative and managerial experience of Mr. Sasic was considered to be insufficient to qualify him for managerial and programme officer roles at the P-4 level beyond language services.

21. As to the general service Appellants, the ASG/OHRM found that seven of them would be suitable for a number of positions within the Secretariat, but all outside their duty station. In turn, the ASG/OHRM found that the six general service language Appellants would not be suitable for ongoing positions in the Secretariat due to their language combinations and their lack of mobility.

22. On 23 August 2017, the Appellants jointly requested management evaluation of the decisions of 6 and 31 July 2017. The request was rejected on 18 September 2017, on the same grounds as those provided in the letter of 3 March 2017.

23. On 22 September 2017, the Appellants filed an incomplet-.o4(and th)-4.ber 204.l76hi

26. Second, the UNDT found that the Administration had not erred or abused its discretion in 2011 in limiting its examination of the Appellants' transferrable skills to existing positions in the Secretariat but outside the ICTY and the MICT. The UNDT found that it fell within the ambit of the Administration's discretion to decide whether to consider positions in the ICTY or the MICT in its examination of the Appellants' transferrable skills. The UNDT also held that by expanding its review of the Appellants' career prospects beyond the ICTY, the Administration struck a balance between the operational realities of the ICTY as a downsizing entity and its interests to provide reasonable incentives to its staff members to stay on board for as long as possible.

27. Third, the UNDT found that the Administration had not erred or abused its discretion in deciding that it was not in the interests of the Organization to grant the general service Appellants permanent appointments based on their lack of career prospects at their duty station. It concluded that, in the context, this amounted to a lack of transferrable skills. While the UNDT

32. The Appellants filed their appeal on 18 April 2019, and the Secretary-General filed an answer on 21 June 2019.

Submissions

The Appellants' Appeal

The UNDT erred in law and fact when it included downsizing as a suitability criterion.

33. The Appellants say that the UNDT erred in failing to apply the established procedures for the determination of suitability. The suitability of the Appellants should have been assessed under the established procedures used to assess all staff members considered in the one-time exercise following ST/SGB/2009/10. Pursuant to these procedures, there were two "checkboxes": the first, to affirm that the staff member had met or excee-.017

performance, length of service, and the general financial framework of the Organization were the critical factors for assessment whether permanent appointments could be granted. Four months later, as of November 1995, the Secretary-General suspended the granting of permanent appointments due to the financial state of the Organization.

36. In 1997, the General Assembly rendered resolution 51/226, effectively confirming the UNAdT's finding. It affirmed that a staff member's attainment of the five-year eligibility criterion is not dispositive of the granting of a permanent appointment and that overall operational realities should guide whether a conversion exercise should take place at all, as opposed to an individual criterion. Indeed, due to the operational realities of the Organization, no one was considered for permanent appointment for eleven years.

37. When the Secretary-General agreed to lift the suspension of permanent appointment consideration and the Regulations and Rules were not amended, the Administration began to structure a framework and implemented an exercise in 2006 setting out two suitability criteria which it listed in its guidelines and a checkbox assessment form: the staff member had met or exceeded his or her performance goals in the relevant time period and had no administrative or disciplinary measure taken against him or her. These criteria were applied to the ICTY staff members whereby a permanent appointment for an ICTY staff member followed three years after downsizing had been announced and only three years before the anticipated closure date. As the exercise pursuant to ST/SGB/2006/9 (Consideration for conversion to permanent appointment of staff members eligible to be considered in 1995) allowed only for consideration of those who reached eligibility on or before 15 November 1995, the Administration conducted a final exercise to assess those who reached eligibility between 1995 and the abolishment of former Rule 104.13 in 2009.

38. The 2009 exercise was controlled by ST/SGB/2009/5 which is virtually identical to ST/SGB/2006/9.Tc.25arereed isl1iz9.830.7596 0 TD21.0178 157.066 T9(n a2)2.4(f)-5.6.n afe(te2.4(f-15.7i)-2 w

39. The General Assembly has never adopted a rule change which altered the suitability criteria. Staff Regulation 4.5(d) and Rule 4.14 state that the Secretary-General shall prescribe which staff members are eligible for consideration for continuing appointments. The Secretary-General prescribed the eligibility criteria in ST/SGB/2011/9. Resolution 51/226 was intended to apply to a new system which became the continuing appointment regime. Moreover, the resolution's criteria for consideration were never intended to apply to suitability but rather eligibility. Thus, a suitability determination based on the established checkbox procedure is not inconsistent.

appointments to permanent and/or compensation for the discrimination to which they have been subjected. The Appeals Tribunal now has sufficient factual information demonstrating that the established procedure for consideration of the Appellants is the use of the two checkbox suitability criteria found in the Administration's guidelines for the ST/SGB/2009/10 conversion exercise. As the Administration found the Appellants individually eligible and suitable under the checkboxes, the sole legal outcome must be conversion to permanent appointment.

43. Were the Appeals Tribunal to find that its bespoke test must be maintained, the Appellants request compensation in the amount of each Appellant's termination indemnity on the ground that the Administration failed to conduct a non-discriminatory assessment as required by the Appeals Tribunal.

44. Finally, as discrimination is a separate and distinct cause of action from the breach of a staff member's due process rights, the Appeals Tribunal should compensate the Appellants with both specific performance/termination in

49. The UNDT also correctly held that the Secretary-General took into consideration the interests of the ICTY and the MICT when determining whether to grant the Appellants permanent appointments. The UNDT held that the Secretary-General was acting within his discretion when he determined that because both the ICTY and the MICT were slated to be downsized and then closed, posts existing in 2011 in these two entities did not create a basis upon which the interests of the Organization would be served by granting the Appellants permanent appointments. The Appellants' assertion that the UNDT erred by not requiring the Secretary-General to assume certain posts at the ICTY and the MICT would provide viable career prospects is erroneous. It conflates two separate questions. In accordance with the 2016 Appeals Tribunal Judgment, the UNDT correctly addressed the question of the interests of the ICTY and the MICT. The Secretary-General was obligated to take these into consideration, and did, separately from the question whether the Secretary-General had the authority to determine that. This was because the ICTY and the MICT were both slated to be closed. The staffing requirements of these two organs could not create an interest for the Organization to convert staff members' fixed-term appointments to permanent appointments.

50. The UNDT correctly found that for the Organization to be able to find posts for general service staff members who had transferrable skills but were locally recruited pursuant to former Staff Rule 104.6, such posts would have had to exist at their local duty station. Absent the existence of such posts, the

undue weight to the downsizing of the ICTY. The UNDT, therefore, correctly held that the contested decisions were lawful. Accordingly, the Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and reject the appeal.

52. Should the Appeals Tribunal find that the UNDT erred, and that despite the careful weighing by the Secretary-General of each individual staff member's case file, the procedure undertaken by the Secretary-General was flawed, the Appeals Tribunal should remand the matter to the Secretary-General for further consideration of the staff members' cases, according to the Appeals Tribunal's instructions. The jurisdiction of the Appeals Tribunal is limited to a judicial review of the exercise of discretion by the competent decision maker and it is not its role to stand in the shoes of the ASG/OHRM and involve itself in the decision-making process reserved for the ASG/OHRM pursuant to ST/SGB/2009/10.

Considerations

53. This Judgment deals with the same issues, at least of law and principle, as that which has been delivered at the same time by this Tribunal in *McIlwraith et al v. Secretary-General of the United Nations.*[6] Although there are some factual differences between the two appeals,

56. Turning to the substantive elements of the appeal, the Appellants argue that the Appeals Tribunal had erred previously in establishing the criteria in permanent appointment conversion cases, and that consequently the UNDT erred in applying these flawed criteria. This submission in effect seeks a revision of Judgments numbered 2016-UNAT-684[7] and 2013-UNAT-359.[8] Under Article 11 of the Appeals Tribunal Statute, requests for revision need to be made within one year of the issuance of the Judgment. The Appellants are therefore time-barred from raising these arguments. Moreover, the new issue they are presenting is not an issue of fact, but an issue of law. There are no other avenues of review of its own particular past judgments by the Appeals Tribunal. The criteria established by the Appeals Tribunal therefore stand and the UNDT did not err in applying them. Even if we were empowered to reconsider our previous Judgment(s), we have not been satisfied that the wrong criteria were adopted and applied.

57. Next, the Appellants say the UNDT erred in tying suitability to the availability of future positions outside the ICTY. We conclude, however, that the UNDT did not so err. It was within its discretion to consider that the ICTY and the MICT were temporary institutions with a finite mandate and that therefore there were no posts to which the staff members' skills could have been transferrable. The so-called "two-step" process addressed "eligibility" for permanent appointment (as the Appellants in fact submit), but that is not the same as requiring permanent appointment upon those two steps being satisfied.

58. The Appellants then contend that the UNDT erred in not granting permanent appointments to general service staff members. We disagree. The Appeals Tribunal's Judgment did not contain any specific instruction as to how the transferrable skills of the general service Appellants had to be assessed in the reconsideration exercise, in particular whether their status as local recruits had to be taken into consideration in examining alternative positions to which they could be transferred. The Administration retained a discretion as to how to assess the transferrable skills of locally recruited staff members and we have not been satisfied that it erred in exercising that discretion.

[7] *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-684.
[8] *Ademagic et al. and McIlWraith v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-359.

The

Judgment

65. The appeal is dismissed and Judgment No. UNDT/2019/023 is affirmed.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Colgan, Presiding	Judge Raikos	Judge Murphy

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar