OEA/Ser.R
TRIBAD/SEN.171
December 15 2023
Original: English

COMPLAINT 312
Garry LaGuerre v.
Secretary General of the OAS

JUDGMENT 171

CONTENTS

OEA/Ser.R
TRIBAD/SEN.171
December 15 2023
Original: English

JUDGMENT 171

COMPLAINT No. 312

Garry LaGuerre v. Secretary General of the Organization of American States,

THE ADMINISTRATIVE TRIBUNAL OF THE ORGANIZATION OF THE AMERICAN STATES (OAS),

Composed of Judges T. Michael Peay, President; Israel Campero, Vice President; Pablo Sandonato de León, Wilson Vallejo Bazante, María Cecilia Cáceres and Janet Nosworthy has before it for Judgment Complaint No. 312, filed by the Complainant, Mr. Garry LaGuerre (hereinafter the "Complainant"), against the Secretary General of the Organization of American States (hereinafter the "Respondent" or the "SG").

Complainant, was represented by attorneys Alex Haines and Victoria Brown, Barristers of *England and Wales* and members of *Outer Temple Chambers* in London, and the SG was represented by Melissa Cossio, Sarah Davidson, Ana Juárez, Vilma Arce-Stark, Winnie Hagemeyer Leonardo-Pereira and Francisco Puchi, all of whom are attorneys at the Department of Legal Services of the General Secretariat of the Organization of American States (GS/OAS).

Pursuant to Article 50 of the Administrative Tribunal's Rules of Procedure, Judge Wilson Vallejo was named first opining judge for this case.

I. CHRONOLOGY OF THE PROCEDURE

1. On March 16, 2022, Complainant filed a complaint challenging the termination of his continuing contract on December 31, 2020, requesting the tribunal to declare the termination decision to be without effect and to order his reinstatement or, alternatively to order an indemnity equivalent to 2 years of basic salary ; an award for moral damages for the illegalities suffered, and award of the maximum amount allowable for his legal fees, pursuant to the Tribunal's Statute (pages 9-45).

2. On March 29, 2022, the Secretary of the Tribunal forwarded the Complaint to the Respondent (page 46).

3. On April 11, 2022, the Respondent filed the motions to dismiss the case in its entirety, or in the alternative, to support the imposition of the filing fee, and to deny and dismiss the complainant's request for a waiver of said filing fee with prejudice, as a preliminary question (pages 48-110).

4. On April 12, 2022, the Tribunal decided, based on Article 24 of the Rules, to initiate the "preliminary questions" procedure referred to in this article and to suspend the time for Respondent to file an answer to the complaint until the Tribunal rules on these motions (page 111).

5. On May 13, 2022, Complainant submitted his responses to Respondent's motions (pages 115-120).

6. On May 18, 2022, the Secretary of the Tribunal forwarded a copy of the Complainant's said responses (page 121).

7. On June 7, 2022, Respondent submitted, based on Article 24.3 of the Rules, its replies to the Complainant's responses to the Respondent's motions (pages 122-158).

8. On June 10, 2022, the Secretary of the Tribunal forwarded a copy of Respondent's replies to the Complainant (page 159).

9. On August 9, 2022, the Tribunal, pursuant to Article 24 paragraph 7 of the Tribunal's Rules of Procedure, bearing in mind the health situation of one of its members, and considering the workload and volume of cases then under consideration, decided to extend the time limit for the Tribunal to take its decision on the pending motions (page 160).

10. On October 21, 2022, pursuant to Article 24 paragraph 4 of the Tribunal's Rules of Procedure, the Tribunal adopted the Resolution 413 by which it unanimously dismissed the Respondent's motions to dismiss Complaint 312 in its entirety and to support the imposition of the filing fee. The Tribunal also decided, on "meritorious claim" grounds, to uphold the Complainant's request for an exception to the security payment otherwise required pursuant to Article VI.7 of the Tribunal's Statute, and to set a new deadline for the Respondent to file the Answer to the Complaint (pages 161-170).

11. On November 18, 2022, Respondent filed its Answer to the Complaint (pages 172-275).

12. On November 30, 2022, the Secretary of the Tribunal forwarded a copy of the Answer to the Complainant (page 276).

13. On December 8, 2022, Complainant requested an extension to file a Replication to the Respondent's Answer (page 277). The same date Respondent presented a letter informing that it did not object to the extension request (page 278).

14. On December 9, 2022, pursuant to Article 40 of the Rules of Procedure, the Tribunal decided to extend the time period to submit the Replication to January 13, 2023 (page 279).

15. On January 13, 2023, Complainant presented the Replication to the SG's Answer (pages 280-297).

16. On January 19, 2023, the Secretary of the Tribunal forwarded a copy of the Replication to the Respondent (page 298).

17. On January 23, 2023, Respondent requested an extension to file a Rejoinder (page 299).

18. On January 24, 2023, pursuant to Article 40 of the Rules of Procedure, the Tribunal decided to extend the time period to February 20, 2023 (page 300-301).

19. On February 17, 2023, Respondent presented its Rejoinder (pages 302-335).

20. On April 12, 2023, the Tribunal convened the LXXII Regular Session of the OAS Administrative Tribunal for hearings and oral debate in this case (pages 347-348).

21. On May 9, 2023, the Tribunal requested from Respondent additional information related to the administrative procedures carried out pursuant to Chapter XII of the Staff Rules (page 351). The same date Respondent submitted the information requested (pages 353-359).

22. On May 10, 2023, the Tribunal heard the parties' oral presentations of their cases. On that same date the Tribunal held public hearings at which it interrogated the following witnesses, pursuant to Article 38 of the Rules:

- Hugo Ascencio, Inspector General
- Javier Arnaiz, Director of the Department of Financial Services
- Marcela Mckelligott, Acting Director of the Department of Human Resources
- Garry LaGuerre, Complainant

23. On May 11, 2023, the Tribunal presided over an oral debate between the parties, pursuant to Article 39 of the Rules of Procedure.

II. RELEVANT FACTS

24. On October 20, 2020, the OAS General Assembly approved the 2021 Program-Budget of the Organization through Resolution AG/RES.2957 (L-O/20) and established $79 million as the ceiling level of expenditure for 2021 (page 214).

25. On that date, the Secretariat for Administration and Finance sent an email to the Inspector General, Hugo Ascencio, regarding the resolution approved for the Program-Budget 2021 and asked him to provide a subprogram distribution of personnel and non-personnel resources allocation by no later than October 27, 2020 (page 270).

26. On October 23, 2020, the Inspector General replied to SAF, proposing the following restructuration of his office (269):

> **" 1. Eliminate the post of Senior Auditor P03**: The functions of this post would be redistributed between the P02 auditors and myself. For the budget year, I am assuming that this change would be effective March 1,

> 2021, that is, the last day that the OIG would absorb the costs of that post would be February 28, 2021.
>
> **2. Re-introduce the post of Administrative Assistant G06 at the OIG**: which was formally assigned to the OIG in the Office's post inventory and which since April 2016, prior to my incorporation into the Organization, has been covered informally by a CPR. This post is critical for the optimal management of the Office's administrative and logistical aspects, including, among others, the translation of reports, supply management, travel management, contract management, and internal control. At the same time, this change would allow the OIG to be in compliance with the Internal Code, which requires that consultants not be assigned the functions of staff. Because the OIG is a Control Agency, this compliance is even more critical, since the number of confidential documents that are managed by the OIG Administrative Assistant is important, including documents regarding possible risks to the GS/OAS due to issues related to CPRs. For the budget year, I am assuming that the post would go through a hiring process, to be concluded by June 30, 2021, so that this post at the OIG be effective as of June 1, 2021."

27. On November 11, 2020, the interim Director of the Department of Human Resources (DHR) notified the Chief of Staff, Secretaries, and Executive Secretaries, including the Inspector General, that they need to present a restructuring plan that same day (page 222).

28. On November 30, 2020, Mr LaGuerre was informed that his contract was to be terminated for budgetary reasons (page 22).

29. On December 2, 2020, Mr LaGuerre requested a hearing on the decision made to terminate his continuing contract, pursuant to Rules 112.1 and 112.3 of the Staff Rules (page 224).

30. On December 30, 2020, in response to this request, Respondent appointed Gerardo de Icaza Hernández, Director of the Department of Electoral Cooperation, as Hearing Officer (pages 354 and 355).

31. On December 31, 2020, Mr LaGuerre's employment was terminated.

32. On January 7, 2021, Complainant accepted the appointment of the Hearing Officer (page 178).

33. On January 14, 2021, DHR notified the Hearing Officer of the deadline to deliver Complainant's hearing report (page 227).

34. On February 1, 2021, the meeting with the Hearing Officer took place (page 25)

35. On March 8, 2021, the deadline for the Hearing Officer to present his Report expired (page 227).

36. On March 11, 2021, the Hearing Officer delivered his report in breach of Rule 112.3(f) (page 358). In his report, the Hearing Officer recommended (page 25):

> "1. Maintain the decision end the continuing contracts of Mr. La Guerre

> 2. Explore possibilities for them to be reinstated or rehired in other positions when the economic situation of the OAS permits it.
>
> 3. Consider granting CPR's to them if specific funds become available and their area of expertise is needed for the projects being financed."

37. On March 23, 2021, DHR informed Complainant that after receipt of the Hearing Officer's report and recommendations, the Secretary General decided to maintain the administrative measure adopted through DHR Communication 497/20 informing the termination of his Continuing Contract (page 27).

38. On April 7, 2021 DHR delivered a copy of the Hearing Report to Complainant (page 230).

39. On April 21, 2021, Complainant requested reconsideration pursuant to Rule 112.3(f) (pages 29-34 and 229).

40. On May 12, 2021 the 15 working days-deadline for referral to Joint Advisory Committee (hereinafter the "JAC" or "the Reconsideration Committee") expired, according to Rule 112.7(a).

41. On June 4, 2021, Complainant re-sent his original reconsideration request to the Office of the DHR Director and the Acting Director of Legal Department (DLS) (page 229).

42. On June 7, 2021, the DLS Director expressed to DHR that she had not received Complainant's email requesting reconsideration (page 229). The casefile shows (at page 229) that the addresses used by Complainant in his first and second emails requesting reconsideration were the same.

43. On June 10, 2021, DHR referred Complainant's reconsideration request to the Reconsideration Committee (page 35)

44. On July 21, 2021, and on July 27, 2021, Mr. Guillermo Moncayo and Ms. Catherine Pognat, respectively, were designated to be part of the Committee to review Mr. LaGuerre's case (page 36).

46. Pursuant to Rule 112.7, since, on July 27, 2021, it was confirmed who two members of the Reconsideration Committee would be, those two members, within the next five working days (i.e., by August 3, 2021), were required to appoint the third member to serve as chairperson of the Committee.

47. More than one month after the deadline to appoint a chairperson, on September 7, 2021, the first two members met virtually to discuss the information received regarding the Petitioner's case and to start the selection process to appoint a Chairperson for the Committee (page 36).

48. On September 28, 2021, Ms. Carolina Franco was appointed as the Chairperson of the Committee, and this was communicated to DHR/OAS on September 29, 2021 (via email) (page 36).

49. On September 30, 2021, through Memo DHR/370/21, DHR informed Complainant of the composition of the Reconsideration Committee, indicating that the Committee would start to

review the case as of October 4, 2021, and that the Committee had 60 days to deliver its report and recommendations to the Secretary General (page 36).

50. On October 4, 2021, the petitioner sent a written statement to the Committee and shared his opinion that the facts included in the written statement would corroborate his argument that the termination of his continuing contract was not based on the Organization's financial situation nor was it in the best interest of the Office of the Inspector General (page 36).

51. On October 25, 2021, the Committee met with Mr. Garry LaGuerre (page 37).

52. On December 1, 2021, the Reconsideration Committee delivered its Report to DHR (pages 35-38 and 359)

53. On December 8, 2021, DHR notified Complainant that DHR had received JACR's report on December 1, 2021 with the following conclusion and recommendations (pages 37-38):

> **"IV. Conclusions**
>
> Based on the above analysis, this Committee considers that the Secretary General's decision to not renew the Petitioners contract, upon its expiration in December 31 2020, complied with the General Standards, Staff Rules, and pertinent regulations of the GS/OAS. In taking this decision, the Secretary General exercised his rights, as established in the OAS Charter and other legal instruments governing the functioning of the Organization.
>
> Additionally, the petitioner's suit did not present any elements on which to question the validity of the action to terminate.
>
> When given the opportunity, the petitioner was unable to sustain his claims or present additional elements on which to reconsider the decision to not renew his contract.
>
> The Committee also noted that the petitioner expressed an interest in coming back to work with the OAS, either as a staff member or a CPR, should funds become available.
>
> **V. Recommendations**
>
> The Committee would like to present recommendations to the OAS General Secretariat regarding the management of human resources and other administrative processes, particularly those that involve the separation from service of staff members.
>
> In order to make the life-changing and traumatic process of separation from service and termination less distressing for affected staff members, the General Secretariat/Secretariat for Administration and Finance should consider:
>
> - Informing the affected staff members within a reasonable time frame (especially visa-dependent staff) of either the expiration and/or the non-renewal of their contracts.

- Separation/termination procedures should be standardized to ensure all personnel are awarded the same information to make the appropriate decisions concerning their rights to appeal.

- Improved information exchange processes between DHR staffers and staff members, as well as among DHR staffers should be adopted and implemented when multiple separations or terminations occur simultaneously."

54. On December 16, 2022, DHR notifies Complainant that the Secretary General decided to maintain his decision to terminate Complainant's employment. DHR includes in its notification the report of the Reconsideration Committee (page 39).

55. On January 12, 2022, Complainant emails DHR requesting an analysis of the Reconsideration Committee decision (page 40).

56. On January 28, 2022, DHR responds to Complainant's communication dated January 12, 2022, stating that the Reconsideration Committee had opted to remain silent, consistent with Article 66 of the General Standards and Staff Rules 112.6 (a) and 112.7 (h) and, consequently, no further analysis or clarification will be provided (page 42).

57. On February 2, 2022, the President of the Reconsideration Committee, Carolina Franco, sent an email to DHR in response to Mr. LaGuerre´s request for further elements concerning the analysis conducted by the Reconsideration Committee (page 44):

> "Both in his initial petition and during the meeting the JACR held with Mr. LaGuerre, he brought forth a series of [word missing] to support his statement that the decision to terminate his continuing contract was unjustified and violated his rights as a staff member and his rights to due process.
>
> The petitioner also recognizes in his report that "it is a fact that the OAS is experiencing severe financial difficulties and cutting staff positions is one way to address this issue" and that "each Secretariat was empowered to reorganize and eliminate posts in order to stay under the budget ceiling approved by Member States".
>
> The Petitioner advanced alleged motives for his supervisor to want to terminate his contract in particular. The arguments brought forth however were not supported by tangible elements but were based on personal impressions or interpretations. The petitioner posited a motive for his supervisor to have wanted to cut his position but was unable to provide tangible elements to back this extraordinary claim.
>
> Furthermore, upon careful analysis of the petition, the Committee found that some of the arguments provided contradicted each other: on the one hand the petition stated that it was the intent of Mr. LaGuerre´s supervisor to assume his position after his own term as OIG expired, and on the other hand, the Petitioner stated that said supervisor´s intention

> was "to eliminate my post and later find resources to outsource my function".
>
> When given the opportunity to speak to the JACR and present additional information to support his case, the petitioner reiterated the same impressions and interpretations he provided in the written petition but didn't advance any additional elements to back his claims."

58. On March 16, 2022, Complainant filed a complaint before the OAS Administrative Tribunal.

III. PRIOR EXHAUSTION OF ADMINISTRATIVE PROCEEDINGS

59. In compliance with Article VI.1.a of the Statute of the Administrative Tribunal, a Complaint is admissible when the person concerned has exhausted the procedures provided in the General Standards or in other existing provisions in force and the Secretary General has made the corresponding final decision. In accordance with Chapter XII of the GS/OAS Staff Rules, those procedures comprise the request for a hearing with the Secretary General and, subsequently, the request for reconsideration. As this Tribunal has stated in its Judgments 124 (Hernández v. Secretary General of the Organization of American States), 142 (Jaume Sosa v. Secretary General of the Organization of American States), or 166 (Cárdenas v. Secretary General of the Organization of American States), the exhaustion of internal administrative channels in a timely manner, before accessing the jurisdiction of the Tribunal, is an essential requirement and, therefore, of mandatory compliance by the interested party, in order to allow the latter to make full use of the administrative appeal process to which she/he is entitled, and not resort to or initiate the judicial determination mechanism of the Administrative Tribunal prematurely and improperly. According to paragraphs 29 to 54 of Section II of this Judgment, the hearing and reconsideration procedures have been duly exhausted, and so this Complaint is deemed admitted.

IV. SUMMARY OF THE PARTIES' KEY SUBSTANTIVE ARGUMENTS

60. In his complaint (pages 9-21), Complainant contends, among others, that:

(i) Complainant was employed on a continuing contract. The weight of that is two-fold: it acts as a quality guarantee and it warrants greater protection (for the benefit of the OAS in terms of talent retention, as well as for the equally important goal of providing a significant measure of job security to loyal staff).

(ii) The single official explanation provided to Complainant, in the termination letter of 30 November 2020 DHR/497/20 was "as a result of the difficult financial situation that the Organization is currently going through and that resulted in considerable budget cuts, your continuing contract will end." This statement

merely asserts that the decision was made in accordance with and in furtherance of the budget.

(iii) Rule 110.4(b) was the only power the OAS had to terminate Complainant's contract, according to which, before terminating the services of a staff member as a consequence of a reduction in force, or the reorganization of an office of the General Secretariat, the procedures called for in Rule 110.6 must be followed. If the OAS claims the termination followed a reduction in force, it failed to consider any available vacant posts per Staff Rule 110.6(f). Accordingly, Rule 110.6(g) was flatly ignored.

(iv) The OAS has failed to provide any evidence that it considered the abolishment of Mr. LaGuerre's post as necessary, as required by Rule 110.4(b). Doing so required analysis of the financial position, potential savings and alternative measures that might address any demonstrated need to reduce costs.

(v) The principles of natural justice require a fair procedure, even where a budgetary restraint requires tough staffing decisions, and managers should not simply be blindly trusted. The OAS, like any international organization, must create, define and apply a fair procedure.

(vi) Complainant's termination leaves a gulf in experience within the OIG, leaving only the IG (D-1) and two junior auditors (P-2). Complainant adds that that is not in the best interests of Member States, and that it is, at a minimum, good practice to have a Senior Auditor, it is also industry standard, and every international organization with an OIG or an internal audit function has at least one Senior Auditor.

(vii) During the administrative stage, the Reconsideration Committee's report contained no analysis whatsoever, in breach of Staff Rule 112.7(h), which requires the Report to include "a summary of the problem, an account of the Committee's actions, its recommendations, and its vote on the recommendations".

61. In his Answer to the Complaint (pages 172-212), Respondent argues, among others, that:

(i) The version of Staff Rule 110.4(b) cited by Complainant was inaccurate. During the preliminary motions procedure Complainant admitted he had cited an erroneous version of the Staff Rule and accepted that it was not applicable, which results in the invalidity of the entirety of submissions and arguments arising from the use of the prior and erroneous text of Staff Rule 110.4(b).

(ii) Complainant misquotes Staff Rule 110.6 basing his arguments on a version of the Rules that does not exist and did not exist at the time of his termination, despite having the current Staff Rules in his possession. The misquoted text on which Complainant relies omits the Rule's express limitation to Career Service members, a type of contract that Complainant never held. In no uncertain terms, the procedures described in Staff Rule 110.6 for purposes of applying the preferential treatment owed to members of the Career Service do not apply to Complainant, as the holder of a Continuing Contract. Staff Rule 110.6 is clear when it indicates in section (e) that "When a reduction in force is necessary, members of the Career

Service shall be given preference over other staff members to continue in service. That preference, as implemented under the remaining provisions of this Rule, does not apply to staff members with continuing contracts or to staff members with fixed term contracts or to trust appointees who are not members of the Career Service".

(iii) Unlike Career Service contracts, a Continuing Contract position, regardless of the seniority, merit, expertise, or any other qualification of the staff member, affords no special rights in the event of a post being abolished for budgetary reasons, and may be terminated on the basis of any of the grounds listed in Article 57 (c)(iii) of the General Standards.

(iv) Complainant's termination fell within the scope of Staff Rule 110.4(a)(iii)(c), which restates Article 57(c)(iii) of the General Standards[1] which were complied with in full. Because Complainant was a Continuing Contract holder, under Article 19(c)(i), prior to reaching his 65th birthday, [he could] be terminated from service by the Secretary General only for cause. The General Assembly's Resolution AG/RES.2957 (L-O/20) is the cause for the termination of contracts of staff members who occupied posts for which funding was not approved therein and recognizes Secretaries and Executive Secretaries would need to reorganize, consolidate, and cut "*para hacer frente a los recortes presupuestarios significativos contemplados en esta resolución*."

(v) Once the General Assembly approved a lower budget than requested and the Inspector General was notified by SAF, Mr. Ascencio was faced with the difficult decision of having to make personnel cuts to the OIG. Mr. Ascencio analyzed the cost of positions in his area and what change in personnel of the OIG would least affect its audits, taking into account that he was still required to ensure that the OIG fulfilled its mandate, and concluded that he could continue to assign the same number of audits to the P2 Auditors, including some of the P2 level work of the P3 Auditor, while assuming those more senior functions of the P3 himself, as a way to minimize as much as possible the effect the budget cuts had on the total number of audits to be completed by the OIG. This structure had already been in place during Mr. LaGuerre's time as interim Inspector General.

(vi) The Inspector General took into account the internal rules of the Organization and his ability to fulfill his mandate in his decision-making, when he states to DFS that "*esta propuesta nos permitiría estar dentro del presupuesto asignado para 2021, entrar en cumplimiento con el Código Interno y mantener el inventario de plazas aprobado para la OIG a nivel total*." The Inspector General also complied with Article 128 of the General Standards (previous Article 125 of the General Standards), which allows him to make direct recommendations to the Secretary General regarding the hiring and termination of personnel in his Office.

[1] Staff Rule 110.4(a)(iii)(c) states:

"(a) The Secretary General may terminate the services of a staff member:

[…]

(iii) When, with respect to all staff members other than members of the Career Service:

[…]

(c) Funding for the post occupied by the staff member is not approved in the program-budget;"

(vii) Managers were not "blindly trusted," as the Complainant claims. The General Assembly defined its objectives once they approved the Program-Budget for 2021 and set out criteria for the resulting process, it also instructed the Secretary General, who in turn notified the areas and required that a plan for the cuts be provided. Mr. Ascencio followed the instructions of the highest organ of the OAS, the General Assembly, and applied all required criteria to his decision-making, which amounted to the termination of Complainant's contract.

(viii) Complainant's termination letter was proper and he has always had access to the General Assembly resolution that was the legal authority for his termination. The letter cites the second highest ranking law in the Organization, General Assembly Resolutions, which contained in its text the reasoning and criteria for the termination. Citing a Staff Rule or an article of the General Standards instead of the actual piece of legislation that governed the termination of his Continuing Contract (AG/RES.2957 L-O(20)) would have been incomplete and improper, in consideration of the hierarchy of the internal rules of the Organization. For this reason, Complainant was provided with the superior normative instrument that applied in his case, consistent with the practice in the Organization and in accordance with its internal rules.

(ix) Complainant spends most of Complaint 312 making broad claims of unfairness and capriciousness without ever citing a single applicable regulation or proving any evidence whatsoever to back his claims. It is the Complainant who bears the burden of proof, as the United Nations and the OAS Administrative Tribunals have recognized.

(x) With respect to the Reconsideration Committee report, Rule 112.7(h) at no point mentions the requirement for an analysis. The Rule, in fact, requires the Committee to provide "a summary of the problem, an account of the Committee's actions, its recommendations, and its vote on the recommendations." Regardless of the conclusions of this report, it had a summary, an account of the Committee's actions, and its recommendations. Complainant also fails to indicate why the impugned actions of an independent body should be attributed to Respondent.

62. In his Replication (pages 280-290), Complainants argues that:

(i) Nowhere in the Answer does the Respondent concisely set out the criteria it says it applied to determine Mr. LaGuerre's termination, nor how the relevant staff members were judged pursuant to those criteria. The reason for such a glaring absence is that no such criteria existed,

(ii) Respondent seems to read the document CP/doc.3601/02 "Career Service" attached as Annex 3 of his Answer, as meaning that a 'reduction in force' cannot apply to Continuing Contracts. Such document from the Permanent Council makes clear that priority in filling vacancies is limited to Career Service contracts, but the remainder of Staff Rule 110.6 continues to apply. Annex 3 to the Answer makes that abundantly clear, as does the text of Staff Rule 110.6 itself. If that were not so, there would be no need to create a distinction in the relevant sub-paragraphs [Staff Rule 110.6(e), (f)(ii)-(iii), (g)(ii)-(iii), (h)-(m)] by referring to Career Service contracts, because it would automatically be so limited.

(iii) While introducing changes intended to limit protections for Career Service individuals, there is no indication in the documents that there was an intention to simultaneously eradicate all protection for Continuing Contracts, and such an intention would not make sense.

(iv) In the Respondent's case, the OAS would have to apply the initial stages of Staff Rule 110.6 in order to 'wait and see' whether any potentially affected staff held Career Service contracts, but then if no such staff existed, they could abandon all procedure at that point. That plainly cannot be the position.

(v) The point is not that there was not a financial requirement to reorganize. Where the parties differ, is that the Respondent treats that budgetary constraint as the start and end of the whole matter. In doing so, they make an error of law. The Complainant, on the other hand, says that in light of those budgetary constraints fair procedures had to be applied to determine next steps.

(vi) The Complainant's case is simple: in order to implement cuts in response to the legitimate budgetary issues: (i) criteria had to be established, (ii) that criteria had to be demonstrably and fairly applied, (iii) staff had to be consulted, and (iv) reasons had to be given for the decisions that enabled the staff members to understand why they had been selected over others. Those safeguards allow the Tribunal (and the individual concerned) to ensure the relevant decisions were fair, rational, and neither arbitrary nor capricious.

(vii) Previous jurisprudence of this Tribunal, in particular Judgment 136 "Zapata v. Secretary General of the Organization of American States", which states that "It seems obvious that due process is not complete until the staff member concerned is told why the administration has concluded that he does not meet the requirements [to obtain or retain a given post] and until there can be an exchange of views thereon through appropriate procedures in the form of a hearing and reconsideration".

(viii) It is not at all understood why the Respondent suggests that the Complainant seeking an explanation in his termination letter is an attempt to supersede a General Assembly Resolution. That is non-sensical. A staff member is entitled to know the reasons for their termination, and a generic resolution of the General Assembly about reduced budget does not suffice.

(ix) Regarding the IG's decision (i) Mr. Ascencio took into account irrelevant factors, including that Mr. LaGuerre had temporarily undertaken the position of acting Inspector General, implying that Mr. LaGuerre's role was surplus, which proceeds on the erroneous basis that he was not also doing his own Senior Auditor duties whilst so acting; (ii) Mr. Ascencio acknowledged that his proposed solution reduced his office's expense by more than was necessary or requested by the SG;, he did not stand back and consider his decision in light of this consideration; instead, he simply determined he would employ an additional resource to offset it; (iii) it was perverse for Mr. Ascencio not to terminate the services of the consultant working for OIG, and he has provided no rationale for his failure in that regard.

(x) The Respondent will say that the "*only situation in which the internal rules require the GS/OAS to provide additional information when abolishing a post is in the case of Career Service contracts*". The Complainant, however, will say it is both obvious and established law that fair procedure must be applied to all staff members, who are entitled to understand the reasons for termination decisions at the bare minimum. The Respondent's failure to apply any demonstrable process was unlawful.

63. In his Rejoinder, Respondents maintains, among others, that:

(i) Complainant argues that by referring to Career Service members in some paragraphs and not others, the drafters of Staff Rule 110.6 created a distinction between paragraphs, and that those that do not expressly mention Career Service members would apply to Complainant's termination. This argument relies on the misquoted text of Staff Rule 110.6 once more, and Complainant's total disregard for Staff Rule 110.6(e) of the current Staff Rules.

(ii) Staff Rule 110.6(e) states: *When a reduction in force is necessary, members of the Career Service shall be given preference over other staff members to continue in service. That preference, as implemented under the remaining provisions of this Rule, does not apply to staff members with continuing contracts or to staff members with fixed term contracts or to trust appointees who are not members of the Career Service* (emphasis added) A plain reading of this subparagraph demonstrates that all provisions following this subparagraph relate to the implementation of the preference in filling vacancies for Career Service personnel when faced with a Reduction in Force. Therefore, there is no need for the remaining subparagraphs after (e) to mention Career Service, as it was already established prior that they relate solely to employees under this type of contract.

(iii) The Member States make it abundantly clear in CP/doc.3601/02 that all procedures outlined in Staff Rule 110.6 apply only to Career Service members. Therefore, Complainant's interpretation of CP/doc.3601/02 (Annex 3 to the Answer) makes no sense after a reading of the document in its entirety.

(iv) As is evident in this Tribunal's jurisprudence, "the reduction-in-force procedure, regulated by Staff Rule 110.6, is intended to guarantee staff members of the international career service their rights" (emphasis added), and is therefore not applicable to Continuing Contract holders" (Judgment 83 "Viaña v. Secretary General of the Organization of American States", and Judgment 153 "Zambrana v. Secretary General of the Organization of American States*"*).

(v) Complainant's termination was fair and complied with the internal rules that governed the process, specifically, Articles 19(c)(i) and 57(c)(iii) of the General Standards and Staff Rule 110.4(a)(iii)(c), and was the result of the budget cuts in the 2021 Program-Budget approved through AG/RES. 2957 (L-O/20).

(vi) Complainant cites *Zapata* without seeming to realize that the facts of this case do not support his position. In *Zapata*, the complainant held a Career Service contract and was entitled to the benefits outlined under Staff Rule 110.6. The paragraph cited by Complainant essentially describes the process afforded to Career Service

members under Staff Rule 110.6, to which Complainant did not qualify because of his Continuing Contract status.

(vii) The Inspector General complied with the criteria established by the General Assembly when determining how to reorganize the Office of the Inspector General and provided extensive contemporaneous evidence to support his decision. In its Resolution AG/RES. 2957 (L-O/20), the General Assembly set out two criteria for carrying out their instructions: (1) that the Secretaries and Executive Secretaries meet the levels of expenditure for each Budget Chapter approved in the Resolution, which necessarily entails taking into account the cost of the positions in the area; and (2) that the areas continue to fulfil their mandates despite the cuts to personnel. Mr. Ascencio then analyzed the cost of positions in his area and what personnel cuts would least affect the OIG's audits, taking into account that he was still required to ensure that the OIG fulfilled its mandate.

(viii) Complainant fails to understand what Respondent has already explained in its Answer and Rejoinder that the termination of a Continuing Contract holder can be carried out "for cause" in accordance with Article 19(c)(i) of the General Standards, and that as the Permanent Council determined, grounds for justifiable "cause" can be found in Article 57 of the General Standards. In Complainant's case, the precise cause for termination was Article 57(c)(iii), "[w]hen funding for the post occupied by the staff member is not approved in the program-budget."

(ix) Complainant argues that to comply with the principle of due process, Mr. Ascencio should have followed Complainant's manufactured process, which includes among other things "*consultation with the relevant staff members*." It is unclear if Complainant is proposing an open forum within each OAS area where staff members have input into who amongst themselves should be terminated, but this bizarre proposition would not only be impractical but also has no legal basis to support it.

(x) Complainant seems to take personal issue with the fact that he was terminated over a consultant (although it is unclear if he refers to the administrative assistant or the CPR under the investigation section of the OIG), calling the decision to keep said consultant in the OIG's employment "perverse." Aside from the problematic tone of this statement, Complainant's assertion not only exposes his misunderstanding of the budget process, but also makes it clear that Complainant attempts to step into the role of his manager, deeming himself more qualified to have decided who should have been terminated in the OIG.

V. THE PARTIES' PETITIONS FOR RELIEF

A. THE COMPLAINANT'S PRAYERS FOR RELIEF

64. At pages 19-20 Complainant presents his petitions as follows:

"28. The Complainant respectfully requests that the Tribunal and the Complainant be provided sight of the following documents by the OAS:

a. any records of development, selection or application of criteria by which staff members would be evaluated; and

b. any records of the rationale for termination.

29. The Complainant respectfully asks that the Tribunal:

a. declare the termination decision to be without effect and reinstate Mr LaGuerre;

b. award moral damages for the illegalities suffered;

c. award Mr LaGuerre 2 years' indemnity in the alternative to reinstatement; and

d. award Mr LaGuerre the maximum allowable amount of one month of a P4, step 6 salary, which comes to $10,830 in respect of his legal fees."

65. At page 212, Respondent presents his petitions as follows:

"In consideration of the foregoing, Respondent respectfully requests that this Tribunal issue an Order:

1) Admitting Respondent's evidence;

2) Dismissing all of Complainant's claims and denying all relief sought in Complaint 312;

3) Finding that Respondent acted in conformity with all internal rules, norms, and the mandate of the General Assembly established through AG/RES.2957 (L-O/20);

4) Calling Mr. Hugo Ascencio and Mr. Javier Arnaiz as witness for the Respondent, in the event the Tribunal decides to hold a hearing for this case; and

5) Granting Respondent such relief as this Tribunal may deem appropriate under Article IX (5) of its Statute."

VI. THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

A. WITHDRAWAL OF THE COMPLAINANT'S REQUEST FOR THE TRIBUNAL TO ORDER HIS REINSTATEMENT

66. The Tribunal takes this opportunity to note that Complainant's request that theTribunal "declare the termination decision to be without effect and reinstate Mr. LaGuerre." (page 19) was

expressly withdrawn by Complainant's counsel during the hearing held before this Tribunal on May 11, 2023. Since it concerns a personal and waivable right, the Tribunal will not address the merits of that issue in its analysis and decision.

B. REGARDING STAFF RULE 110.4(B) AND THE ALLEGED INVALIDITY OF THE PROCESS

67. After the Respondent indicated in his motion to dismiss the case that the version of Staff Rule 110.4(b) cited by the Complainant was inaccurate, the Complainant admitted to having cited an incorrect version of the Staff Rules. The Respondent argues that this admission automatically entails the invalidation of the entire allegation 1, allegation 2, and allegation 3 of Complaint 312, along with any arguments derived from the use of the previous and incorrect text of Staff Rule 110.4(b). In this regard, the Tribunal considers that a normative citation error -expressly acknowledged- does not, in any way, invalidate the entire process. Still, where relevant, it should be considered as part of the substantive analysis.

C. REGARDING THE COMPLAINANT'S EMPLOYMENT CONTRACT TYPE

68. There is no dispute that the Complainant held a continuing contract, which is one of the categories assigned to personnel within the SG/OAS. Consequently, he was not part of the personnel category known as "career service," a category that, according to the organization's internal rules, guarantees considerably different treatment for its holders - Rule 110.6, subparagraph i), for example, in cases of contract termination.

69. In this context, the Complainant alleges that, "…If the OAS claims the termination followed a reduction in force, it failed to consider any available vacant posts per Staff Rule 110.6(f). Accordingly, Rule 110.6(g) was flatly ignored. Similarly, the OAS breached Rule 110.6(j)…" (page 18).

70. For the Tribunal, as analyzed below, it is clear that a continuing contract can indeed be terminated for the reasons provided for in the organization's internal rules and, in that case, the specific rights specified in subparagraph i) of Rule 110.6[2], to which the Complainant refers in paragraph 26 of his Complaint, previously transcribed, do not apply because he does not belong to the career staff category. However, the general rules provided in that rule are applicable to him.

[2] "...(i) If a Career Service staff member is not placed in a vacant position in accordance with paragraph (h) above, the following procedures shall apply: (i) The Career Service staff member affected may displace another staff member who holds a post of the same grade, provided that the Career Service staff member meets the requirements for that post and that, other conditions being equal, he/she has more seniority in the Career Service. If the staff member displaced is a member of the Career Service, he/she may, in turn, displace another staff member holding a post of the same grade, under the same terms, and so on successively. (ii) If a Career Service staff member affected cannot be transferred to another post of the same grade in accordance with the provisions of the preceding subparagraph, he/she shall be offered vacant posts of a lower grade, beginning with the immediately inferior grade, provided that he/she meets the minimum requirements for the post. If there is no vacancy that can be offered him/her, or if he/she does not accept the offer, his/her services shall be terminated..."

D. ON THE POSSIBILITY OF TERMINATION OF CONTINUING CONTRACTS

71. It has already been pointed out that while continuing contracts do not explicitly enjoy the same privileges as career service officials, Article 19 of the General Standards clearly establishes the rights and benefits of personnel in the continuing contract category regarding their "Duration, termination, and Indemnification," stipulating that "Prior to reaching his/her 65th birthday, a staff member on a Continuing Contract may be terminated from service by the Secretary General only for cause.".[3]

E. ON THE EXISTENCE OR NON-EXISTENCE OF PREFERENCES IN CASE OF TERMINATION OF EMPLOYMENT

72. Is Staff Rule 110.6 for the application of preferential treatment to career officials applicable to the Complainant, as he was a holder of a continuing contract?

73. Although this issue was strongly contested by both parties in this proceeding, the due process failures that the Tribunal identified and analyzes in more detail below were the critical determining factors that shaped the outcome of this case. Therefore, the legal need to interpret that rule ultimately became superfluous.

74. However, the Tribunal cannot fail to point out that, the language of Personnel Rule 110.6 is ambiguous; is subject to frequently disputed interpretation by the parties; and is judicially difficult to apply. For these reasons, as we have recommended in a previous decision[4], this Rule should be edited and updated to provide greater clarity for the best interests of the administration, the personnel and this Tribunal, in view of the inevitability of future reorganizations and/or personnel reductions.

F. ADOPTION OF RESOLUTION 2957 BY THE GENERAL ASSEMBLY

75. The General Secretariat repeatedly emphasizes that the procedure for terminating the Complainant's continuing contract was fair because, on the one hand, it was based on General Assembly Resolution AG/RES.2957 (L-O/20), which tasked the Secretary General with making the necessary adjustments, reductions, and reorganizations to comply with the budget ceiling. For that purpose, the Resolution granted Secretaries and Executive Secretaries the authority to carry out the General Assembly's instructions and establish certain criteria to guide these decisions. It is important to note that the respondent explicitly states "… the Secretaries and Executive Secretaries should provide an accounting and be authorized to make necessary changes: to reorganize, consolidate, and cut" while requiring the GS/OAS to continue fulfilling its mandates..." (page 193)

76. The Complainant, on the other hand, expressly acknowledges the organization's need "... to implement cuts in response to the legitimate budgetary issues..." (page 282).

77. In previous decisions, this Tribunal has understood and stated that "…The General Assembly urgently adopted Resolution 2957 in response to the pandemic and the budget that it had spawned. As noted in the previous section III.B, that resolution established a US$79 million

[3] Article 19 (c)(i) of the General Standards to Govern the Operations of the General Secretariat.
[4] Judgment 169 "Steven Griner v. Secretary General of the Organization of American States*"* (2022), at pages 72-73.

maximum for the 2021 program-budget and "instruct[ed] the Secretary-General to make such adjustments, reductions, and restructurings as may be needed to comply with [that budgetary limit]".[5]

78. It is therefore a given that the overarching ***and generic*** motivation for the 2020 terminations were the budget cuts that the GA mandated as necessary to reach the designated budget ceiling target. Having deemed this Complaint to be admissible, the Tribunal was then called upon to determine – though solely from a due process standpoint – whether the administrative decision-making process that led to this particular termination was carried out lawfully, that is, in accordance with applicable internal law, procedures, and due process norms.

79. With the foregoing in mind, and having regard to the respective claims and counterclaims asserted by the parties in pleadings and the hearings, the Tribunal has been asked to decide, on the one hand, whether the Complainant, "...a staff member on a continuing contract, was terminated unlawfully without any criteria being announced, far less applied.", and whether, as further alleged, "No consideration to alternatives was given … [and] [t]here was a wholesale failure to provide a fair procedure, which resulted in an irrational decision..."[6]. And on the other hand, we are asked to decide whether, as Respondent claims, "…Respondent fulfilled every obligation he had under the applicable OAS rules for Complainant's termination, including following the criteria and instructions established by the highest organ within the Organization: the General Assembly…" (page 178).

G. THE MATERIALIZATION OR EXECUTION OF THE GENERAL ASSEMBLY'S OVERARCHING REASON TO CONSIDER TERMINATING COMPLAINANT'S CONTINUING CONTRACT

80. In analyzing the foregoing, it is important for the Tribunal to consider a) that the Executive Secretaries for the various units were granted by the General Assembly specific authority to reorganize and cut positions as needed; and b) that the OIG was the functional equivalent of the Executive Secretaries insofar as having primary authority to and responsibility for making the necessary cuts in his unit in accordance with the criteria established by the General Assembly. For his part, with respect to those criteria, the Inspector General asserts that these were "...thoroughly followed...when deciding what post to abolish in the OIG..." (page 193).

81. There is no dispute about the General Assembly's competence to adopt budgetary limits for the Organization, as it did with Resolution 2957, and to mandate that internal adjustments be made. Neither is there any dispute about the Inspector General's competence, as the head of the OIG, to decide on the necessary adjustments to comply with the approved budget. Therefore, what is material is how and why the Inspector General adopted his decision that is the subject of this complaint. That decision can only be examined by this Tribunal through the prism of its specifically explained underlying motivation – and its compliance with applicable due process considerations. Indeed, Respondent's Answer supports this analysis when it acknowledges that the termination procedure of the complainant was fair (in the section entitled,"...Complainant's Termination Procedure Was Fair..." at page 193).

[5] Judgment 169 " Steven Griner v. Secretary General of the Organization of American States*",* paragraph 195.

[6] Opening paragraph of the Complaint, page 9

82. To support its arguments, the Respondent relies on annexes numbered from 1 to 11, which are detailed on page 5 of its Answer (page 176), added to the casefile starting from page 213. Of the evidence provided, detailed in the aforementioned attachments, the Respondent particularly relies on two pieces of evidence: 1) Annex 9, the sworn statement of Mr. Hugo Ascencio; and 2) email communications exchanged between SAF and Mr. Ascencio.

83. Before analyzing that evidence in detail, the Tribunal deems it important to consider that, according to the Inspector General's plan for 2021, the OIG required "...a total of USD 916.9 thousand, allocated to personnel expenses of USD 793.5 thousand and non-personnel expenses (including payments to Consultants for Results or CPRs) of USD 123.4 thousand..." (page 239).

84. In a communication dated October 22, 2020, sent by the organization's Department of Administration and Finance, the Inspector General was informed that the budget limit set for the OIG unit amounted to USD 859.40, and he was requested to decide how he would achieve that goal by no later than October 27, 2020 (pages 270 and 271).

85. On October 23, 2020, in a memorandum addressed to Mr. Oscar Chavera, Officer in the Secretariat for Administration and Finance, four days before the deadline mentioned in the preceding paragraph, the Inspector General stated (page 269):

> *"...aunque me encuentro sumamente complacido con el trabajo de todo el personal de mi Oficina, el presupuesto 2021 aprobado no me permitiría asumir el incremento de costos de personal que se ha anticipado para ese año. En consecuencia, se requiere de una re-estructuración de la OIG para dar cumplimiento a la asignación del presupuesto 2021...en mi carácter de Inspector General de la Organización me permito proponer al Secretario General la siguiente re-estructuración de mi Oficina: 1. Eliminar la posición de Auditor Senior P03: Las funciones de está (sic) posición serían redistribuidas entre los auditores P02 y el suscrito...".*

86. While the foregoing document communicates the OIG's proposed office workload restructuring decision to conform to the approved budget, there is no indication of the analytical rationale or reasoning process behind that decision. For instance, there is no explanation of why the P03 position was eliminated instead of one of the other existing P02 positions, which could have also addressed the budget deficit including the specific dollar amount assigned to the OIG unit. This justification only emerges in the sworn statement provided by Mr. Ascencio on November 15, 2022, almost two years after the notification of the termination of Mr. LaGuerre's continuing contract. Notably, on November 30, 2020, the Complainant was notified of his termination through memorandum DHR/497/20 signed by the Acting Director of Human Resources, Ms. Nubia P. Thornton, stating that *"...su contrato continuo terminará el 31 de diciembre de 2020..."* (page 22).

87. At the very minimum, the termination letter sheds no light whatsoever on any specific, analysis-based reasons for the decision to terminate Complainant's P03 position instead of other positions. However, what is clear is that, pre-November 15, 2022, the specific reasons for the OIG's decision to terminate the Complainant were surrounded by a shroud of ambiguity. This absence of any readily-accessible and rational articulated analysis, coupled with supporting documentation that was produced in real-time of the decision-making was absent. Such evidence could have convincingly corroborated the reasoning that would subsequently be found in the OIG's

affidavit produced nearly two years later. In the absence of such evidence, the decision in question fails to satisfy, for purposes of due process, the criteria needed to convincingly demonstrate justification to terminate "for cause," that this Tribunal has previously established.

88. Pursuant to our prior jurisprudence regarding decisions by the Secretariat-General that adversely affect the rights of personnel, including their job security, due process will be considered denied when *"...is not complete until the staff member concerned is told why the administration has concluded that..."*[7] In this case, *no contemporaneously memorialized reasons* were offered to explain the elimination of the P03 position rather than other fixed-term contract positions within that unit, even though all of those contract positions, by the OIG's admission, could equally have satisfied that unit's designated contribution to the cost reduction mandate.

89. Where else beyond the Inspector General's affidavit [8] can a formally-articulated rationale for the specific selection of the Complainant's termination be found?

90. For this Tribunal, the only clearly formulated reason comes from the sworn statement given by Mr. Hugo Ascencio on November 15, 2022, which was nearly two years after the Letter DHR/497/20, and after the Complainant had filed his complaint with this Tribunal.

91. This is further confirmed when Mr. Ascencio, in his testimonial statement at the hearing, responded explicitly to the question posed by the respondent's attorney:

> "Can you please explain the considerations you took into account in your decision-making process that led to the elimination of the P3 position in the OIG's audit area?" [9]

92. Mr. Ascencio responded explicitly: "The considerations are presented in paragraphs twelve to sixteen of my sworn statement..."[10]

93. Furthermore, in the same testimonial statement, when asked by the Complainant's attorney about the process of making his decision as described in his sworn statement: "...How long do you say that process that you describe took you roughly?"[11], Mr. Ascencio replied:

> *"...el proceso en general fue aproximadamente un mes que fue cuando tuvimos las deliberaciones con la SAF, empezaron como en septiembre y luego el requerimiento final vino en octubre de 2022, perdón 2020, 22 de octubre de 2020, y sobre ese plazo se nos dieron tres días hábiles*

[7] Judgment 136 "José N. Zapata v. Secretary General of the Organization of American States", page 8.
[8] Starting from minute twenty-eight with twenty-nine seconds of the testimony given by Mr. Hugo Ascencio, Inspector General of the organization, before this Tribunal.
[9] Starting from minute eleven with twenty seconds of the recording of the testimony given by Mr. Hugo Ascencio.
[10] Starting from minute eleven with thirty-three seconds of the recording of the testimony given by Mr. Hugo Ascencio.
[11] Starting from minute twenty-five with fifty-six seconds of the recording of the testimony given by Mr. Hugo Ascencio.

> *para hacer nuestra propuesta de cómo cumplir con el techo presupuestario..."*[12],

94. This timeframe was reiterated when the Tribunal's President asked about the total time it took to make the decision to terminate, to which he responded:

> *"...fue en total un mes porque antes del correo de 22 de octubre de la SAF, desde septiembre, principios de septiembre había iniciado el proceso de las discusiones del programa presupuesto..."*[13].

95. When asked by Judge Campero about the time spent on making the decision mentioned above –roughly 30 days– and the motivation for the decision to terminate the Complainant's position and not those of other employees, due to the latter's greater qualification of computer skills and, specifically, why should the Tribunal objectively take this reasoning as proved[14] Mr. Ascencio responded:

> *"...Si considero que lo que muestro, ya se muestra en el expediente sobre el tema de la evaluación, lo que se presenta en mi declaración jurada sobre la cantidad de auditorías, cuáles eran las que más se daban en la oficina del inspector general y lo que también mencioné hace un momento sobre los entrenamientos, es muestra objetiva de que fue parte del criterio y creo que también la otra parte son los resultados, el test objetivo de que los resultados del cumplimiento del plan de auditoría de la oficina del inspector general se cumplieron en los dos años posteriores"*[15]

96. Again, the rationale for his decision, according to Mr. Ascencio, is in his sworn statement, made nearly two years after the termination of the Complainant's contract, with one addition: the results of the execution of the OIG's annual audit plan in the two years following the termination of Mr. LaGuerre's contract.

97. This is further confirmed when, earlier in the questioning by the Complainant's defense counsel, Mr. Ascencio agreed with Respondent's counsel that the October 23, 2020 email he sent to Mr. Chavera did not contain or describe the reasons for the decision to cut the P03 position. He stated:

> *"...Si, estoy de acuerdo con usted, esa solo es la conclusión de mi análisis, no el soporte de cómo llegué a esa conclusión..."*[16]

---

[12] Starting from minute twenty-six with six seconds of the recording of the testimony given by Mr. Hugo Ascencio.
[13] Starting from minute twenty-seven with eighteen seconds of the recording of the testimony given by Mr. Hugo Ascencio.
[14] Starting from minute forty-two with fifty seconds of the recording of the testimony given by Mr. Hugo Ascencio.
[15] Starting from minute forty-three and thirty-six seconds of the recording of the testimony given by Mr. Hugo Ascencio.
[16] Starting from minute twenty-nine and sixteen seconds of the recording of the testimony given by Mr. Hugo Ascencio. In English: "Yes, I agree with you, that is only the conclusion of my analysis, not the reasoning on how I arrived at that conclusion..." [translation of the Tribunal].

98. The entire analysis and the decision-making process remained unarticulated until November 15, 2022. They were not documented in a way that could, for example, be delivered formally and concretely to and therefore known to Complainant. Notwithstanding the reasons that, according to Mr. Ascencio, were informally presented to Complainant orally during a telephone call, that communication in no case complies with the formal duty to provide reasons.

99. This Tribunal ratified the criterion indicated in the preceding paragraph when it expressly stated that:

> *"...240...el Tribunal encuentra extraño que, por una cuestión de transparencia, la Secretaría General optó por no precisar en su carta de terminación del 30 de noviembre de 2020 que el art. 57(c)(iii) había sido la base de su decisión. Esto quedó claro solo cuando se le pidió al recurrido que defendiera y explicara su decisión ante este Tribunal. Si esto se hubiera hecho en el aviso de terminación del 30 de noviembre, le habría proporcionado al recurrente, no solo un aviso más completo (de acuerdo con Zapata), sino también una base legal específicamente identificable sobre la cual centrar su reclamo para impugnar la rescisión..."*[17]

100. In this case, almost 2 years had passed (i.e., from November 30, 2020, to November 15, 2022) after this claim was filed with this Tribunal before the Complainant could accurately know the reasons why his position was chosen for termination – and not others in that unit that would have equally satisfied the approved budget goal.

101. Hence, the Tribunal recognizes as valid, self-evident and therefore undisputed that the generic, overarching reason that motivated consideration of the *possible* need to terminate the Complainant's continuing contract was the GA's declaration of severe budget limitations. However, the same cannot be said for the specific underlying decisional reasoning that the Respondent now relies upon to justify termination of one position over others in that unit.

102. There is no evidence in the case file, prior to Mr. Ascencio's sworn statement, that demonstrates or documents the reasoning the Inspector General used for his decision. Therefore, the decision outlined in the October 23, 2020 email to Mr. Chavera and the subsequent actions stemming from it, particularly the DHR/49720 letter dated November 30, 2020, which informed Mr. Garry LaGuerre that his continuing contract would be terminated on December 31, 2020 lacked objective justification and thus suggest the appearance of arbitrariness and violation of due process.

103. Moreover, the Tribunal deems it important to underscore that, under the internal law of the Organization, the adoption of an authoritative resolution by the General Assembly is, by its very nature, a legislative act of general or prescriptive character. In that sense, its measures establish the broad legal framework within which the resolution's stipulated purposes and goals are to be achieved – in this instance, its budgetary purposes and goals. However, such legislative measures are not self-executing and therefore cannot independently effectuate specific employment terminations with no need for well-explained justifications for each employee affected.

104. Accordingly, unless a resolution expressly provides otherwise (which the Tribunal finds Resolution 2957 does not), such a resolution could not on its own order a specific employee's

[17] Judgment No. 169 "Steven Griner v. Secretary General of the Organization of American States".

contract termination in a way that is entirely divorced from a prior process that is well-explained, properly- documented, and ultimately reviewable by this Tribunal if challenged. To hold otherwise would be to legitimize terminations that contravene fundamental due process guarantees owed to staff, which the Tribunal believes is ***not*** what the General Assembly had in mind when adopting GA Res. 2957.

105. It follows that, General Assembly Resolution 2957, like all General Assembly decisions, must be implemented by the General Secretariat in an orderly and legally-justified manner, in accordance with applicable internal law, relevant Tribunal jurisprudence, and, where appropriate, the principles and provisions of the OAS Charter, the highest normative instrument governing the Organization, including applicable accountability processes enshrined within Charter.

106. Indeed, a key reason why the prescriptive provisions of General Assembly resolutions cannot be considered as in and of themselves automatically self-executing, or as sufficient justifications to authorize case-by-case terminations of contracts is that employment termination decisions inherently require the authorized decision-maker(s) to conduct a careful and focused review of the particular situation of each employee through a formal prior process. And, this process must be carried out in strict conformity, *inter alia*, with the applicable General Standards and the Staff Rules, even if doing so presents particular challenges for the decision-making process. Only through such a process can it be assured that the final judgment of the administrative decision-maker was rational, not arbitrary or capricious, and therefore justified and lawful.

107. A further reason why General Assembly resolutions pertaining to post reductions or internal personnel restructurings cannot be considered as self-executing or as a wholly sufficient basis to legitimize specific termination decisions, such as in the instant case, is to ensure that the actions of Secretariat decision-makers remain subject to meaningful review by this Tribunal. Otherwise, the oversight function of this Tribunal would be rendered questionable, moot, and institutionally irrelevant, at least in scenarios involving reorganizations and/or workforce reductions. It is therefore institutionally essential to ensure that the General Secretariat remain subject to ordinary and well-established accountability processes.

108. Moreover, the Tribunal's review of claims such as those presented here, and their review in the light of these legal norms, serves as a de facto complement to ensure that GA resolutions that implicate labor rights, such as the one here, are carried out in accordance with the full panoply of the Organization's internal law.

109. The Inter-American Court of Human Rights has repeatedly stated that: "...Motivation is the expression of reasoned justification that allows for a conclusion to be reached..."[18] In the instant case, as previously mentioned, the specifics of motivation only acquired clarity as of November 15, 2022, and not before.

110. The tardily-explained motivation here failed to be noticed by either the appointed Hearing Officer or by the Reconsideration Committee. These internal administrative grievance processes should not be seen, either by complainants or by personnel assigned to fulfill those important roles, as mere formal steps to be exhausted before resorting to this Tribunal . The Hearing Officer merely relied upon the undisputed existence of budgetary constraints to sustain the termination, as was communicated to the Complainant in Memorandum DHR/163/21 dated March 23, 2021. In the Reconsideration Committee's report, the funding deficit was not even addressed in the conclusions;

[18] Including, among others cases, "*Chaparro Alvarez et al. v. Ecuador*", para. 107, and recently "*Cordero Bernal v. Peru*", para. 79.

instead, it stated that "In taking this decision, the Secretary General exercised his rights, as established in the OAS Charter and other legal instruments governing the functioning of the Organization..." [19], which is also not disputed.

111. Some documentary and other testimonial evidence presented by the parties the Tribunal considers to be not central to the adjudication of this dispute. Therefore, this judgment addresses only those issues deemed to be essential to reaching the principal findings and conclusions on which this decision is based.

H. ON THE FAILURES THAT OCCURRED DURING THE ADMINISTRATIVE REVIEW

H.1 Non- compliance with the Rule's deadlines by the Respondent

112. Pursuant to Rule 112.3, (f) the Hearing Officer shall complete his/her investigation, report, and recommendations within 60 days after his appointment. The Hearing Officer appointment was accepted by Complainant on January 7, 2021, therefore, the deadline to submit the report was March 8, 2021 (page 227). The Hearing Officer, however, submitted his report to DHR on **March 11, 2021**.

113. At page 230 DHR implies that the 15-day deadline for Complainant to request the reconsideration should start on March 23, 2021, which is the date on which that department informed him of the SG's decision to uphold the termination decision (page 27). In that same communication, DHR informed Complainant that, as an act of good faith, it nevertheless decided to start the reconsideration request deadline from April 7, which was the date on which it delivered the Hearing Officer's report to Complainant. This sequence of DHR actions directly harmed the Complainant's right to defense because the notification of the SG's decision of March 23, 2021 did not attach the Hearing Officer's report for Complainant to read and evaluate. In effect, the Complainant was not provided sufficient time to fully exercise his right to request reconsideration, in the light of the Hearing Officer's recommendation to uphold his termination. In other words, the 15-day deadline should not have started until the Complainant had received his copy of the Hearing Officer's report, because his familiarity of the contents of that document was essential for preparation of his request for reconsideration. That is an important reason why the notification of the Secretary General's decision must always attach that report. As this Tribunal has upheld in previous cases (Judgment 154- *Kassar*), the failure to provide incumbent staff members with the reports relating to their own cases and in compliance the deadlines set forth in applicable grievance procedures, is a due process violation that undermines the staff members' access to information and right of defense.

114. On April 21, 2021, Complainant requested reconsideration pursuant to Rule 112.3(f) (pages 29-34 and 229). Pursuant to Rule to Rule 112.7(a) DHR had to refer the case to the constituent members of the reconsideration Committee within the next 15 working days, i.e., by no later than **May 12, 2021.** However, the referral was done **on June 10, 2021**, almost a month after the term's expiration. While DLS says it never received the reconsideration request (which seems to be odd as the email addresses used by Complainant in his first email are the correct ones), DHR,

[19] Report of the Committee, page 37 of the file.

which has primary responsibility to follow up on reconsideration requests, acknowledged receipt of the first reconsideration request on April 21, 2021.

115. Pursuant to Rule 112.7(a), once it is confirmed who the two members of the Committee will be for a case, these two members shall, **within the next five working days**, appoint the third member to serve as chairperson of the Committee. As noted above at paragraph 46, the first two members were confirmed on **July 27, 2021** and, within 5 working days thereafter, they were required to appoint a third member by **August 3, 2021. However, the selection of the third member did not occur until September 28, 2021, more than one month and a half after the deadline.**

116. Pursuant to Rule 112.7(e), the Joint Advisory Committee on Reconsideration **shall act as speedily as possible in its review of the case. It was therefore wrongful that the Reconsideration Committee waited more than 60 days after August 3, 2021 to start its review of the case (i.e., on October 4, 2021).** The extent of this delay is something that has never occurred in previous cases brought before the Tribunal. This is clearly egregious, considering that the total amount of days for the Reconsideration Committee to complete its mandate is **60 days**. Regrettably, the reconsideration Committee in its report did not provide any reasonable explanation for this delay.

H.2 The Committee's Poor Analysis and Lack of Explanation

117. The Committee on Reconsideration took 6 months to complete its mandate, however, despite those 6 months, the reasoning offer in the "*Analysis and Considerations*" section of its report, was the following (page 37):

> "The Committee's members, with the information gathered, both written and from the meeting held with the Petitioner on October 25, 2021, conducted a thorough analysis of each of the items and issues presented by the Petitioner in his request for reconsideration"

118. Despite the Committee's claim to have conducted a "*thorough analysis"* of the merits of the case, as shown at page 33 of the casefile, the Reconsideration Committee's main conclusion to maintain Complainant's termination rests upon merely the following skimpy analysis (page 37):

> "Based on the **above analysis,** this Committee considers that the Secretary General's **decision to not renew** the Petitioners contract, **upon its expiration** in December 31 2020, complied with the General Standards, Staff Rules, and pertinent regulations of the GS/OAS. In taking this decision, the Secretary General exercised his rights, as established in the OAS Charter and other legal instruments governing the functioning of the Organization. (Emphasis added)."

119. In short, the Committee offered no meaningful or informative analysis for the record herein. Describing the Committee's work as not meticulous may not be unfair. For instance, the need to recognize ab initio that the Complainant here was a continuing contract holder and not a fixed-term contract holder cannot be over-emphasized. And yet, the Reconsideration Committee erroneously refers to the Secretary General's decision to "not renew the petitioner's contract upon its expiration." It then goes on to state that his decision complied with the applicable rules (by implication, those presumably relating to non-renewals of fixed-term contracts). Hence, the Committee failed to scrutinize the plain text of the Complainant's termination letter (DHR/497/20)

(among the documents presented to the Committee, see page 36). Had it done so, it would have been noted that the letter does not mention an expiration of the contract or a decision not to renew. Instead, the letter clearly states that the Complainant's contract "will end," not that it "will not be renewed."

120. The Tribunal observes that the Committee apparently interchanged and confused the terms "termination" and "non-renewal" throughout its report. If so, it failed to understand the legal difference and the distinct rules relating to them, a confusion that clearly affects the substance and utility of the Committee's analysis, conclusions, and recommendations.

121. But apart from the quality of the Committee's analysis, what concerns the Tribunal even more was refusal, upon Complainant's request, to provide him with an explanation. **None of the Rules invoked by the Committee to remain silent** (Rules 112.6 (a)[20] and 112.7 (h)[21] **granted it the right to do so.** The Complainant was not requesting any new analysis to re-open his case, but rather to be provided the alleged "*thorough analysis*" already done by the Committee.

122. The Tribunal considers this kind of response to a staff member who had been waiting 8 months for the Committee's report to be unacceptable and disrespectful, particularly given that this body is entrusted with reviewing this case impartially and competently. Accordingly, the Committee's refusal to elaborate and the GS/OAS's failure to insist upon a more elaborated explanation of the Committee's analysis and conclusions contravened Complainant's right to an effective defense in pursuit of his administrative grievance process. And the combination of the above-discussed administrative review failures constitutes due process violations that deserve compensation.

VII. THE DECISION

123. In light of the preceding, the Tribunal RESOLVES by majority to partially accept the claims raised in this Complaint, as well as the respective requests for reparation, and consequently:

1. TO ORDER the General Secretariat, based on Article IX.3 of the Statute of the Tribunal, to pay the Complainant a compensation equivalent to six months of his last remuneration (salary and post adjustment), given the lack of motivation for the decision to terminate his continuous contract, which, together with the other facts referred to in the preceding reasoning, constitute a violation of the Complainant's due process.

2. TO ORDER the General Secretariat, for purposes of Article IX.5 of the Statute of the Tribunal, to recognize and pay the Complainant the maximum amount allowed, which amounts to one month's remuneration (salary and post adjustment) at the P-4, step 6 level on the salary scale for headquarters for legal fees.

---

[20] Rule 112.6(a): (a) A Joint Advisory Committee on Reconsideration is established to advise the Secretary General on the consideration and disposition of petitions for Reconsideration.

[21] Rule 112.7(h) The Committee shall adopt a report by majority vote and submit it to the Secretary General within 60 days following the date on which it began its review of the matter. The report shall include a summary of the problem, an account of the Committee's actions, its recommendations, and its vote on the recommendations. Any member of the Committee may request that his/her dissenting opinion appear in the report.

3. TO DENY the additional claims included in the complaint under the reasoning expressed in this decision.

4. TO REITERATE to the General Secretariat the Tribunal's recommendation[22] relating to future reorganizations and reductions in force, specifically, to:

   (i) clarify and make more transparent and more manageable the relevant criteria to be applied by decision makers as to who is to be separated and who is not; and

   (ii) clarify, as a matter of codified policy that, without exception, "the General Standards for the Operation of the General Secretariat, the Staff Rules and other relevant provisions" will be applied faithfully and rationally in relation to all future reorganizations and reductions in force; and,

5. TO RECOMMEND to the General Secretariat that before the adoption of any decision or action that involves the involuntary separation of a staff member from service in the Organization, whether reorganization, budgetary constraints, or disciplinary processes, that decision must be based upon formally documented, real time-prepared, and specifically-articulated reasoning, to avoid and to minimize not only the recurrence of cases like the instant case but also the consequential Tribunal orders for payment of compensation for associated due process violations.

Let notification be given.

Judge T. Michael Peay
President

Judge Israel Campero
Vice President

Judge Wilson Vallejo Bazante

Judge María Cecilia Cáceres Navarrete

Judge Janet Nosworthy

Mercedes Carrillo
Secretary

Washington, D.C., December 15, 2023.

Annex: Dissenting opinion of Judge Pablo Sandonato de León.

[22] Judgment 169 "Steven Griner v. Secretary General of the Organization of American States".

DISSENTING OPINION OF JUDGE PABLO SANDONATO DE LEÓN

1. I voted against the judgment as I am in disagreement with the manner in which the Tribunal exercised its jurisdiction (I), the granting of legal fees (II) and on the issuance of recommendations (III).

2. The fact that my analysis in the following lines is limited to some aspects of the judgment should not be understood as an agreement on the remaining parts of the judgment. In fact, dwelling into them is both unnecessary and contradictory with the reasons explained later in this dissenting opinion. I would only mention: (i) that this case is not about non-renewal, it is about termination; and (ii) that a discussion about an alleged self-executory character of General Assembly resolutions, or a lack of, is strictly unnecessary in order to settle the present dispute. Also, Complainant is not challenging a General Assembly resolution, which he cannot do, but the individual decision, the termination of this contract of employment, implementing a General Assembly resolution.

*

I. ON THE JURISDICTION OF THE TRIBUNAL AND HOW IT IS EXERCISED

3. Administrative tribunals are not assigned with a general jurisdiction to adjudge on all matters relating to staff members (general jurisdiction or "juridiction de droit commun"), but only on those matters concerning certain type of disputes, namely employment disputes, between, generally, an employee and his employer. This is a universally accepted principle of international civil service law. Already the first administrative tribunal, created almost a century ago, on September 26th, 1927, the Administrative Tribunal of the League of Nations, inspired precisely by the French *Conseil d'Etat*[23], enjoyed a limited jurisdiction to adjudge disputes concerning employment relations between staff members of the Secretariat of the League on Nations or of the International Labour Office against their respective employer, that is, the Secretariat of the League or the Director-General of the International Labour Office. The Administrative Tribunal of the League of Nations, already in its Judgments N°. 2 (*In re* Phelan) and N° 4 (*In re* Bouvaist-Hayes), settled the criteria, still today generally accepted, that matters arising out of an organization's discretionary power of appreciation will be subject to a narrow exercise of the tribunal's jurisdiction, precisely because of the administrative nature of the tribunal. Indeed, the Administrative Tribunal of the League of Nations, following the French Conseil d'Etat, settled the standard today generally accepted among international administrative tribunals that discretionary decisions will be subject to a control or review as to how discretion was excessed and would not go into the materiality or merit of the challenged decision, unless it is necessary to adjudge on the question posed to the tribunal.

4. I deemed it necessary to introduce this general and historical framework as it is illustrative of the nature of my dissent and, I hope, may help to understand it.

5. The Statute of the OAS Administrative Tribunal was adopted by the Permanent Council, by resolution CP/RES. 48 (I-O/71) pursuant to a delegation of authority from OAS General Assembly under resolution AG/RES. 35 (I-O/71). According to Article I, paragraph iii of the

[23] *Société des Nations,* Actes de la Deuxième Assemblée, Séance des Commissions, II, pp-71-72.

Statute, the Tribunal has jurisdiction to "adjudicate disputes between the Secretary General and the staff members of the General Secretariat arising out of the employment relationship".

6. The OAS Administrative Tribunal is not a labour tribunal applying labour law governing a private employment relationship between an employee and an employer, such as a waiter on the one hand and the restaurant that employs him on the other hand, or a librarian and the library that employs him. The OAS Administrative Tribunal is an administrative tribunal because it adjudges employment (not labour!) disputes between an individual an a pubic organization, hence an eminently public law relationship. An international civil servant's employment relationship is much closer to a national civil servant's employment relationship than to a private employee labour relationship with his employer. A private employee labour relationship with his employer is essentially a private relationship governed by the employment contract, whereas a national civil servant's relationship with his employer, such as a law clerk employed in a court of law, is essentially a public relationship governed not by labour law, but by administrative law. The OAS Administrative Tribunal is an administrative court (such as a "juzgado contencioso-administrativo" or "tribunal administratif" at the national level) and not a labour court. The distinction is not anodyne as it goes into the very nature of the exercise of its jurisdictional power. In other words, a labour judge, would be much more inclined, and it may even be his duty under national applicable law, to go into the actual merits and reasoning of the challenged decision, whereas an administrative judge's jurisdiction is limited to considerations of misuse or excess of power or breach of law.

7. An Administrative Tribunal's function is to decide whether the challenged decision was adopted in breach of the applicable law, be it substantial or procedural, as it existed at the material time, namely when the decision was adopted, or because it was arbitrary or, more generally, through a misuse of power. It is complainant's burden to prove such breach of law or misuse of power or to rebut the presumption of legality covering the administration's activity, to the satisfaction of the Tribunal. If that is the case, then the Tribunal shall order the breach of law to cease and send the case back to the competent authority for proper decision (reparation through restitution) if possible, or to order a different form of reparation, either through compensation or satisfaction or both, as the case may be. To put it differently, an administrative tribunal such as the OAS' exercises a judicial review, not a merit-based review.

8. On the contrary, in order to settle the dispute before it, an administrative tribunal's role is not to retry the case, as a domestic labour judge would do, and to attempt to substitute the Secretary-General's best informed opinion on the opportunity or the intellectual process behind the adoption of the challenged decision to its own. The Tribunal is not to place itself in the role of an administrative decision-maker and to determine, as it does in the present case, how the Secretary-General should have acted in the best interest of the Organization. This is what the majority does in the judgment and this is way I am in disagreement.

9. In the instant case, Complainant was provided with the reasons for termination of his fixed term contract of employment (paragraph 22 of the Judgment). Indeed, Respondent's communication to Complaint clearly stated that: "as a result of the difficult financial situation that the Organization is currently going through and that resulted in considerable budget cuts, your continuing contract will end effective December 31, 2020". The communication goes further, explaining that the: "above-mentioned decision has been made in accordance with the Program–Budget of the Organization for 2021 approved by the General Assembly that instructs the Secretary General to make such adjustments, reductions, and restructurings as may be needed to comply with the resolution and recognizes the principle that the Secretaries and Executive Secretaries should be authorized to make necessary changes -to reorganize, consolidate and cut-, in order to deal with the significant budget cuts contemplated in the resolution". This is enough to satisfy Respondent's

obligation of a duly motivated decision. There is a mandate of the General Assembly ordering the Secretary General to reduce spending. How the Secretary General came to select one rather than another employee falls within his responsibility as chief administrative officer of the General-Secretariat. Of course, this is not tantamount to say that the Tribunal will never review those decisions. The Secretary-General has been vested with discretionary powers by the General Assembly and the Tribunal should in principle not enquire into its exercise, provided however that such discretionary powers are exercised in compliance with the applicable law and not misused, since any such breach of law or misuse of power would call for the rescinding of the challenged decision.

10. It is Complainant's burden to demonstrate that the Secretary-General's decision was adopted in breach of applicable law or flawed because of misuse or excess of power. In the present case, Complainant did not prove a breach of applicable material or procedural law or a misuse of power nor did he rebut the presumption of legality of administrative acts regarding the termination of his contract of employment. Moreover, Respondent provided Complainant with a reasoned decision for terminating his contract of employment that was comprehensible and precise. That justification allowed Complainant to understand why his contract was terminated and the Tribunal to exercise a judicial review. How Respondent came to the conclusion that was Complainant's contract the one that was going to be terminated falls within the margin of appreciation of Respondent. As the majority in Judgment 170, recognized, concerning the employment relationship "while Complainant is indeed entitled to his own opinion as to what is in the best interest of the Organization as a staff member he is not best placed to make that determination. The authoritative source of what is in the best interest of GS/OAS is the SG himself".

11. I also note that there is no requirement for Respondent under applicable law to provide "*contemporaneously memorialized reasons*" (paragraph 88 of the Judgment) as the Tribunal states. In my view, this is a judicial development unsupported in applicable law.

12. I also have difficulties in accepting the following paragraph: "[t]he Tribunal recognizes as valid, self-evident and therefore undisputed that the generic, overarching reason that motivated consideration of the *possible* need to terminate the Complainant's continuing contract was the GA's declaration of severe budget limitations. However, the same cannot be said for the specific underlying decisional reasoning that the Respondent now relies upon to justify termination of one position over others in that unit" (paragraph 101). I believe the Tribunal goes into a delicate reasoning. Good faith and the legality of the action of the Administration must be presumed. International tribunals and international administrative tribunals apply this legal presumption, elevated to the rank of a general principle of law.

*

II. ON LEGAL FEES

13. The Tribunal grants legal fees to Complainant.

14. Contrary to what the Tribunal did in Judgment 170, "prepared using as its basis significant portions of the initial draft judgment" (Judgment 170, fourth introductory paragraph), in the present judgment, the Tribunal's decision is not reasoned, as it should be. The Tribunal offers no factual nor legal analysis on the reasons to grant legal fees.

15. On the merits of the grating of legal fees in the present case, and as I explained in my Dissenting Opinion to Judgment 170:

> "The Tribunal has a settled jurisprudence in cases of multiple defeat, such as the present one, according to which `each party shall cover its own expenses and procedural costs´ (Judgment No. 128: `Oscar E. Chávez v. Secretary General of the Organization of American States´. See also: Judgment No. 139: `Eugenia Sara Hanono v. Secretary General of the Organization of American States´ and Judgment 161: `Janet Holguín v. Secretary General of the Organization of American States´ " (para. 84).

16. Further, according to Article IX.5 of the Statute of the Tribunal an order for an indemnity for attorney's fees and costs can be issued "when the losing party has brought a clearly frivolous claim or objection, did not have solid grounds for litigating, has been totally defeated, or has been proven to have acted with actual malice". In my view, since the above requirements have not been acknowledged by the majority, the majority should not have granted legal fees.

17. In fact, as in Judgment 170, the Tribunal is awarding legal fees without any legal provision granting the Tribunal the right to do so. In other terms, the Tribunal is deciding *ex aequo et bono*. Under our Statute I cannot join the majority on this point.

*

III. ON THE ISSUE OF RECOMMENDATIONS

18. I also find it imperative to dwell on the Tribunal's recent tendency to issue recommendations to the Secretary-General in the operative part of the judgment.

19. The Tribunal issued a recommendation in the operative part of the judgement for the first time in 2003, with Judgment 147. The Tribunal issued a second recommendation five years later, in 2008, in Judgment 154.

20. Since 2008, the Tribunal has included recommendations in the operative part of the judgment on a total of 12 occasions, including: Judgments, 157, 160, 161, 162, 163, 165, 168, 169, 170 and in Resolution 477 (issued in 2014). During my tenure as member of the Tribunal, the Tribunal also issued recommendations, through judgments 168, 169 and 170. I have dissented in all three judgments. Up until now, I did not think it necessary to expressly comment on this point. I now deem it necessary to clarify my position in the hope that this will, somehow, contribute to the reflection on the issuance of recommendations by a judicial body such as OAS Administrative Tribunal.

21. Before I give the reasons for my dissent I also find it necessary to clarify that my position of principle regarding the issuance of recommendations in the operative part of the judgment is not to be construed as approving or disapproving the content of the recommendations decided and ordered by the majority. For the sake of clarity, I do not comment on the merits of the recommendations decided and ordered by the majority.

22. The reasons of my dissent in including recommendation in the operative part of the judgment are the following.

23. *First*, the Tribunal has a tendency, sometime called a practice, to issue recommendations. Now, for a practice to exist there must be a legal basis for it. A practice, must originate from or be

grounded on the existing law (practice *intra legem*) or must originate in agreement with the law (practice *secundum legem*); failure to do so renders the practice illegal. In other words, a practice cannot emerge against the law (practice *contra legem*), simply because it is a violation of the law. No matter how long this violation persists, time does not render it legal (*ex injuria jus non oritur*).

24. Pursuant to Article I, para. iii. of the Statute, the Tribunal has jurisdiction to "*adjudicate* disputes between the Secretary General and the staff members of the General Secretariat arising out of the employment relationship" (emphasis added). The Tribunal hears the case submitted to it and is bound to issue a decision. Neither Article I, para. iii. of the Statute, nor any other provision of the Statute empowers the Tribunal to issue recommendations.

25. *Second*, by adopting a formal position on a general matter, despite being related to the dispute, the Tribunal is in fact putting itself in a delicate situation which could be understood in future cases as prejudging.

26. *Third, w*hen considering the proper exercise of its jurisdiction, the Tribunal must focus on the legal question submitted to it, rather than on such related or ancillary questions as may have arisen in connection with the legal question submitted to it that are not necessary for the legal question submitted to be adjudged. It is our duty, as an international jurisdictional Tribunal "not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not indicated in those submissions"[24].

27. *Fourth*, the Statute does not grant the Tribunal an advisory function; that is to ascertain, in a case where there is no dispute, whether a given, abstract, situation is or not in accordance with the applicable law, to order the illegality to stop, as the case may be, but without actually granting an indemnity. The advisory function is not an exercise of the jurisdiction. The advisory function can be found mostly in Human Rights bodies, such as the Inter-American Court of Human Right or the European Commission of Human Rights, but exists also in non-Human Right tribunals of general jurisdiction, such as the Court of Justice of the European Union and the International Court of Justice, the principal judicial organ of the United Nations. It has very seldomly been exercised by arbitration tribunals, if granted such advisory function. The OAS Administrative Tribunal has not been granted an advisory function. Because of what I have just said, I have some difficulties in understanding how could the Tribunal possibly issue a recommendation while exercising its jurisdictional function, and include such recommendation, which by definition is non-binding, in the operative part of the judgment which, by definition is binding. In other words, the Tribunal is ordering something, (i) that it cannot order, because it has no advisory function; (ii) that is not binding, namely a recommendation- despite allegedly doing so through the exercise of its jurisdiction, which is binding by definition -!-, and; (iii) at the same time, it is not applying its jurisdiction -as an advisory function is not an exercise of jurisdiction.

28. In my view, and without commenting on the merits of the recommendations decided and ordered by the Tribunal, the Tribunal could have forwarded the same message included in the recommendations, through other means, such as the valuable and elsewhere widely used *obiter dicta*, that would have better served justice, judicial technique, and honoured its high authority within the hemispheric institution.

Pablo SANDONATO DE LEÓN

[24] *Request for interpretation of the Judgment of November 20th, 1950, in the asylum case, Judgment of November 27th, 1950. I.C.J. Reports 1950*, p. 402.