CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeals Nos. 627/2020-636/2020
(Ulrich BOHNER (V) and others v. Secretary General of the Council of Europe)
Appeal No. 637/2020
(Stanislas FROSSARD v. Secretary General of the Council of Europe)
Appeal No. 663/2020
(Silvia MUŇOZ BOTELLA (II) v. Secretary General of the Council of Europe)

The Administrative Tribunal, composed of:

Mr András BAKA, Deputy Chair,
Ms Françoise TULKENS,
Mr Christos VASSILOPOULOS, Judges,

assisted by:

Ms Christina OLSEN, Registrar,
Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The Tribunal received nine appeals, lodged and registered on the following dates, by:

- Mr Ulrich BOHNER (V), appeal submitted on 4 February 2020 and registered on 5 February 2020;
- Ms Mélina BABOCSAY (VI), appeal submitted on 5 February 2020 and registered on 6 February 2020;
- Mr Yann DE BUYER (II), appeal submitted and registered on 13 February 2020;
- Mr Marc BAECHEL (IV), appeal submitted and registered on 14 February 2020;

- Mr John PARSONS, appeal submitted on 9 February 2020 and registered on 18 February 2020;
- Mr Günter SCHIRMER, appeal submitted and registered on 21 February 2020;
- Mr Hanno HARTIG, appeal submitted and registered on 27 February 2020;
- Mr Lars NYCTELIUS, appeal submitted on 25 February 2020 and registered on 3 March 2020;
- Mr Alfonso ZARDI, appeal submitted on 7 March 2020 and registered on 9 March 2020; and
- Ms Andréa Jeannine FRANCK, appeal submitted on 26 February 2020 and registered on 10 March 2020.

2. On 27 April 2020, the Secretary General forwarded her observations on the appeals. The appellants filed a memorial in reply on 18 May 2020.

3. The Tribunal also received two other appeals, lodged and registered on the following dates, by:

- Mr Stanislas FROSSARD, appeal lodged on 10 January 2020 and registered on 11 March 2020; and

- Ms Silvia MUŇOZ BOTELLA (II), appeal lodged on 9 May 2020 and registered on 11 May 2020.

4. On 11 March 2020, the first 10 appellants (see paragraph 1 above) filed further pleadings.

5. On 27 April and 27 May 2020 respectively, the Secretary General forwarded her observations on these appeals.

6. Owing to the precautionary measures implemented in Europe because of the pandemic, the hearing in these appeals took place by videoconference rather than physically, on 28 October 2020 as planned. The appellants in Bohner and others were represented by Mr Giovanni Palmieri, legal adviser on international civil service law. Mr Frossard conducted his own defence and that of Ms Muňoz Botella. The Secretary General was represented by Mr Jörg Polakiewicz, Director of Legal Advice and Public International Law (Jurisconsult), assisted by Ms Sania Ivedi, administrative officer in the Legal Advice and Litigation Department.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The six appellants in appeals Nos. 629/2020, 630/2020, 632/2020, 634/2020 and Nos 637/2020 and 663/2020 are Council of Europe staff members working at the Organisation’s headquarters. They are all permanent members of staff assigned to various departments of the Council. The six appellants in appeals Nos. 627/2020, 628/2020,

631/2020, 633/2020, 635/2020 and 636/2020 are former staff members of the Organisation in receipt of retirement pensions from it.

i. Background to these cases

8. On 3 July 2017, the Minister for Foreign Affairs of the Russian Federation informed the Chair of the Committee of Ministers of the Council of Europe of the Russian Federation's decision to suspend payment of its contributions to the budget of the Council of Europe for 2017 until the credentials of the delegation of the Federal Assembly of the Russian Federation within the Parliamentary Assembly of the Council of Europe were restored. At the same time, the Russian Federation stated that it would continue to fulfil its commitments within the Organisation. The letter was worded as follows:

> *"The Russian Federation expresses deep concern about the aggravating crisis within the Parliamentary Assembly of the Council of Europe (PACE). The statement of the Russian Foreign Ministry dated 30 June 2017 contains a detailed assessment of the crisis by the Russian side. In order to prevent the situation from developing according to this dangerous scenario, the Russian Federation decided to suspend payment of its contributions to the budget of the Council of Europe for 2017 until full and unconditional restoration of the credentials of the delegation of the Federal Assembly of the Russian Federation within the Parliamentary Assembly of the Council of Europe. At the same time, the Russian Federation continues to fulfil its commitments within the Organisation. Without any interference with PACE's substantive working issues, we consider it unacceptable to apply sanctions against the members of parliaments elected by the people. We strongly believe that the PACE rules of procedure need to be reformed in such a way as to better accommodate the views of all the PACE members and the Europeans they represent."*

9. At its 1300th meeting (Budget) from 21 to 23 November 2017, the Committee of Ministers of the Council of Europe adopted the following decision:

> "The Deputies, having regard to the Co- ordinating Committee on Remuneration's (CCR) recommendations with regard to the 2018 adjustment of remuneration for staff of the Council of Europe and the corresponding monthly basic salary scales as set out in document CM(2017)123-add2,
>
> 1. decided, in application of Article 6 – Affordability of the Rules on the remuneration adjustment method, not to award the annual salary adjustment recommended by the CCR due to the default of payment of 2017 obligatory contributions which produced a significant reduction in the Organisation's budget;
>
> 2. noted that, in pursuance of Article 36 of the 132nd report (CM(2001)170-rev), the above decision not to award the annual adjustment will apply to pensions payable under Appendix V of the Staff Regulations;
>
> 3. noted that, in accordance with the interpretation given to paragraph 3 of the 34th report by the CCG (CCG(65)5) dated 25 October 1965, at its 77th session on 29 June 1966 (cf. CCG/M(66)6), the above decision will apply to salaries of temporary staff serving in the Council of Europe;
>
> 4. noted that under the terms of Article 3 of Resolution CM/Res(2009)5 on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights, the above decision will apply to the annual remuneration of judges and of the Commissioner for Human Rights;

> 5. approved, with effect at 1 January 2018, the amounts of allowances/supplements expressed in absolute value, set out in Annex to the 251st report of the CCR (document CM(2017)124);
>
> 6. agreed that, should the application of the method result in a negative adjustment, they would consider the Secretary General's proposal not to apply that negative adjustment up to a maximum of 1.1% in total."

10. In its decision delivered on 20 June 2019, the Tribunal declared unfounded the appeals by seven appellants challenging the decisions not to award them the salary adjustment for 2018 and to defer until 2019 the entry into force of the salary moderation clause (see ATCE, Alberelli (III) and others v. Secretary General, Nos. 595-601/2018, paragraph 7).

ii. Facts concerning these cases

11. On 9 September 2019, the following announcement was published on the Council of Europe's intranet site:

> "On Friday 30 August, the Russian authorities informed the Organisation that the transfer of its contribution to the budget for the years 2017 and 2018 was being processed, and this has now been received by our Treasury.
>
> The Russian Federation has paid €53.2 million (out of a total of €54.7 million) of its 2017/2018 contributions, the remaining amount being related to contributions towards certain Partial Agreements which according to the Russian authorities will be paid shortly.
>
> The Russian Federation has already paid all its 2019 contributions (total of €32.5 million) to the Organisation's budget.
>
> These amounts do not include late payment interest."

12. On 21 November 2019, on the proposal of the Secretary General, the Committee of Ministers decided to award the salary adjustment for 2019 retroactively, in accordance with the adjustment method adopted by the Committee of Ministers in line with the recommendations contained in the 244th Report of the Co-ordinating Committee on Remuneration (CCR) for the period from 1 January 2017 to 31 December.

13. On 25 November 2019, the Secretary General replied to the administrative requests by the appellants in appeals Nos. 627/2020-636/2020, and to that by the appellant in Appeal No. 637/2020 (see paragraphs 1 and 3 above) as follows:

> "You refer to the decisions by the Committee of Ministers concerning the application of the affordability clause for 2018 and 2019. You take the view that the circumstances that led to the decisions to apply the said clause no longer obtain following the payment by the Russian Federation of all its contributions to the Council of Europe's budget for 2017 and 2018. You are asking the Secretary General to implement in full, with retroactive effect, the recommendations by the Co-ordinating Committee on Remuneration concerning 2018 and 2019.
>
> I would draw your attention to the fact that the decision to apply the affordability clause is a final decision that determines the Organisation's budget for a given year. The requirement of financial stability for the Organisation means that a subsequent change in the circumstances taken into account when the budget was adopted cannot on its own justify calling into

question the final nature of the annual budget. Moreover, the remuneration adjustment method in no way requires a fresh decision to be taken on the salary adjustment once the difficulties which justified application of the affordability clause have been resolved.

With regard to the adjustment of remuneration for 2019, the Committee of Ministers agreed, in its decision of 28 November 2018, to consider 'a proposal by the Secretary General to award the 2019 remuneration adjustment recommended by the CCR' should the payment of the Russian Federation's contributions be received in 2019. It was therefore without calling into question the final nature of the decisions relating to the Organisation's budget and on the basis of an exception specifically provided for by the Committee of Ministers in its initial decision that the Secretary General proposed that the Committee of Ministers award the salary adjustment provided for in Annex 1 to the 257th report of the CCR with effect from 1 January 2019. At the 1361st meeting of the Ministers' Deputies, following very difficult discussions, the Deputies decided to adjust remuneration with effect from 1 January 2019 (the adjustment index for France being 2.5%). The Programme and Budget for 2020-2021 was adjusted accordingly. The total impact of the award of the 2019 annual salary adjustment is 5 541 000 euros on the 2019 budget and 5 973 000 euros on the 2020-2021 budget. It will therefore be necessary to abolish 26 to 35 posts (...).

In the case of the remuneration adjustment for 2018, the Committee of Ministers' decision did not include any provision similar to the one in the decision concerning the remuneration adjustment for 2019. The Secretary General is not therefore required by a decision of the Committee of Ministers to make a proposal seeking to depart from the final nature of the decision in question. In the absence of an obligation of that kind, the Secretary General decided not to use her discretion and not to propose that the Committee of Ministers retroactively adjust remuneration for 2018. The Secretary General took the view that such a proposal would have a negative impact on the discussions concerning the adoption of the budget for 2020-2021 and could jeopardise the move to zero-real growth, which is of vital importance for the future of the Council of Europe. This decision by the Secretary General also takes account of the need to abolish 17 to 25 more posts to fund any retroactive adjustment of remuneration. The Secretary General therefore concluded that such a proposal would not be in the interest of the Organisation. (...)"

14. Also on 25 November 2019, the following announcement was published on the Council of Europe's intranet site:

"On 21 November the Committee of Ministers approved the 2020-2021 Programme and Budget based on Zero Real Growth. (...)

Remuneration and allowances

As part of the budget decisions, the Ministers' Deputies have decided to award the 2019 remuneration adjustment (...) with effect from 1 January 2019. (...) Following the payment of the outstanding obligatory contributions, the Secretary General has proposed to award the 2019 salary adjustment (...), to which the Ministers' Deputies agreed. This retroactive salary adjustment will be paid to staff members and pensioners concerned with the December payroll.

In addition, the Minister's Deputies have decided to award the 2020 remuneration adjustment (2.6% for France) recommended by the CCR.

(...)"

15. Between 10 and 19 December 2019, the appellants in appeals Nos. 627/2020-636/2020 and the appellant in appeal No. 637/2020 (see paragraphs 1 and 3 above) lodged administrative complaints requesting the annulment of the decision dismissing their administrative requests for the retroactive award of the remuneration adjustment for 2018.

The appellant in appeal No. 663/2020 (see paragraph 3 above) lodged her administrative complaint on 17 February 2020, stating that she had noted, upon receiving her payslip for January 2020, that there had been no salary adjustment for 2018 and requesting that "[her] salary be increased in future by 1.1% under arrangements feasible for the Council of Europe's budget (for example, staggering such increase over several years or offsetting any negative adjustments in the years ahead)".

16. By decisions issued on 9 and 10 December 2019 and 13 March 2020 respectively, the Secretary General rejected all the administrative complaints. The Secretary General's arguments were as follows:

> "You refer to the decision by the Committee of Ministers on 21 November 2019 by which it was decided, upon the proposal of the Secretary General, retroactively to award the salary adjustment for 2019 recommended by the Co-ordinating Committee on Remuneration ("CCR"). You complain that the same decision was not taken for 2018. You are requesting the annulment of the Secretary General's decision of 25 November 2019 insofar as she dismissed your request to implement, with retroactive effect, the CCR's recommendation on adjustment of remuneration for 2018.
>
> (...)
>
> It should be stressed that the remuneration adjustment method in no way requires a fresh decision to be taken on the salary adjustment once the difficulties which justified application of the affordability clause have been resolved. The decision on any salary adjustment is a decision which relates to the Organisation's budget and which is taken when the Committee of Ministers approves the budget for the following financial year. It is a final decision which determines the level of the budget for a given year and in the light of which the budget is approved. The decision cannot be regarded as being provisional or being applicable subject to changes in the circumstances that led to application of the clause. The requirement of financial stability for the Organisation means that a subsequent change in the circumstances taken into account when the budget was adopted cannot on its own justify calling into question the final nature of the annual budget. Deciding otherwise would be contrary to the principle of legal certainty. (...)
>
> It should be pointed out that the affordability clause in Article 6 of the Rules on the remuneration adjustment method for staff of the Co-ordinated Organisations set out in the annex to the 244th CCR report expressly states that that the Committee of Ministers may 'decide that the annual adjustment recommended by the CCR be awarded in part or not at all, and […] decide also on the timing for the payment of any adjustment' (…). Clearly, in the instant case, the impugned decision by the Committee of Ministers in 2017 purely and simply refused the adjustment of remuneration for 2018 without making provision for deferred payment thereof at a later date in the event of the Russian Federation paying its contributions.
>
> Consequently, there is no legal basis to support your argument that the CCR's recommendation on the adjustment for 2018 should be implemented in full, with retroactive effect, following the payment by the Russian Federation of its obligatory contributions.
>
> Insofar as the *rebus sic stantibus* clause is relied upon to justify payment of the salary adjustment with retroactive effect, the Secretary General believes that it does not establish an obligation to adjust remuneration retroactively because of the Russian Federation's payment of its obligatory contributions. The *rebus sic stantibus* clause is a concept of customary international law which has been codified in Article 62 of the Vienna Convention on the Law of Treaties. According to the clause, the elements of a treaty or a contract remain applicable only insofar as the essential circumstances which constituted the basis for the conclusion of those instruments remain as they stand and insofar as changes in them do not

radically alter the obligations initially accepted by the parties. Under the *rebus sic stantibus* clause, treaties or contracts may therefore become inapplicable on account of a fundamental change in circumstances that was not foreseen by the parties at the time of their conclusion. It is therefore an exception to the principle of *pacta sunt servanda*, according to which parties must abide by agreements.

The purpose of the *rebus sic stantibus* clause is to enable a party to a treaty (or to a contract) to invoke an unforeseen change in circumstances that was such as to alter its own willingness to be bound by the treaty and entailed a radical change in the extent of the obligations still to be performed under the treaty by the parties. In order for the clause to be invoked by a party, the legal act to which it is to apply must include an element of negotiation and must reflect the agreement of the parties to be mutually bound by an agreement applying to them.

In the light of the above, the *rebus sic stantibus* clause cannot therefore apply to decisions relating to salary adjustments given that such decisions are taken unilaterally by the Committee of Ministers pursuant to the remuneration adjustment method. Decisions on salary adjustments do not involve any element of negotiation and no agreements are concluded between the parties concerned – consequently, no party to an agreement may rely on a change in circumstances that is such as to alter its own willingness to be bound by an agreement.

In any case, to be applicable, the *rebus sic stantibus* clause requires a change in circumstances that was not foreseen by the parties. In the instant case, the payment by the Russian Federation of its obligatory contributions was not unforeseeable; quite the opposite (...).

It follows from the above that there is no obligation on the Committee of Ministers to reverse the decision to apply the affordability clause. On the contrary, any decision to reverse the application of the affordability clause is a discretionary and sovereign decision of the Committee of Ministers, which, on an exceptional basis, could decide to apply the salary adjustment retroactively in view of the Russian Federation's payment of its contributions, as it did for the adjustment for 2019. As this would be an exceptional ad hoc decision involving no legal obligation whatsoever, the Committee of Ministers has broad discretion to decide whether or not to review its decisions on the salary adjustment and, if it were to decide to award the salary adjustment, to award it in full or in part from the date which it deemed appropriate, in accordance with Article 6 of the remuneration adjustment method.

The Secretary General's decision to propose that the Committee of Ministers retroactively adjust remuneration for 2019 alone was a deliberate decision that took account of the circumstances of the case and of all the interests involved.

Firstly, this decision took account of the terms of the Committee of Ministers' decision of 28 November 2018, which provided for (...) the possibility of an exception to the rule that a decision not to award a salary adjustment pursuant to the affordability clause is final (...).

Secondly, (...) any proposal also to award the salary adjustment for 2018 retroactively would have a negative impact on the discussions concerning the adoption of the budget for 2020-2021 and could jeopardise the move to zero-real growth (...).

Thirdly, account was taken of the budgetary implications not only for the 2018 budget but also for the budgets for the following years, taking account of the cumulative effect of salary adjustments and, in particular, of the subsequent need to abolish 17 to 25 more posts (in addition to the 26 to 35 posts to be abolished because of the retroactive adjustment for 2019) to fund any retroactive adjustment of remuneration for 2018.

(...)"

17. Between 5 February and 9 May 2020, the appellants lodged the present appeals against the rejection of their administrative complaints.

II. RELEVANT PROVISIONS AND REGULATIONS

18. With regard to the applicable regulations, in particular the rules on the operation of the co-ordination system, the relevant provisions of the remuneration adjustment method and the decisions on the remuneration adjustment for 2018, the Secretary General refers to the observations submitted in the case of Gianfranco Alberelli (III) and others v. Secretary General (appeals Nos. 595/2018-601/2018, 20 June 2019, paragraphs 19-20).

19. With more particular regard to the moderation clause, the Secretary General stated the following in her observations of 27 April 2020 (see paragraph 5 above):

> "12. Firstly, it should be pointed out that, in adopting on 18 October 2016 the remuneration adjustment method for the period from 1 January 2017 to 31 December 2020 as set out in the 244th CCR report, the Committee of Ministers noted that an addendum to that report proposing a moderation clause would be adopted by the CCR at the latest by 30 June 2017 for implementation as of 1 January 2018 (CM/Del/Dec(2016)1268/11.5).
>
> 13. By a decision of 22 November 2017, the Committee of Ministers accordingly adopted the amendments to Article 4.1.6.2 of the Rules on the remuneration adjustment method, as set out in Annex I of the addendum to the 244th CCR report (document CM(2017)120), with effect from 1 January 2019. The amendments in question consisted in inserting in the remuneration adjustment method in force the moderation clause proposed by the CCR. In this connection, reference should be made to the recommendation by the CCR, which merely recommended that the governing bodies adopt the amendments in question without mentioning a recommended implementation date."

THE LAW

20. The appellants in appeals Nos. 627/2020-636/2020 are seeking the annulment of the administrative decision by which the Secretary General refused to initiate the procedure to enable the Committee of Ministers to fulfil the obligations stemming from the remuneration adjustment "method", taking due account to that end of the general legal principle of *rebus sic stantibus*.

21. The appellant in appeal No. 637/2020 is seeking the annulment of the Secretary General's decision refusing to adjust remuneration to take account of the method for 2018 following the late payment by the Russian Federation.

22. The appellant in appeal No. 663/2020 is challenging the Secretary General's refusal to include in future in the appellant's salary the increase of 1.1% calculated for 2018 following the payment in full by the Russian Federation of its budgetary contribution due for 2017, 2018 and 2019.

I. JOINDER OF APPEALS

23. As the 12 appeals are closely interconnected, the Administrative Tribunal orders their joinder under Rule 14 of its Rules of Procedure.

II. EXAMINATION OF THE APPEALS

A. Admissibility

1. *The Secretary General*

24. **In case No. 663/2020** (see paragraph 3 above), the Secretary General maintains that the appeal is inadmissible because it is out of time under Article 59, paragraph 3, of the Staff Regulations, which requires complaints to be submitted within 30 days from the date of publication of the act concerned, in the case of a general measure. In the instant case, the appellant was informed on 25 November 2019, through the intranet announcement, that only the salary adjustment for 2019 would be awarded.

25. Consequently, the Secretary General maintains that the date of 25 November 2019 is the date that must be taken as the starting point and that the appellant therefore had a period of 30 days expiring on 27 December to lodge her administrative complaint, this time-limit being extended to 2 January 2020 under Article 61 of the Staff Regulations because of the closure of the Organisation for the end-of-year festive period. Yet she did not lodge her complaint until 17 February 2020.

26. The Secretary General goes on to state that it was the December 2019 payslip which constituted the individual decision indicating that the 2018 salary adjustment had not been awarded, as that payslip included back-payment of the 2019 salary adjustment and therefore showed that the same decision had not been taken for the 2018 adjustment.

27. The Secretary General concludes from this that the appellant's complaint was out of time and that this appeal is accordingly inadmissible.

2. *The appellant*

28. The appellant holds that her appeal is admissible because her administrative complaint was lodged less than 30 days after she received the document, namely her January 2020 payslip, which for the first time gave effect to the individual decision taken in her case not to increase her salary by the amount of 1.1% corresponding to the salary adjustment which she ought to have been awarded for 2018. While this payslip did include the full salary adjustment of +2.6% calculated for 2020, this should have come on top of a basic figure incorporating the salary adjustments calculated for 2018 and 2019. However, this payslip showed that payment from 1 January 2020 started out from a basic amount that only incorporated the increase for 2019 and not the salary adjustment of +1.1% due for 2018.

29. The appellant is therefore of the opinion that the Secretary General's claim that the appeal was out of time must be rejected.

3. *The Tribunal's assessment*

30. The Tribunal underlines the importance of compliance with the prescribed time-limits when lodging an administrative complaint, in order to ensure observance of the principle of legal security inherent in the Council of Europe system, in the interests of both the Organisation and its staff (see ATCE, appeal No. 416/2008, Švarca v. Secretary General, decision of 24 June 2009, paragraph 33, with other reference).

31. The Tribunal notes that the announcement published on the intranet on 25 November 2019 clearly indicated that only the salary adjustment for 2019 would be awarded (see paragraph 14 above). In this connection, the appellant in no way demonstrates any ambiguity in the content of the announcement. In addition, the salary adjustment for the whole of 2019 was indeed included in the payslip for December 2019. Even assuming that the appellant received the payslip on 2 January 2020, she ought to have lodged her administrative complaint by 2 February 2020 at the latest; yet she did not do so until 17 February 2020 (see paragraph 15 above). The Tribunal would add that if the appellant expected the salary adjustment for 2018 to appear in her January 2020 payslip, she had merely cherished a hope that was not founded on any regulatory measure adopted by the Organisation.

32. In the light of these considerations, the Tribunal concludes that the appellant's administrative complaint and her appeal No. 663/2020 are inadmissible on account of being out of time. Consequently, it accepts the plea of inadmissibility entered by the Secretary General.

B. On the merits

1. *The appellants*

33. **The appellants in appeals Nos. 627/2020-636/2020** maintain that the decisions taken in their cases breach the general legal principle of *rebus sic stantibus* whereby the effects of any legal measure cease once the reason for the measure ceases to exist. The appellants further maintain that the Organisation's refusal to adjust remuneration for 2018 breaches the general principle of legitimate expectations.

34. At the outset, the appellants refer to the Tribunal's decision in Giancarlo Alberelli (III) and others (ATCE, appeals Nos. 595/2018-601/2018, decision of 20 June 2019, paragraphs 102-105):

> "102. The Tribunal must point out, however, that this decision does not cover the question of what should be done if the Russian Federation eventually honours its obligations for 2017 and 2018.
>
> 103. Indeed, the Secretary General has argued that the decision to proceed retroactively with the adjustment for 2018 belongs to the Committee of Ministers, if the Russian Federation pays its contributions. However, in the view of the Tribunal, this aspect of the dispute is not 'existing' within the meaning of Article 59, paragraph 2, of the Staff Regulations and, consequently, there is no need for the Tribunal to rule on it.

> 104. Accordingly, if the Russian Federation pays its contributions for 2017 and 2018 and if the organisation does not reverse its decision to apply the budgetary feasibility clause, on the basis of the '*rebus sic stantibus'* principle (fundamental change of circumstances), which is also codified in the two Vienna Conventions mentioned above (in Article 62 of each text), it will be for any Council of Europe staff members who so wish to contest this new decision in the manner and within the time-limits prescribed in Article 59 of the Staff Regulations.
>
> 105. The Tribunal believes it is worth pointing out here that in the dispute which has just come before it on the similar question of the non-adjustment of remuneration for 2019 (appeals Nos. 607-615/2019 – Alberelli (IV) and Others v. Secretary General of the Council of Europe), reference was made to the Committee of Ministers' decision of 28 November 2018, which prompted the administrative decisions challenged in these new appeals, to examine a proposal by the Secretary General to apply the salary adjustment if the obligatory contributions are paid in 2019."

35. The appellants argue that the *rebus sic stantibus* principle may be applied in the internal law of international organisations, firstly, to agreements concluded between the administrative authority and staff representatives and, secondly, to unilateral measures adopted by the legislative authority (Committee of Ministers) or the administrative authority (Secretary General) and by which the Organisation enters into obligations, in particular in respect of its staff.

36. The appellants maintain that in the instant case the decision in the aforementioned Alberelli appeal clearly shows that the legal basis for the Committee of Ministers' decision to apply the affordability clause for 2018 ceased to exist when Russian honoured its obligation to pay its contributions for the year in question. Russia's non-payment of its contribution was the reason for the Committee of Ministers' decision to freeze remuneration levels and therefore apply the affordability clause and not follow the adjustment method and the CCR's recommendations in this connection.

37. However, the radical change in circumstances, i.e. the disappearance of the aforementioned reason, had the effect of restoring the Organisation's obligation to apply the results of the remuneration method to serving and former staff members of the Organisation. With reference to the case law of the Court of Justice of the European Union, the appellants maintain that the adoption of the adjustment method was a legislative measure, whereas the application every year of the results of the method to the Organisation's staff members is "an implementing measure that is more administrative than normative, falling within the scope of application by the Council of that provision" (i.e. the adjustment method).

38. In contrast, the Committee of Ministers, on noting the existence of the circumstances provided for in Article 6 of the method set out in the aforementioned 244th report, adopted a normative measure insofar as it departed from the rule in the adjustment method instead of implementing it. The appellants maintain that the disappearance of the only reason cited by the Committee of Ministers to justify the departure from the rule (the Russian Federation's non-payment) impacted the validity of the measure by which the Committee of Ministers relieved itself from the obligation to follow the remuneration adjustment method.

39. The appellants maintain that under Article 62, paragraph 1, of the Vienna Conventions,[1] only a change "which was not foreseen by the parties" may lead to application of the *rebus sic stantibus* principle. It is clear that the Committee of Ministers did not foresee the Russian Federation's payment of its contribution for 2018. However, it did do so for 2019.

40. Having contested the arguments made by the Secretary General in rejecting the appellants' administrative complaints (see paragraph 16 above), the appellants argue that the Committee of Ministers should have taken note of the fact that its decision to apply the affordability clause to the 2018 adjustment no longer had a historical or logical basis. In their view, it should have drawn the appropriate conclusions and awarded the adjustment that was due on 1 January 2018 under the adjustment method. The Secretary General ought to have submitted a corresponding proposal to the Committee of Ministers, but she refused to do so.

41. In conclusion, the appellants believe that the decision not to review the application of the affordability clause to the adjustment as from 1 January 2018 was unlawful, as was the decision taken at the same time to defer the entry into force of the moderation clause.

42. The appellants further maintain that the Committee of Ministers breached the general legal principle of legitimate expectations, which requires international administrations to honour the commitments which they have made to staff members. In their view, the remuneration adjustment method has regulatory force. The results of the method as from 1 January 2018 were not applied on the basis of the affordability clause; the reason for applying the affordability clause to the adjustment now no longer exists. In conclusion, on this point, the appellants maintain that the breach of the general principle of *rebus sic stantibus* was combined with a breach of the general principle of legitimate expectations, respect for which is vital in an organisation that seeks to preserve a spirit of fairness in relations with its serving and former staff members.

43. **The appellant in appeal No. 637/2020**, while not referring explicitly to the *rebus sic stantibus* clause, underlines that the affordability clause was worded narrowly so as to ensure, as far as possible, cohesion between the member organisations in the co-ordination system. Although provision is made for exceptional circumstances to constitute grounds for refusing to award a salary adjustment, consideration must be given to the importance of consistent and fair treatment between the member organisations in the co-ordination system. For that reason, the affordability clause may only be invoked in compliance with the requirements set out in Article 6 and applied in accordance with the principle of proportionality. The appellant maintains that a definitive departure from

[1] A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

the salary scales established by the co-ordination system without proper reason would entail downgrading of the Council of Europe in relation to the other Co-ordinated Organisations.

44. The appellant further criticises the grounds which the Secretary General puts forward in her rejection of the administrative complaint to justify her decision not to propose that the Committee of Ministers award the salary adjustment for 2018. In conclusion, he asks the Tribunal to annul the Secretary General's decision to implement indefinitely the Committee of Ministers' decisions on the salary freeze in 2018.

45. In his observations in reply, the appellant explains that he is not asking for back-payment of the additional salary which he should have received from 1 January 2018 to date if he had received the salary increase calculated for 2018. He is merely asking that his salary be increased by +1.1% for the future so as to "catch up" with the salary scales of the other Co-ordinated Organisations as from the date of the Tribunal's decision. He therefore asks the Tribunal to order the Secretary General to increase his salary by 1.1%, corresponding to the salary adjustment calculated for 2018, with effect from the date of the Tribunal's decision, on a non-retroactive basis and under arrangements acceptable to the Organisation in budgetary terms.

2. *The Secretary General*

46. The Secretary General states that the appellants maintain that the Organisation is under an obligation retroactively to award the salary adjustment for 2018 on the basis of the *rebus sic stantibus* principle, on the ground that reason for applying the affordability clause for 2018 no longer exists.

47. The Secretary General does not deny that there has been a change in circumstances because the circumstances that were taken into account by the Committee of Ministers on 22 November 2017 in deciding to apply the affordability clause – and thereby refuse to award the adjustment of remuneration as from 1 January 2018 – have indeed changed because the Russian Federation did in the end pay its obligatory contributions for 2017 and 2018. Nevertheless, it cannot be concluded that this change in circumstances entails an obligation on the Organisation retroactively to award the remuneration adjustment for 2018.

48. The Secretary General maintains that the decision to award the salary adjustment retroactively for 2018 would require either that the member States decide to pay contributions on top of those already paid since 2018 or that funding sources be found within the budget at the Organisation's disposal – which would essentially and inevitably entail the abolition of posts as was the case with the retroactive adjustment of remuneration for 2019.

49. As for the *rebus sic stantibus* principle, which is a concept of customary international law codified in Article 62 of the 1969 Vienna Convention on the Law of Treaties and of the 1986 Vienna Convention on the Law of Treaties between States and

International Organisations or between International Organisations (not yet in force), the Secretary General argues that the purpose of the principle is to enable a party to a treaty to invoke an unforeseen change in circumstances that was such as to alter its own willingness to be bound by the treaty and entailed a radical change in the extent of the obligations still to be performed under the treaty by the parties. In order for the clause to be invoked by a party, the legal act to which it is to apply must be bilateral or multilateral and must include an element of negotiation. It must reflect the agreement of the parties to be mutually bound by an agreement applying to them which reflects their respective commitments. In this context, the Secretary General underlines that the *rebus sic stantibus* clause is not applicable to unilateral measures and that the appellants have not succeeded in proving their claim that it does.

50. The Secretary General states that, in any case, to be applicable, the said principle requires a change in circumstances that was not foreseen by the parties, the effect of which "is radically to transform the extent of obligations still to be performed", as provided for in Article 62, paragraph 1 b), of the Vienna Conventions. In the instant case, the payment by the Russian Federation of its obligatory contributions was not unforeseeable. Nor were there any obligations still to be performed once the decision to apply the affordability clause had been taken. On the contrary, any decision to reverse the application of the affordability clause is a discretionary and sovereign decision of the Committee of Ministers, which, on an exceptional basis, could decide to apply the salary adjustment retroactively in view of the Russian Federation's payment of its contributions, as it did for the adjustment for 2019.

51. After reiterating the arguments made in the decisions rejecting the appellants' administrative complaints, the Secretary General then goes on to conclude that there is no obligation on the Organisation to reverse the application of the affordability clause for 2018, and this is in strict compliance with the remuneration adjustment method and general legal principles.

3. *The Tribunal's assessment*

52. First of all, the Tribunal notes that, as indeed is widely recognised, like other international organisations, the Council of Europe needs stable financial resources reflected in a budget in order to operate smoothly.

53. The Council of Europe's budget is mainly funded by financial contributions from the 47 member States. Each member State's contribution is calculated on the basis of its population and gross domestic product. In addition, as indicated on the Council of Europe's website, the major contributors, i.e. France, Germany, Italy, the Russian Federation and the United Kingdom, all contribute to the ordinary budget at the same rate.[2]

54. In the recent past, the Council of Europe has had to deal with the difficulties caused in part by the Russian Federation's decision in 2017 temporarily to suspend the

[2] https://www.coe.int/en/web/about-us/budget

payment of its contributions to the Organisation's budget, which had a major direct impact on the funding of its activities, including staff salaries, and hence on its smooth operation (see paragraphs 8-9 above). The crisis in question ended in August 2019 with the payment by the Russian Federation of its contributions to the Organisation's budget for 2017, 2018 and 2019 (see paragraph 11 above).

55. In this connection, it should be noted that the Tribunal dismissed as unfounded the appeal by some staff members who challenged the decision not to award them the salary adjustment for 2018 and to defer until 2019 the entry into force of the salary moderation clause (see paragraph 10 above). Being bound by the complaints lodged with it, the Tribunal nevertheless added, *obiter dictum*, that it reserved its position on any appeals if the Organisation did not reverse the application of the affordability clause, on the basis of the *rebus sic stantibus* principle, once the Russian Federation had paid its contributions for 2017 and 2018 (see paragraph 34 above).

56. The Tribunal takes the view, however, that the *rebus sic stantibus* clause, from the angle of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, does not apply in the instant case. These international treaties cover contractual relations between states and international organisations. The *rebus sic stantibus* principle is a safeguard clause, reiterated in substance in Article 62 of the aforementioned Vienna Conventions, which is an exception to the principle of *pacta sunt servanda*, according to which agreements must be abided by, as codified in Article 26 of the said conventions.

57. In this context, the Tribunal takes the view that extending the applicability of these international instruments to the situation which the present appellants find themselves in would undermine the object and purpose of the Vienna conventions, as indicated in Article 31 thereof in particular.

58. The Tribunal would add that the *rebus sic stantibus* clause is a legal doctrine whereby the elements of a treaty or a contract remain applicable only insofar as the essential circumstances that justified the conclusion of the instruments stay as they stand and any change in them does not radically alter the obligations initially accepted. Under the clause, treaties or contracts may therefore become inapplicable owing to fundamental changes in circumstances.

59. The Tribunal agrees with the Secretary General's argument that the *rebus sic stantibus* clause does not apply to unilateral measures (see paragraph 49 above). Nevertheless, even assuming that the *rebus sic stantibus* clause applied in the instant case by transposing it to employment contracts between staff members and the Council of Europe made up of 47 member States, including the Russian Federation, this would involve bilateral acts including, inter alia, salary provisions.

60. In the present case, the appellants criticise the Organisation for not awarding them the remuneration adjustment for 2018 retroactively, citing the *rebus sic stantibus*

principle because, in their view, the reason for applying the affordability clause for the said year no longer applies (see paragraphs 20-21 and 44 above). However, the Tribunal would point out that for the said principle to apply, the change in circumstances in question must be fundamental in relation to those which obtained when the contract was concluded and must not have been foreseen by the parties (see paragraph 39 above).

61. In the case of the present appeals, the Tribunal acknowledges that the Russian Federation's non-payment of its contributions could probably not have been foreseen at the time when the respective employment contracts were signed. The question then is whether the said non-payment was a fundamental change in the previous circumstances. The Tribunal has already noted that the budgetary crisis was temporary, covering three years (2017-2019), and that the Organisation paid the salary adjustment retroactively for 2019 (see paragraphs 12 and 14 above). In these circumstances, the Tribunal is of the view that the information in the present file does not demonstrate that this was a fundamental change in the present case.

62. The Tribunal acknowledges that the appellants have submitted information which could prove that the decision by the Secretary General and the Committee of Ministers not also to award the salary adjustment for 2018 was disproportionate or breached the general principle of legitimate expectations. In this connection, the Tribunal further acknowledges that the Russian Federation did pay its contributions for the entire period of non-payment covering 2017, 2018 and 2019 (see paragraph 11 above). Nevertheless, with reference to the principle, *ad impossibilia nemo tenetur* (nobody is held to the impossible), the Tribunal believes that the Committee of Ministers and the Secretary General, in exercising their discretion in the matter, carefully assessed all the relevant elements, weighing up the interests both of the Organisation and of its staff, before deciding to award the salary adjustment for 2019 alone. In this connection, the Tribunal refers to the explanations and arguments submitted by the Secretary General in the present case concerning the decision not to adjust salaries for 2018 (see paragraphs 16 and 51 above), which it deems relevant and convincing and which prove that the Organisation took account both of the operation of the Organisation and of the situation of its staff.

63. In the light of the above, the Tribunal considers that appeals Nos. 627/2020-637/2020 are unfounded and must be dismissed.

III. CONCLUSION

64. In conclusion, the Tribunal accepts the plea of inadmissibility entered by the Secretary General in appeal No. 663/2020 and declares the appeal inadmissible.

65. The Tribunal considers that appeals Nos. 627/2020-637/2020 are unfounded and must be dismissed.

For these reasons, the Administrative Tribunal:

Accepts the plea of inadmissibility entered by the Secretary General in appeal No. 663/2020 and declares the appeal inadmissible;

Declares appeals Nos. 627/2020-637/2020 unfounded and dismisses them;

Decides that each party will bear its own costs.

Adopted by the Tribunal by videoconference on 28 October 2020 and delivered in writing in accordance with Rule 35, paragraph 1, of the Tribunal's Rules of Procedure on 22 December 2020, the French text being authentic.

The Deputy Registrar of the Administrative Tribunal	The Deputy Chair of the Administrative Tribunal
E. HUBALKOVA	A. BAKA