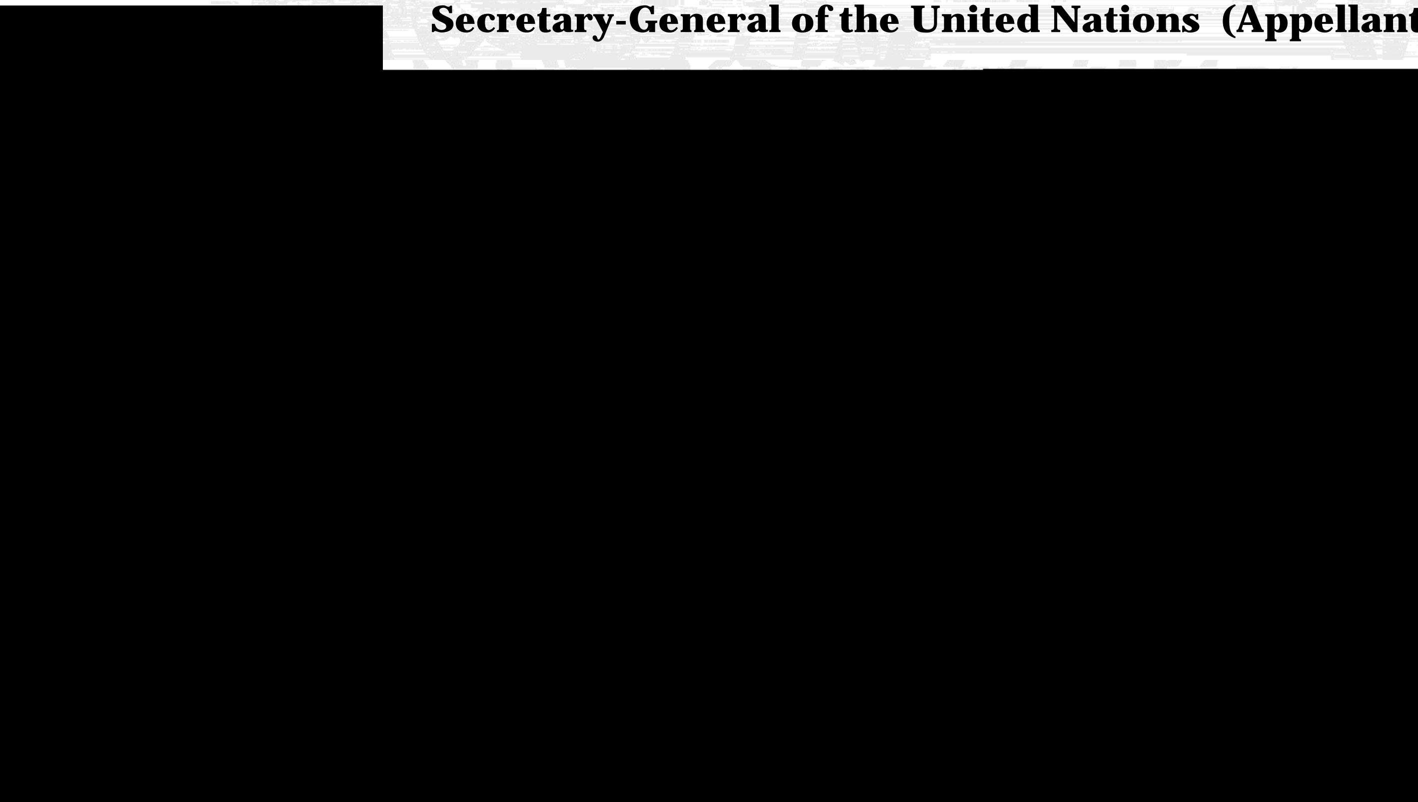
UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2017-UNAT-742

Kallon (Respondent/Applicant)

v.

Secretary-General of the United Nations (Appellant/Responde



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2016-9359Date: 31 March 2017 Re

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Mr. Kallon: George G. Irving

Secretary-General: Carla Hoe

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second reporting officer and Director of Mission Support of MINUSTAH (DMS/MINUSTAH), Mr. GS, evaluated his performance as good in a difficult environment. In his testimony before the UNDT, Mr. GB described Mr. Kallon's performance as "extremely good".

4. In mid-2012, Mr. GB, who was then the CMS of the United Nations Interim Security Force for Abyei (UNISFA), sought to recruit Mr. Kallon as his CPO in Sudan. On 17 July 2012, Mr. GB notified the DMS/MINUSTAH that Mr. Kallon had been selected for reassignment to the post of CPO in UNISFA, subject to *inter alia* receiving designation under ST/SGB/2005/7 to perform procurement functions.

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(c) The HCC was concerned that MINUSTAH was not aware of the relevant Haitian laws or policies regarding the solicitation of armed guard security services. It apparently only became aware at a later stage of the solicitation process that local legislation permitted only Haitian companies to provide such services. The Secretary-General's apprehension was that the misdirected solicitation process, exposing the contract to international competition, resulted in a low response rate.

(d) The HCC was further concerned about an apparent lack of segregation of responsibilities between requisitioning and procurement staff in MINUSTAH in relation to the provision of mobile phone and data services.

(e) MINUSTAH amended a contract for the provision of medical services numerous times and extended its duration in a manner exceeding the delegated authority. The HCC thought this gave rise to concerns about compliance and the ability of MINUSTAH to manage the contract and track expenditure.

6. On 8 August 2012, the DMS/MINUSTAH agreed to release Mr. Kallon on reassignment to UNISFA and confirmed his satisfactory performance and the absence of a misconduct case. The next day, 9 August 2012, the ASG/OCSS wrote to the then Under-Secretary-General of the Department for Field Support (USG/DFS and DFS, respectively) and forwarded to her the HCC Note. In his written communication, the ASG/OCSS expressed the opinion that the deficiency in the management of procurement procedures and operations was a matter of serious concern, as it called into question the capability of MINUSTAH in lawfully performing procurement functions. He requested that the concerns should be resolved in a timely manner and concluded by saying: "in addition to the improvement efforts to be made on the systemic structure and arrangement, I also request for a greater care to be exercised in future assignments of those responsible staff members".

7. On 24 August 2012, the Assistant Secretary-General of DFS (ASG/DFS) forwarded the comments of the ASG/OCSS to the DMS/MINUSTAH, requesting him to address the concerns regarding MINUSTAH's procurement process as spelt out in the HCC note and to inform DFS by 10 September 2012 of the actions to be taken.

8. By e-mail dated 10 September 2012, the DMS/MINUSTAH requested Mr. Kallon to coordinate a response to the HCC Note giving clarification and identifying measures to address the issues. Mr. Kallon prepared a draft response to the USG/DFS on behalf of MINUSTAH and sent it to the DMS/MINUSTAH on 23 September 2012. The draft response is not analysed in the UNDT's Judgment, but the evidence of Mr. Kallon before the UNDT was to the effect that the issues identified in the HCC note arose before he took up the position as CPO, were in some respects outside his control and were not his exclusive responsibility. It is important to emphasise though that his response was not sent to the USG/DFS or any manager other than the DMS/MINUSTAH. Instead, on 8 October 2012, the DMS/MINUSTAH faxed to DFS a response to the concerns outlined in the HCC Note and the steps to be taken to address them. Although the response incorporated some of the content of Mr. Kallon's draft, it was a significantly different document. In it, the DMS/MINUSTAH stated that the steps to be taken would include the appointment of a replacement Officer-in-Charge of the Procurement Section and the reassignment of Mr. Kallon to another mission. The DMS/MINUSTAH obviously had in mind the fact that two months earlier, on 8 August 2012, he had agreed to release Mr. Kallon on reassignment as CPO/UNISFA. What he did not know was the ASG/OCSS had acted to reverse that reassignment a few days earlier.

9. On 4 October 2012, the ASG/OCSS wrote to the Director of the Field Personnel Division, stating that he was not in a position to support Mr. Kallon's designation as CPO in UNISFA in light of the "outstanding issues" raised by the HCC Note. Mr. Kallon was informed by a Human Resources Officer of DFS of this decision on 5 October 2012. The parties have referred to this decision as "the UNISFA decision".

10. On 15 October 2012, Mr. Kallon was tasked with implementing a matrix of actions in response to the HCC Note. The DMS/MINUSTAH, on 18 October 2012, wrote to the ASG/DFS, stating that he had learned that the ASG/OCSS had declined to designate Mr. Kallon for the function of CPO in UNISFA. This decision, he said, impacted the action plan he had outlined in that his entire procurement reform plan hinged on the reassignment of Mr. Kallon. He then proceeded to offer a damning indictment of Mr. Kallon's performance which unquestionably adversely affected his professional prospects.

11. The DMS in his communication to the ASG/DFS expressed the belief that retaining Mr. Kallon at the helm of the procurement section would impact MINUSTAH's ability to make the required changes in procurement at MINUSTAH. He added that Mr. Kallon's working

relationship with the majority of his subordinates and other stakeholders in the procurement process had deteriorated to the point that it would be challenging for him to continue functioning in his current position. In view of this appraisal, which was at significant variance with all his prior performance appraisals, the DMS noted that Mr. Kallon's "non-designation" for UNISFA casted doubt on his designation as CPO for MINUSTAH, which is a larger and more complex mission. He therefore recommended that Mr. Kallon's designation as CPO for MINUSTAH be reviewed and that he be reassigned to a function that did not require his designation as CPO. He added that the replacement of Mr. Kallon was fundamental to making the improvement expected from MINUSTAH. In passing, it is worth noting that on 17 July 2010, shortly after Mr. Kallon took up his position at MINUSTAH, the then Officer-in Charge of the Headquarters Procurement Division, who had known Mr. Kallon in the Congo, wrote to him informing him that he had been misled as to the nature of Mr. Kallon's assignment. He had apparently expected Mr. Kallon to be assigned to MINUSTAH as a "temporary help". The Officer-in-Charge bluntly apprised Mr. Kallon that had he known the true facts he "would have had different recommendations for you and for the CPO candidature". Thus already at the outset there was opposition to the appointment of Mr. Kallon as CPO at MINUSTAH.

12. On 25 October 2012 and 9 November 2012, Mr. Kallon wrote to the Field Personnel Division, DFS, to request information regarding the denial of his designation for CPO/UNIFSA. He filed a request for management evaluation of the UNISFA decision on 3 December 2012. On 28 November 2012, the ASG/OCSS wrote to ASG/DFS communicating that he had decided to withdraw Mr. Kallon's designation as CPO/MINUSTAH. On 30e CPUU1 0 TD6.6

14. Mr. Kallon filed two applications before the UNDT, one for each decision, on 28 March 2013. By Order No. 151 (NY/2014), dated 18 June 2014, the cases were combined or consolidated. The UNDT ordered the parties, by Orders No. 206 and No. 207 (NY/2013) dated 20 August 2013, to file a joint statement with a consolidated list of agreed facts and legal issues, and indicating whether they were amenable to resolving the matter informally through mediation or *inter partes* discussions. The Secretary-General informed the UNDT, on 3 September 2013, that the Management Evaluation Unit (MEU) remained seized of the matter. The parties informed the UNDT in joint requests filed in each case that they had begun *inter partes* discussions aimed at reaching an informal resolution and requested an extension of time to comply with the Orders. In response to several further joint requests, the UNDT granted seven extensions of time. At some point during the *inter partes* discussions, the MEU became directly involved. It had not prior to that formally responded to Mr. Kallon's requests for management evaluation. By joint submission, dated 30 April 2014, the parties informed the UNDT about the involvement of the MEU, a process of reconsideration of the decisions by the Organization's management and their agreement that Mr. Kallon had not been accorded his formal due process right to respond in his personal capacity to the observations of the HCC prior to withdrawal of his designation. They informed the UNDT that Mr. Kallon was given an opportunity to respond to the observations and "a further decision concerning his designation has been taken by the Administration".

15. On 19 May 2014, the Under-Secretary-General of Management (USG/DM) addressed a letter to Mr. Kallon. This document has assumed cardinal importance. In it, the USG/DM placed on record that the MEU had noted that Mr. Kallon's involvement "in the review of the procurement cases HCC highlighted is not well documented". It was realised that the response which Mr. Kallon had prepared to the HCC concerns on behalf of the MINUSTAH procurement section, "addressing the points made by HCC in detail by explaining the context of each case", might not have been given full and proper consideration by the Administration. In order to correct this, the MEU recommended that OCSS review the matter after affording Mr. Kallon an opportunity to present his views. The letter further recorded that Mr. Kallon, in the period January-March 2014, had made submissions through his counsel presenting his views and submitted supporting documentation on the issues raised. The ASG/OCSS on 16 April 2014 had submitted a memorandum to the MEU containing the outcome of the review, which basically upheld the ASG's original determinations in both decisions. The USG/DM outlined his view of the then prevailing position as follows:

> After reviewing OCSS's memorandum and your comments on the review, the MEU concluded that OCSS provided a reasoned basis for its determination, addressing the salient concerns with the procurement cases in question, while specifically addressing those concerns in light of your submissions.
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> …
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> The MEU considered that, while the initial decision to remove your designation as Chief … Procurement Officer may have lacked a step insofar as it was taken without affording you the opportunity to comment in your individual capacity, this was fully remedied by the aforementioned review. As the MEU found no basis to question the lawfulness or integrity of that review, it recommended upholding the outcome.
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> …
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> In light of the foregoing consideration of your case, the Secretary-General has decided to endorse the findings and recommendations of the MEU and to uphold the contested decisions.

16. In short, in so far as the two designation decisions were tainted by procedural unfairness or impropriety, the Secretary-General took the view that the defect had been cured or remedied by the process of review and reconsideration. No decision was taken at any stage to rescind or suspend the original decisions and to maintain or restore the *status quo ante* pending the review. Rather, both designation decisions were allowed to stand and after having the benefit of further submissions and documentation, the Secretary-General decided to "uphold the contested decisions".

The proceedings before the UNDT

17. In their pre-trial joint submissions, the parties identified the issues for trial before the UNDT to be whether the contested decisions were proper exercises of discretionary authority. In its Judgment, the UNDT stated that in addition to the procedural issues it was necessary "to consider whether the contested decisions were justified" and to determine "whether, in addition to being procedurally defective, the contested decisions were substantively unfair or improper".[1] Stated more concisely, the issues were simply whether the decisions were substantively reasonable (justifiable) and procedurally fair.

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> procurement process. … We tried to cope as much as possible with the rules and when we had to bypass due to the exigencies, we did. Now this is not necessarily related to the cases which are the object of your review … but I just wanted to specify that … some of the procurement activities were not totally in line with the way they should have been due to the exigencies and the complexity of the situation.

22. That said, the UNDT, as appears from its Judgment, was mindful of the necessity for appropriate accountability. In terms of Financial Rule 101.1, the Secretary-General delegated authority and responsibility for the implementation of the Financial Regulations and Rules to the USG/DM. Financial Rule 105.13 states that the USG/DM is responsible (which authority has in turn been delegated to the ASG/OCSS) for the procurement functions of the United Nations and shall designate the officials responsible for performing such functions. Section 2.1 of Administrative Instruction ST/AI/2004/1 (Delegation of authority under the Financial Regulations and Rules of the United Nations) states that failure to abide by the terms and conditions of the delegation of authority under the Financial Regulations and Rules may result in its withdrawal. The ASG/OCSS must hold accountable those staff members to whom he has delegated authority through designation and to ensure that they have the requisite qualifications and experience to carry out the functions assigned to them.[4] However, there is a lacuna in the framework relating to the delegation of procurement authority through designation in that there is no specific procedure for holding staff members accountable for non-compliance and to determine whether a designation should be withdrawn. The UNDT adopted a pragmatic approach, correctly in our view, to the effect that in the absence of any specific provision governing the process for holding staff members with designation accountable, the UNDT would rely on the basic principles of administrative law and judicial review. By that we understand that any administrative action in relation to the withdrawal of a designation should be lawful, reasonable and procedurally fair. The UNDT examined the concerns of the HCC and the subsequent actions taken by the Administration from that perspective.

23. Before examining its findings in relation to the substantive and procedural propriety of the decisions, it will be best to consider first the evidence given during the trial about the problems identified in the HCC note. The testimony in relation to the first issue raised in the HCC note established that MINUSTAH leased the land in question, originally 100,000 square meters, in 2006 (four years before Mr. Kallon was assigned to Haiti). MINUSTAH began work on improvements to the land in December 2006. The work included the construction of a

[4] Section 3 of ST/SGB/2005/7.

perimeter wall, watch towers, roads, buildings, internal drainage and the boring of deep wells. The work was completed in November 2007 and cost more than USD 1,9 million. In 2007, the leased area was increased by 140,000 square meters. The lease contained four one-year options which were exercised for four consecutive years until late 2011, when the lease expired. The Secretary-General's criticism of Mr. Kallon is that

designation, must be at least rational and procedurally fair. At no stage prior to the UNIFSA decision did the relevant officials conduct a full investigation to identify the causes of the problems raised in the HCC note or the responsibility of any specific staff member for them. The Secretary-General failed to produce any written record containing detailed reasons for the decision, or indicating that the ASG/OCSS came to any definitive conclusions or findings. The evidence before the UNDT did not show that the ASG/OCSS engaged in any weighing exercise before making the UNIFSA decision.

30. First of all, the UNDT held that the ASG/OCSS, in his letter of 9 August 2012 to the USG/DFS, evinced an element of pre-judgement in calling for greater care to be exercised in future designations in that he did not take into account that there may have been other valid explanations and extenuating factors for the deficiencies identified in the HCC note. Mr. Kallon was never explicitly informed that his performance was a concern or that consideration was being given to withdrawing his designation. He was not afforded the opportunity to be heard or to make any submissions to the ASG/OCSS in relation to either the issues in the HCC note or the decision to reverse his assignment to UNIFSA. He was not singled out as responsible for the deficiencies, or asked to provide an explanation. Importantly, Mr. GS, the DMS/MINUSTAH, volunteered in his testimony that the concerns raised in the HCC note all related to events that had occurred prior to Mr. Kallon's arrival at MINUSTAH.

31. Moreover, the response in Mr. Kallon's memorandum of 23 September 2012 to the DMS/MINUSTAH was never sent to the ASG/OCSS or the USG/DFS. The ASG/OCSS appears not to have communicated directly with MINUSTAH or with Mr. Kallon prior to making the UNIFSA decision. He also did not wait to receive the response of the DMS/MINUSTAH to the HCC issues before he took the decision. There was no urgency requiring the ASG/OCSS to make the UNIFSA decision without considering the views and submissions of the DMS/MINUSTAH and Mr. Kallon.

32. The UNDT accordingly held that the decision was irrational and procedurally unfair. There was no rational connection between the information before the decision-maker and the reasons for the decision; and, Mr. Kallon had not been afforded an opportunity to comment on the decision, which was likely to materially and adversely affect his rights, before it was taken.

33. The UNDT took a similar view with regard to the MINUSTAH decision. There were no structured discussions of any kind to review the seriousness of any shortcomings or to consider any remedial action that might be required before the MINUSTAH decision was made. In his memorandum sent to the ASG/DFS on 18 October 2012, the DMS/MINUSTAH stated that the replacement of Mr. Kallon as CPO was integral to his plans for the mission and alleged that Mr. Kallon's professional relationships had deteriorated to the point that he could not continue as CPO. Mr. Kallon's uncontroverted testimony is that it was not brought to his attention at any stage that there was any difficulty of this kind. The allegation is also in sharp contradiction with his e-PAS rating six months earlier as having exceeded performance expectations.

34. The UNDT rejected the Secretary-General's submission that the withdrawal of the designation was distinct from a performance appraisal. In its view, the decision was connected to his alleged performance. The requirements of procedural fairness in relation to allegations of failing to meet the required standard of work performance require an investigation to establish the reasons for any unsatisfactory performance. The employee normally should be given an opportunity to respond to the allegations of poor performance and consideration must be given to remedial action for improvement. As the UNDT put it, accountability is meaningless unless staff members know which specific shortcomings they are being held accountable for and, crucially, why.

35. Mr. Kallon was also never confronted with the allegation that he had breached the relevant Financial Regulations and Rules or that he was considered by the ASG/OCSS to have placed the Organization's financial resources at risk. It was never explained to him why he was being held solely responsible for the issues identified by the HCC, most of which, as the DMS/MINUSTAH acknowledged, related to decisions taken before he arrived at MINUSTAH. Mr. Kallon had not been accorded the due process

implied in every contract of employment. The MINUSTAH decision was arbitrary and unreasonable in that no reasoned conclusion

with respect to the lack of clear procedures and policies for fairly managing staff members who are alleged to have failed to exercise their delegated authority appropriately.

41. In his submissions in relation to the question of relief, filed after the Judgment on Liability, the Secretary-General argued that rescission should not be granted because the claim was in effect moot as the original decisions of November and December 2012 had been reconsidered and substituted by the decision of the ASG/OCSS on 16 April 2014. The point essentially added a novel dimension to the Secretary-General's earlier submission that the procedural defects had been cured or made no difference. The UNDT rejected the argument on the basis of its earlier findings that final factual determinations and conclusions were rendered without due process in November and December 2012 and the reconsideration in April 2014 had not resulted in Mr. Kallon obtaining rescission of the contested decisions or specific performance. The UNDT implicitly held that the proceedings before it with regard to the disputed decisions would have practical effect, and events had not placed the matter beyond the law in such a way that resolution of the dispute was deprived of practical significance or rendered purely academic. The UNDT evidently regarded the decision of 16 April 2014 as not resulting in there no longer being an actual controversy between the parties or in any ruling it might make having no actual, practical effect. The controversy did not cease to exist as a consequence of the later decision and the dispute about the administrative decisions remained alive.

Submissions and consideration – mootness

42. The only finding on the merits with which the Secretary-General takes issue on appeal is that in relation to mootness. He argued that the UNDT erred in law by disregarding what it referred to as "the prevailing decision", being the decision of the ASG/OCSS of 16 April 2014, which was endorsed by the USG/DM in his communication to Mr. Kallon on 19 May 2014. He submitted that by not considering the legal consequences and effects of the prevailing decision, the UNDT, cognizant of the outcome of the reconsideration process and the issuance of the prevailing decision, adjudicated claims that became moot on 16 April 2014. He maintained that the Administration conducted a "thorough reconsideration process" of both administrative decisions as "part of the parties' continuing efforts to resolve the matters informally before the MEU". The procedural irregularity identified by the MEU, the complete absence of due process and procedural fairness prior to the withdrawal of the designations and unN0171Mis tregallprocdit widituTw[(om

44. A judicial decision will be moot if any remedy issued would have no concrete effect because it would be purely academic or events subsequent to joining issue have deprived the proposed resolution of the dispute of practical significance; thus placing the matter beyond the law, there no longer being an actual controversy between the parties or the possibility of any ruling having an actual, real effect. The mootness doctrine is a logical corollary to the court's refusal to entertain suits for advisory or speculative opinions. Just as a person may not bring a case about an already resolved controversy (*res judicata*) so too he should not be able to continue a case when the controversy is resolved during its pendency. The doctrine accordingly recognizes that when a matter is resolved before judgment, judicial economy dictates that the courts abjure decision.[13]

45. Since a finding of mootness results in the drastic action of dismissal of the case, the doctrine should be applied with caution. The defendant or respondent may seek to "moot out" a case against him, as in this case, by temporarily or expediently discontinuing or formalistically reversing the practice or conduct alleged to be illegal. And a court should be astute to reject a claim of mootness in order to ensure effective judicial review, where it is warranted, particularly if the challenged conduct has continuing collateral consequences. It is of valid judicial concern in

appraisal would be prepared, and that this appraisal alone would be placed on his official status file. The applicant was provided on 9 March 2011 with the revised appraisal, which did not refer to matters post-dating 31 March 2010. The UNDT held that the applicant's claim in this respect was moot. The UNDT stated:[14]

> ... In cases where the Administration rescinds the contested decision during the proceedings, the applicant's allegations may be moot. This is normally the case if the alleged unlawfulness is eliminated and, unless the applicant can prove that he or she still sustains an injury for which the Tribunal can award relief, the case should be considered moot.

The applicant in *Gehr* was unable to demonstrate to the UNDT how his rights remained adversely affected by a decision, which had been superseded. Nor could he show that he was suffering any injury because of that decision. Likewise, although he was told in November 2010 that he would not be entitled to rebut his performance appraisal, he was informed on 9 March 2011, when he received the revised appraisal that he could submit a rebuttal statement, which he did on 15 March 2011. His claim that he was not entitled to rebut his 2009-2010 performance appraisal was thus moot and he had not proved that he was still suffering any damage as a result of the decision.

47. The position of Mr. Kallon in this appeal is markedly different to the applicant in *Gehr*. The initial decisions to remove his designations resulting in his demotion were irrational and not

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evidence and weighing it impartially. A narrower reconsideration by the same decision-maker restricted to the existing record, even if supplemented, is less likely to displace the adverse taint of the earlier decision arrived at unfairly. Furthermore, some deviations from the principles of

Submissions and consideration - compensation

57. It will be recalled that the UNDT awarded Mr. Kallon compensation in the amount of USD 50,000 as "non-pecuniary damages" for moral injury. The Secretary-General avers that it erred in doing so because there was insufficient evidence of moral injury justifying an award of compensation. This appeal therefore raises the question of what constitutes moral injury justifying an award of compensation and what kind of evidence is sufficient or necessary to prove such injury.

58. Article 10(5) of the UNDT Statute provides:[16]

> As part of its judgment, the Dispute Tribunal may *only* order one or both of the following:
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> > (*a*) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
> >
> > (*b*) Compensation *for harm, supported by evidence*, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

59. The italicized or emphasized words in Article 10(5) of the UNDT Statute were introduced by amendment in Paragraph 38 of General Assembly resolution 69/203 on 18 December 2014. The purpose of the amendment of Article 10(5) is explained as follows: present 2.5(si)(NS2[(ord)2S rd)2S rda2 TD-.

60. Accordingly, compensation may only be awarded for harm, supported by evidence. The mere fact of administrative wrongdoing will not necessarily lead to an award of compensation under Article 10(5)(*b*) of the UNDT Statute. The party alleging moral injury (or any harm for that matter) carries the burden to adduce sufficient evidence proving beyond a balance of probabilities the existence of factors causing harm to the victim's personality rights or dignity, comprised of psychological, emotional, spiritual, reputational and analogous intangible or non-patrimonial incidents of personality.

61. It is trite that not all rights are of a patrimonial nature. An infringement of the fundamental right to dignity or reputation does not result in damages in the sense of a direct diminishing of the patrimonial estate of the complainant. The injury sustained consists, in whole or in part, in harm to personality or social position, resulting usually in emotional distress or a loss of reputation, social standing or personal advancement. The impairment affects an interest beyond the scope of the complainant's patrimony. The law regards such personality rights as worthy of protection. The loss of a positive state of emotional gratification or emotional balance is harm deserving of compensation. By contrast, breaches of contract lead to awards of damages only where there is actual harm in a patrimonial sense. Contractual damages aim at putting the successful plaintiff in the same position as if the contract had been performed, but only in respect of economic loss directly attributable to the breach. The notion of compensation used in Article 10 of the UNDT Statute is different from and wider than damages. The latter refers to the recompense of economic loss while "compensation" may include such loss but is not restricted to it.

62. The authority conferred by the UNDT Statute to award compensation for harm thus contemplates the possibility of recompense for non-economic harm or moral injury. But, by the same token, Article 10(7) of the UNDT Statute prohibits the UNDT from awarding exemplary or punitive damages. The dividing line between moral and exemplary damages is not very distinct. And for that reason, a proper evidentiary basis must be laid supporting the existence of moral harm before it is compensated. This prudent requirement is at the heart of the amendment of Article 10(5)(*b*) of the UNDT Statute by General Assembly resolution 69/203. For a breach or infringement to give rise to moral damages, especially in a contractual setting (including the contract of employment), where normally a pecuniary satisfaction for a patrimonial injury is regarded as sufficient to compensate a complain

attended by peculiar features, or must occur in a context of peculiar circumstances. Whether damages can be recovered depends therefore on evidence of the purpose and ambit of the contract, the nature of the breach, and the special circumstances surrounding the contract, the breach and its positive or negative performance.[17]

63. Generally speaking, the presence of certain circumstances may lead to the presumption of moral injury – *res ipsa loquitur*. The matter may speak for itself and the harm be established by the operation of the evidentiary presumption of law. However, when the circumstances of a certain case do not permit the application of the evidentiary presumption that such damages will normally follow as a consequence to an average person being placed in the same situation of the applicant, evidence must be produced and the lack of it may lead to the denial of compensation.[18] Much will necessarily depend on the evidence before the UNDT.

64. Conscious of the amendment and its purpose, the UNDT in this case thoughtfully deliberated upon the nature of the harm caused by the injury and the evidence before it supporting a finding of harm. In reaching its conclusion, the UNDT was guided by the principles pronounced by this Tribunal in *Asariotis*[19] prior to the amendment of Article 10(5)(*b*) by General Assembly resolution 69/203. In that case this Tribunal said:[20]

> ... To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:
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> (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may *of itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.
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> (ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly

[17] See generally S. Litvinoff: *Moral Damages* [1977] 38(1) Louisiana Law Review, 1.
[18] *Massabni v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-238.
[19] *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.
[20] *Ibid.,* paras. 36-37, emphases in original, internal citations omitted.

> linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

… We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

68. The evidence to prove moral inju

the degree of injury and the issue of aggravating factors. Many who are affronted in their dignity may be of a personality type better able to withstand it, others are more vulnerable. And delictual principles (the so-called "thin skull rule") teach that we are obliged to take our victims as we find them. The best evidence of this kind of harm and the nature, degree and ongoing quality of its impact, will, of course, be expert medical or psychological evidence attesting to the nature and predictable impact of the harm and the causal factors sufficient to prove that the harm can be directly linked or is reasonably attributable to the breach or violation. But expert evidence, while being the best evidence of this kind of injury, is not the only permissible evidence. This Tribunal accepted as much in *Asariotis* when it explicitly stated that such harm can be proved by evidence produced "by way of a medical, psychological report *or otherwise*".[22] There is no absolute requirement in principle or in the rules of evidence that there must be independent or expert evidence. In some circumstances, taking a common sense approach, the testimony of the applicant of his mental anguish supported by the facts of what actually happened might be sufficient.

71. Finally, this Tribunal should always give defe

documentary evidence that he had applied for more than 80 positions with

> the obvious emotion and distress exhibited by the Applicant, constitute evidence that he suffered real and genuine moral injury as a result of the contested decisions.

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78. The Secretary-General's second argument misconstrues the finding of the UNDT. The decisions and the harm they caused cannot be reduced to a technical procedural irregularity. Mr. Kallon's rights to reasonable and procedural administrative justice were substantially infringed in a manner causing him real moral injury. There can be no denying that he was arbitrarily deprived of his procurement designation, demoted to a position where he could not apply his experience and specific skills, humiliated before his colleagues and publicly condemned to misgivings about his propriety on the basis of no evidence and without the benefit of a fair hearing. The reputational harm is self-evident, while the evidence of his diminished employment prospects stands uncontroverted. The *prima facie* evidence of Mr. Kallon's diminished career prospects, adduced by Mr. Kallon during his oral testimony, shifted the evidentiary burden to the

Original and Authoritative Version: English

Dated this 31st of March 2017 in Nairobi, Kenya.

(Signed)	*(Signed)*	*(Signed)*
Judge Murphy	Judge Raikos	Judge Knierim

(Signed)

Judge Halfeld

Judge Thomas-Felix, Judge Lussick and Judge Chapman append a joint partly dissenting opinion.

Entered in the Register on this 22nd day of June 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Concurring Opinion by Judge Sabine Knierim

1. I am in the delicate position of agreeing with Judge Thomas-Felix, Judge Lussick and Judge Chapman on the requirements of compensation for harm under Articles 9(1)(*b*) of the Appeals Tribunal Statute and 10(5)(*b*) of the UNDT Statute and with Judge Murphy, Judge Raikos and Judge Halfeld on the outcome of the present case.

2. Like my colleagues Judge Thomas-Felix, Judge Lussick and Judge Chapman, I think that the harm for which compensation is requested must be supported by evidence and that a staff member's testimony alone is not sufficient to present evidence supporting harm under Articles 9(1)(*b*) of the Appeals Tribunal Statute and 10(5)(*b*) of the UNDT Statute. It is important to point out, in the interest of providing a clear rule on this crucial issue, that this is the opinion of the majority of the Appeals Tribunal. In this respect, I would like to emphasize that I do not agree with paragraphs 57 *et seq.* of Judges Murphy *et al.*'s opinion. Rather, I follow and endorse the arguments presented by my colleagues in their dissenting opinion. I would like to add the following:

3. I respectfully dissent from paragraph 68 of the Judgment which states:

> … And, as stated above, the facts may also presumptively speak for themselves to a sufficient degree that it is permissible as a matter of evidence to infer logically and legitimately from the factual matrix, including the nature of the breach, the manner of treatment and the violation of the obligation under the contract to act fairly and reasonably, that harm to personality deserving of compensation has been sufficiently proved and is thus supported by the evidence as appropriately required by Article 10(5)(*b*) of the UNDT Statute. And in this regard, it should be kept in mind, a court may deem *prima facie* evidence to be conclusive, and to be sufficient to discharge the overall onus of proof, where the other party has failed to meet an evidentiary burden shifted to it during the course of trial in accordance with the rules of trial and principles of evidence.

In my opinion, even the most shocking breach of due process rights cannot, after the amendment, lead to a presumption of harm in the person of the staff member or to a shift of the burden of proof to the Secretary-General. Whatever the nature or degree of a breach of due process rights and regardless of how disrespectful and outrageous the Organization's behaviour has been, a staff member who requests compensation under Articles 9(1)(*b*) of the Appeals Tribunal Statute and 10(5)(*b*) of the UNDT Statute always has to prove that harm was caused to him or her by the unlawful actions of the Administration.

8. It is legally possible to uphold the UNDT's award of compensation on appeal as the UNDT did not award specific amounts of compensation for stress and anxiety on the one hand and loss of reputation on the other hand, but instead set a total amount of compensation for "non-pecuniary harm". For the loss of reputation alone, a compensation of USD 50,000 can and should be awarded. In this regard, it is crucial for me that the UNDT did not only find procedural flaws but stated that the impugned administrative decisions were unlawful on the merits as the evidence showed that Mr. Kallon was neither responsible nor accountable for the irregularities and deficiencies at MINUSTAH set forth in the HCC 25 July 2012 note. As the Secretary-General has not questioned the UNDT Judgment in this respect, the Appeals Tribunal is bound by this finding. To award compensation in the amount of USD 50,000 under these circumstances is neither excessive nor punitive but rather fair and proportionate.

Original and Authoritative Version: English

Dated this 31st of March 2017 in Nairobi, Kenya.

(Signed)

Judge Knierim

Entered in the Register on this 22nd day of June 2017 in New York, United States.

(Signed)

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6. The opinion of Judges Murphy *et al.* has now revived the old approach to moral damages, which is that compensation can be awarded by virtue of a mere procedural breach without requiring any supportive and substantive evidence of harm. The opinion has also introduced a new element to the award of damages, namely, non-patrimonial damages - a concept which is not a part of our jurisprudence and which confuses the issue even further.

7. From a literal interpretation of the provisions of the amended Statute, one can only conclude that the law as it now stands states that a mere procedural breach is not a ground for compensation for harm and that compensation for harm must be supported by evidence.

8. In the full bench decisions of *Ademagic et al.*,[2] *Featherstone*,[3] and *Marcussen et al.*,[4] the Appeals Tribunal stated as follows:

> We vacate the awh9i4eeW nBT10.02 .e20.5e a98.r3n1on for hj/a on foupphe52 io pag4 Tm592.1(e)9

11. In the instant case, we find that the UNDT erred when it awarded compensation for "stress and anxiety" and "stigmatisation and reputational damage"[7] although Mr. Kallon did not present an iota of evidence, apart from his own testimony, to prove that he suffered "stress and anxiety" as a result of the procedural irregulari

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