

JUDGE JOHN RAYMOND MURPHY , PRESIDING .

1. This case arose from the refusal by the Mechanism for International Criminal Tribunals (MICT) ¹ to grant Mr. Tevita Colati , a Security Lieutenant with the MICT, a continuing appointment despite an earlier notification from the Office of Human Resources Management (OHRM) to him that he had been granted a continuing appointment in the Secretariat of the United Nations.

Facts and Procedure

2. Mr. Colati joined the Department of Peacekeeping Operations (DPKO) as a Security Officer first with the United Nations Assistance Mission in Afghanistan (UNAMA) on 29 July 2007 and then with the United Nations Interim Force in Lebanon (UNIFIL) on 15 September 2012. DPKO is part of the Secretariat of the United Nations.

3. On 11 November 2015, Mr. Colati was offered a one-year fixed-term appointment as a Security Lieutenant with the MICT's Security & Safety Section in Arusha, Tanzania, with effect from 4 January 2016. The MICT is an international tribunal created by the United Nations Security Council in 2010, under Chapter VII of the Charter of the United Nations (Charter), to inherit and carry on the residual functions of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) after the closure of the two Tribunals.

4. Mr. Colati accepted the offer on 13 November 2015. By memorandum dated 17 November 2015, addressed to the Chief Human Resources Section at UNIFIL, the Chief Human Resources Section at ICTY requested the transfer of Mr. Colati from UNIFIL to the MICT with effect from 1 January 2016 in accordance with the "Inter -Organization Agreement Concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances" (Inter-Organization Agreement).

5. Mr. Colati then transferred from UNIFIL to the MICT on 4 January 2016. On 20 January 2016, he signed a letter of appointment for a fixed-term appointment from 1 January to 31 December 2016. The letter of appointment stated that "[t]his appointment is strictly limited to service with the Mechanism for the International Criminal Tribunals" and

¹ The official name for the MICT is the United Nations International Residual Mechanism for Criminal Tribunals or UN-IRMCT for short . It is often called simply as "the Mechanism".

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10. On 3 November 2016, notwithstanding the fact that Mr. Colati had left UNIFIL, a Secretariat entity, at the end of 2015, and in 2016 worked for the MICT, a non-Secretariat entity, he received an email notification from OHRM informing him that he had been granted a continuing appointment in the Secretariat of the United Nations, effective 28 October 2016. The e-mail further informed Mr. Colati that his Hb (C)-3.hMCID 2 >556. ()JT . ()JT (e)3.7 5()JT .7-3.1 (t0.002

13. On 11 July 2017, Mr. Colati submitted a request for management evaluation of the decision of the MICT not to issue him a letter of appointment reflecting a continuing appointment with service in the MICT. In a response dated 2 November 2017, the Under-Secretary-General for Management (USG/DM) explained that Mr. Colati was

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26. The Secretary-General submits that the UNDT correctly determined that it was lawful not to grant Mr. Colati a continuing appointment and to withdraw the erroneous notification. Both Secretary-General's Bulletin ST/SGB/2011/9 and Administrative Instruction ST/AI/2012/3 set forth the criteria that a staff member must satisfy in order to be eligible for consideration for the granting of a continuing appointment. In terms thereof, Mr. Colati needed to have been in active service in the Secretariat throughout the period of consideration, *i.e.*, from 1 December 2015 through 28 October 2016. He did not satisfy this criterion because he left UNIFIL for the MICT, a non-Secretariat entity, in January 2016 and was therefore not eligible for consideration for such conversion.

27. The MICT was established under Chapter VII of the Charter as a subsidiary organ of the Security Council, whereas the Secretariat was established under Chapter XV of the Charter. For the staff members of a subsidiary organ of the Security Council to be considered as staff members of the Secretariat, a further step would be necessary. However, no such step has been taken in the case of the MICT. Mr. Colati's letters of appointment with the MICT make no reference to the appointments being with the Secretariat.

28. The absence of any evidence showing any MICT staff member having been granted a continuing appointment in the Secretariat demonstrates that the MICT is a non-Secretariat entity, and that Mr. Colati was not treated differently than other similarly situated MICT staff members. Furthermore, there was no evidence that the Secretary-General's excellence awards in 2017 7 (at tT4be)-4.4 (cr)-6ftie m2t tT4be

evidence in the interest of justice and the efficient and expeditious resolution of the proceedings.

31. Mr. Colati has filed a motion to file additional pleadings. His motion seeks to introduce a submission that this Tribunal has decided previously that the MICT is indeed a Secretariat entity and is thus precluded from holding to the contrary. Section II. A.3 of the Practice Direction No. 1 of the Appeals Tribunal provides that a motion to file an additional pleading may be granted by the Appeals Tribunal if there are exceptional circumstances justifying the motion. A prior factual finding of this Tribunal resulting in issue preclusion could form exceptional circumstances and, thus, the motion should be granted so that the issue may be properly considered and adjudicated.

32. Article 49 of General Assembly resolution A/RES/65/247 of 24 December 2010 approves the granting of continuing contracts as at 1 January 2011 to eligible staff members on the basis of the continuing needs of the Organization. Article 53 sets out the criteria that staff members must satisfy in order to be eligible for consideration for the granting of continuing contracts.

28 October 2016. Mr. Colati was in the service of UNIFIL in December 2015, and with the MICT for all of 2016.

35. Section 3.2 of the Secretary-General's Bulletin on Organization of the Secretariat of the United Nations, ST/SGB/2015/3, dated 22 July 2015, sets out the major organizational units of which the Secretariat consists. The MICT is not included in the list. The MICT is accordingly not part of the Secretariat. Mr. Colati, thus, did not qualify for a continuing appointment in terms of Section 2.6 of ST/AI/2012/3 and his appeal must be dismissed on that ground alone.

36. The non-Secretariat status of the MICT is confirmed in a memorandum (the delegation memorandum) addressed by the OiC/DM to the Registrar, MICT, dated 19 March 2012 dealing with "Arrangements for Human Resources Management—International Residual Mechanism for Criminal Tribunals". The delegation memorandum effects a delegation of authority under the Staff Regulations and Rules by the Secretary-General to the Registrar of the MICT. Paragraph 5 of the delegation memorandum states explicitly that staff members of the MICT "will not be considered staff members of the Secretariat and their service will be exclusively limited to service" with the MICT. Paragraph 7 of the delegation memorandum provides that the appointment authority for the relevant fixed-term appointments "will be subject to the ICTY/ICTR appointment and promotion bodies/central review bodies unanimously endorsing the Registrar's selection recommendation". Paragraph 9 of the delegation memorandum specifically states: "As with the staff of ICTR and ICTY who, pursuant to paragraph 53(c) of General Assembly Resolution 65/247 are ineligible for continuing appointments, the staff of the Residual Mechanism are not eligible for continuing appointments". The MICT accordingly had no authority to grant Mr. Colati a continuing appointment.

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41. The withdrawal decision by OHRM of the erroneous notification is equally unassailable. Where the Administration finds that it has made an unlawful or mistaken decision, it is entitled to take action to remedy the error.⁵ Likewise, the UNDT correctly dismissed the second application as not receivable. The two applications concern the same subject-matter and the same cause of action between the same parties. There is in substance one administrative decision refusing to grant a continuing appointment and the first application was *lis pendens* when the second application was made.

42. In the result, the appeal must fail.

Judgment

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