UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/092
Judgment No.: UNDT/2020/069
Date: 8 May 2020
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ZERVOS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Robbie Leighton, OSLA

Counsel for the Respondent:
Alan Gutman, AAS/ALD/OHR

Introduction

1. On 27 June 2019, the Applicant, a Senior Legal Advisor, at the P-4/6 level, working with the International Residual Mechanism for Criminal Tribunals ("IRMCT"), serving on a loan to the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo ("MONUSCO") filed an application before the Dispute Tribunal contesting a decision not to grant him a continuing appointment (the contested decision").[1]

2. The Respondent filed a reply on 26 July 2019 in which it is argued that the application is not receivable, and, if found receivable, has no merit.

Facts

3. The Applicant joined the International Criminal Tribunal for the Former Yugoslavia ("ICTY") on 28 November 2008, where he remained until 30 April 2014. On 1 May 2014, he joined the IRMCT. On 1 June 2017, he joined MONUSCO on loan from the IRMCT.[2]

4. On 6 November 2017, while serving with MONUSCO, the Applicant received an email from MONUSCO Human Resources Section ("MONUSCO HRS") inviting staff who considered themselves eligible for continuing appointments to complete relevant forms requesting for inclusion in the review process.[3] The Applicant completed the relevant forms on 7 November 2017.[4]

5. On 7 November 2017, the Applicant sent an email to the Focal Person, Continuing Appointment Project in MONUSCO[5], informing her that he was serving on loan in MONUSCO from the Mechanism for International Criminal Tribunals ("MICT") and that he had submitted his form for consideration in the continuing

[1] Application, section II.
[2] Application, section VII.
[3] Ibid., para 4.
[4] Application, annex 2.
[5] Application, annex 3.

appointment review process. He also indicated that he believed that he was eligible for appointment. By a copy of the same email, the Applicant contacted the ICTY Chief, Human Resources Section ("ICTY CHRS")[6] inquiring about the continuing appointments. In response, the ICTY CHRS responded that, since ICTY was expressly excluded from consideration for continuing appointments, she believed that "they will consider the MICT, the "legal successor" to the tribunals, to be excluded as well".[7]

6. On 8 November 2017, the Applicant also contacted the legal officer at IRMCT seeking her guidance on the eligibility of the IRMCT staff for consideration for continuing appointments.[8] The legal officer responded, among others: "I believe they will consider the MICT […] to be excluded as well. I believe this restriction has been inferred by OHRM, as none of the governing documents we're aware of specifically mention the MICT, and they were all issued after the adoption of the MICT statute on 22 December 2010" and "they may refuse to consider you or deny conversion.".[9]

7. From February-August 2018, the Applicant sent several requests to MONUSCO HRS for updates on his application for continuing appointment. The Applicant was repeatedly advised that the process was ongoing in the Office of Human Resources Management ("OHRM") and that he would be notified of the outcome.[10]

8. On 18 January 2019, MONUSCO HRS informed the Applicant that all staff members who qualified for continuing appointments as of 1 July 2014 had already been notified and received their letters of appointment. The Applicant's name was not included on the list. On the same day, the Applicant was advised by MONUSCO HRS to take that communication as the official notification.[11]

[6] The Tribunal notes different designation of the same person's title (Application, annexes 1 and 11). The Tribunal assumes that the person might have been serving both institutions in the transitional period.
[7] Application, annex 11, page 3.
[8] Application, Annex 12.
[9] Ibid.
[10] Application, section VII, para 7 and 6, application, annex 3 and 4.
[11] Application, annex 5.

9. On 26 February 2019, the Applicant requested management evaluation of the contested decision and he received the response on 18 April 2019.[12]

Receivability

Respondent's submissions

10. The Respondent contends that the application is time-barred and as such not receivable because the Applicant did not request management evaluation within the 60-day statutory period of staff rule 11.2(c).[13]

11. The 60-day period to request management evaluation started on 7 November 2017, the day the Applicant knew that he was ineligible for consideration for a continuing appointment. By email, the ICTY CHRS notified the Applicant that OHRM had determined that IRMCT staff members are ineligible for consideration for a continuing appointment. The same information was communicated to the Applicant by the legal officer at the IRMCT the next day. The legal officer advised the Applicant that the IRMCT did not have the delegated authority to grant continuing appointments, and that the delegation of authority explicitly stated that staff members of the IRMCT are ineligible for consideration for a continuing appointment. Subsequent correspondence with MONUSCO is irrelevant because the entity responsible for the determination of the eligibility for continuing appointment was the parent office, in this case, IRMCT. Accordingly, the 60-day statutory for requesting management evaluation expired on 6 January 2018; yet the Applicant submitted the request on 21 March 2019, more than one year beyond the statutory deadline.

Applicant's submissions

12. The Applicant submits that the emails from the ICTY CHRS and the IRMCT legal officer do not demonstrate that a decision had been taken or communicated the decision to him. For that reason, it cannot be considered that he had knowledge of a complete decision until the communication of 18 January 2019 from the MONUSCO

[12] Application, annex 6 and 7.
[13] Reply, section II

Human Resources Officer. In addition, neither the ICTY CHRS nor the legal officer of IRMCT who communicated with the Applicant on the matter had authority to decline a request for a continuing appointment nor did they indicate that such a decision had been made by someone else. Accordingly, the emails did not result in the Applicant having knowledge of a final administrative decision taken regarding his request for continuing appointment.

Considerations

13. The Tribunal agrees with the Applicant that staff members are not able to contest the expression of a specific rule but must await a decision, pertaining to their own contract of employment, pursuant to that rule, before they have a decision reviewable *ratione materiae* and therefore triggering a deadline for challenge.[14] Clearly, the correspondences from the two officials on 7 and 8 November 2017 do not convey a refusal to grant the continuing appointment to the Applicant, nor had these officials the mandate to make such an administrative decision. They only expressed their views on what the likely outcome of the application might be, while clearly indicating that they were not decision-makers. This correspondence thus does not constitute an expression of an administrative decision.

14. The Tribunal further recalls that the Applicant had filed his express request with MONUSCO. The ICTY CHRS inquired, moreover, whether she was copied on the correspondence for action or for her information only and did not advise that MONUSCO was not the competent office. The subsequent correspondence from MONUSCO informing the Applicant that the review was ongoing and that he would ultimately receive a communication from OHRM, whichever the decision would be, demonstrates that both parties were acting under assumption that the decision was yet to be taken. Ultimately, indeed the response came from MONUSCO, who confirmed their communication to have the value of official notification. In this connection, the Respondent's position that the Applicant should not have recognized the competence of MONUSCO to issue communication on the matter and assume, instead, that the

[14] *Tintukasiri et al.* 2015-UNAT-526, paras. 35 - 37

competent office was IRMCT, seeks to place the Applicant under a virtually Kafkaesque burden in dealings with the administration. This position is untenable and the Respondent's argument on this score fails.

15. Staff rule 11.2(c) provides that a request for management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. The Applicant was notified of the decision by the MONUSCO Human Resources Officer on 18 January 2019. The Applicant requested the management evaluation on 26 February 2019. Therefore, on the question of receivability the Tribunal concludes that he was within the prescribed time limits of 60 days under staff rule 11.2(c). The application is accordingly receivable.

Merits

Submissions

16. The Respondent contends that the Applicant was ineligible for consideration for a continuing appointment based on a three-prong argument: First, because he was not a staff member of the United Nations Secretariat during the eligibility period, from 30 June 2009 to 1 July 2014. Second, because eligibility of IRMCT staff was specifically excluded in the delegation of authority to the IRMCT Registrar. Third, because he was not selected for a position through a competitive process, which includes a review by a Secretariat review body in accordance with ST/SGB/2011/9 on continuing appointments.

17. Regarding the first argument, the Respondent points out that from 28 November 2008 to 30 April 2014, the Applicant was a staff member of ICTY. Subsequently, from 1 May 2014 to 1 July 2014, the Applicant was a staff member of IRMCT. Section 2.1 (e) of ST/SGB/2011/9 on Continuing appointments explicitly excludes ICTY staff members from eligibility for consideration for a continuing appointment. An intention to similarly exclude IRMCT staff should be inferred. The IRMCT is a non-Secretariat entity. It is a subsidiary organ of the Security Council. It was created under Chapter

VII of the United Nations Charter and not under Chapter XV of the Charter, and its staff members are not Secretariat members. The inclusion of IRMCT in a variety of activities or reports of the Secretariat, or in administrative service arrangements with the Secretariat, does not entitle the Applicant, and other IRMCT staff members, to the status of Secretariat staff members. This was annotated in the Applicant's Personnel Actions. The Respondent documents also that the Job Opening at IRMCT, for which the Applicant applied, put applicants on notice that international tribunals are not integrated in the Secretariat.[15]

18. The Applicant's position is that none of the properly promulgated administrative issuances relating to continuing appointments, ST/SGB/2011/9 (Continuing appointments), ST/AI/2012/3 and ST/IC/2015/23 (Review for consideration for granting of a continuing appointment, as at 1 July 2014), excluded the IRMCT staff. Under ST/SGB/2011/9 paragraph 2.1 (e) and other issuances relating to continuing appointment, the Secretary-General explicitly excluded the staff of ICTY from consideration for conversion of continuous appointment. Further, under paragraph 2.1(d), he explicitly excluded locally recruited staff in field missions including peacekeeping missions and special political missions. The fact that excluded bodies are listed in the rule, means that bodies not listed as excluded are included. Given that the Secretary-General is required under ST/SGB/2009/4 (Procedures for the promulgation and administrative issuances) paragraph 5.1 to review existing issuances and amend them as required, it is neither required nor available to the administration to infer an exclusion of the IRMCT from ST/SGB/2011/9, since no such amendment has been made in the eight and a half years after the IRMCT was created.

19. Absence from ST/SGB/2015/3 (Organization of the Secretariat of the United Nations) list of main organizational units is not dispositive of the question as to whether it is part of the Secretariat, neither is a definition contained in ST/AI/2016/1 (Staff selection and managed mobility system) including IRMCT among "non-Secretariat organizational units which are administered by the United Nations Secretariat". It

[15] Respondent's submission pursuant to Order No. 076 (NBI/2020), Annex R/4.

should be noted that ICTY and ICTR did not appear in ST/SGB/2015/3's (Organization of the Secretariat of the United Nations) list or its previous incarnations, yet they were deemed Secretariat entities for the purpose of permanent appointments and continuing appointments, as evidenced by their explicit exclusion in ST/SGB/2011/9. In turn, the General Assembly report A/73/79, Composition of the Secretariat, lists the IRMCT as part of the Secretariat and demonstrates that a number of its staff have permanent appointments.

20. The Respondent's argument that the IRMCT was created under Chapter VII rather than Chapter XV of the UN Charter, is irrelevant to the question whether the IRMCT is part of the Secretariat. Peacekeeping operations and political missions are established by the Security Council and yet their staff have been considered as part of the Secretariat. The Secretariat rules, regulations and administrative issuances apply equally to such staff as to any other members of the Secretariat.

21. In support of the second prong of argument, the Respondent relies on the 19 March 2012 delegation of authority from the Officer-in-Charge, Department of Management to the IRMCT Registrar where eligibility of IRMCT staff was specifically excluded. Specifically:

> a. Paragraph 5 - staff members of the Residual Mechanism will not be considered staff members of the Secretariat and their service will be exclusively limited to service with the Residual Mechanism; and
>
> b. Paragraph 9 - as with 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.

22. The Applicant points out that the delegation of authority, in accordance with ST/SGB/2019/2 (Delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules), concerns the decentralization of decision making in relation to human, financial and physical resources. Nothing in a

delegation of authority might alter the terms and meaning of properly promulgated administrative issuances regarding the provision of continuing appointments. Policies of general application require promulgation. To exclude IRMCT staff from consideration for continuing appointment it required carving out such exception in the promulgated rules as had been done for the ICTY and ICTR.

23. The third prong of the argument concerns the question whether the Applicant was selected for a position through a competitive process, which includes a review by a Secretariat review body as required under ST/SGB/2011/9.

24. The Applicant's position on this issue is that contrary to the Respondent's argument, his recruitment into IRMCT was reviewed by a Secretariat review body, which is demonstrated by his placement on a Secretariat roster of candidates for legal officer posts at the P-4 level.

25. The Respondent rebuts by stating that the Applicant was not selected from a Secretariat's roster during the eligibility period and his selection to a position at ICTY and subsequently, at IRMCT, were not reviewed by a Secretariat review body. The Respondent documents that on 2 April 2014, following his application to Job Opening 13-LEG-RMT-27274-R-THE HAGUE, the Applicant was placed on a roster maintained by ICTY. That roster was utilized by IRMCT in accordance with the delegated authority and section 2.7 of ST/SGB/2011/7 (Central review bodies) which authorizes the use of special joint advisory bodies, which, however, are not the Secretariat central review bodies.[16]

Considerations

26. Regarding the interpretation of section 2.1 (e) of ST/SGB/2011/9, at the outset, it is recalled that ST/SGB/2011/9 serves to implement General Assembly resolution 65/247 on Human resource management. As acknowledged by the Respondent[17], at the date of the adoption of resolution 65/247, which authorized exclusion of ICTY and

[16] Ibid.
[17] Management evaluation response, page. 3.

ICTR staff from eligibility for continuing appointments, MICT had already been called into existence, albeit only a day before, by Security Council Resolution 1966. Thus, the General Assembly acted being alive of the emergence of a new entity in nexus with the *ad hoc* International Criminal Tribunals. Yet, it did not authorize exclusion of the staff of MICT, or successors of *ad hoc* Tribunals in general.

27. The Tribunal agrees with the Applicant that exclusions of staff from consideration for continuing appointments must not be broadened by analogy, as expressed by the maxim *unius est exclusion alterius.* As confirmed by the Appeals Tribunal, the first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.[18] Even leaving momentarily aside the question of authorization by the General Assembly for further exclusions, ST/SGB/2011/9 at section 2.1 demonstrates that the Secretary-General, nearly a year after the creation of MICT, precisely drafted the conditions for eligibility, among them, exclusion of professional groups, and did not amend it since. As such, the argument about legislative intent must be set aside.

28. Regarding the question whether IRMCT staff has status of the Secretariat staff, the Tribunal notes that the argument seems to conflate the question of non-Secretariat status of particular entities with the question of status of their staff. It is recalled that following the human resources management reform of 2009, appointments under the 100, 200 or 300 series of the Staff Rules were eliminated and replaced with fixed-term appointments, eliminating at the same time the distinction between Secretariat staff and

[18] *Scott* 2012-UNAT-225.

100, 200 or 300 series staff. Moreover, under art 101 of the United Nations Charter, United Nations staff may be assigned "[…] as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat." Accordingly, often organizational units which are separate from the United Nations Secretariat are nevertheless "administered" by the Secretariat, among them, the Tribunals. This implies that the staff of non-Secretariat entities may nevertheless have the status of the Secretariat staff. This is indeed confirmed by the fact of granting staff serving at the International Tribunals permanent appointments under ST/SGB/2009/10 "Consideration for conversion to permanent appointment of *staff members of the Secretariat* eligible to be considered by 30 June 2009 [emphasis added]". In this respect, there is also a rich body of Appeals Tribunal jurisprudence confirming eligibility of staff serving at ICTY and the United Nations Assistance to the Khmer Rouge Trials ("UNAKRT") to be considered for permanent appointments without their status as Secretariat staff being ever called into question.[19]

29. As such, neither the placement out of the Secretariat structure in published graphs nor the means of coming of an entity into a legal being are controlling for the question at hand. Specifically, while it is not in contention that the MICT is a successor of the ICTY and ICTR and is a subsidiary organ of the Security Council and that the MICT was created by the Security Council under chapter VII of the United Nations Charter while the Secretariat was created under Chapter XV of the Charter, this consideration is irrelevant for the status of staff. As rightly pointed out by the Applicant, peacekeeping and political missions are also created under Chapter VII of the Charter, yet their staff is considered the staff of the Secretariat and excluding locally recruited personnel from eligibility for conversion to continuing appointments required authorization by the General Assembly resolution.

30. From Security Council resolution 1966 (2010) on MICT, it results that the Secretary-General was requested to implement it and to "make practical arrangement

[19] *Malstrom* 2013-UNAT-357; *Gueben et at* 2016-UNAT-692; *Ademagic,* 2019-UNAT-953, *Ilwraith* 2019-UNAT-953; *Tredici* UNDT-2014-114.

for the effective functioning of the Mechanism" (preamble), which included appointing a "small number of staff" of the Registry (statute, art.15.4). This language closely resembles the one used in the case of ICTY and ICTR. Absent a different denomination in the Security Council resolution, there is no basis to ascribe the staff of the Mechanism a fundamentally different standing from the staff of *ad hoc* Tribunals. All considered, denying IRMCT staff the same status would need to result from an explicit legal act or convincingly from other premises which would indicate whose staff it is in accordance with an identifiable legal framework. The Tribunal fails to see such basis.

31. Regarding the argument based on the delegation of authority, the Tribunal agrees with the Applicant that it is not dispositive of the issue. The document affirms that appointments of staff are done on behalf of the Secretary-General, that staff rules and regulations apply to them and that the Secretary-General retains authority over important status matters. However, delegation of authority, being basically an internal document, is incapable of creating a discrete category of staff, neither is the Secretary-General authorized to "disown" a group of staff that he appoints. The same, by extension, holds true regarding personnel actions, technical documents created by the Respondent, which do not create legal relations.

32. Looking into any indication of contractual exclusion of eligibility for continuing appointment, the Tribunal noted that it was not provided with the Applicant's letters of appointment at ICTY and IRMCT. Letters of appointment as described in the management evaluation and those that the Tribunal was able to consult in the case of *Colati*[20], apparently do not inform the IRMCT staff that they are not Secretariat staff; rather, they inform that the appointees are subject to the authority of the Secretary-General and that fixed-term appointments do not carry expectancy of conversion to *any other type of appointment* in the Secretariat of the United Nations" (emphasis added). If anything, this indicates that the current appointment is with the Secretariat. In turn, statements included in Job Opening 13-LEG-RMT-27274-R-THE HAGUE, suggest that the Applicant would be serving on secondment from ICTY (thus,

[20] *Colati* UNDT/2019/068.

the Secretariat, albeit not eligible for continuing appointment); compound confusion by contradictory information about mobility[21]; to ultimately put a legal caveat that "the United Nations Secretariat is a non-smoking environment". These documents are, therefore, not informative for the question at hand.

33. The Respondent, however, succeeds on the third prong of the argument in invoking the requirement of selection pursuant to a review by a Secretariat review body, in accordance with Section 2.1 of ST/SGB/2011/9. The Tribunal considers it rational and consistent with General Assembly resolution 65/247 that for continuing appointments with the Secretariat, the requisite review be done by a Secretariat review body rather than other specialized review bodies such as may be convoked under staff rule 4.15. This condition was not satisfied in the Applicant's case. In conclusion, the impugned decision to not include him in the conversion exercise carried out at the time was correct.

JUDGMENT

34. The Application is dismissed.

(Signed)
Judge Agnieszka Klonowiecka-Milart
Dated this 8th day of May 2020

[21] "The appointment is limited to the Mechanism. Appointment of the successful candidate on this position will be limited to the initial funding of the post. Extension of the appointment is subject to the extension of the mandate and/or the availability of funds. As the international tribunals are not integrated in the Secretariat, UN Staff Members serve on assignment or secondment from their parent department/office if selected. Appointments of staff members in the United Nations are subject to the authority of the Secretary-General. Staff Members are expected to move periodically to new functions in accordance with established rules and procedures, and may in this context be reassigned by the Secretary-General throughout the Organization based on the changing needs and mandates."

Entered in the Register on this 8th day of May 2020

(*Signed)*
Abena Kwakye-Berko, Registrar, Nairobi