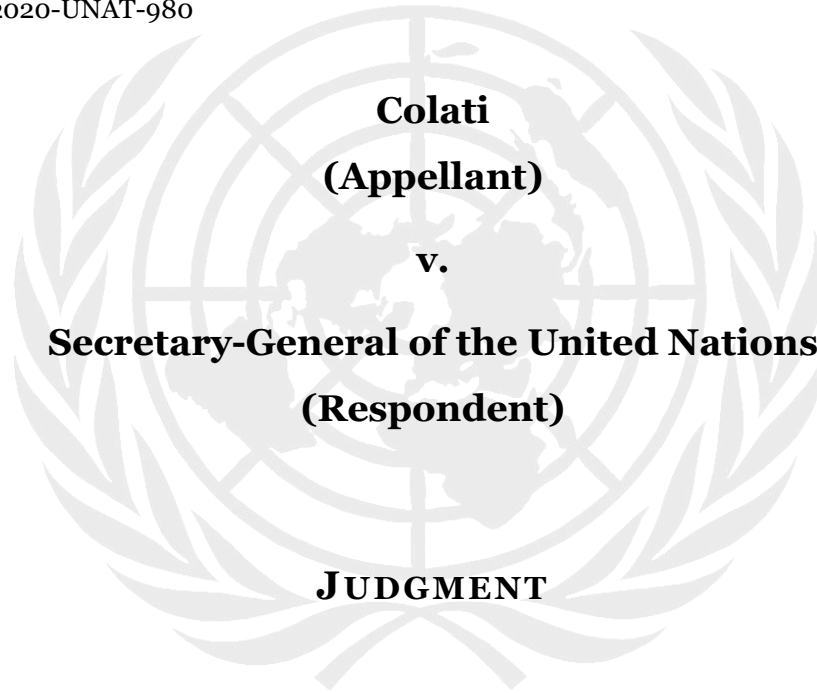




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-980



Before:	Judge John Raymond Murphy Judge Graeme Colgan Judge Dimitrios Raikos
Case No.:	2019-1278
Date:	27 March 2020
Registrar:	Weicheng Lin

Counsel for Mr. Colati: April L. Carter
Counsel for Secretary-General: John Stompor

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".

that the fixed-term appointment “does not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations”.

6. In resolution 65/247 adopted on 24 December 2010, the General Assembly approved the granting of continuing contracts to eligible staff members on the basis of the continuing needs of the Organization. However, in the same resolution, the General Assembly determined that the staff members of the ICTR and the ICTY were ineligible for such consideration. This eligibility exclusion was subsequently reiterated in paragraph 2.1(e) of the Secretary-General’s Bulletin ST/SGB/2011/9 (Continuing appointments) dated 18 October 2011 and paragraph 2.4 of Administrative Instruction ST/AI/2012/3 (Administration of continuing appointments) dated 14 August 2012. The Administration interpreted the General Assembly’s exclusion of both the ICTR and ICTY staff members from consideration for a continuing appointment as applicable equally to the staff of the MICT.²

7. Under ST/AI/2012/3, an eligible staff member might be granted a continuing appointment only if s/he was in active service in the Secretariat under a fixed-term appointment throughout the period of consideration from 1 December 2015, date of start of the review, to the date of award of the continuing appointment.

8. Pursuant to the provisions of ST/SGB/2011/9 and ST/AI/2012/3, on 24 November 2015, the Assistant Secretary-General for OHRM issued Information Circular ST/IC/2015/23, setting out the procedures for the conduct of the 2013 annual review of staff eligible for consideration for conversion to a continuing appointment.

9. At some point, either before or after his transfer, the exact date being unknown, Mr. Colati was invited by OHRM to apply for conversion to a continuing appointment.

² In a memorandum dated 19 March 2012, the Officer-in-Charge of the Department of Management (OIC/DM) informed the Registrar of the MICT that: “[a]s 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 [MICT] are not eligible for continuing appointments”. In the same memorandum, the OIC/DM specified that movement of staff in the professional or higher categories to the MICT from the Secretariat among others should be considered under the Inter-Organization Agreement. The OIC/DM also informed the Registrar of the MICT that, while it was a non-Secretariat entity, the MICT might be listed as a department in the human resources management scorecard for the purposes of assessment and monitoring exercises.

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 e-mail 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 HR Partner at the MICT would issue the letter of appointment and the personnel action to effect the conversion of his fixed-term appointment to a continuing appointment.

11. On 6 December 2016, Mr. Colati wrote to the Human Resources Section at the MICT requesting follow-up actions to effect the conversion before his fixed-term appointment was to expire on 31 December 2016. Prior to any further action being taken regarding the continuing appointment, on 20 December 2016, the MICT offered to renew Mr. Colati's fixed-term appointment with the MICT for two years from 1 January 2017 to 31 December 2018. Mr. Colati accepted the appointment by signing the letter of appointment on 22 December 2016. In a personnel action form raised on 1 January 2017 regarding Mr. Colati's contract renewal, there was a disclaimer at the end of the form, stating:

Personnel actions referring to the United Nations Secretariat or the Secretariat or using the United Nations emblem shall not be construed to grant staff members of non-Secretariat entities, including ICSC, UNJSPF, ICTY, ICTR, MICT, UNAKRT, UNICRI, UNIDIR, UNCCD, UNFCCC and ITC, the status of a staff member of the United Nations Secretariat. Any such reference or use of emblem is incidental to the provision of administrative services by the United Nations Secretariat to the non-Secretariat entities. Accordingly, for staff members of such non-Secretariat entities "EOD UN Secretariat" shall mean the effective date of the letter of appointment the staff members currently hold[...] with the non-Secretariat entities. The letter of appointment, issued to the staff members of the non-Secretariat entities, contains all the terms and conditions of employment. All contractual entitlements of such staff members are strictly limited to those contained expressly or by reference in their letters of appointment.

12. In an e-mail dated 31 May 2017, the then Chief, Human Resources Section at the ICTY, informed Mr. Colati that the MICT was not in a position to grant him a continuing appointment, because it did not have the delegated authority to make such appointments. However, she offered to contact DPKO to explore the possibility of retroactively processing Mr. Colati's transfer to the MICT as a secondment, so that he would hold a lien on his UNIFIL post during his secondment and eventually return to UNIFIL to resume his continuing appointment. Nothing appears to have come from that suggestion.

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 ineligible for consideration for conversion because he was not in active service in the Secretariat during the period of consideration, as he had joined the MICT, a non-Secretariat entity, in January 2016. However, the USG/DM further informed Mr. Colati that OHRM would review its decision embodied in its 3 November 2016 notification regarding his being granted a continuing appointment.

14. On 13 November 2017, Mr. Colati filed an application with the UNDT contesting the MICT's decision not to grant him a continuing appointment.

15. On 12 December 2017, the Director, Learning Development and Human Resources Services Division, OHRM, informed Mr. Colati that OHRM was withdrawing the 3 November 2016 notification because it had been "erroneously" issued. The Director explained that since Mr. Colati was not in active service in the Secretariat throughout the period of consideration that commenced on 1 December 2015 and ended on 28 October 2016 in his case, Mr. Colati became ineligible upon his transfer from UNIFIL to the MICT on 1 January 2016.

16. On 16 January 2018, Mr. Colati filed a request for management evaluation of the 12 December 2017 decision to withdraw OHRM's notification. On 8 March 2018, Mr. Colati was informed that the decision to withdraw the notification had been upheld. On 19 March 2018, Mr. Colati filed a second application with the UNDT contesting the withdrawal of the notification and requesting consolidation of his two applications. The UNDT consolidated the two applications by Order No. 123 (NBI/2018) issued on 22 August 2018.

17. In Judgment No. UNDT/2019/068 dated 29 April 2019, the UNDT considered the issue of receivability of Mr. Colati's two applications and determined that his 13 November 2017 application was receivable, but his 19 March 2018 application was not because the latter was contesting essentially the same decision that was already pending before the UNDT. On the merits of the 13 November 2017 application, the UNDT reviewed the history of the establishment of the MICT and the scope of the authority that the Secretary-General of the United Nations had delegated to the MICT Registrar and found that, notwithstanding the

erroneous notification from OHRM, the decision not to grant Mr. Colati a continuing appointment was lawful. Consequently, the UNDT dismissed Mr. Colati's applications.

18. On 26 June 2019, Mr. Colati appealed the UNDT Judgment to the United Nations Appeals Tribunal (Appeals Tribunal), and on 3 September 2019, the Secretary-General filed his answer. On 31 January 2020, Mr. Colati submitted a motion to file additional pleadings.

Submissions

Mr. Colati's Appeal

19. Mr. Colati submits that the UNDT erred in law and fact in finding that he was not entitled to a continuing appointment. He maintains that he was properly invited to participate in a continuing appointment conversion exercise, met the eligibility criteria, received enough points during the review and was granted a continuing appointment on 3 November 2016.

20. In his view, the UNDT failed to place the Administration's claim that the MICT staff members are not to be treated as members of the Secretariat in its appropriate context. It misinterpreted the effect of creation of the MICT under Chapter VII of the Charter and erred in finding that the creation of an entity under Chapter VII placed that entity outside of the Secretariat. The MICT is a stand-alone Secretariat entity with the Secretary-General of the United Nations serving as its chief administrative officer. The creation of the MICT pursuant to Chapter VII, as opposed to Chapter XV, of the Charter, is a distinction without a difference in terms of the application of the Staff Regulations and Staff Rules, including eligibility for a continuing appointment. Like their colleagues at the ICTR and ICTY and dozens of peacekeeping operations and political missions, the MICT staff members have received fixed-term appointments in the Secretariat of the United Nations. In this context, the ICTY was also established under Chapter VII. But its staff members were treated as Secretariat staff during the 2006 and 2009 conversion exercises.³

³ In this connection, Mr. Colati states that in addition to the ICTY, nine other peacekeeping operations or political missions such as the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), the United Nations Mission in South Sudan (UNMISS) and the United Nations Organization Stabilization Mission in Democratic Republic of the Congo (MONUSCO) were created under Chapter VII, and approximately 1,100 staff members of these Chapter VII entities enjoy permanent appointments and continuing appointments.

21. Moreover, Mr. Colati contends that the UNDT erred in finding that the 19 March 2012 memorandum from the OIC/DM to the MICT Registrar regarding the delegation of authority altered the nature and placement of the MICT staff members within the Secretariat. That memorandum illegally extended the exclusion of the ICTR and ICTY staff members from consideration for conversion to the MICT staff members. The Administration misapplied the General Assembly resolution 65/247 and ST/AI/2012/3. The claim that the MICT is not a Secretariat entity has no legal basis or binding authority. None of the administrative issuances prohibit continuing appointments within the MICT. The UNDT committed an error resulting in a circumstance where the MICT staff members were treated as within the Secretariat for all purposes, except honouring their contractual rights for consideration for continuing appointments.

22. The UNDT, it is alleged further, erred by failing to find that Mr. Colati entered service as a Security Officer in the United Nations' Department of Security and Safety (UNDSS) at Headquarters, which is a Secretariat entity, and continued in this function in various entities throughout his tenure. He was then and is now a Secretariat staff member. Examples showing that the MICT has been treated as part of the Secretariat include Mr. Colati receiving direction to complete a survey for UNDSS staff members, and a MICT sergeant receiving an excellence award for her contribution to the MICT from the Under-Secretary-General for UNDSS as a UNDSS staff member.

23. In his motion for additional pleadings, Mr. Colati contends that this Tribunal has found that the MICT is a Secretariat entity and is now precluded from holding otherwise.

24. Mr. Colati requests that the Appeals Tribunal set aside the UNDT Judgment, reinstate his continuing appointment and direct the Administration to give effect to this appointment.

The Secretary-General's Answer

25. As a preliminary matter, the Secretary-General requests that the Appeals Tribunal not admit a field mission mandate table, the organizational chart and the correspondence regarding a survey conducted by UNDSS that Mr. Colati annexes to his appeal, because these documents were not previously submitted to the UNDT and no exceptional circumstances justify their admission to the appeal record.

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 were limited to staff members in the Secretariat, or that the survey that Mr. Colati was instructed to complete was exclusively for staff members of the Secretariat. Moreover, any coordination between the UNDSS and the Security and Safety Service of the MICT does not change Mr. Colati's status as a MICT staff member.

29. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss Mr. Colati's appeal in its entirety.

Considerations

30. The request of the Secretary-General not to admit the additional documents annexed to Mr. Colati's appeal must be granted. These documents were not filed with the UNDT and Mr. Colati has not attempted to make out any case in terms of Article 2(5) of the Appeals Tribunal Statute that exceptional circumstances justify the receipt of the additional

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, including: the completion of a minimum of five years of continuing service under the Staff Regulations and Rules of the United Nations; not being national staff recruited for field missions; and importantly, the explicit exclusion of the international or locally recruited staff recruited for service in the ICTR or the ICTY.

33. Staff Regulation 4.5 provides that the Secretary-General shall prescribe which staff members are eligible for consideration for continuing appointments; and Staff Rule 4.14 provides that the Secretary-General shall prescribe the criteria determining staff members' eligibility for consideration for continuing appointments. The Secretary-General's Bulletin on Continuing Appointments, ST/SGB/2011/9, gives effect to A/RES/65/247 and repeats the criteria for eligibility.

34. Section 2.6 of ST/AI/2012/3 requires that in order for an eligible staff member to be granted a continuing appointment, he or she "must be in active service in the Secretariat under a fixed-term appointment throughout the period of consideration". The term "period of consideration" is defined to refer to the period of time between the eligibility date, as indicated in Section 2.1 of ST/AI/2012/3, and the date of the granting of the continuing appointment as indicated in section 4.2 of the same administrative instruction. The eligibility date is set and announced by OHRM. In this case, it was 1 December 2015. The period ran through to

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.

37. Paragraph 16 of the delegation memorandum provides that the movement of staff to the MICT from the Secretariat will be considered under the Inter-Organization Agreement. The Inter-Organization Agreement is an agreement of the organizations party to it concerning the rights of a staff member of one organization who is transferred, seconded or loaned to another organization, and the rights and liabilities of the two organizations concerned. The Inter-Organization Agreement states that a "transfer" of a staff member from one organization to another involves conditions which give the staff member no right to return to the releasing organization. In addition, Mr. Colati's letters of appointment to the MICT state that the fixed-term appointment "does not carry any expectancy of renewal or of conversion to

any other type of appointment in the Secretariat of the United Nations” and record that the appointment is “strictly limited to service with” the MICT.

38. The evidence, thus, establishes beyond doubt that Mr. Colati transferred from the Secretariat to the MICT, a non-Secretariat entity, during the period of consideration. He was thus not eligible for a continuing appointment for three reasons: firstly, he did not work for the Secretariat; secondly, the MICT had no authority to grant a continuing appointment; and thirdly, he was not in active service in the Secretariat under a fixed-term appointment throughout the period of consideration. The UNDT, accordingly, did not err in reaching its conclusion that Mr. Colati was not eligible for a continuing appointment.

39. In his additional pleading, Mr. Colati asserts that the Appeals Tribunal “has made factual findings on a dispositive issue in this case after the close of the primary pleading deadlines”. He contends that, in *McIlwraith et al.*,⁴ at paragraph 52, this Tribunal found that posts at the MICT were “Secretariat posts” thus rendering the MICT a Secretariat entity. Paragraph 52 of the judgment reads:

For the Organization to be able to find posts for general service staff members who had transferrable skills but were locally recruited pursuant to former Staff Rule 104.6, such posts would have had to exist at their local duty station. No Secretariat posts existed at the local duty station other than at the ICTY or MICT and the Organization did not anticipate such posts would become available at the local duty station in the near future. Former Staff Rule 109.1(c)(ii)(a) provided that with regard to locally recruited staff members, the various rights of staff members on permanent appointments “shall be deemed to have been satisfied if such locally recruited staff members have received consideration for suitable posts available at their duty stations.

40. There is no finding in paragraph 52 of *McIlwraith et al.* that the MICT is a Secretariat entity. The finding is to the effect that there were no posts for locally recruited general service staff members at the duty station, and that no Secretariat posts existed there. Insofar as the finding seems to suggest that there may have been Secretariat posts at the MICT, that alone, were it true, would not be sufficient to constitute an obviously non-Secretariat entity as a Secretariat entity in light of the governing legal instruments.

⁴ *McIlwraith et al. v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-953.

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.

⁵ *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 30, quoting *Cranfield v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-367, para. 36.

Judgment

43. The appeal is dismissed and Judgment No. UNDT/2019/068 is hereby affirmed.

Original and Authoritative Version: English

Dated this 27th day of March 2020.

(Signed)

Judge Murphy, Presiding
Cape Town, South Africa

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 19th day of June 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar