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## **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”).<sup>1</sup>

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.<sup>2</sup>

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.<sup>3</sup> The Applicant completed the relevant forms on 7 November 2017.<sup>4</sup>

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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”)<sup>6</sup> 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”.<sup>7</sup>

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.<sup>8</sup> 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.”<sup>9</sup>

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.<sup>10</sup>

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.<sup>11</sup>

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<sup>6</sup> 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.

<sup>7</sup> Application, annex 11, page 3.

<sup>8</sup> Application, Annex 12.

<sup>9</sup> Ibid.

<sup>10</sup> Application, section VII, para 7 and 6, application, annex 3 and 4.

<sup>11</sup>





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-

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.<sup>15</sup>

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

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<sup>15</sup> Respondent's submission pursuant to Order No. 076

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





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*.<sup>18</sup> 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.<sup>18</sup> 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

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<sup>18</sup> Scott2012-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.<sup>19</sup>

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 ito 5h(ng )-70(f)3217(l)17(e)3( )]

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 ~~exp(1)it(2)at(3)it(4)er(5)3(6)H(7)2(8)over(9)1(0)8(1)2(2)3(3)5(4)of(5)4(6)1(7)1(8)9(9)2(0)2(1)ally(2)in(3)ter(4)ri(5)or(6) /F1 12.0 Tf 0.0 0~~ 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 an



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