The Administrative Tribunal,

Considering the first and second complaints filed by Mr H. W.S. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 26 June 2006, the OPCW's replies of 20 October 2006, the complainant's rejoinders of 25 January 2007 and the Organisation's surrejoinders of 16 March 2007;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are to be found in Judgment 2407, delivered on 2 February 2005, concerning the OPCW's seven-year tenure rule and the implementation of the associated staff turnover policy.

The complainant, a United States citizen born in 1945, joined the OPCW on 15 August 2001 under a three-year fixed-term contract as Director of Administration. His contract was subsequently extended for a period of one year. At a meeting on 3 December 2004 the Director-General informed him that his contract would not be extended again and encouraged him to resign. During the next two months the possibility of an amicable settlement was discussed, but the parties were unable to reach an agreement.

By a letter of 16 February 2005 the complainant was informed that, pursuant to the decisions of the Executive Council and the Conference of States Parties concerning in particular the staff turnover policy, the Director-General was not in a position to offer him a further extension of his contract beyond its expiry date of 14 August 2005. He could, however, be granted a special extension of up to six months between the date of that letter and his actual separation from the Organisation, if he so wished. The complainant did not request a special extension. On 25 February 2005 he wrote to the Director-General stating that it was his "firm intention to contest the termination [of his contract] by administrative means and eventually to lodge an appeal before the [Tribunal]". He added that he had "already filed a complaint in Washington concerning [his] treatment at the hands of the US Delegation to the OPCW, and their interference in [his] professional affairs, including efforts to force [his] early departure from the Organisation", and that he intended to make this matter public. However, he indicated that legal action might be avoided if an amicable settlement were reached. In a letter dated 11 March 2005, likewise addressed to the Director-General, the complainant emphasised that he had joined the Organisation on the clear understanding that it would employ him for a period of seven years. He evaluated the material and moral prejudice caused to him by the decision not to extend his contract at 685,000 euros, including legal costs.

On 14 March 2005 the Director-General placed the complainant on special leave with full pay, with immediate effect. In a memorandum of that same date, which he handed to the complainant, he explained that this decision had been taken pursuant to Interim Staff Rule 5.3.01(a), in order to protect the interest of the Organisation and to attenuate the adverse effects of the complainant's action in filing a complaint against the delegation of a Member State relating to the exercise of his functions at the OPCW.

In a further letter to the Director-General dated 28 April 2005 the complainant stated that his letter of 11 March was to be considered as a formal request for review of the decision not to extend his contract. Noting that he had received no reply to that request, or indeed to his letter of 25 February, he stated that he now had no option but to lodge an appeal with the Appeals Council.

The complainant lodged a first appeal on 10 May 2005, claiming compensation for moral and material prejudice. He contended that the decision not to extend his contract was illegal in that it was based on false reasons and that he was entitled to three further one-year extensions of his contract. In the course of the written proceedings before the Appeals Council, the Organisation objected to the fact that the complainant was represented by a professional lawyer, in breach of Interim Staff Rule 11.2.03(h).

In reply to the complainant's letter of 28 April 2005, the Deputy Director-General informed him by letter of 26 May that, since he had not submitted, within the applicable time limit, a request for review of the decision not to extend his contract, in accordance with Interim Staff Rule 11.2.02(a), that decision stood "unimpugned and unimpugnable". The complainant then lodged a second appeal, challenging the decision of 26 May but relying on the pleas and arguments put forward in his first appeal.

The two appeals were joined by the Appeals Council, which issued a report on 8 March 2006. The Council held that the complainant's letter of 11 March did, in essence, constitute a request for review and that the first appeal was therefore receivable as it was in compliance with Interim Staff Rule 11.2.02(a). Accordingly, it did not consider it necessary to examine the receivability of the second appeal. It accepted the submissions filed by the complainant's lawyer, noting that the Organisation had been aware of his involvement in the case for some time and had raised no objection until then. Referring to Judgment 2407, it held that the complainant had no legitimate expectation of completing seven years of service in the Organisation. Moreover, it considered that he had not put forward sufficient evidence to support his allegation that the decision not to extend his contract had been taken for reasons other than the turnover policy. Consequently, it recommended that the Director-General confirm that decision.

By a letter of 20 March 2006 the Director-General dismissed both appeals. He maintained that the appeals were irreceivable and expressed the view that the Appeals Council had committed an error of law by accepting submissions filed on the complainant's behalf by his lawyer. In his first complaint the complainant impugns the decision of 20 March 2006 insofar as it concerns his first appeal. In his second complaint he impugns the same decision insofar as it concerns his second appeal.

B. The complainant's submissions in his first and second complaints are *mutatis mutandis* identical. He maintains that his first appeal was receivable, since his letter of 11 March constituted a request for review and his appeal against the Director-General's implicit rejection of that request was filed within the time limit stipulated in the Interim Staff Rules. He contests the Director-General's view that he should not have been allowed to be represented by his lawyer before the Appeals Council; this would have constituted a violation of his defence rights, especially since the Director-General's decision to place him on special leave in effect prevented him from seeking assistance and advice from within the Organisation.

On the merits the complainant submits that the decision not to extend his contract violated his contractual rights. He argues that the indication in his letter of appointment that "the total length of service with the OPCW Secretariat shall not exceed seven years" means that the usual length of contract is seven years, but that the Director-General may, in the exercise of his discretion, decide not to extend a contract, provided that there is a "good reason" relating to a disciplinary matter, inadequate performance or the interests of the service. According to the complainant, the reason given for the decision not to extend his contract, namely the turnover policy, is unsubstantiated and is merely a pretext. He considers that it is not sufficient to refer simply to the turnover policy without specifying how this particular decision was in the interest of the service. He adds that, to the extent that it is based on that reason, the impugned decision is discriminatory, since he is the only director in the history of the Organisation to have been prevented from completing seven years of service on the basis of the turnover policy.

The complainant also submits that the impugned decision contravenes the "principle of legitimate expectations". Referring to Judgment 675, he asserts that he had a legitimate expectation of completing seven years of service in the Organisation. He points out that, whereas Rule 4.1.01 of the Interim Staff Rules provides that a staff member's letter of appointment contains, expressly or by reference, all the terms and conditions of employment, the turnover policy is not mentioned in his letter of appointment. Nor is it mentioned in the Staff Regulations or the Interim Staff Rules.

According to the complainant, the true reason for the impugned decision lies elsewhere. He explains that from mid-2004 onwards, the United States authorities put pressure on him to leave the OPCW, but that since their efforts proved unsuccessful, the only way to remove him rapidly from his functions was to invoke the staff turnover policy. In December 2004, he says, the Director-General had already told him that he would not extend his contract upon its expiry in August 2005 and had encouraged him to resign. He claims that he has been "thrown out of the Organisation in an unacceptable and injurious way". Under these circumstances, he considers that the decision not to extend his contract and summarily to place him on special leave constituted a misuse of power on the part of the Director-General.

The complainant asks the Tribunal to order the OPCW to pay him 675,000 euros in compensation for material and

moral injury, and a further amount for costs.

C. In its replies the OPCW submits that both complaints are irreceivable. As far as the first complaint is concerned, it maintains that the complainant did not submit a request for review of the decision not to extend his contract within the applicable time limit, and that the Appeals Council ought therefore to have dismissed his first appeal as irreceivable. Referring to Judgment 775, it recalls that "[i]f an internal appeal was time-barred and the internal appeals body was wrong to hear it, the Tribunal will not entertain a complaint challenging the decision taken on a recommendation by that body". Regarding the second complaint, the Organisation draws attention to the fact that the letter of 26 May 2006 from the Deputy Director-General, against which the complainant's second appeal was directed, did not notify him of any appealable administrative decision. Consequently, the Appeals Council ought to have dismissed his second appeal as being irreceivable *ratione materiae*. In the Organisation's view, the Tribunal's ruling in Judgment 775 concerning an internal appeal that was time-barred should apply by analogy to appeals that are irreceivable for other reasons, and the second complaint should be dismissed accordingly. It adds that, even if it were assumed that the letter of 26 May did convey a challengeable administrative decision, the second appeal would be irreceivable *ratione temporis* because the complainant did not submit a request for review of that decision within the applicable time limit. The OPCW also invites the Tribunal to rule that the complainant's lawyer was not entitled to represent the complainant in the proceedings before the Appeals Council and that, consequently, the rejoinder that he submitted to the Council on behalf of the complainant was not receivable.

On the merits the Organisation refers, in its reply to the second complaint, to the arguments put forward in its reply to the first complaint. It recalls that, according to the case law, the decision whether or not to extend a fixed-term contract is discretionary and, as such, is subject to only limited review by the Tribunal. It points out that in view of the express terms of the extension of the complainant's fixed-term contract, which stated that it was "subject […] to the provisions of the Staff Regulations and Interim Staff Rules [...], including the provision that this extension does not carry any expectation of renewal or conversion to another type of appointment", he cannot claim to have had any contractual right to or legitimate expectation of an extension beyond 14 August 2005. In this regard the OPCW refers to the Tribunal's ruling in Judgment 2407. It also notes that the complainant has produced no evidence of any commitment on the part of the Organisation to employ him for a minimum period of seven years.

As regards the allegation that the impugned decision is discriminatory, the OPCW observes that the complainant's assertion that he is the only director to have been separated from the Organisation on the grounds of the turnover policy before having completed seven years of service is incorrect – he was in fact the third. It adds that, even if the allegation were true, the decision would not *ipso facto* be discriminatory; the adoption of the turnover policy, from which directors were not exempted, meant that one of the directors would inevitably become the first to be separated from the Organisation for that reason.

The Organisation submits that the complainant has adduced no credible evidence to support the view that the decision not to extend his contract was based on false reasons. It notes that he has not alleged that the Director-General was involved in any discussions between him and the US authorities and asserts that, whatever may have occurred between those authorities and the complainant, it had no impact on the impugned decision. It denies that the complainant has suffered any prejudice attributable to any fault or wrongdoing on its part.

Lastly, regarding the allegation of misuse of power, the OPCW refers to the case law and submits that there is no evidence that the Director-General exercised his authority for an improper purpose, or that the decision not to extend the complainant's contract was taken for extraneous reasons.

D. In his rejoinders the complainant presses his pleas on both the receivability and the merits of his complaints. He considers that his case is very similar to that on which the Tribunal ruled in Judgment 2408.

E. In its surrejoinders the OPCW maintains its position in full.

CONSIDERATIONS

1. By two separate complaints the complainant challenges the decision of 20 March 2006 by which the Director-General dismissed the two appeals that he had lodged following the decision not to extend his contract. As the underlying facts and arguments are the same, the complaints should be joined to form the subject of a single

judgment.

2. The complainant submits that the Director-General erred in finding that he had not exhausted internal remedies and that he was not entitled to be represented by his lawyer. He also submits that in the absence of other reasons, such as poor performance, disciplinary concerns, or that an extension was not in the interests of the Organisation, extension of his contract was mandatory for a period of seven years. He alleges improper and false reasons for the decision not to extend his contract and discrimination.

Exhaustion of internal remedies

3. According to Interim Staff Rule 11.2.02(a), a staff member wishing to appeal an administrative decision must first write to the Director-General requesting a review of the decision. The dispute between the parties centres on whether the letters of 25 February 2005 and 11 March 2005 constitute a request for review.

4. The Organisation contends that neither of the letters submitted prior to 15 April 2005 – the date which pursuant to Interim Staff Rule 11.2.02(a) was the deadline for a request for review – contained such a request, and that a belated statement in the complainant's letter of 28 April 2005 that his letter of 11 March 2005 constituted a request for review was of no legal effect. It argues that, since the complainant himself has not claimed that the letter of 25 February 2005 was a request for review, the Appeals Council erred in finding that it was such a request. As to the letter of 11 March 2005, the Organisation maintains that the complainant was only interested in being "compensated" financially and was not trying to vacate or modify the decision not to extend his contract.

5. The Appeals Council found that the letter of 11 March, particularly when read in the context of the earlier letter, was essentially a request for review of the Director-General's decision. In his letter of 20 March 2006 the Director-General rejected the Appeals Council's interpretation on the basis that, since the letter had been prepared with the assistance of a lawyer, if the complainant had wanted a review of the decision he would have made an explicit request. Without specifically addressing the Appeals Council's reasoning, he stated that the letter contained no explicit or implicit request for review.

6. In a context in which the complainant clearly contested the legality of the decision not to extend his contract, the letter of 11 March 2005 was construed by the Appeals Council as impliedly requesting a review of that decision, even though the letter was expressly concerned with a claim for compensation. The Tribunal accepts that conclusion as correct.

Representation by a lawyer

7. The complainant submits that the Director-General's conclusion that the Appeals Council erred in law in finding that the rejoinder signed by his lawyer was admissible was itself an error of law. He argues that interpreting Interim Staff Rule 11.2.03(h) as prohibiting representation by a lawyer before the Appeals Council violates his right of defence, particularly because, having been placed on special leave, he was separated from anyone inside the Organisation who could give him advice, including the "free advice guaranteed under the Staff Rules".

8. The Organisation considers that the Rule restricting those who can assist with an internal complaint does not violate the complainant's right to defence. It is a general norm, included in the Regulations and Rules of many UN organisations, that a party may be represented in proceedings in a judicial or quasi-judicial forum only by persons who are allowed to play a role as a representative. The Organisation adds that its relevant Rule does not violate any rights of defence, particularly since there is a large pool of persons from which to select a representative, and that there is no mitigating reason for a differential application of the Rule in the complainant's case. It also refers to Judgment 995, in which the Tribunal held that the head of the defendant organisation correctly dismissed the complainant's appeal as irreceivable because it bore the signature of a lawyer rather than that of the complainant or another staff member.

9. In the present case, only the rejoinder before the Appeals Council is at issue and not the entire appeal. While the Tribunal agrees that the Council erred in accepting the rejoinder, this error is of no practical consequence given that all the documents and information necessary to understand the internal complaint were included at the time the appeal was filed.

The decision not to extend the contract
and the turnover policy

10. The complainant asserts that a staff member's contract must be extended until the end of the seven-year period unless there is a good reason not to extend it, such as disciplinary issues, poor performance, or the Organisation's interests. He maintains that reliance on the turnover policy does not constitute a good reason. He argues that this policy is not mentioned in his letter of appointment and thus cannot be used as a reason not to extend his contract. Interim Staff Rule 4.1.01 states that a staff member's contractual entitlements are limited to those contained expressly or by reference in the letter of appointment. He also relies on Judgment 2408, in which the Tribunal concluded that to invoke the staff turnover policy as the reason for not extending a contract was an abuse of authority and an act demonstrating want of good faith. However, in his rejoinder the complainant appears to have resiled somewhat from the latter position and acknowledges that in Judgment 2407, upon which the Organisation relies, the Tribunal recognised that the seven-year tenure rule can be overtaken by reason of the turnover policy.

11. In Judgment 2019 the Tribunal reiterated the grounds upon which it would intervene in a decision not to extend a fixed-term contract. It stated:

"22. Anyone who enters into a contract of employment for a fixed term must abide by its terms and is not entitled to automatic renewal or conversion to another type of appointment. The complainant accepted his appointment subject to whatever conditions were laid down in the letter of appointment and the provisions of the Staff Regulations and Rules.

23. A decision by an organization not to renew such a contract is within its power and authority. In a long line of cases the Tribunal has held that such a decision, being discretionary, 'may be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority'. […] Not one of these conditions is present in this case. […]"

12. In addition, the complainant claims that he had a legitimate expectation that his contract would be extended. In this regard he relies on Judgment 675, in which the Tribunal held that an international civil servant expects, when cutting himself off from his home country to make a career in the service, that normally his contract will be renewed. However, it must be observed that the Tribunal was simply stating that, because of the expectation of renewal, there must be a decision relating to renewal or non-renewal. At consideration 10, the Tribunal stated:

"[…] a contract of employment for a fixed term carries within it the expectation by the staff member of renewal and places upon the organisation the obligation to consider whether or not it is in the interests of the organisation that that expectation should be fulfilled and to make a decision accordingly."

13. In that same judgment the Tribunal recognised the discretionary nature of the decision, but stressed that this does not mean that the decision can be arbitrary or irrational. That is, there must be a good reason for the decision and the reason must be given.

14. Further, on the question of legitimate expectation, having regard to the applicable provisions of the Staff Regulations and Interim Staff Rules and to the terms of the complainant's contract, his assertion of legitimate expectation cannot be sustained. By signing his letter of appointment of 9 August 2001, the complainant submitted to the Staff Regulations and Interim Staff Rules of the Organisation, including the "Special Condition (c)" that is written directly into the appointment letter. It states, in particular, that the OPCW is a non-career organisation and that contract extension will become progressively more difficult. Moreover, the letter of extension of 14 February 2004 sets out that the complainant is subject not only to the Staff Regulations and Interim Staff Rules, but also to the decisions of the Conference of States Parties and the Executive Council. Lastly, the complainant's signature to the extension was subject to the specific caveat that "this extension does not carry any expectation of renewal or conversion to another type of appointment", which he accepted.

15. It is clear that a decision as to whether the complainant's contract should be extended was made and that it was made in a timely fashion. The real issue is whether the reason given for the decision, namely, the turnover policy, is a legitimate reason.

16. In Judgment 2407 the Tribunal stated unequivocally that there is nothing improper in basing a decision not to extend a contract on the tenure policy established by the OPCW. In the case leading to that judgment, the

complainants argued that Staff Regulation 4.4, which fixes the maximum tenure of staff members at seven years, could not be used as a reason for not extending a contract. They also challenged the applicability of the turnover policy adopted by the Executive Council in March 2003 and confirmed by the Conference of States Parties a month later. That policy provided that in the implementation of the tenure rule the average rate of turnover of staff would be set at one-seventh per year.

17. Notably, in that case, none of the complainants' contracts referred to the turnover policy, as opposed to the present case, where it was explicitly referred to in the extension of the complainant's contract. At consideration 20 of Judgment 2407, the Tribunal held that the turnover policy was a legitimate ground for not granting an extension:

"The second argument advanced in support of the complaint of the lead complainant is that the impugned decision was not properly substantiated. In fact the decision was fully supported by the adoption of the turnover policy for the purpose of implementing the seven-year tenure rule. The turnover policy is not, and could not be, directly attacked and it is a logical, and perhaps even a necessary, consequence of the tenure rule. Once it is accepted that such a policy will inevitably result in the non-renewal of the contracts of staff members who, in the absence of both the rule and the policy, would have been given contract extensions, the only reason for deciding to let some of them go is the turnover policy itself. To put the matter another way, once it is accepted that a certain percentage of staff will have to leave every year, and once normal attrition through retirement, release for lack of work and dismissal for unsatisfactory performance has been taken into account, the early years of the implementation of a fixed turnover policy will inevitably result in the release of some people who would otherwise have received new contracts. If, as is the case here, all the persons in the pool of those whose contracts are coming to an end have exemplary performance records and are in positions which must continue to be filled if the Organisation is to function properly, there is no objective, consistent or strictly rational basis on which the administration can decide who is to stay and who is to go. It is the classic case of the exercise of discretion. As long as there is no evidence of wrongdoing such as personal prejudice, ulterior motive or bad faith, and there is none, the decision-maker must ultimately be allowed to exercise his or her judgement and the Tribunal will not interfere. The substantiation for the decision is, and was stated to be, the turnover policy and nothing more can be required in the way of a reason."

18. Additionally, at consideration 17 the Tribunal recognised that none of the fixed-term contract employees had a legitimate expectation of renewal.

19. Lastly, it should also be noted that in Judgment 2408, on which the complainant relies, the Tribunal did not question the legitimacy of the Organisation's reliance on the tenure and turnover policies. Instead, the Tribunal was critical of the Organisation's decision because it was not motivated by the tenure policy at all, but was motivated by other reasons. The Tribunal observed that, with respect to the complainants in the case leading to Judgment 2407, the decisions not to extend their contracts were made following recommendations based on the staff turnover policy. In Judgment 2408 there was no recommendation based on that policy, but there was a recommendation based on unsatisfactory performance.

Improper and false reasons
for not extending the contract

20. The complainant argues that the Director-General succumbed to pressure by a particular delegation to get him to leave the OPCW and go to another international organisation, and that it was for that reason that his contract was not extended. He states that when he met with the Director-General on 3 December 2004, the latter told him that "some delegation members [had] brought to his attention that they had 'some discomfort' with the complainant". In his view, this statement is evidence of the pressure placed on the Director-General by the delegation. Thus, he contends that this, and not the turnover policy, was the real reason for the decision not to extend his contract. As further evidence of a strategy aimed at moving him out of the Organisation, he points out that he met with members of the delegation in November 2004, at which time it was concluded that there was no position for him at the other organisation.

21. Beyond mere speculation based on meetings with the delegation, the only evidence the complainant has put forward in support of the assertion of false reasons is the statement allegedly made by the Director-General on 3 December 2004. The Organisation specifically denies the allegation. However, even if the statement was made, it is not sufficient to prove the complainant's contention that the decision was taken in response to outside pressure. Additionally, none of the e-mails produced by the complainant lends support to that contention.

22. The complainant also characterises the decision not to extend his contract as a misuse of authority; however, he has failed to provide any proof of misuse of authority warranting further consideration.

Discrimination

23. The complainant maintains that he is the only director in the history of the Organisation whose appointment was not extended so that he would serve at least seven years. He points out that some directors have been kept on after seven years and some past the age of retirement, including his successor. He takes the position that this demonstrates that he was a victim of discrimination.

24. The Tribunal observes that there are no provisions in the Staff Regulations and Interim Staff Rules prohibiting the extension of tenure beyond seven years in every case, nor is there a mandatory retirement policy. In fact, Regulation 4.4 as well as the tenure policy formulated by the Conference of States Parties provide that a person can be extended beyond seven years under certain circumstances. Further, the Organisation claims that there have been past cases of other directors not being extended on the basis of this tenure policy. Whether that is so, the complainant has not established that he has been treated less favourably than other persons in the same position in fact and in law. As stated in Judgment 2193, an allegation of discrimination can only be taken into consideration by the Tribunal and, if need be, give rise to redress on condition that it is based on precise and proven facts which establish that discrimination has occurred.

25. In view of the foregoing considerations, the Tribunal concludes that the complaints must be dismissed on the merits.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 9 May 2007, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 28 August 2007.