The Administrative Tribunal,

Considering the complaint filed by Mr E. S. against the International Criminal Court (ICC) on 8 December 2006 and corrected on 26 January 2007, the Court's reply of 10 May, the complainant's rejoinder of 14 June and the ICC's surrejoinder of 10 September 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. The complainant, a Rwandan and British national born in 1966, joined the ICC on 16 January 2005 as a spokesperson at grade P-3 under a fixed-term appointment ending on 31 March 2005. His contract was extended twice, from 1 April 2005 to 15 January 2006 and from 16 January to 15 July 2006.

On 21 December 2005 the complainant was told by his supervisor that a performance appraisal report was required before the renewal of his contract. A performance appraisal meeting was held the next day between the complainant, his supervisor and the *Chef de Cabinet* of the Presidency where concern was voiced about his performance. A performance appraisal report was drafted by the complainant's supervisor, signed by his second-level supervisor, i.e. the Registrar of the Court and sent to the complainant for comments and signature on or about 15 January 2006. On 9 January the complainant's supervisor had sent him an e-mail while on maternity leave, warning him that the report was "hard" but that he will have the opportunity to improve his performance in the following months. Two meetings took place between the complainant, the Registrar and the *Chef de Cabinet* on 2 and 24 February 2006. During the latter meeting the Registrar informed the complainant that his contract would not be extended after 15 July, a decision that was later confirmed in writing on 10 March 2006.

By a memorandum of 27 April 2006 the complainant requested a review of the decision not to extend his contract beyond 15 July and asked the Registrar to give reasons for his decision. The Registrar replied, in a letter dated 22 May, that his decision was motivated by the poor performance and the attitude of the complainant and that he had therefore decided to maintain it. On 2 June the complainant filed an appeal with the Appeals Board, which rendered its report on 31 August 2006, recommending that the appeal be dismissed as unfounded on its merits. The Registrar informed the complainant by registered letter of 5 September 2006 of his decision to accept the Board's recommendation. That is the impugned decision.

B. The complainant contends that the decision not to extend his fixed-term appointment was tainted with procedural flaws and mistakes of fact and law, and that it constituted an abuse of authority. He submits that his supervisor's intention was in fact to "get […] rid of [him] by whatever means including malicious allegations". He also objects to the fact that his post was advertised and his departure announced long before his appeal had been decided, in violation of his privacy and dignity.

He asserts that he was not appraised for the period from January to July 2006 and that the only appraisal which took place in 2005 was the annual performance appraisal of December. This, he argues, was not in conformity with ICC Staff Rule 104.17(a), which states that "the performance of each staff member shall be regularly appraised". He refers to the ICC Performance Appraisal Guidelines, which define the procedure as a two-way process for which both the supervisor and the staff member prepare beforehand, and which output is recorded by the supervisor on the appropriate form. In that respect, the complainant points out that, while he was on annual leave, his appraisal meeting was hastily convened by his supervisor, who invited the *Chef de Cabinet*, although the latter was not his direct supervisor, and that no minutes were taken. Moreover, the report that followed this meeting ignored his response and arguments and only recorded the "unsubstantiated opinions" of his supervisor, many of which had not even been raised during the meeting. The complainant believes that the report was deliberately pre-dated in an attempt to show that it had been discussed with him before his supervisor sent it to the Registrar, and he attaches an e-mail received from his supervisor to support this view. According to him, the failure to record his arguments in

the report constituted a breach of due process.

The complainant argues that in any event, the appraisal report of December 2005 which had offered grounds for the renewal of his appointment in January 2006 could not provide the basis for a decision of non-extension after July 2006. As the Appeals Board indicated, there was no formal performance appraisal for the period from January to July 2006, and this, according to the complainant, amounts to a breach of Staff Rule 104. He further alleges that the two meetings that took place in February 2006 were not "performance appraisal meetings" within the meaning of Staff Rule 104.17(b) as they were conducted not by his supervisor but by the Registrar, or the *Chef de Cabinet*, who did not monitor his work directly. He denounces as unfair the decision of the Registrar to substitute himself for his supervisor while retaining his power of decision concerning the extension of his contract.

Moreover, the impugned decision amounts to breach of good faith. While the appraisal report of December 2005 had set a mid-year review in April 2006 to achieve the defined objectives, the decision not to renew his contract was taken in February 2006, less than two months after the extension of his contract.

The complainant indicates that he was given no oral or written warning that his employment was at risk before the meeting of 24 February 2006 and that he did not receive any complaint about his performance during the period of his first appointment. Indeed, he argues that despite the fact that he was heavily relied upon as the only staff member who could work in both French and English, and that he had no assistant or intern to support him, he did "very well" as Spokesperson of the ICC. He contends that there was no evidence of the alleged poor performance and points out the inconsistencies and contradictions between the ICC's claims that he lacked initiative and respect, and the content of the appraisal report of December 2005.

He observes that the job description for his post indicated an initial appointment of one year, with the possibility of extension, and that he was assured that his first contract would serve as a probationary period after which he would sign a contract for the remainder of his initial appointment. He points out that the Registrar committed an error of law by deciding that the extension of his appointment from January 2006 should be considered as a probationary period. Furthermore, the complainant claims that the six-month extension as from January 2006 raised a legitimate expectation on his part to have his contract renewed for three years, in conformity with the "ICC's policy".

The complainant asks the Tribunal to set aside the impugned decision and to award him material damages equivalent to all salaries, allowances and entitlements he would have received up to 15 January 2009, plus interest. He also claims compensation for moral damages in the amount of 25,000 euros and costs in the amount of 10,000 euros.

C. In its reply the ICC objects to the receivability of the complaint on the grounds that it is time-barred. It says that the complainant, having acknowledged receipt of the impugned decision and signed the delivery slip on 8 September 2006, cannot contend that the impugned decision was notified to him on 11 September. It adds that the ninety-day period prescribed by Article VII, paragraph 2, of the Statute of the Tribunal had expired before he filed his complaint with the Tribunal on 8 December 2006. Therefore, he has not met the mandatory time-limit imposed by that provision which, it points out, consistent precedent has strictly applied.

On the merits the defendant submits that the only reason behind the decision not to extend further the complainant's contract was that his performance was below average. That decision, which relates to a matter that falls within the discretionary authority of the Registrar, is lawful and amply supported by facts.

Concerning the probationary period to which the complainant alludes, the ICC submits that no special conditions were applicable to his contract and that his employment was not subject to probation. It adds that the Staff Rules and the letter of appointment made it clear that he had neither a right to, nor any expectation of, an extension.

The Court points out that the complainant did not raise any objections to the content of the appraisal report before signing it. Following the meeting held in December 2005, there were at least two progress meetings during which his performance was reviewed and discussed with him. Consequently, the allegation that he was not made aware of his poor performance is baseless and without merit.

As to the allegation of lack of preparation for the December meeting, the ICC states that it "is nothing but a lame excuse and afterthought", the complainant having been at liberty to ask for the meeting to be rescheduled. On the contrary, he voluntarily came to the meeting and signed the appraisal report. Moreover, it took him three months to

file a “formal request” to challenge the report and he has provided no reason for this delay.

The Court refutes the “clearly biased” material submitted by the complainant and the “overly exaggerated restatement of his so called achievements”, and asserts that he has provided no evidence of any prejudice or procedural flaw.

Concerning the complainant’s assertion that his performance during the period from January to June 2006 was not appraised, the Court points out that at least two monthly performance appraisal meetings took place. It emphasises that “the absence of a formal report for that period was intended to avoid confrontation and minimi[s]e tensions caused by the [c]omplainant’s attitude of belligerence”. It points out that despite his poor performance, the complainant was given a six-month extension in order to offer him the opportunity to improve. Two monthly meetings having revealed that he had done nothing to address the serious problems associated with his work, the Registrar was left with no alternative but to notify him, in good faith, of the non-extension of his appointment; he did so well in advance to enable the complainant to seek job opportunities elsewhere.

The ICC indicates that the complainant never raised the issue of not having the support of an intern during the discussion of his performance and that interns are available to staff upon request. It adds that the information that he needed to do his work was also available upon request.

D. In his rejoinder the complainant rejects the Court’s plea of irreceivability. He confirms that he received the impugned decision on 11 September 2006. He contends that, as the Court should know, the signature on the delivery slip is not his and he had stopped living at the address where the impugned decision was delivered, as an e-mail exchange with the removal company demonstrates. Moreover, he argues that the defendant’s reply to his complaint is time-barred as it was not submitted within thirty days of the date of receipt of the complaint, as provided by the Rules of the Tribunal. On the merits the complainant develops his pleas, pointing out that the defendant has consistently failed to provide any evidence to substantiate its arguments.

Concerning his probationary period he maintains that it is irrelevant that there was no written specification that his initial appointment was probationary, as there is overwhelming evidence of this fact. The complainant also notes that the two meetings held in February 2006 have not been recorded in his official status file, contrary to the requirements of Staff Rule 104.17, and he insists that they therefore did not constitute performance appraisals.

He states that he is “deeply shocked” by the “insensitive and unfair” unsubstantiated claim that his “belligerent attitude” prevented any formal report from being made for the period from January to June 2006, and asks the Tribunal to award him moral damages in respect of this false accusation. Moreover, he considers that the admission that no formal report had been drawn up for the period from January to June 2006 in itself proves that the decision not to renew his contract is fundamentally flawed. The complainant further produces evidence from former colleagues showing that his supervisor was prejudiced against him.

He considers that it is “absurd” to claim that the few weeks between the extension of his appointment in January 2006 and the non-renewal decision in February afforded him the reasonable opportunity to improve that good faith would have required of the defendant. Nevertheless, he states, his performance did improve, but this was not taken into account.

E. In its surrejoinder the ICC elaborates on its position. It maintains that the complaint is time-barred. It points out that the complainant has not produced any proof that the address he had given to the Court as a “forwarding address” in the Netherlands was a temporary one, and that the Dutch postal service does not leave registered mail at a given address in the absence of the recipient. Moreover, no indication was given as to who signed the receipt for the registered letter. It states that its reply to the complaint was sent in time, as evidenced by its exchange of correspondence with the Registrar of the Tribunal.

The defendant insists that, at all times, it observed all the terms and conditions of the complainant’s appointment, and that the complainant has failed to plead and/or adduce evidence to the contrary. It therefore questions the receivability of the complaint since, according to Article II, paragraph 5, of the Statute of the Tribunal and Staff Rule 111.1(a), the Tribunal’s mandate is to hear complaints alleging non- observance of the terms of appointment of officials.

The Court states that, according to its Performance Appraisal Guidelines, appraisal of staff members and feedback

thereon are “continuous”, that once a year the performance of the staff member is “formally” appraised and that following the formal meeting there must be “at least one progress-monitoring meeting”. Thus, there is no basis for the Tribunal to disregard the performance appraisal which was conducted in accordance with the prescribed procedures, as the Appeals Board noted, and which conclusively established that the complainant failed to meet the required standards of performance.

The ICC denies that the complainant was not given fair and prompt warnings by his supervisor about his performance. It contests the “so-called credible evidence” produced by the complainant purporting to establish that his supervisor showed prejudice towards him and points out that this issue was never raised during the appraisal process.

CONSIDERATIONS

1. The complainant is a former staff member of the ICC. He was employed as a spokesperson under a fixed-term contract from 16 January until 31 March 2005. His contract was later extended to 15 January 2006. Following a performance appraisal report dated 22 December 2005 his contract was further extended until 15 July 2006. On 24 February 2006 the Registrar of the Court informed him that his contract would not be renewed. That was confirmed in writing on 10 March 2006.

2. On 31 August 2006 the Appeals Board recommended the dismissal of an internal appeal brought by the complainant with respect to the decision not to extend his contract. The Registrar of the Court accepted that recommendation and the complainant was so informed by registered letter dated 5 September 2006. That is the impugned decision in the complaint which he filed on 8 December 2006.

3. The complainant states that he received the letter informing him of the impugned decision on 11 September 2006. The ICC disputes this on the basis that a postal receipt, which purports to bear the complainant’s signature, indicates that the letter was delivered to his address in Eindhoven, in the Netherlands, on 8 September. Accordingly, the Court contends that the complaint was not filed within ninety days of the receipt of the impugned decision and is, thus, not receivable under Article VII of the Statute of the Tribunal.

4. In answer to the defendant’s argument that the complaint was not filed within time, the complainant asserts that neither the handwriting nor the signature on the postal receipt are his. In addition, he states that he relocated to Belgium on 8 September and, when informed on the weekend of 9-10 September that an envelope bearing the ICC’s logo had arrived in Eindhoven, he then travelled there to collect the letter on 11 September. By way of corroboration, he attached to his rejoinder an e-mail indicating that his possessions would be collected from The Hague (the Netherlands) on 7 September and delivered to Belgium on 8 September.

5. The ICC contends that the complainant’s account of the receipt of the notification dismissing his appeal should not be accepted. In this regard, it points out that he has not indicated who signed the receipt for the registered letter. Further, it says that it has been reliably informed that it is the practice of the Dutch postal service to deliver registered mail personally to the addressee and, if he or she is not available, to leave a note requesting him or her to go to the nearest post office where the mail is delivered on proof of identity. Significantly, the ICC does not state that the postal service requires proof of identity when, as in the present case, the registered mail is delivered to the address shown on the letter. Given these particular facts and that the complainant’s account is to some extent corroborated by the e-mail relating to the delivery of his possessions, and given also that it is for the sender to establish the date on which a communication is received, the complainant’s account should be accepted. Accordingly, the complaint was filed within time.

6. It is also contended that the complaint is not receivable because it does not relate to the non-observance of the terms of the complainant’s appointment as specified in Article II of the Statute of the Tribunal and Staff Rule 111.1(a). In this regard, the ICC points out that the complainant had a fixed-term contract that came to an end and asserts that he has neither pleaded nor adduced evidence of the non-observance of its terms. The argument is misconceived.

7. As stated in Judgment 2573, notification of the non-renewal of a contract is “treated [by the Tribunal] as a decision having legal effect for the purposes of Article VII(1) of its Statute”. According to the Tribunal’s case law, it is treated as a discretionary decision that may be set aside “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" (see Judgment 1262, under 4; see also Judgments 2019 and 2660). The complainant contends that the decision not to renew his contract was procedurally flawed, was based on mistakes of fact and of law and was an abuse of authority. Accordingly, he pleads the non-observance of terms of appointment that are implied by operation of law. The complaint is therefore receivable.

8. Although not stated in the memorandum of 10 March 2006, the complainant was informed that the reason for the non-renewal of his contract was his unsatisfactory performance. It was pointed out in Judgment 1583, under 6, that "[a]n organisation may not in good faith end someone's appointment for poor performance without first warning him and giving him an opportunity to do better". It is an abuse of authority if it purports to do so. Similarly, it is a breach of form for an organisation to "base an adverse decision on a staff member's unsatisfactory performance if it has not complied with the rules established to evaluate that performance" (see Judgment 2414, under 24).

9. Much of the complainant's argument is directed to establishing that the performance appraisal report dated 22 December 2005 did not comply with Staff Rule 104.17 and that it was also procedurally flawed. The report, in which the complainant's overall performance was rated "below average", was completed by his immediate supervisor but signed on her behalf by the acting head of her section. It was noted in the report that, as the complainant's functions also related to the President of the Court, the appraisal meeting took place in the presence of the *Chef de Cabinet* of the Presidency. The Registrar, the complainant's second-level supervisor, signed the report on 8 January 2006. He noted that, as the complainant's immediate supervisor would be on maternity leave until April 2006, he would monitor the performance of the complainant with regular monthly meetings and that those meetings would be attended by the *Chef de Cabinet*. It was stated in the report that "[p]rogress monitoring (mid-year review) [was] scheduled [for] Mid-April". The only comment recorded by the complainant was that he would like to "take some courses on report drafting and writing skills", both in English and French.

10. The complainant contends that, as there was only one performance appraisal report, there was a breach of the requirement in Staff Rule 104.17 that "each staff member shall be regularly appraised". The complainant fails to note that the ICC Performance Appraisal Guidelines specify that although "[a]ppraisal […] should be continuous […] once per year at least, it should be formal". Certainly, a formal appraisal took place at the end of the complainant's first year and, although he claims that there was no appraisal between January and March 2005, there is nothing to suggest that there was not regular appraisal and feedback between April and December 2005. Accordingly, the argument based on Staff Rule 104.17 must be rejected.

11. So far as concerns the claimed procedural irregularities, the complainant states that the performance appraisal meeting was hastily convened and when he was on annual leave, that it was attended by the *Chef de Cabinet* who was not his direct supervisor and that many of the claims made in the report were not put to him at the meeting; in addition, the report was signed not by his supervisor on 22 December but by the acting head of section some time later after the former had proceeded on maternity leave. He also claims that comments made by him at the appraisal meeting were not recorded in the report. The complainant did not seek to have the meeting deferred and did not object to the presence of the *Chef de Cabinet*. Indeed, the purpose of the latter's presence seems to have been to ensure fairness to the complainant in respect of the duties performed for the Presidency. Nothing turns on the precise date on which the report was signed and it was open to the complainant to record his comments, including with respect to matters which he says were not put to him at the appraisal meeting, when the report was returned to him for that purpose after review by the Registrar. Accordingly, the complainant's arguments with respect to procedural irregularities must also be rejected.

12. It is also contended by the complainant that the decision not to extend his contract was based on an error of law in that the ICC impermissibly treated the extension period from January to July 2006 as a probationary period. That argument must be rejected. There is nothing to support that claim and, even if there were, that would be a matter going to the decision to extend his contract for six months, not the decision not to renew it when that six months expired.

13. The complainant's case based on abuse of authority is mainly directed to establishing that his performance improved after the performance appraisal report of December 2005 and that this was not taken into account when it was decided not to extend his contract. Whether or not there was improvement, there is nothing to suggest that his performance up to 24 February was not taken into account. Additionally, he claims that there was no proper

evaluation of his performance after his receipt of the performance evaluation report and that the period between then and 24 February was not adequate to determine whether or not his performance had improved. In essence, he claims that he was not given a real opportunity to do better. To understand this argument, it is necessary to return to events surrounding the performance appraisal report of December 2005.

14. The complainant says – and it is not disputed – that he received the report of December 2005 on or about 15 January 2006. Prior to his receipt of the report, his supervisor sent him an e-mail, dated 9 January 2006, saying that he would have an opportunity to improve his performance "in the next months" and that the acting head of section would speak to him to make a plan for those months. Presumably, it was on this basis that a review was scheduled for mid-April.

15. There is no evidence that the acting head of the section met with the complainant to formulate a plan for the following months. Instead, there were meetings with the Registrar and *Chef de Cabinet* as foreshadowed in the performance appraisal report. The first of those meetings took place on 2 February and the second on 24 February 2006, when the complainant was informed that his contract would not be renewed. Thus the time allowed to the complainant to improve his performance was less than six weeks, not the "next months" indicated by his supervisor. Moreover, the complainant was entitled to assume from his performance appraisal report that he had until mid-April to demonstrate improvement and that there would then be a proper review in which he would be able to present a case that his contract should be renewed. And in the light of the statement that there would be a review in mid-April, it is not to be supposed that any shorter period allowed a genuine opportunity for improvement.

16. The ICC could not in good faith decide that the complainant's contract would not be renewed without giving him the opportunity to make progressive improvement until mid-April and without conducting a proper review at that stage. It follows that the decision not to renew the complainant's contract was an abuse of authority and that the subsequent decision rejecting his appeal must be set aside.

17. Although the impugned decision must be set aside, it does not follow, as claimed by the complainant, that he is entitled to material damages on the basis that his contract should have been renewed until 15 January 2009. A fixed-term contract carries no right to renewal. Moreover, there is no basis for assuming that a proper evaluation and review of the complainant's performance in mid-April would have resulted in any extension of his contract. However, he lost a valuable opportunity to have the question of renewal considered on the basis of a proper review of his performance up to mid-April. The loss of that opportunity warrants an award of material damages in the amount of 7,500 euros. Additionally, the ICC should pay the complainant moral damages in the amount of 2,000 euros and 500 euros by way of costs.

DECISION

For the above reasons,

1. The decision of 5 September 2006 is set aside.

2. The ICC shall pay the complainant 7,500 euros as material damages.

3. It shall also pay him 2,000 euros in moral damages and 500 euros in costs.

4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 8 November 2007, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Mary G. Gaudron

Giuseppe Barbagallo

Catherine Comtet

Updated by SD. Approved by CC. Last update: 27 February 2008.