

**Tribunal administratif**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1159

Case No. 1258 : LACOSTE

Against : The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Mr. Mayer Gabay, Vice-President, presiding; Mr. Spyridon Flogaitis, Ms
Brigitte Stern;

Whereas at the request of Beatrice Lacoste, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 December 2001, and twice periodically thereafter until 30 April 2002;

Whereas, on 30 September 1998, the Applicant filed an Application containing pleas which read, in part, as follows:

"Section II: PLEAS

1. TO ORDER

(a) that the decision taken by the Secretary-General regarding the Report ... [of the] Joint Appeals Board [(JAB)] be rescinded,

(b) TO DECLARE null, void and of no effect the decision of the Registrar of [the International Criminal Tribunal Rwanda (ICTR)] not to renew the contract of the Applicant;

2. TO DIRECT the Office of Human Resources Management [(OHRM)] (UN-NYHQ) and/or ICTR to reinstate the Applicant in the position she had at the time of the purported separation, at the same level and step, with all benefits, including repeated renewals of her contract with regular raises in level and step and corresponding raise in salary;

3. TO DIRECT that such reinstatement automatically restore the Applicant in all her rights and entitlement as a staff member, including particularly,

contributions to the pension fund retroactively to the date of purported separation;

4. TO DIRECT OHRM and /or ICTR to renew the contract of the Applicant with the Secretariat of the United Nations and/or with the ICTR, during a period of at least two years and six months;

5. TO ORDER the Respondent to search and remove from its files ... all detrimental documents regarding the Applicant ... to recall copies of such documents within a period indicated in the said order ... and to send the Applicant a written confirmation ...

6. TO ORDER the Respondent to file in all the Applicant's files the documents favourable to her which may have been removed from her files, or should have been put in them ...

7. TO ORDER, should the Secretary-General, within thirty days of the notification of the decision, decide in the interest of the United Nations to pay compensation in lieu of specific performance, that the Applicant be compensated the maximum amount of compensation allowed ...

8. TO ORDER ICTR to complete a fair and unbiased [performance evaluation report (PER)] for the period of May 1996 to February 1997 or to allow the Applicant to rebut the unfair PER."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 September 2002 and periodically thereafter until 31 January 2003;

Whereas the Respondent filed his Answer on 31 January 2003;

Whereas, on 15 April 2003, the Applicant filed Written Observations adding to her pleas as follows;

The Applicant respectfully requests the Administrative Tribunal to hold oral proceedings in the present case, in application of article 15 of the Rules.

Whereas, on 7 November 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant entered service in April 1992 on a fixed-term appointment until 30 June 1995. Following a break in service, she was reappointed on 29 May 1996 on a one-year fixed-term contract as Chief of Press and Information, at the P-4 level, with the International Criminal Tribunal for Rwanda (ICTR). Her appointment was extended until 30 September 1997, and was not renewed. Effective 27 August 1999, the Applicant was reappointed on an appointment of limited duration as an Information Officer (P-4) in the United Nations Mission in Kosovo (UNMIK). The

appointment was subsequently extended through 30 June 2001, at which time the Applicant separated from service.

A series of memoranda exchanged in late November and early December 1996 between the Applicant on the one hand and the Registrar and the Acting Chief of Administration, ICTR on the other hand, reflected a lack of agreement between them with respect to the Applicant's responsibility and job functions.

On 27 January 1997, the Registrar, ICTR, sent a memorandum to the Acting Chief of Administration which stated in part:

"I have received your memo of 24 January 1997 reporting yet another incident concerning our current Chief of Information [the Applicant].

Judging from what I have so far seen on the files, in the form of complaints concerning her services to the Tribunal, I believe it would be most appropriate to assign [the Applicant] to some other duties within the Tribunal than her present position which seem now to yield only difficulties after difficulties and endless confrontation with other staff members.

I would like you to assign her immediately to assist in the preparation of the first Yearbook on the ICTR putting together the relevant information and documents that form part of the ICTR activities and public record from its establishment in November 1994."

On February 2 1997, the Vice-President of the Tribunal, wrote to the President of the Tribunal, objecting to the removal of the Applicant from her duties as Chief of Press and Information to work on the ICTR Yearbook stating:

"[the Applicant] has proved to be a highly qualified professional who has very close ties with both local and foreign correspondents. ... A change of Spokesperson at this time could only be detrimental to the Tribunal. ... Therefore the question arises, why dismiss a qualified staff member who is doing her job very successfully. ... It is not difficult to answer this question if one remembers that for a certain period of time the Chief of Press and Information has been persecuted."

In the Applicant's PER covering the period 29 May 1996 - 31 January 1997, signed by the Registrar on 25 May 1997, the Applicant received primarily "B" and "C" ratings with some "F" ratings, with an overall appraisal as "Fair". The Applicant signed her PER on 2 June 1996 with a notation "will rebut". The Applicant filed her rebuttal on 18 June 1997. After numerous failed attempts to convene an acceptable panel in Arusha, to deal with the Applicant's rebuttal, on 22 October 1998,

the Applicant in a letter to the Chief, Overseas Service Cluster, OSD, OHRM, requested that a Rebuttal Panel be convened at Headquarters in New York.

In her PER dated 29 July, 1999, the Applicant received a rating of “a very good performance” with primarily “A” and “B” grades. This PER also refers to the Applicant’s work on the Yearbook as conscientious and favourably received at the Judges’ Plenary meeting in June 1997.

On 10 March 1999, OHRM advised the Applicant that there were neither mitigating nor exceptional circumstances to warrant a review of her case outside of Arusha. Nevertheless, on 29 July 1999, OHRM approved the Applicant’s request to hold a rebuttal hearing in New York. She was sent a list of five proposed panel members on 13 August 1999, from which she, in her letter of 25 August 1999, selected three. The rebuttal procedure, however, was never completed. Moreover, notwithstanding the statement of the Respondent that the memoranda damaging to the Applicant, exchanged between the Acting Chief of Operations and the Registrar, were not included in her Official Status file, they were in fact included in the material sent to the Rebuttal panel.

On 21 April 1999, the Applicant lodged an appeal with the JAB. The JAB issued its report on 22 February 2001. Its considerations and conclusions read in part as follows:

“Considerations

16. The Panel had no doubt that there were serious differences of opinion between the Registrar and the Acting CAO on the one hand, and Appellant on the other, as to how she should carry out her duties as Information Officer. This disagreement extended to virtually every aspect of her responsibility... Mr. Adede, in the PER he prepared some months after his resignation from the post of Registrar, gave Appellant an F (unsatisfactory) rating for supervision—without specifying, as required by the PER form, “the number and the level of staff under his/her supervision,” and commented: “completely failed to motivate (?) or relate to staff under her supervision in a professional manner.”

...

20. The Panel noted that Respondent has offered no explanation for the decision and has simply stated that Appellant “has no right to the extension of her appointment.” As noted above, the Panel was well aware that “the fixed-term appointment does not carry any expectancy of renewal” ... However, as the Tribunal has ruled on numerous occasions in analogous cases, the Appellant had the right to full and fair consideration by the

Administration when it made the decision whether or not to extend her appointment. Since Appellant was subsequently reappointed and is currently employed by the Organization, the Panel could only conclude that, as of today, the Appellant is considered a staff member meeting the standards of Staff Regulation 1.2(b). The decision for non-renewal must have been based, therefore, on material and evaluations available at the time the decision was made.

21. The Panel notes that Respondent states (...) that as of 9 September 1999, 'the memoranda from the Acting CAO to the Registrar (of 24 January 1997) and from the Registrar to the Acting CAO (of 27 January 1997) are not included in the official status file of Ms. Lacoste'. Since these memoranda were included in the relevant information provided in August 1999 to the Rebuttal Panel considering the PER prepared by the Registrar in May 1997 and covering the period 29 May 1996 to 31 January 1997, they were still part of Appellant's file at that time. These two memoranda were clearly adverse material as defined in ST/AI/292 and were placed in her file in violation of the procedure specified in paragraph 2 of that Administration Instruction. This was implicitly acknowledged by the Administration by having them removed.

22. Conspicuously absent from Appellant's file at the time the decision for non-renewal was made was a PER for the period 31 January through June 1997, with the evaluation "a very good performance" and which was not completed by the first and second reporting officers until March 1999. ...

23. ... [The Panel unanimously concluded that Appellant had been denied due process in the decision not to extend her fixed-term appointment.

24. The Panel was also of the view that the Rebuttal Panel constituted at Headquarters should be dissolved as its deliberations have already been compromised by the submission to its members of the two memoranda mentioned in paragraph 20, above. The Panel saw no utility, at this point in time, of constituting another Rebuttal Panel.

Recommendation

25. The Panel recommends to the Secretary-General that:
- (a) in compensation for the denial to Appellant of due process in the decision not to extend her contract, she be paid six months net base salary plus applicable allowances at the rate in effect in Arusha in October 1997; and
 - (b) in lieu of the PER signed by Mr. Adede and in the absence of a valid Rebuttal report, a copy of this report be placed in Appellant's OS file.
26. The Panel makes no further recommendation with respect to this appeal."

On 19 June 2001, the Under-Secretary-General for Management, sent a copy of the JAB report to the Applicant and advised her that the Secretary-General had decided to accept the Board's findings and recommendations.

On 29 April 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The report of the Joint Appeals Board and the decision of the Secretary-General are ill founded in law and fact;
2. The decision to reassign her and not to extend her fixed-term appointment was improper and influenced by undisclosed extraneous considerations and not by considerations of the Applicant's performance;
3. The award of six months salary is not adequate compensation for the loss of more than four years work or the damage to the Applicant's career and employment prospects.
4. The Applicant was denied due process by the JAB and the failure to have a rebuttal hearing for an unfair PER;
5. The Registrar's decision was arbitrary, malicious, and devoid of any legitimate or legal basis;
6. The Applicant's rights were violated by the substitution of three JAB panel members without her or her Counsel's agreement;

Whereas the Respondent's principal contentions are:

1. The Applicant's reassignment to another position within ICTR did not violate her rights.
2. The decision to reassign the Applicant within her unit was not improperly motivated.
3. The JAB proceedings were in no way flawed and the Applicant was afforded a fair hearing.
4. The Respondent has already awarded appropriate compensation to the Applicant in connection with the non-completion of the rebuttal process for her first PER; the delays in completing the Applicant's second PER; the placement of adverse material in the Applicant's official status file and the denial of fair consideration in the non-renewal of the Applicant's fixed term appointment.

The Tribunal, having deliberated from 27 October to 21 November 2003 in New York, now pronounces the following Judgement:

I. The Tribunal wishes to make a preliminary comment, *obiter dictum*, pointing out that it has been traditional, since the United Nations Administrative Tribunal was established, for its judgements to be drafted in French or English. It is surprising therefore - given that linguistic diversity is one of the strengths of the Organization - that a French Applicant should submit her Application in English, thus making it more arduous for the Tribunal to draft a judgement in French on the basis of the documents submitted to it.

II. The Applicant worked as Chief of the Press and Information Office, at the P-4 level, at the International Criminal Tribunal for Rwanda (ICTR), by which she was recruited on 29 May 1996, on a one-year fixed-term appointment. On 31 January 1997, she was removed from her post with the Press and Information Office and reassigned to edit the Yearbook of the Tribunal. Her contract was extended for two consecutive periods of one month and then for a period of two months, following which it was not renewed. The Applicant thus left her post at ICTR on 30 September 1997 and filed a number of appeals subsequent to those events.

III. On the one hand, she challenged the mid-term evaluation made during her first contract. On 2 June 1996, the Applicant signed her performance evaluation report for the period from 29 May 1996 to 31 January 1997 and invoked her right to rebut it. The Applicant did indeed challenge that evaluation and asked that a panel should be convened in New York. That request was not granted by the Administration until 29 July 1999, but the procedure for the establishment of a rebuttal panel was never completed, as will be explained below.

IV. The Applicant also challenged the decision to reassign her to edit the Yearbook of the Tribunal and the non-renewal of her contract before the Joint Appeals Board, which submitted its report on 22 February 2001. In its report, the JAB deemed that the reassignment of the Applicant was not contrary to the terms of her employment, nor was it inappropriate given her qualifications. On the other hand, the JAB deemed that the decision not to renew her contract had not been taken following a full and fair review and that it had denied the Applicant's due process.

The JAB therefore ordered that six months' net base salary with the applicable allowances should be paid in compensation and that, in the absence of a valid rebuttal of the performance evaluation report for the period from 29 May 1996 to 31 January 1997, the report of the Joint Appeals Board should be placed in the Applicant's file in place of the performance evaluation report she had challenged.

V. The Applicant is appealing to the Tribunal against the decision of the Secretary-General accepting the report of the Joint Appeals Board. She makes several pleas. First, she claims to have been prevented from carrying out her functions as Chief of the Press and Information Office by the constant intervention in her work by the Registrar of ICTR, her supervisor, and by the lack of adequate support staff and equipment. Second, she claims that her reassignment was in fact a disguised disciplinary measure. Third, she believes that the delay in the procedure for the rebuttal of her performance evaluation report for the period from 29 May 1996 to 31 January 1997 constitutes a flagrant violation of her right to due process, which cannot be remedied simply by placing the report of JAB in her file. Fourth, she believes that her rights to normal procedure were not respected before the JAB, on the one hand because she challenges the change in the composition of the JAB, of which she had not been warned, and, on the other hand because she complains that two unfavourable documents were placed in her file and submitted to the JAB unbeknown to her. Fifth, the Applicant challenges the decision not to renew her contract, which she regards as a further reprisal against her and as an infringement on her rights as a United Nations staff member.

VI. The Administration has not responded to the Applicant's arguments that she was constantly prevented from working in conformity with her conditions of employment. On the contrary, it has replied that the reassignment was within the Registrar's competence and that the Applicant had not proved the existence of improper motivation or extraneous considerations:

"The Respondent submits that the reassignment of a staff member to a different position in a unit falls within the authority delegated to the heads of offices who can reassign staff members based upon the needs and interests of the office. The Respondent notes that there were difficulties with the Applicant's position as Spokesperson/Chief, Press and Information Unit, resulting in constant disagreements with her supervisor as to the manner in which her functions were to be performed ... The Respondent submits that in the present case, and in light of the above difficulties, the decision to reassign

the Applicant within her unit was a legitimate exercise of the Registrar's discretionary authority, particularly in view of the highly sensitive nature of the duties of the Spokesperson/Chief, Press and Information Unit ... The Respondent submits further that the Applicant's dissatisfaction with her duties after the reassignment, does not make that decision unfair or improperly motivated".

The Administration considers, moreover, that the procedure before the JAB was in no way flawed and that the compensation granted in respect of the Applicant's other pleas was appropriate:

"The Respondent has already awarded appropriate compensation to the Applicant for the non-completion of the rebuttal process in connection with her first PER; the delays in completing the Applicant's second PER; the placement of adverse material in the Applicant's official status file and the denial of fair consideration in the non-renewal of the Applicant's fixed term appointment".

VII. The Tribunal will consider the various pleas of the Applicant in order and points out, as a preliminary, that in two recent judgements (Judgements Nos. 1132, *Goddard*, (2003), and 1135, *Sirois*, (2003)), the Tribunal has already learned of the serious dysfunction and reprehensible practices within ICTR during the period when the facts of this case occurred.

VIII. The Applicant claims, first, that the Registrar's instructions and the lack of staff and equipment within the Office prevented her from carrying out her functions, as defined in her contract and her conditions of employment as set out in the vacancy announcement and the job description for her post. The Tribunal notes that the Applicant's conditions of employment clearly indicate that she was working under the authority of the Registrar, who was her direct supervisor. More precisely, they indicate that the Registrar "is the Tribunal's 'channel of communication' and closely supervises the post". It was therefore not unusual for the Registrar to have given instructions to the Applicant as to how to carry out her functions. It appears, however, from the facts of the case that that authority was used in such a way as to reduce considerably the Applicant's margin for manoeuvre in the exercise of her functions. Strict instructions coming from both the Registrar and the Chief Administrative Officer of ICTR considerably limited the information which the Applicant was authorized to transmit outside ICTR. The Tribunal is particularly sensitive to the evidence produced by the Applicant which underscores the fact that those she reported to were aware of the limited resources at her disposal. The

Applicant indicates, inter alia, that she was never authorized to go to Kigali, a fact which the Administration has not refuted. The Tribunal also notes that the Applicant regularly brought her difficulties to the attention of her superiors, who nevertheless constantly maintained their position.

IX. The Tribunal wishes, however, to place this hierarchical authority of the Registrar in its context. On the one hand, it has already been placed in evidence that a despotic organization was established by the Registrar and the Chief Administrative Officer of ICTR, an organization that has been severely criticized to the Office of Internal Oversight Services (OIOS) by the Chief of Finance, the President of the Tribunal and the Judges. In the report of the Secretary-General on the activities of the OIOS (A/51/789, dated 6 February 1997), OIOS highlighted the attitude of the Registrar, who had usurped all powers and imposed his authority, not to say his authoritarianism:

“According to the Registrar, he has absolute authority when it comes to any matter with administrative or financial implications. Because of this perception, almost no decision can be taken by the other organs of the Tribunal that does not receive his review and agreement or rejection. In the opinion of OIOS, this must change to more accurately reflect the servicing function of a Registry.”

And the report adds: “The President of the Tribunal should supervise the activities of the Registrar as provided by the Tribunal’s Rules of Procedure and Evidence” (*idem*, para. 79).

X. Moreover, other considerations which underline certain ambiguities in the Applicant’s position vis-à-vis the various people involved at ICTR should also be taken into consideration. In the job description for the post held by the Applicant, one of the tasks assigned to it is: “the media and information policies of the ITR in consultation with the three relevant senior representative: the President, the Prosecutor and the Registrar”. It has already been pointed out in the earlier cases referred to in paragraph VII of this judgement that there was an open struggle between two factions at ICTR, as the Applicant states in her appeal:

“In fact the Applicant was caught in a feud between the Registrar and the Prosecutor, the Registrar and the Judges, and the Registrar and the outside world as negative media coverage intensified”.

XI. All these elements which serve as a background to the events that have given rise to this case show that the Registrar certainly abused his authority in the daily management of the press service, but, in the opinion of the Tribunal, this does not allow it to conclude that the Registrar abused his authority to an extent that would justify the grant of financial compensation to the staff member thus harassed. The Tribunal refuses, at least at this stage, to conclude that the Applicant was genuinely and deliberately prevented from carrying out her functions to the point that her rights as a staff member of the Organization were not respected. There is no denying that she worked in difficult conditions, but that in itself is not sufficient to conclude that her rights as a United Nations staff member were violated. The fact is that, despite everything, the Applicant was able to continue to discharge her duties, that, to use her own words, she did “damage control”, through perseverance, as indicated by the many thank-you letters which the Applicant placed in her file. The Tribunal nevertheless intends to take these elements into account in its further reasoning as possible proof of a pattern in the relations between the Applicant and ICTR. In particular, the fact that the Registrar, on the one hand, prevented the Applicant from passing important information outside ICTR and, on the other, stated in her performance evaluation report - which the Applicant was never able to rebut - that she “could have done more to make the Tribunal’s work known outside apart from routinely reported decisions” is a clear sign of bad faith.

XII. Secondly, the Applicant claims that the decision to reassign her to edit the Yearbook of the Tribunal constituted a disguised disciplinary measure. It is the Tribunal’s task to consider, on the one hand, the competence of the Registrar to order the Applicant’s reassignment and, on the other, to ascertain that that reassignment was not arbitrary or based on improper motives.

XIII. The Tribunal should first reply to the question of whether the Registrar was invested with the necessary authority to reassign the Applicant. As the Administration rightly states, under regulation 1.2 (c) of the Staff Regulations, United Nations staff members are subject to the authority of the Secretary-General - and, by delegation, to that of the chiefs of service - who may decide to reassign them at their discretion. The question arises, however, whether in January 1997, at the time of the reassignment, the Registrar of ICTR had the competence of chief of service recognized by staff regulation 1.2 (c). As the Tribunal established in the

Goddard [Judgement No.1132 (2003)] and *Sirois* [Judgement No.1135 (2003)] cases, it appears from an examination of the file that a delegation of authority with regard to personnel management was only granted to ICTR for the first time in October 1997. The Tribunal must therefore determine whether the authority to reassign personnel was an authority inherent in the post of chief of service or whether it was an authority which must be expressly delegated, which was done only in October 1997, several months after the decision to reassign the Applicant was taken by the Registrar. The Tribunal considers that, even if the Registrar did not, in January 1997, have the authority to appoint the Applicant or to terminate her contract, he must, as her supervisor and in order to ensure the smooth functioning of the administration, be considered to have had the inherent authority to assign her to work necessitated by the interests of the service.

XIV. The Tribunal is then asked to state that, even if the Registrar was competent, he used his authority in an abusive manner and based his decision on motives other than the interests of the service. The Tribunal states that, while the chief of service indeed has discretionary authority in this matter, he may not act in an arbitrary manner and that it is up to the Tribunal to monitor the motives for his decisions. The Administration claims that the Applicant did not show proof of the existence of improper motives. It should be noted that, while the JAB did not expressly condemn the decision to reassign the Applicant, it nevertheless expressed certain reservations, since it stated that “the Panel felt that the manner in which Mr. Adede announced his decision to reassign her left much to be desired”. However, the Joint Appeals Board considered that the decision to reassign the Applicant was not contrary to her conditions of employment and was not inappropriate in view of her qualifications. The Tribunal rejects this reasoning: the fact that the reassignment was not inappropriate given the competence of the Applicant in no way excludes the possibility that it may have been based on improper motives. Moreover, it appears clear from the file that the post to which the Applicant was reassigned (editor of the Yearbook of the Tribunal) involved work which was very different from that for which she had been initially recruited and that it was therefore difficult to claim that the new assignment was in keeping with the Applicant’s conditions of employment; moreover, it is even difficult to ascertain whether it was an assignment within the same service. What appears from an examination of the facts of the case, in particular the memorandum dated 6 February 1997 from Judge Ostrovsky to the

President of the Tribunal, is that the decision to reassign the Applicant was taken without any real consideration for the interests of the service, at a time when the Tribunal was going through a troubled period during which there was a particularly strong need and demand for communication. In the circumstances, it was clear that the editing of the Yearbook of the Tribunal (which had, moreover, not yet been published in February 1998, eight months after the editing had been completed) was less urgent and necessary than good press coverage. In view of the tensions existing between the Applicant and her superiors in the preceding months, the reassignment must therefore have been decided on the basis of considerations other than the strict interests of the service.

XV. The Tribunal considers that the Applicant provided sufficient evidence to convince it that her reassignment was based on factors other than the interests of the service. Indeed, it appears from an examination of the file that the motivation for the instructions given to the Applicant in January were not in the interests of the service but were aimed at protecting the personal interests of the Registrar, as it appears from the very explicit letter sent to the Applicant on 17 January 1997, two weeks before her reassignment, by which he tried to limit as much as possible any contact with the press by the Applicant and the judges:

“... it would be greatly appreciated if no further requests are accepted for interviews with Judges or officers of the Tribunal ... The negative accounts about the Tribunal by the press in the wake of the confidential Draft Report by the United Nations OIOS should no longer be the subject of constant discussion between the Tribunal and the press”.

Some judges protested against such interference by the Registrar in the work of the Press and Information Office. In particular, Judge Ostrovsky, Vice-President of the Tribunal, stated: “Since there are so many problems in the activity of the Registrar and the Administration, it is necessary to rectify the situation instead of trying to silence the Judges and the members of the staff”.

XVI. Furthermore, the memorandum dated 27 January 1997 from the Registrar addressed to the Chief Administrative Officer requesting the Applicant’s reassignment to edit the Yearbook of the Tribunal explicitly states that the reassignment was based on “complaints” from colleagues, about which the Applicant had never been informed, and on an “incident” which warranted her removal from the post of Chief of the Press and Information Office:

“I have received your memo of 24 January 1997 reporting yet another incident concerning our current Chief of Information Ms. Beatrice Lacoste.

“Judging from what I have so far seen on the files, in the form of complaints concerning her services to the Tribunal, I believe it would be most appropriate to assign Ms. Lacoste to some other duties within the Tribunal than her present position which seem now to yield only difficulties after difficulties and endless confrontation with other staff members.

“I would like you to assign her immediately to assist in the preparation of the first Yearbook on the ICTR putting together the relevant information and documents that form part of the ICTR activities and public record from its establishment in November 1994”.

To which “incident” does this refer? The charge against the Applicant should instead be imputed to the Registrar. In fact, at the time of the arrest of four major suspects and their transfer from Cameroon to Arusha, two press communiqués were issued. One was issued by the Applicant, following a request from the Prosecutor, Ms. Louise Arbour, who had sent her a communiqué stating: “Prosecutor Louise Arbour confirms the transfer of four major accused as a capital turning point for the Rwanda Tribunal”. At the same time, a press communiqué was prepared by the Registrar and issued directly, without the Applicant’s knowledge; this communiqué, unlike that of the Prosecutor, tended to give all the credit for the arrest to the Registrar by stating: “Registrar Andronico Adede and Deputy Prosecutor Honoré Rakotomanana travelled to Cameroon on Wednesday January 22 in order to secure a smooth transfer”. In the view of the Tribunal, this demonstrates bad faith by imputing to the Applicant an incident over which she had no control since the Registrar had not considered it appropriate to inform the Chief of the Press and Information Office that he was issuing a communiqué on a major event concerning the Tribunal, and, moreover, he used this incident as the central factor justifying the removal of the Applicant from her functions as Chief of the Press and Information Office.

XVII. The Tribunal concluded from this accumulation of evidence that the decision to reassign the Applicant to edit the Yearbook of the Tribunal was arbitrary and based on motives extraneous to the interests of the service.

XVIII. Thirdly, the Tribunal now considers the question of the alleged violation of the Applicant’s rights to due process because she was unable to have the rebuttal procedure conducted in the proper manner, in other words within six weeks of her

challenge of the performance evaluation report, as provided for in the rules of procedure. As she explains: “(d)uring four years the Applicant unsuccessfully tried to rebut a very unfair, vindictive and damaging PER”. The Tribunal does not feel that it needs to dwell at length on this question since the violation of the Applicant’s rights is flagrant. On the one hand, the fact that the report was signed by the Registrar of ICTR three months after his enforced departure could detract from the quality and honesty of the evaluation. Moreover, and above all, the delay in the procedure for the rebuttal of the performance evaluation report was absolutely inexcusable and demonstrated serious deficiencies in the Administration. The Tribunal points out that a significant delay is in itself damaging to the conditions of service of United Nations staff members (Judgement *Macmillan-Nihlén*, No. 880, (1998)), a delay which is all the more disputable in that it relates to a rebuttal procedure, which should be speedy or it will be meaningless. By reason of these serious violations of the Applicant’s rights, the Tribunal considers that the mere insertion of the report of JAB in the Applicant’s file is not sufficient and that the Applicant merits fair compensation for the wrongs suffered.

XIX. Fourthly, the Tribunal will deal with the allegations of violations of due process in the procedure before JAB. It appears there, too, from the evidence in the file, that the procedures followed left much to be desired. The Tribunal will come rapidly to the examination of the Applicant’s plea, namely that the members of the Joint Appeals Board changed - twice - without her being informed, in violation of her rights to due process. The Tribunal accepts this plea and strongly rejects the Administration’s shocking argument that it was up to the Applicant to show how the change in the composition of JAB was damaging to her interests. This concerns an essential right of the defence, which must be respected without the Applicant being required to show that the failure to respect that right involved specific damage.

XX. Finally, the Tribunal will examine the last plea made by the Applicant, namely the illegality of the failure of the new Registrar appointed in March 1997 to renew the Applicant’s contract. Here again, it is important to determine, first, whether the new Registrar had the authority not to renew the Applicant’s fixed-term contract and, second, whether, if it is determined that he had such authority, he exercised that authority in an arbitrary manner on the basis of improper motives.

XXI. The question of the Registrar's competence to decide not to renew the contract is raised by the Applicant in her supplementary observations, whereas the Administration, curiously enough, does not raise it even once. However, as the Tribunal has pointed out above concerning the decision to reassign the Applicant, it has been established that the delegation of authority in personnel matters was only granted to ICTR for the first time in October 1997, in other words after the dismissal of the Applicant, the relevant decision having been taken on 7 August 1997. The Tribunal concludes therefore from the facts of the case that ICTR, in the person of the new Registrar, did not have the legal competence to terminate the Applicant's contract.

XXII. The Tribunal is then asked to state that, even if the Registrar had had the competence, he used his authority in an abusive manner and based his decision on motives other than the interests of the service. It appears, however, from the conclusion previously reached by the Tribunal - namely that the Registrar did not have the competence to decide not to renew the Applicant's contract - that in principle it would not be necessary for the Tribunal to determine whether the Registrar, if he had had the competence to take that decision, should be considered as having used his authority in an abusive and biased manner, basing his decision on a motive which had no substantive grounds. The events which occurred at Kigali are, however, so contrary to what one might expect from the functioning of the United Nations Administration, that the Tribunal considers it its duty to examine the process which led to the non-renewal of the contract.

XXIII. The Tribunal points out, first of all, that a staff member on a fixed-term contract is not generally entitled to count on its extension; that is clear from rule 104.12 (b) of the Staff Rules. The Administration has the discretion not to renew or not to extend the contract without having to justify its decision. In that case, the contract expires automatically and without prior notice, in accordance with rule 109.7 of the Staff Rules. (See Judgements No. 440, *Shankar* (1989), No. 496, M.B. (1990), No. 1003, *Shasha'a* (2001), *Bonder*, No. 1052 (2002)). Nevertheless, in the context of this decision, the holder of a fixed-term contract is also entitled to a fair and complete review of his or her situation.

XXIV. The Applicant considers that the decision not to renew her contract had no basis in law, while the Administration merely states that “(t)he Respondent has already awarded appropriate compensation to the Applicant for ... the denial of fair consideration in the non-renewal of the Applicant’s fixed term appointment”. The Administration thus maintains its acceptance of the conclusions of the Joint Appeals Board that “as the Tribunal has ruled on numerous occasions in analogous cases, the Appellant had the right to full and fair consideration by the Administration when it made the decision whether or not to extend her appointment. Since Appellant was subsequently reappointed and is currently employed by the Organization, the Panel could only conclude that, as of today, the Appellant is considered a staff member meeting the standards of Staff Regulation 1.2(b) ... the Panel unanimously concluded that Appellant had been denied due process in the decision not to extend her fixed-term appointment”.

XXV. The Tribunal agrees with this analysis, even though it does not accept all the Applicant’s arguments. In particular, the Applicant considers that the renewal decision is simply the continuation of a series of reprisals against her and that the non-renewal is therefore arbitrary and based on improper motives. The Tribunal rejects on this point the misleading reasoning of the Applicant, who cites in support of her arguments the memorandum from Judge Ostrovsky to the President of the Tribunal. The comments cited concerned the decision to reassign and not the decision not to renew. Yet a clear distinction must be drawn between the two decisions, particularly as they were not taken by the same person. The decision not to renew was taken by the new Registrar of ICTR, who was appointed in May 1997 and was therefore not involved in the earlier events at ICTR. It is therefore difficult to imagine that he deliberately followed the policy of his predecessor, which had been condemned by several OIOS reports. At any rate, nothing in the file indicates that he did.

XXVI. The Tribunal believes, however, that the decision not to renew was profoundly flawed. This is because it was taken on the basis of serious procedural irregularities which necessarily affected the decision itself. It is known to be the Tribunal’s established jurisprudence that, even where there is no acquired right to renewal of a fixed-term contract, the Tribunal monitors the way in which the Administration adopts the discretionary measure not to renew a contract, in order to

prevent the measure from becoming arbitrary rather than discretionary. It is particularly important for the Tribunal to protect this right of staff to expect that a fair procedure will be followed in the adoption of the Administration's discretionary decisions, so that staff will not be left entirely to the mercy of the Administration's whims. Depending on the extent to which procedures were ignored, and the existence or otherwise of solid prospects for renewal, the Tribunal may conclude that the procedural irregularities did not fundamentally vitiate the decision taken and that the applicant is therefore entitled only to a limited compensation for the inadequate treatment of his or her case; or it may conclude that, although there was no entitlement to renewal of the contract, the procedural irregularities were so serious or so relevant to the decision not to renew that the non-renewal decision should be considered illegal and the staff member entitled either to renewal of his or her contract or to compensation in lieu thereof if the Administration refuses to comply. The latter conclusion applies in principle only in cases where there have been serious and manifest violations of the rights of the staff member and also where the likelihood that the contract would be renewed was particularly strong, for general and/or specific reasons. (Judgement No. 1052, *Bonder*, 2002)

XXVII. In this case, as the Joint Appeals Board recognized, serious procedural irregularities were committed which marred the decision-making. Firstly, the procedure for rebuttal of the first performance evaluation report was not completed. The Tribunal has on many occasions stressed that all the relevant material must be in staff members' files when their contracts come up for renewal, so that the renewal procedure can be transparent, as for example in the *Beliayeva* case:

“Having undertaken a consideration of the Applicant's situation, it was incumbent upon the Respondent to make his determination in accordance with fair procedures. Because the evaluation of the Applicant's performance was a factor, it is unacceptable that the decision as to her future was taken before the rebuttal procedure was finalized. The Tribunal does not accept as reasonable DPI's position that completion of the rebuttal procedure was not material to its decision not to renew the Applicant's appointment. *To accept this proposition would be to render redundant the Organization's entire rebuttal procedure.*” (*Beliayeva*, Judgement No. 826, para. VII, emphasis supplied by the Tribunal).

XXVIII. Secondly, the Applicant's file contained - but no longer contains, according to the information available to the Tribunal - unfavourable memoranda exchanged between the Registrar and the Chief Administrative Officer of ICTR on 25 and 27

January 1997, which clearly constitute adverse material within the meaning of ST/AI/292. On the other hand, the Applicant's performance evaluation report covering the period from January to June 1997, during which she was responsible for editing the ICTR Yearbook, giving her work a "Very good" rating was not on file, for the simple reason that it was not received until July 1999, two years later. In other words, at the time of the contract renewal decision, the only information available to the new Registrar was the extremely unfavourable PER written in circumstances that are well known and three months after his departure by the former Registrar, and there was no information at all for the period during which the Applicant was assigned to edit the Yearbook, for which the Tribunal now knows retroactively that she received a very good rating.

XXIX. The Tribunal notes in particular that very often, when the performance evaluation report has not been finalized, a staff member's contract is renewed for a short period pending finalization of the evaluation. This was, for example, the procedure followed for another ICTR staff member in the preceding year, when the Chief of Personnel informed the Registrar that "Mr. Saadou has to be maintained in the Finance Section as long as the procedure of the PER are in progress". The Tribunal takes note of the fact that the same approach was not adopted towards the Applicant, to say the least.

XXX. In view of these serious procedural irregularities, it is clear that the Applicant's rights to due process have been violated and that she was not given fair and full consideration when the renewal of her contract was considered.

XXXI. The question then remains whether the Applicant was deprived of a right or a legitimate expectancy of renewal of her contract, as she claims:

"Clearly, the Applicant, as other staff members unfairly treated whose contracts were not renewed, had expectations of having their contracts renewed. All of them had to set up an office from scratch and had acquired useful knowledge and experience in setting up key offices of the ICTR that would have been valuable in the long run".

This is a sensible remark to which the Tribunal can subscribe in so far as the Applicant speaks not of legal expectations but simply of expectations.

XXXII. As already emphasized, it appears that, had it not been for the hostility of the Registrar and the multiple irregularities in the treatment of the renewal of the Applicant's contract, there is nothing to indicate that her contract would not have been renewed. On the contrary, there are concordant indications of the opposite. Firstly, the judges, through the Vice-President, announced that they considered that her performance as Chief of the Press and Information Office was perfect. Secondly, and perhaps even more significantly, the Spokesman of the Secretary-General of the United Nations indicated in a fax dated March 1997 - about two months after she had been removed from the post of Chief of the Press and Information Office - that he considered the Applicant to be "quite professional" in her work as spokesperson of ICTR. The Tribunal echoes the question of Judge Ostrovsky: "why dismiss a qualified staff member who is doing her job very successfully"? Even if this indignation concerned the Applicant's reassignment, the same nagging question arises regarding the non-renewal of her contract.

XXXIII. In any case, the conclusion reached by the Tribunal is that the new Registrar's decision not to renew the contract should be considered as null and void, having been taken both *ultra vires* and on the basis of serious procedural irregularities.

XXXIV. The Applicant therefore deserves fair compensation for the injury suffered, which - contrary to the tendentious allegations of the Administration - this Tribunal is free to re-evaluate on the basis of its conclusions. The Tribunal wishes here to remind the Administration that it cannot at will limit the Tribunal's jurisdictional powers, as it tries to do in its answer, in which it states:

"The Respondent submits further that, when the Secretary-General has accepted a unanimous JAB recommendation to pay compensation, the Tribunal should intervene only in cases of error of law or improper motive by JAB or the Respondent, for otherwise there would be no incentive for Applicants to discontinue appeals until adjudicated by the Tribunal. The Respondent submits that a judicial policy of not interfering with decisions accepting unanimous JAB recommendations, absent error of law or improper motive, would assist in reducing the volume of applications to the Tribunal".

The Tribunal wishes to affirm that its judicial policy is not to have as few cases as possible, but to render justice by protecting both the due prerogatives of the Administration and the rights of international civil servants, and that this does indeed imply the review of legal issues or of improper motivation but may possibly,

depending on the circumstances, encompass the evaluation of factual issues that the Tribunal considers to have been incorrectly analysed or incorrectly categorized by the Joint Appeals Board or revision of the conclusions drawn by Joint Appeals Board from its findings regarding compensation for the injury suffered by the staff member.

XXXV. For the foregoing reasons, the Tribunal:

1. Declares that the decision to reassign the Applicant from the post of Chief of the Press and Information Office to the editing of the ICTR Yearbook was based on improper motives;

2. Orders that a new performance evaluation report should be prepared for the period from May 1996 to February 1997 and that the Applicant should be given the opportunity effectively to rebut her performance evaluation report;

3. Declares that the decision not to renew the Applicant's contract should be considered as null and void, having been adopted by an authority that was not competent to do so and was acting in violation of the Applicant's due process rights;

4. Notes that reinstatement of the Applicant would be meaningless in view of the circumstances;

5. Orders payment to the Applicant, as compensation for all the irregularities committed in the treatment of her situation, of one and a half years' net salary with all allowances at the rate in force on the date of the judgement, in addition to the compensation already paid to the Applicant following the Joint Appeals Board decision;

6. Orders the Administration to verify that any unfavourable documents that may be in the Applicant's personnel file unbeknown to her have indeed been removed and that the favourable documents are indeed put in the file, in particular the performance evaluation report revised by a rebuttal panel, and orders the Administration to send the Applicant written confirmation that it has indeed performed this task, with the exact list of the documents concerned, within a period of six months;

7. Rejects all other pleas.

(Signatures)

Mayer Gabay
Vice-President, presiding

Spyridon Flogaitis
Member

Brigitte Stern
Member

New York, 21 November 2003

Maritza Struyvenberg
Executive Secretary