112th Session **Judgment No. 3079**

THE ADMINISTRATIVE TRIBUNAL,

Considering the first complaint filed by Mr E. W. against the International Criminal Court (ICC) on 7 December 2009 and corrected on 15 April 2010, the ICC's reply of 26 July, the complainant's rejoinder of 29 October 2010 and the Court's surrejoinder dated 3 February 2011;

Considering the second complaint filed by the complainant against the ICC on 23 February 2010 and corrected on 2 June, the ICC's reply of 8 September, the complainant's rejoinder of 2 December 2010 and the Court's surrejoinder dated 10 March 2011;

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 German national, was born in 1959. He joined the Court in 2004 under a one-year fixed-term appointment as Senior

Lawyer, at grade P-5, in the Prosecution Section of the Office of the Prosecutor. His appointment was subsequently extended, with his last extension being from 1 July 2008 to 30 June 2011.

In June 2008 the complainant wrote two e-mails to the members of the Executive Committee – including the Prosecutor and the Deputy Prosecutor – expressing his frustration about their management style and their way of treating staff. He stated that he was no longer proud to work for the Office and expressed his "deep dissatisfaction" with the way he was "forced to work".

On 15 December 2008 the Deputy Prosecutor informed the complainant orally that the Executive Committee had decided that he would no longer lead the trial of the Lubanga case on which he had been working since he joined the Court in 2004. Having asked for explanations, the complainant met with the Prosecutor and the Deputy Prosecutor later that day. The Prosecutor told him that the Executive Committee no longer trusted him to present the position of the Office of the Prosecutor in the Lubanga trial. He added that the decision to remove him from the case was final. The three of them met again the following day and agreed that the Executive Committee would inform the members of the team working on the Lubanga trial that the Deputy Prosecutor would replace the complainant and lead the team and that the complainant would inform the victims and the defence counsel. The minutes of that meeting, which they signed on 16 December, indicate that they also agreed that the Human Resources Section would be tasked to find a solution to ensure that the complainant receive adequate compensation for all the extra hours he had worked during the last four and a half years. On 17 December 2008 the decision to remove the complainant from the Lubanga case was reported in an international newspaper. Thereafter, there were several meetings and exchanges of e-mails between the complainant and the Deputy Prosecutor regarding the Executive Committee's decision, the handover of the Lubanga case and the complainant's next assignment. By an e-mail of 11 February 2009 the Deputy Prosecutor notified the complainant that he was assigned to another case, the "Uganda case", as a Senior Trial Lawyer.

The complainant wrote to the Secretary of the Appeals Board on 13 February 2009 requesting a review of the decision to take him off the Lubanga case. He specified that the Deputy Prosecutor had notified him on 16 January 2009 that this decision was final. By a letter of 13 March the Prosecutor replied to the complainant that the contested decision was not an administrative decision breaching his terms of appointment or applicable rules and regulations and thus was not open to review. He added that his request was time-barred as it had not been submitted within 30 days from the date on which the decision was taken, i.e. before 15 January 2009. He further stated that, by signing the "agreement" of 16 December 2008, the complainant had accepted his removal from the Lubanga case.

On 24 March 2009 the complainant filed a first appeal with the Secretary of the Appeals Board, challenging the decision to remove him from the Lubanga case. In its report of 13 August the Board held that the appeal was receivable *ratione temporis*, given that the contested decision was two-fold: the first part consisted of removing the complainant from the Lubanga case (as indicated in the minute of 16 December 2008 and confirmed on 16 January 2009) and the second part consisted of assigning him to another case (as indicated in the e-mail of 11 February 2009). According to the Board, the complainant could not fully assess the consequences of his removal from the Lubanga case until he was informed of his new assignment, and the time limit for lodging his request for review therefore began to run only from 11 February 2009. It also found that the appeal was receivable *ratione materiae*, because a violation of his terms of appointment could not be excluded *prima facie*. On the merits, the Board found that the contested decision amounted to demotion and that it affected the complainant's reputation and career prospects. It recommended that the reassignment decision be "revised" to ensure that his level of responsibility remained the same, and that measures be taken to restore his reputation. The Board further recommended that he be awarded moral damages.

In the meantime, on 10 March 2009 the complainant wrote to the Chief of the Human Resources Section seeking the payment of 145,759.73 euros in compensation for the extra hours he had worked

between 1 July 2004 and 15 December 2008. He recalled that, during the meeting of 16 December 2008, the Prosecutor had promised that he would be granted "adequate compensation" for overtime work. The Chief replied on 20 March 2009 that the Court did not grant overtime payments to staff at the professional level and that the statement made in the minutes of the meeting of 16 December was meant to refer to the taking of special leave with pay. On 17 April the complainant filed a request for review of that decision, which the Prosecutor rejected on 15 May on the grounds that, according to Staff Rule 103.15, payment of compensation for overtime work is limited to General Service staff. He also denied having promised to grant the complainant monetary compensation for overtime work. The complainant filed a second appeal with the Appeals Board on 12 June 2009, contesting the Prosecutor's refusal to review the decision of 20 March.

By a memorandum of 14 September 2009, which is the decision impugned by the complainant in his first complaint, the Prosecutor notified the complainant that he had decided to reject his first appeal as time-barred and hence irreceivable. In his view, the Board had committed an error of law in that only one administrative decision had been taken with regard to his position as Senior Trial Lawyer on the Lubanga case, and that decision had been communicated to him on 16 December 2008.

On 5 October 2009, referring in particular to the decision of 14 September, the complainant tendered his resignation. According to the terms of an agreement signed by him and by the Prosecutor that day, the Prosecutor accepted his resignation with effect from 7 October 2009 and allowed the commutation and payment of the 72 days of annual leave accrued by the complainant, i.e. 12 additional days above the normal 60 days that may be accrued.

On 30 October the Appeals Board issued its report on the complainant's second appeal. Noting that professional staff regularly work extended hours in the ordinary course of their duties, it considered that the complainant could not expect to be compensated for each and every minute he had worked beyond ordinary business hours. Moreover, the complainant had not provided sufficient evidence

that the Court's promise to compensate him for the overtime he had worked referred wholly or primarily to financial compensation. The Board recommended that his claim for 145,759.73 euros in compensation should be rejected, as well as his claim for costs. Nevertheless, it pointed out that the nature of the "adequate compensation" had never been determined, and it therefore recommended that the Prosecutor award the complainant "realistic, and preferably mutually agreed, compensation" without restricting this *a priori* to compensatory time off under Staff Rule 103.15.

On 26 November 2009 the Prosecutor informed the complainant that he had decided to endorse the Appeals Board's recommendation not to grant him the relief claimed. He added that, since the complainant had signed the agreement of 5 October, the recommendation to award him "realistic" compensation had become moot. The complainant impugns that decision in his second complaint.

B. In his first complaint the complainant contends that the decision to remove him from the Lubanga case and to reassign him to the Uganda case was arbitrary for several reasons. He points out in particular that the only reason given to him – i.e. that the Executive Committee was not confident that he would present the position of the Office of the Prosecutor in the Lubanga trial – lacked any factual basis, since he had always presented the Office's position in all proceedings. The Prosecutor therefore tried to introduce new reasons before the Appeals Board. Furthermore, the complainant argues that, between 9 January 2009, when he completed the handover of the Lubanga case, and 10 February 2009, he was not assigned any task, which shows that there was no need, and certainly no urgent need, for the Office to reassign him to the Uganda case. He also emphasises that he had successfully led the Lubanga trial team for four and a half years and that his competence had never been questioned by the Executive Committee.

The complainant also contends that the impugned decision is tainted with four errors of law. First, the Court did not comply with the general principle of law that an employee of an international organisation is entitled to a "proper administrative position", that is to say, the employee should hold a post and perform the duties pertaining

thereto. He indicates inter alia that it took the Court several weeks to find him a new assignment after it was decided to remove him from the Lubanga case and that the other case to which he was assigned was a "dead" case because no suspect had been arrested. In this regard, he refers to the findings of the Appeals Board, which noted that his reassignment entailed a significant decrease in the resources allocated to him and amounted to a demotion. Second, he argues that the impugned decision amounts to a hidden disciplinary measure for having expressed his frustration about the way the Executive Committee was managing the Office of the Prosecutor. Third, the ICC did not abide by the principle that an international organisation must treat its staff with respect and consideration. Indeed, the decision to remove him from the Lubanga case was widely publicised, which caused irreparable damage to his professional reputation and impaired his dignity. Fourth, the Prosecutor failed to give reasons in the impugned decision for disagreeing with the Committee's recommendations, whereas the Tribunal's case law requires that a decision rejecting the recommendations of the internal appeal body should be substantiated. The complainant emphasises that he never agreed to his removal from the Lubanga case and that the document that he signed on 16 December 2008 is not an agreement between him and the Prosecutor but the minutes of the meeting held that day.

In his second complaint he contends that the decision to refuse the payment of the extra hours he had worked is also tainted with errors of law. Indeed, the ICC breached the promise made to him during the meeting of 16 December that he should "receive adequate compensation for all the extra work he ha[d] done during the last four and a half years". Referring to the Tribunal's case law, he submits that, according to the rules of good faith, anyone to whom a promise was made may expect it to be kept. He adds that, contrary to the Appeals Board's recommendation, the decision to pay him 12 additional leave days was not a mutually agreed decision, as it was

taken by the Prosecutor alone, and it did not constitute a "realistic" compensation given that the extra hours he had worked amounted to 347 days. He points out that only financial compensation may now be contemplated since he is no longer employed by the ICC.

The complainant also argues that the impugned decision constitutes a breach of the principle of mutual trust. Apart from the fact that he was offered only 12 days' leave in compensation for 347 days' work, the Prosecutor stated before the Appeals Board that his intention was to allow the complainant to take time off in order to explore new job opportunities, yet he had expressed no desire to leave the Office. This demonstrates a lack of good faith on the part of the ICC.

The complainant asks the Tribunal to set aside the impugned decisions and to draw "all legal consequences", particularly by awarding him material and moral damages. He specifies that, with respect to the extra hours he worked, he claims 145,759.73 euros in material damages or "any other amount left to the wisdom of the Tribunal". Lastly, he claims costs.

C. In its reply to the first complaint the ICC submits that the Appeals Board's finding that the appeal was receivable involved an error of law. First, the appeal was irreceivable *ratione materiae* insofar as the complainant did not show that the decision to remove him from the Lubanga case had infringed his terms of appointment or violated any pertinent rules, as required by Staff Rule 111.1(a). It stresses that the complainant's letter of appointment stipulated that he was assigned to the position of Senior Trial Lawyer within the Prosecution Division of the Office of the Prosecutor, which is the position he held up to his resignation. Second, the appeal was time-barred, given that it was not filed within 30 days from the date of notification of the decision of 15 December 2008. The Court stresses that the complainant appended his signature to the minutes of the meeting of 16 December 2008, which indicated that the decision to remove him from the Lubanga case was final. It adds that all the issues relating to the complainant's reassignment should be declared irreceivable as the complainant did not exhaust internal means of redress in that respect.

On the merits, the Court asserts that the complainant's duties in his new assignment were not different to those he had when he started working on the Lubanga case. It adds that in a prosecution service different cases may be at different stages of the procedure and a senior trial lawyer may supervise a different number of colleagues depending on the nature of a case. The ICC denies that the challenged decision was a hidden disciplinary measure, stressing that it had no reason to impose a sanction on the complainant, whose performance was uncontested. It asserts that it did its utmost to protect the complainant's dignity and reputation. It indicates that the newspaper articles to which he refers are supportive of him and that it is therefore unlikely that his reputation was harmed. It emphasises that the complainant resigned voluntarily and that it cannot be blamed for the consequences of that decision. The ICC submits that the complainant was given reasons for the decision to remove him from the Lubanga case, i.e. the lack of trust in his continued availability and commitment to represent the Office of the Prosecutor. The additional reasons given during the internal appeal proceedings to justify the decision were further explanations and not new reasons. It denies that the decision was arbitrary and points out that, if it had been biased against him, the Court would not have renewed his contract for three years in June 2008. It asserts that the Executive Committee considered the Court's best interest in deciding that the Deputy Prosecutor should lead the Lubanga case instead of the complainant. In addition, the Prosecutor has full authority over the management and administration of the Office of the Prosecutor, including staff, facilities and other resources. Hence, he was competent to remove the complainant from the Lubanga case and to reassign him to another case.

Regarding the second complaint, the Court submits that the Prosecutor acknowledges that he promised the complainant that he would be compensated for overtime work but denies that he promised him that he would be granted monetary compensation. It stresses that there is no rule or practice by which professional staff of the Court should be financially compensated for overtime work and that, according to Staff Rule 103.15, compensatory time off may be granted only on an exceptional basis. The defendant contends that the

Prosecutor followed the Appeals Board's recommendation given that he concluded an agreement with the complainant on 5 October 2009 to pay him 12 additional leave days. The defendant indicates that it never accepted the complainant's calculation of overtime work, which is, in its view, "over-inflated". It points out that professional staff regularly work extended hours in the ordinary course of their duties and that, according to the Tribunal's case law, staff members in the professional category and higher may be expected to work more than the normal weekly hours without compensation for overtime.

The ICC argues that the agreement of 5 October 2009 goes beyond the payment of an additional 12 days' leave, since the Prosecutor also allowed the complainant to resign at only two days' notice, instead of the 60 days foreseen in the complainant's appointment letter. It denies the allegations of bad faith, indicating in particular that the acceptance of the complainant's resignation at very short notice and the commutation of leave days beyond the ordinary maximum of 60 days was a "loyal implementation" of the Appeals Board's recommendation.

D. In his rejoinder on the first complaint the complainant argues that his request for review was receivable *ratione materiae*, since the decision to remove him from the Lubanga case injured his dignity and good name and therefore violated the terms of his appointment as well as general principles of law. It was also receivable *ratione temporis*, since that decision was not final on 16 December 2008. Indeed, the Deputy Prosecutor had told him that she would try to persuade the Prosecutor and the other members of the Executive Committee to change their minds, and on 16 January 2009 she had advised him not to shred his personal papers on the Lubanga case. Moreover, he was aware that several senior members of the Office had written to the Prosecutor on 22 December 2008 to request that he reconsider his decision. It was only on 16 January 2009 that the Deputy Prosecutor informed him that her efforts had proved unsuccessful and that the decision was final.

Regarding his second complaint, the complainant emphasises that his claim for compensation is based on the promise made to him by the

Prosecutor, not on Staff Rule 103.15. He states that there is no connection between the minutes of the meeting of 16 December 2008 and the agreement of 5 October 2009.

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

CONSIDERATIONS

1. Both of these complaints arise out of the removal of the complainant, a former official of the ICC, as Senior Trial Lawyer for a matter known as "the Lubanga case". It is therefore convenient that the complaints be joined.

2. On 15 December 2008 the complainant's immediate supervisor, the Deputy Prosecutor, informed him that the Executive Committee had decided that he would no longer lead the trial of the Lubanga case on which he had been working since his appointment in July 2004 and which was due to commence in January 2009. Later that day the complainant met with the Deputy Prosecutor and the Prosecutor. He met with them again on 16 December 2008.

3. The minutes of the meeting of 16 December, signed by the complainant, the Deputy Prosecutor and the Prosecutor, respectively, record the events of 15 December 2008 as follows:

> "On 15 of December the Deputy Prosecutor informed the Senior Trial Lawyer of the decision, making it the first time that the Senior Trial Lawyer was informed that he is taken off the Lubanga case. The Senior Trial Lawyer requested the Deputy Prosecutor to request [the Executive Committee] to reconsider its decision and reiterated that he was still willing to lead the team at trial. He requested to see the Prosecutor together with the Deputy Prosecutor. During that meeting, the Senior Trial Lawyer again informed the Prosecutor that he [was] willing to lead the team at trial

> and requested the Prosecutor to reconsider the [Executive Committee's] decision. The Prosecutor informed the Senior Trial Lawyer that the decision was final."

The minutes then record various steps to be taken in consequence of the decision, including that the Executive Committee would inform "the members of the Lubanga trial team that [the complainant] w[ould] not lead the team during the remaining preparation of the trial […] and that the Deputy Prosecutor will lead the team, effective today". They also record that the complainant would "hand over the case in the coming days to the Deputy Prosecutor" and would inform various persons, including the victims and defence counsel, and request them to address all further enquiries to the Deputy Prosecutor. The minutes concluded with the following statement:

> "Human Resources was tasked to find a solution to ensure that the Senior Trial Lawyer will receive adequate compensation for all the extra work he has done during the last four and half years for the Office and to ensure that his carrier [sic] development will not be affected."

4. Steps were taken soon after the meeting of 16 December 2008 to inform the various persons concerned that the complainant was no longer leading the Lubanga trial team. The complainant also took steps to hand over the case to the Deputy Prosecutor. The handover was completed on 9 January 2009. In the meantime, the complainant had several further conversations with the Deputy Prosecutor who, although a member of the Executive Committee, was not happy with the decision to remove him from the Lubanga case and undertook to speak to the other members with a view to persuading them to reconsider the decision. In the course of her conversations with the complainant, the Deputy Prosecutor requested him not to shred his personal papers relating to the case and he refrained from doing so. On 13 January 2009 the complainant enquired of the Deputy Prosecutor as to the outcome of her discussions with the other members of the Executive Committee. She informed him on 16 January 2009 that, despite her efforts, they were not prepared to alter their decision. She undertook to continue her efforts in the hope that there would be a change of mind prior to the start of the trial on 26

January. There was no such change and the trial commenced as scheduled.

5. On 12 January 2009 the complainant asked for "a new assignment which fully mirror[ed his] job description as a P5 Senior Trial Lawyer". He repeated that request on 25 January and, again, on 9 February 2009. On 11 February the Deputy Prosecutor informed him that he had been "assigned to the Uganda case as a Senior Trial Lawyer".

6. The complainant forwarded a request to the Secretary of the Appeals Board on 13 February, asking that the Prosecutor "review […] his decision to take [him] off the Lubanga case, which was notified to [him] on 16 January 2009, as final". He did not, in that request, make reference to the decision to assign him to the Uganda case. The Prosecutor replied to that request on 13 March 2009, stating, amongst other things, that the decision to remove him from the Lubanga case was made on 15 December 2008 and that Staff Rule 111.1 required that a request for review be made within 30 days of that date. He added that "[a]s the mandatory time limit [...] has expired since, [his] request would no longer be receivable". The complainant filed an internal appeal on 24 March 2009, identifying the decision in question as the "[o]ral decision [...] to take me off my position as the Senior Trial Lawyer in the Lubanga case".

7. The Appeals Board submitted its report on 13 August 2009. It held that the appeal was receivable on the basis that the decision was two-fold, the first part consisting of the removal of the complainant from the Lubanga case and the second consisting of his reassignment to the Uganda case. It expressed the view that the complainant "could only fully assess the consequences of his removal from the Lubanga case once he was informed of the entirety of the decision, including the re-assignment to the Uganda case". It concluded that "the date from which the time-limit started to run [was] 11 February 2009" and, thus, the appeal was receivable. It also concluded that the decision to remove the complainant from the

Lubanga case and to reassign him to the Uganda case was a disguised sanction and recommended that his reassignment be reviewed so that he maintained his previous level of responsibility. It also recommended that measures be taken to counter the negative publicity that had prejudiced his reputation and that he be compensated for that prejudice by way of damages.

8. The Prosecutor informed the complainant on 14 September 2009 that he had decided "to maintain [his] decision to take [him] from the Lubanga trial team". One of the grounds for that decision was that the internal appeal was irreceivable, it being said:

> "Only one administrative decision was taken with regard to your position as the Senior Trial Lawyer on the Lubanga case, and that decision was communicated to you on 16 December 2008. Both your request for review and your appeal only related to that decision, which was time-barred and, therefore, irreceivable."

That decision is the subject of the first complaint.

9. The complainant contends that the Appeals Board was correct in its analysis of the decision that led to the first complaint as "two-fold" with the consequence that the time for requesting review did not start to run until 12 February 2009. Alternatively, he argues that by reason of his continuing discussions with the Deputy Prosecutor and her discussions with other members of the Executive Committee, the matter was kept open until 16 January when she informed him that they had not changed their minds. In this regard, he contends that, by reason of these discussions and certain other events, he had "a reasonable and justified expectation that the Prosecutor would reconsider his decision [...] and thus could reasonably consider that the information [he] was provided with [...] on 15 and 16 December 2008 would not amount to a final decision". These arguments must be rejected.

10. In cases where officials are simply transferred from one post to another or assigned different duties or functions, decisions to that effect will ordinarily have a double aspect and may properly be described as "two-fold". However, that is not the case where decisions

to transfer or reassign have been preceded by separate and specific decisions to remove persons from their posts or to relieve them of their duties. And that is so even if it is later necessary to assign new duties or to appoint or transfer the person concerned to a new post. In the present case, there were two distinct decisions: the first to take the complainant off the Lubanga case and the second and later decision to assign him to a different case. The Appeals Board erred in conflating the two even though the later decision was taken in consequence of the first and was, in that sense, connected to it. Accordingly, the question is whether, as the complainant argues, the first decision, namely, the decision to remove him from the Lubanga case, did not become final until 16 January 2009.

11. It is not disputed that, at least by 16 December 2008, the complainant was informed that the decision to remove him from the Lubanga case was final and that he acknowledged as much when he signed the minutes of the meeting held that day. Nor is it disputed that, very shortly afterwards, steps were taken to implement the decision, including by the complainant handing over the case to the Deputy Prosecutor by 9 January 2009. However, the complainant argues that he was entitled to rely on the fact that his direct supervisor, the Deputy Prosecutor, told him that she was seeking to persuade the other members of the Executive Committee to change their minds as indicating that the decision was, in fact, not final. In this context, he points to her request that he not shred his personal papers and, also, the fact that other Senior Trial Lawyers and the Senior Appeals Counsel wrote to the Prosecutor on 22 December requesting "that the decision [...] be revisited". In support of his argument, the complainant relies on statements in the Tribunal's decided cases (for example Judgment 607, under 8) that time limits "are not supposed to be a trap or a means of catching out a staff member who acts in good faith". He also relies on the statement in Judgment 2066, under 5, that:

> "when an organisation hints that it will reconsider a decision affecting a staff member, it cannot reasonably expect the latter to challenge that decision. Nor may the staff member lodge an appeal against it unless the Administration expressly states that the appeal procedure will take its course despite attempts to settle the case. In such instances, the rule that

> confirmation of an earlier decision sets off no new time limit for appeal does not apply."

See also Judgment 2300, under 4.

12. There are several difficulties with the complainant's argument that there was no final decision until 16 January 2009. The first is that there was no ambiguity in the statement of 15 December 2008 or in the minutes of the meeting of 16 December regarding the final nature of the decision to remove him from the Lubanga case. Another is that steps were taken almost immediately to implement the decision. Further, there was no hint from the Prosecutor or other members of the Executive Committee that they might change their minds, only the indication by the Deputy Prosecutor that she would try to persuade them to do so. Moreover, her statement to the complainant on 16 January 2009 was not in the nature of a decision. It was simply a statement that she had not been able to persuade the other members of the Executive Committee to change their minds but that she would continue her attempts to do so. It may be accepted that the complainant hoped, up until 16 January 2009, that the Prosecutor and other members of the Executive Committee would change their minds but there was nothing in their behaviour or, indeed, in the conversations that he had with the Deputy Prosecutor to lead him to think that the decision which was clearly said to be final was provisional in nature or, for any other reason, was exempt from the time limit within which to seek its review. Accordingly, the complainant's internal appeal was irreceivable. It follows that the first complaint is also irreceivable.

13. The second complaint arises out of the stipulation in the minutes of the meeting of 16 December 2008 that the Human Resources Section would be asked to find a solution to ensure that the complainant receive adequate compensation for "all the extra work he ha[d] done during the last four and [a] half years". On 10 March 2009 the complainant wrote to the Chief of the Human Resources Section seeking payment of 145,759.73 euros for the extra hours that he estimated he had worked during the period in question. His request was

refused on 20 March 2009 on the basis inter alia that the statement in the minutes was intended to refer to the taking of special leave with pay, not the payment of overtime. The complainant sought review of the decision and, ultimately, filed an internal appeal. The Appeals Board submitted its report on 30 October 2009, finding that a promise had been made to compensate the complainant but that "the nature of the promise [had] never [been] made explicit". It rejected the argument that the promise was "strictly limited to compensatory time off within the meaning of Staff Rule 103.15" and noted the Prosecutor's "stated commitment to honour his promise for adequate compensation". In consequence, it recommended that the Prosecutor award the complainant "realistic, and preferably mutually agreed, compensation without imposing *a priori* a restriction to solely [compensatory time off] under Staff Rule 103.15".

14. The Prosecutor informed the complainant of his decision to reject his internal appeal on 26 November 2009. That decision was based on events that occurred in October when the complainant resigned. The Prosecutor stated that he had implemented the commitment made at the meeting of 16 December 2008 "by accepting [the complainant's] resignation from the ICC at a very short notice and without the loss of any of [his] accrued leave days, and allowing, by explicit exception, the commutation of leave days beyond the ordinary maximum of 60 days under Staff Rule 109.7". The decision concluded with the statement that:

> "As this arrangement may be considered an award which was mutually agreed and not limited to [compensatory time off] under Staff Rule 103.15, I consider that [the] recommendation of the [Appeals Board] has become moot."

That decision is the subject of the second complaint.

15. It is not disputed that a commitment was made to the complainant to compensate him for "all the extra work he [had] done". What is disputed is the actual meaning of that promise and whether it was fulfilled by the actions of the Prosecutor in relation to the complainant's resignation. In effect, the complainant construes the

commitment as a promise to pay him for each and every hour of overtime worked at the salary scale applicable when the hours were worked. In support of that argument, he places emphasis on the word "all". However, that word must be construed in the light of Staff Rule 103.15(b) which provides:

> "Staff members in the Professional or higher categories shall be required to perform their duties in line with their responsibilities outside their working schedule to the extent required by service. The Registrar and the Prosecutor, as appropriate, may exceptionally grant compensatory time off for overtime worked."

Within that context, the expression "all the extra work [...] done" must be construed not as referring to each and every hour of overtime worked, but as the extra work over and above that which might normally be expected of a member of the professional staff who was required to perform duties outside normal hours "to the extent required by service".

16. The question of whether the commitment at issue was limited to compensatory time off, in accordance with Staff Rule 103.15(b), need not be explored. If it was, it became incapable of fulfilment in that manner when the complainant resigned and, unless it has otherwise been fulfilled, the complainant is entitled to damages for its breach. The actions which are said to have resulted in fulfilment of the promise were not at the time of those actions said to constitute its fulfilment or to be in any way related to that promise. Moreover, the Prosecutor's acceptance of a shortened period of notice appears to have been the result of his own unilateral actions. The evidence is that the complainant originally intended to give two months' notice but the Prosecutor met his counterpart from the Special Tribunal for Lebanon to which the complainant had accepted an appointment and offered to facilitate his early availability. On becoming aware of this, the complainant suggested certain possibilities to the Prosecutor. Those possibilities did not involve shortening the period of notice or the commutation of the 12 leave days to which he was entitled over and above the 60 days allowed by Staff Rule 109.7(a). Whatever the circumstances that led to the agreement with respect to the complainant's resignation, there is no evidence to link that agreement

in any way with the promise to compensate him for the extra work he had done. Accordingly, that promise remains unfulfilled and the Prosecutor's decision of 26 November 2009 must be set aside.

17. The complainant's calculations indicate that, in total, he worked approximately 2,610 hours outside normal working hours during the period he worked on the Lubanga case. On the basis that it would not be unreasonable to expect a Senior Trial Lawyer, such as the complainant, to work on average up to two hours per day outside normal working hours without compensation and that weekends and periods of annual leave should be excluded, the promise should be construed as allowing for compensation for approximately one third of the extra time worked. The complainant is entitled to damages for breach of that promise which the Tribunal assesses at 40,000 euros. The complainant is also entitled to costs, including costs of the internal appeal, in the amount of 7,500 euros.

DECISION

For the above reasons,

1. The first complaint is dismissed as irreceivable.
2. The Prosecutor's decision of 26 November 2009 is set aside, as is the earlier decision of 20 March 2009.
3. The ICC shall pay the complainant the sum of 40,000 euros in damages.
4. It shall also pay him costs in the amount of 7,500 euros.
5. The second complaint is otherwise dismissed.

In witness of this judgment, adopted on 4 November 2011, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet