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How far does the requirement of judicial impartiality extend? Do the requirements of judicial impartiality extended down to court officers and staff?

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR
THE INTERNATIONAL CRIMINAL COURT

ISSUE:
HOW FAR DOES THE REQUIREMENT OF JUDICIAL IMPARTIALITY EXTEND? DO THE REQUIREMENTS OF JUDICIAL IMPARTIALITY EXTENDED DOWN TO COURT OFFICERS AND STAFF?

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17. Roy S. Lee, *Creating an International Criminal Court – of Procedures and Compromises, in* Reflections on the International Criminal Court, (Herman A.M. von Hebel, *et al.* ed., T.M.C, Asser Press 1999).

18. Kristina Miskowiak, The International Criminal Court: Consent, Complementarity and Cooperation (2000).

19. William A. Schabas, An Introduction to the International Criminal Court (2nd Ed. 2004).

20. William A. Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone (2006).

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21. Thomas Heathe Clark, Note, *The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice": Striking a Delicate Balance*, 4 Wash. U. Global Stud. L. Rev. 389, (2005).

22. Jacob Katz Cogan, *International Criminal Courts and Fair Trial: Difficulties and Prospects.* 27 Yale J. Int'l L. 111, (Winter 2002).

23. Jack Goldsmith, Centennial Tribute Essay, *The Self-Defeating International Criminal Court*, 70 U. Chi. L. Rev. 89, (Winter 2003).

24. Laurence R. Helfer & Anne-Marie Slaughter, *Why states Create International Tribunals: A Response to Professors Posner and Yoo*, 93 Calif. L. Rev. 899, (May, 2005).

25. William K. Lietzau, Symposium, *Check and Balances and Elements of Proof: Structural Pillars for the International Criminal Court*, 32 Cornell Int'l L.J. 477, (1999).
26. Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 Harv. Int'l L. J. 271, (Winter 2003).

27. Theodor Meron, Editorial Comment, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 A.J.I.L. 359, (April 2005).

28. Valerie Oosterveld, Mike Perry & John McManus, *How Will the World Relate to the Court: The Cooperation of States with the International Criminal Court*, 25 Fordham Int'l L.J. 767, (March, 2002).

29. Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 Colum. Human Rights L. Rev. 291, (Spring 1998).

30. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 Calif. L. Rev. 1, (January, 2005).

31. Michael Scharf, *Getting Serious About an International Criminal Court*, 6 Pace Int'l L. Rev. 103, (1994).

32. Shoaib A. Ghias, *A Theoretical and Political Analysis of the WTO Appellate Body*, 24 Berkely J. Int'l L. 534.,(2006).

33. Adam M. Smith, *"Judicial Nationalism" in International Law: National Identity and Judicial Autonomy at the ICJ*, 40 Tex. Int'l L.J. 197, (Winter 2005).

34. Wessel, J. *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication.* 44 Colum. J. Transnat'l L. 377 (2006).

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35. E. J. Dionne Jr., Editorial, *Bush's Dangerous Choice*, Wash. Post, October 4, 2005, at A23 .

36. David C. Iglesias, Op-Ed, *Why I Was Fired*. N.Y. Times, March 21, 2007, at A21.

37. Evan Perez, *Divisions Hinder Efforts At Justice Department --- Two Differing Camps Emerge As Former Chief of Staff Is Set To Testify About Firings*, Wall St. J., March 26, 2007, at A6.

38. *Justice and Junkets*, N.Y. Times, January 27, 2006, at A22

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue[1]

How far should the requirement of judicial impartiality and independence extend? Should International Criminal Court ("ICC") Officers and Staff comply with the same standards of judicial independence as Judges and other court officers?

B. Summary of Conclusions

i. The Pre-Trial Chamber is obligated to recuse itself or separate Mr. Gilbert Bitti , Senior Legal Advisor to the Pre-Trial Chamber, from working on any case that he previously handled as a Legal Advisor in the Office of the Prosecutor.

Article 41 of the Rome Statute of the International Criminal Court gives the Presidency the power to remove a judge when:

> "[H]is or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted."[2]

If Mr. Bitti continues to work on the same case for the Pre-Trial Chamber on which he advised the Office of the Prosecutor while working there, then it raises the objective appearance of bias. In other cases where a Judge's impartiality has been challenged, the Judge has taken affirmative steps, such as not assuming executive duties, to assure the tribunal that there was no threat to its impartiality. In those cases where the Judge has not taken affirmative actions, the Appeals Chamber declined to question the Trial Court's

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[1] How far should the requirement of judicial impartiality extend? Should International Criminal Court Officers and Staff comply with the same standards of judicial independence and impartiality as Judges and other court officers?

[2] Rome Statute of the International Criminal Court, art. 41, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. [Reproduced in accompanying notebook at tab 1].

discretion if issues of partiality were well known to all parties and anyone could have raised the issue at a lower level. Because the Pre-Trial Chamber has not taken any steps to reassure the parties that information Mr. Bitti gained while working for the Office of the Prosecutor will not taint the judges he serves, then the Judges must either recuse themselves or present evidence that they have separated Mr. Bitti from such cases.

ii. If the Judges do not recuse themselves, then the act of hiring Mr. Gilbert Bitti is an administrative decision which adversely impacts the Pre-Trial Chamber's objective impartiality and judicial independence.

Although the Court in *Prosecutor v. Delalic*[3] refused to dismiss the Appeals Panel solely because members participated in an administrative decision regarding Judge Odio Benito's impartiality, in *dicta* the Court noted that if an administrative decision impinges on impartiality then it could serve as a basis for disqualification.[4] Here, the Pre-Trial Chamber made an administrative decision when it hired Mr. Bitti that could negatively reflect on their independence and impartiality because they knew or should have known the consequences. Mr. Bitti previously worked for the Officer of the Prosecutor and his duties for the Pre-Trial Chamber, if not properly monitored, would overlap with and conflict with his past duties.

Given that the Pre-Trial Chamber's administrative hiring decision is so closely linked with concepts of objective bias, the Pre-Trial Chamber should note that this "administrative" decision raises questions of the appearance of bias.

[3] Prosecutor v. Delalic, Case No. IT-96-21, Decision of the Bureau on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, (October 25, 1999). [Reproduced in accompanying notebook at tab 7].

[4] *Id.* at ¶ 9 - 10.

iii. The ICC Statute and tradition both give the Office of the Prosecutor wide discretion, but statutory deficiencies allow political interference.

Article 42 of the Rome Statute gives the Prosecutor independence from political orders, but other provisions in the Rome Statute enable political decisions to override the Prosecutor's independence.[5] Thus while our ideals hope the in the sensitive area of international criminal prosecutors would be free from political interference reality cautions otherwise.

II. BACKROUND

A. Factual Backround

[5] See Rome Statute, *supra* note 2, at art. 42 [reproduced in accompanying notebook at tab 1]. See Also *Id.* at art. 16. (Noting that the Security council may defer a prosecutor's investigation under its Chapter VII powers of the United Nations Charter for up to 12 months). See also *Id.* at art. 15 (noting that the Prosecutor may initiate investigations *proprio motu*). See Also *Id.* at art. 14 (Regards State Party referral for the Office of the Prosecutor to start an investigation). See Also *Id.* at art. 12-13. (Regards the jurisdiction of the court to hear a case.) See Also *Id.* at art. 19 (If a State sufficiently investigates or prosecutes a case then the court lacks jurisdiction). See Also William A. Schabas, An Introduction to the International Criminal Court 82 (2nd Ed. 2004) ("The International Law Commission proposal met with sharp criticism as an interference in the independence and impartiality of the future court. By allowing political considerations to influence prosecution many felt that the entire process could be discredited.") [Reproduced in accompanying notebook at tab 18]. See Also *Id.* at 119 ("The initiative to prosecute a case may come from three sources: a State Party, the Security Council or the Prosecutor," internal citations omitted). See Also *Id.* at 120 ("Some powerful States vigourously opposed the idea [of a fully independent prosecutor], fearful that the position might be occupied by an NGO-friendly litigator with an attitude… During the Rome Conference, the United States declared that an independent prosecutor "not only offers little by way of advancing the mandate of the Court and the principles of prosecutorial independence and effectiveness, but also will make much more difficult the Prosecutor's central task of thoroughly and fairly investigating the most egregious of crimes… The fears of the conservatives have been given some recognition in provisions by which the Court's judges may supervise prosecutorial discretion." Emphasis added).

The Office of the Prosecutor is one of the four "organs" of the International Criminal Court along with the Divisions, the Presidency and the Registry.[6] The Divisions "organ" contains the Pre-Trial, Trial, and Appellate Divisions.[7] The State Parties elect the Tribunal's 18 judges for a single 9 year term and the judges are ineligible for re-election.[8] Three judges, elected by a majority of the Tribunal's 18 judges, comprise the ICC Presidency to administer the court.[9] The Registry handles the non-judicial aspects of the Court's administration and the principle officer, the Registrar is elected to a five year term by the judges.[10]

The Office of the Prosecutor, a "separate and independent organ of the court," investigates and prosecutes suspected crimes and criminals.[11] The State Parties elected the Prosecutor and he and his deputies must be "persons of high moral character with extensive experience in criminal prosecutions."[12] All principles of the Court's "organs," judges, the Prosecutor and his deputies, and the Registrar and his deputies take a solemn oath to carry out their duties "impartially and conscientiously."[13]

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[6] William A. Schabas, An Introduction to the International Criminal Court 177 (2nd Ed. 2004) [reproduced in accompanying notebook at tab 18]; Rome Statute, *supra* note 2, art. 34 [reproduced in accompanying notebook at tab 1].

[7] *Id.*

[8] *Id.* at 177, 179; Rome Statute, *supra* note 2, art. 36 [reproduced in accompanying notebook at tab 1]

[9] *Id.* at 177; Rome Statute, *supra* note 2, art. 38 (noting that the Presidency is responsible for the "proper administration of the Court, with exception of the Office of the Prosecutor.") [reproduced in accompanying notebook at tab 1].

[10] *Id.* at 182-183; Rome Statute, *supra* note 2, art 43 [reproduced in accompanying notebook at tab 1].

[11] *Id.* at 181-182; Rome Statute, *supra* note 2, art 42 [reproduced in accompanying notebook at tab 1].

[12] *Id.*

[13] *Id.* at 183; Rome Statute, *supra* note 2, art 45 [reproduced in accompanying notebook at tab 1].

On December 7, 2005 a former Legal Advisor in the Office of the Prosecutor ("OTP"), Mr. Gilbert Bitti, surprised the OTP when he attended a Pre-Trial conference as a Senior Legal Advisor to the Pre-Trial Division.[14] Previously Mr. Bitti worked in the OTP as a Legal Advisor in the Legal Advisory Section of the OTP from January 2004 until October 2005.[15] Immediately after leaving the OTP he became Senior Legal Advisor to the Pre-Trial Division in October 2005.[16]

Mr. Bitti's duties in the OTP included rendering legal advice, participating in legal discussions regarding pending cases, and composing legal memoranda advising the Prosecutor.[17] Most troubling, Mr. Bitti worked on the same case in the OTP for which he attended the Pre-Trial conference as the Senior Legal Advisor for the Pre-Trial Division.[18] Previously, Mr. Bitti wrote legal memoranda, participated in discussion and helped to develop legal strategies for crimes that occurred in Uganda and the Democratic Republic of the Congo.[19] As Senior Legal Advisor to the Pre-Trial Division it's likely that Mr. Bitti will work on issues that he previously worked on and helped devise strategy for in the OTP.[20]

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[14] Prosecutor v. Kony, Prosecutor's Application to Separate the Senior Legal Advisor to the Pre-Trial Division from Rendering Legal Advice Regarding the Case, Case No. ICC-02/04-01/05, ¶ 10 (August 31, 2006) [Hereinafter referred to as "Prosecutor's Application"] [Reproduced in accompanying notebook at tab 10].

[15] *Id.* at 4.

[16] *Id.*

[17] *Id.* at 4-5.

[18] *Id.*

[19] *Id.* at 7-8.

[20] *Id.* at 9.

When the OTP learned of Mr. Bitti's new position as Senior Legal Advisor to the Pre-Trial Division, it took steps to notify the court of this appearance of impropriety. Indeed, in its application before the Pre-Trial Chamber II the OTP noted

> "On 9 January 2006, approximately one month after the OTP learned that Mr. Bitti appeared to be participating in the same case in which he had worked as OTP Legal Adviser, the OTP filed a notice in this proceeding and in the DRC [Democratic Republic of the Congo] proceeding informing the Pre-Trial Chambers that the OTP had sought certain administrative relief from the Presidency, with the aim of preventing future challenges by any party to the appearance of impartiality of the judges of the Pre-Trial Chamber."[21]

Between January and October 2006 the OTP repeatedly voiced its concerns to the Pre-Trial Chambers, but the Court did not take affirmative steps to assure the Prosecutor that Mr. Bitti's duties would not include the *Kony* case that he worked on while at the OTP.[22]

Since this January 2006, defense counsel has also joined the Prosecution's request, since the Court has issued conflicting statements regarding Mr. Bitti's duties.[23]

B. Historical Backround

Nuremberg provides a basis for international criminal tribunals and the appearance of impartiality problem. Several drafters of the London Agreement and the Charter of the International Military Tribunal, which created the Nuremberg Tribunal, later participated in the trials.[24] The London Agreement and the Charter of the International Military Tribunal gave the Nuremberg Tribunal power to prosecute Nazi

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[21] *Id.* at 10 (internal citations omitted, clarification added), See also *id.* at note 14.

[22] *Id.* at 14.

[23] *Id.*

[24] Whitney Harris, Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945-1946 498-499 (1954).

war criminals. Justice Robert Jackson was the United States chief representative, helping to form the London Agreement.[25] Justice Jackson later served as the Chief American Prosecutor at Nuremberg.[26] Advocates for the United Kingdom and France, who helped their nations' negotiate the London Agreement, also served as their nations' prosecutors at Nuremberg.[27] Most troubling were situations where the Tribunal's judges previously advocated for a seemingly partial decision.

Before trial at Nuremberg Soviet General Iona Timofeevich Nikitchenko remarked:

> We are dealing here with the chief war criminals who have already been convicted and whose conviction has been already announced by both the Moscow and Crimea declarations by the heads of the governments, and those declarations both declare to carry out immediately just punishment for the offenses which have been committed… The case for the prosecution is undoubtedly known to the judge before the trial starts and there is, therefore, no necessity to create a sort of fiction that the judge is a disinterested person who has no legal knowledge of what has happened before. If such procedure is adopted that the judge is supposed to be impartial, it would only lead to unnecessary delays and offer the opportunity for the accused to bring delays in the action of the trial.[28]

General Nikitchenko represented the USSR at Nuremberg and the principle French negotiator, M. Le Conseiller R. Falco, served as France's alternate member on the Tribunal.[29]

Critics charge that the Nuremberg Tribunal was nothing more than "victors' justice" and that the Tribunal was not impartial, especially given General Nikitchenko's

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[25] *Id.* at 499.

[26] *Id*

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[27] *Id.*

[28] General Nikitchenko quoted in *Id.* at pg 16-17.

[29] *Id.* at 499.

seemingly biased statement.[30] Furthermore since Nuremberg, the United Nations created other *ad hoc* tribunals to prosecute international war crimes and various crimes against humanity.[31] These tribunals have also faced challenges to judicial impartiality.[32] Defendants at the ICTY and ICTR Tribunals have charged that Judges or Prosecutors lacked impartiality. None of the *ad hoc* tribunals have faced a situation where the Prosecutor challenged judicial impartiality nor have any of the *ad hoc* tribunals ruled on a case where a judicial staff member's activities served as a basis to attack judicial impartiality.[33]

Questions regarding impartiality and independence are not limited to the International Criminal Court and judges in general. In recent weeks allegations that political influence improperly entered into discussions between President George W. Bush and Attorney General Alberto Gonzales regarding whether to replace eight United States Attorneys have rocked the United States.[34] Indeed, commentators argue over

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[30] See Whitney Harris, *supra* note 15, at 500-501 (refuting critics charges and the political realities after World War II that constrained full judicial impartiality).

[31] For example the United Nations created the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the wake of ethnic cleansing and the UN created the International Criminal Tribunal for Rwanda ("ICTR") to prosecute perpetrators of Hutu/Tutsi conflict.

[32] See Prosecutor v. Delalic, Case No. IT-96-21, Decision of the Bureau on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative That Certain Judges Recuse Themselves, ¶ 2 (Oct. 25, 1999) (Challenging an ICTY judicial panel's impartiality because it participated in a plenary finding Judge Odio Benito's election as Vice-President of Costa Rica compatible with her duties as an ICTY Judge) [reproduced in accompanying notebook at tab 7]; Prosecutor v. Akayesu, Case No. ICTR-96-4, Appeals Chamber Judgment, ¶ 90 (Jun. 1, 2001) (Claiming that biased prosecution diminished the trial chamber's impartiality) [reproduced in accompanying notebook at tab 5]; Prosecutor v. Furundizija, Case No. IT-95-17/1-A, Appeals Chamber Judgment, ¶ 164, (Challenging Judge Mumba's impartiality given past history when she represented her government on the United Nations Commission on the Status of Women) [reproduced in accompanying notebook at tab 9]

[33] The writer searched all *ad hoc* tribunal cases challenging judicial impartiality and the writer found no evidence of a judicial impartiality challenge on the aforementioned basis.

[34] See David C. Iglesias, Op-Ed, *Why I Was Fired*. N.Y. Times, March 21, 2007, at A21 (In his editorial piece former US Attorney David Iglesis contends that despite, excellent performance reviews, the

whether the President or Attorney General could have dismissed the US Attorneys for political reasons since they serve "at the pleasure of the President."[35] Issues like these reflect on the independence of the Judiciary and Prosecutorial discretion. Previously the Bush administration faced a similar challenge regarding its motives when the administration nominated former White House Counsel Harriet Miers to replace Sandra Day O'Connor on the United States Supreme Court. Among the various reasons why President Bush withdrew Miers' nomination were questions raised in the U.S. Senate about her role as White House Counsel and position in setting controversial administration policies.[36]

The United States Supreme Court has not escaped criticism either. Indeed, many point to Justice Antonin Scalia's duck hunting trip with Vice-President Dick Cheney as especially troubling, given that the Vice-President was a party in an upcoming court case.[37] To many observers, what was especially troubling about this was Justice Scalia's refusal to recuse himself when his objective appearance of impartiality was compromised by his enjoying a hunting trip with a known future litigant in his court.[38] Equally

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American Attorney General, Alberto Gonzalez, suggested that the President fire him when he would not rush a corruption investigation against a democratic politician.) [Reproduced in accompanying notebook at tab 35].

[35] See Evan Perez, *Divisions Hinder Efforts At Justice Department --- Two Differing Camps Emerge As Former Chief of Staff Is Set To Testify About Firings*, Wall St. J., March 26, 2007, at A6 [Reproduced in accompanying notebook at tab 37].

[36] See E. J. Dionne Jr., Editorial, *Bush's Dangerous Choice*, Wash. Post, October 4, 2005, at A23 [Reproduced in accompanying notebook at tab 35]

[37] See *Justice and Junkets*, N.Y. Times, January 27, 2006, at A22 [Reproduced in accompanying notebook at tab 38].

[38] *Id.*

damaging was evidence that "gifts" and other junkets are not uncommon for Supreme Court Justices to receive.[39]

This paper will not rehash political issues and will not revisit issues already discussed in Prosecutor v. Kony, *Prosecutor's Application to Separate the Senior Legal Advisor to the Pre-Trial Division from Rendering Legal Advice Regarding The Case*,[40] but instead this paper will look at the issue of impartiality between the Office of the Prosecutor the other organs of the International Criminal Court. Particularly, this paper will analyze what structural safeguards protect Judicial and Prosecutorial decision making and what are the dangers of actual or apparent political influence on judicial impartiality. This paper will concentrate on the emergence of independence standards in international tribunals from Nuremberg, to the *ad-hoc* tribunals and finally the ideals expressed by the Rome Statute of the International Criminal Court. Overall, this paper will discuss judicial independence and prosecutorial discretion, their strengths and flaws at the ICC, and the advantages and disadvantages of politics interfering with ICC decisions.

III. JUDICIAL IMPARTIALITY IN INTERNATIONAL CRIMINAL TRIBUNALS

Judicial independence is a paramount concern for judges in all judicial systems.[41] Assessing Judicial independence in international criminal tribunal is more difficult

[39] See *Id.* ("The Los Angeles Times reported in 2004, for example, that Justice Clarence Thomas had accepted thousands of dollars in gifts in recent years, including an $800 leather jacket, a $1,200 set of tires from Nascar and an extravagant vacation from a conservative activist. Federal judges below the Supreme Court level accept dozens of free vacations each year from well-heeled special interests under the guise of "judicial education.'").

[40] Prosecutor's Application, *supra* note 14 [Reproduced in accompanying notebook at tab 10].

[41] Theodor Meron, Editorial Comment, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 A.J.I.L. 359 (April 2005). [Reproduced in accompanying notebook at tab 26].

because none of the tribunals reflect a single legal system, unlike many national courts where "judges, lawyers, and commentators" can base their interpretations on the tradtions of a single system.[42] Independence increases public respect in the courts and makes the public and governments more likely to turn to courts to resolve disputes.[43] Furthermore independence helps judges keep an eye toward the law and filter out extraneous concerns that should not weigh on their judgments.[44] Overall the concerns for judicial independence help to increase predictability and enhance trust in judicial decisions.[45]

Measuring impartiality is based on assessing a judges subjective and objective impartiality.[46] A judge's prior and outside activities help to determine whether he or she can rule impartially in a particular case.[47] The relatively confined world of international legal tribunal actors (judges, attorneys and prosecutors) complicates the issue since actors in this small group may have previously participated in conflicting roles.[48] Furthermore,

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[42] Jacob Katz Cogan, *International Criminal Courts and Fair Trial: Difficulties and Prospects*, 27 Yale J. Int'l L. 111, 116 (Winter 2002) [Reproduced in accompanying notebook at tab 22].

[43] Meron, *supra* note 41, at 359 [Reproduced in accompanying notebook at tab 27].

[44] *Id.* Extraneous concerns can include issues of tenure, pay, political pressure or any other sets of factors that most court systems seek to eliminate from judicial decisions.

[45] *Id.*

[46] *Id.*

[47] See Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 Harv. Int'l L. J. 271, 280, (Winter 2003) [Reproduced in accompanying notebook at tab 26].

[48] *Id.* ("[A] judge on an international court may have acted in the past as counsel before the same tribunal, or may have acted as an advisor to one of the parties before the tribunal; she may have served as a diplomat dealing with issues which subsequently cone before the court; or she may have expressed views in academic writings on issues directly relevant to the case.")

rules in many legal systems favors academics or other skilled persons to fill key positions.[49]

A. Objective and subjective appearance of impartiality among international war crimes tribunals

Judicial independence is the mechanism that ensures the goal of judicial impartiality.[50] An independent judiciary ensures that judges apply the law, free of self-interest constraints, or other issues that can improperly cloud their judgment.[51] Judicial independence must balance the need for decisional independence with accountability.[52] Thus judicial independence helps judges block out extraneous influences and apply the law neutrally.[53] It is the means we use to protect the right to a fair trial of the accused.[54] In the United States, the American Constitution grants all "judicial power" to the federal judiciary, while giving Congress the power to hold the judiciary accountable.[55] In the area of International Human Rights law judicial independence is the means we use to protect the end – judicial impartiality.[56]

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[49] *Id.*

[50] Charles Gardner Geyh, When Courts & Congress Collide: The Struggles for Control of America's Judicial System 8 (2006) [Reproduced in accompanying notebook at tab 13].

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] See *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed 60, 1 Cranch 137 (1803) (U.S. Supreme Court held that Congress had no right to change the court's original jurisdiction) [Reproduced in accompanying notebook at tab 4].

[56] William A. Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone 505 (2006) [Reproduced in accompanying notebook at tab 19].

While subjectively a judge or prosecutor may be above reproach, structural deficiencies in nomination, tenure and appointment, affecting judicial independence, can objectively cast doubt on the officer's ability to impartially complete his or her job.[57] International bodies address the problems created by the lack of objective or subjective judicial independence differently.

While traditional independence analysis looks at the protection governments give to judges' decisional independence to protect the end of impartiality, it is clear that the protections extend to all aspects of the judicial process. At the heart of the Prosecutor's Application in *Prosecutor v. Kony*, is whether the Pre-Trial Chamber based its decision on legitimate gap filling or whether the decision reflects improper judicial activism. Gap filling is a proper judicial exercise because drafters often leave provisions open to interpretation at the discretion of the court.[58] Indeed the ICC Preparatory Commission specifically left provisions open for the Court's future interpretation.[59]

Articles 40 and 41 note that judges must be independent and impartial, but the articles only discuss how outside activities may affect independence and objective bias may affect impartiality.[60] Here, we face a question where the Pre-Trial Chamber Judges'

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[57] *Id.* at 506.

[58] Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication.* 44 Colum. J. Transnat'l L., 377, 386 (2006) ("Gap-filling occurs when other institutions fail to articulate a specific rule so that judges must make a policy determination in the process of resolving the dispute at hand. The negotiating history behind the Rome Statute illustrates the gap-filling role judges must often fill; some delegates to the ICC's Preparatory Commission argued that problems arising from ambiguity in the treaty would be naturally addressed by the bench.") [Reproduced in accompanying notebook at tab 33].

[59] *Id.* See Also *Id.* at note 39 ("See, e.g., William K. Lietzau, *Check and Balances and Elements of Proof: Structural Pillars for the International Criminal Court*, 32 Cornell Int'l L.J. 477, 481 (1999) (discussing ambiguity in regard to the elements of crimes)") [reproduced in accompanying notebook at tab 25].

[60] Rome Statute, *supra* note 2, art. 40-41 [reproduced in accompanying notebook at tab 1].

impartiality may raise reasonable concerns of bias. Furthermore, since this case is unique and the drafters failed to further delineate the boundaries of objective bias, then the Trial Chamber must "gap-fill" by looking to decisions and rules in other jurisdictions to determine the test for impartiality. Before we gap fill from other *ad hoc* tribunals we should first see if there are relevant ICC provisions that further define a judge's impartiality obligations.

i. Rome Statute Articles that provide structural safeguards to attacks to judicial independence

The Rome Statute of the ICC provides structural safeguards and guards against attacks to judicial independence. Article 36 of the Rome Statute details the qualifications judicial candidates must possess and their election procedures.[61] Specifically, judges must be "persons of high moral character" and judicial candidates must have international humanitarian law experience in addition to being eligible to serve on their home nation's highest court.[62] Furthermore, Articles 46 – 49 outline detailed procedures for when State Parties may remove judges for misconduct and those articles also detail judicial privileges, immunities and protections for their salaries from political attack.[63]

On its surface the Rome Statute provides many safeguards for the independence of ICC Judges and the Office of the Prosecutor. Article 36 § 3 notes that the state parties must choose among judicial candidates that reflect "high moral character, impartiality

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[61] Rome Statute, *supra* note 2, art. 36 [reproduced in accompanying notebook at tab 1]

[62] *Id.*

[63] *Id.* at art. 46-49; See Also Charles Gardner Geyh, *supra* note 47, at 30 ("The debate on the modification [of the compensation clause] underscored the tension between two competing aims: to insulate judicial salary from legislative manipulation and to permit the legislature to increase judicial pay to ensure that judge receive salaries commensurate with their status as members of an independent branch of government." Clarification added) [reproduced in accompanying notebook at tab 13];

and integrity" and who are eligible for the highest judicial offices in their home countries.[64] The statute provides for judicial elections by secret ballot and legal, geographic and gender diversity.[65] Once Judges have been elected by two-thirds of the State Parties, then the judges serve for nine years without eligibility for reelection.[66]

While these factors help favor independence, the relevant Article regarding independence does not define the limits of Judicial Independence. Article 40 notes that "The judges shall be independent in the performance of their functions," but it doesn't say what "independent" or "independence" contains.[67] The other provisions in Article 40 attempt to place broad limits on outside influence by noting that Judges shall serve full time and not engage in activities that may or appear to compromise their independence.[68] Furthermore, only an "absolute majority" of the Judges may decide what outside activities compromise their judgment or affect their fulltime commitment to the court.[69]

Many critics contend that the limited authority and political control of judges and prosecutors creates a far effective prosecution of alleged rights violators.[70] These critics

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[64] Rome Statute, *supra* note 2, at art. 36 [Reproduced in accompanying notebook at tab 1].

[65] *Id.* at art 36 §§ 6-7.

[66] *Id.* at art. 36 § 9 (The statute create staggered elections so that a third of the judges are eligible for reelection every three years. The first panel consisted of judges with three, six, and nine year terms, but the three year term judges could be reelected.)

[67] Rome Statute, *supra* note 2, at art. 40 § 1. [Reproduced in accompanying notebook at tab 1]

[68] *Id.* at §§ 2-3.

[69] *Id.* at § 4.

[70] See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 Calif. L. Rev. 1, (January, 2005). (Posner and Yoo contend that states comply with international court decisions more often when the judges have very limited jurisdiction and are under political control. Indeed Posner and Yoo contend that the most "independent" international dispute resolution bodies are the least effective and are the ones most likely to have their judgments ignored by state parties. Posner and Yoo however do make an exception for the European Court of Humans Rights and other European bodies where they note the political harmony and independent legal traditions for the success of those independent bodies).

contend that those who favor international courts incorrectly believe that the judicial independence favored in domestic courts can be reproduced on the international level with similar results.[71] However these critics note that international tribunals lack "a hierarchy, an enforcement mechanism, and a legislative instrument that allows for centralized change."[72] In many situations a party who loses before an independent tribunal will ignore the order because the court has no enforcement mechanism.[73]

These same critics reserve some of their most bitter complaints for the International Court of Justice. Posner and Yoo cite many of the features that support independence as what they see as flaws in the ICJ.[74] Indeed Posner and Yoo argue that nations only comply with ICJ decisions only 40% of the time when the court exercises its compulsory jurisdiction.[75]

ii. ICTY's Application of the objective impartiality standard based on a Judge's previous service for her home government

In *Prosecutor v. Furundzija*[76] the ICTY Appeals Chamber rejected the defendant's challenge to the Trial Chamber's independence and objective impartiality.[77]

[Reproduced in accompanying notebook at tab 30]. See Also Laurence R. Helfer & Anne-Marie Slaughter, *Why states Create International Tribunals: A Response to Professors Posner and Yoo*, 93 Calif. L. Rev. 899, (May, 2005). (Helfer and Slaughter argue that Posner and Yoo's conclusions are based on flaw methodology and discount the success of independent tribunals). [Reproduced in accompanying notebook at tab 24].

[71] Posner, *supra* at 12. [Reproduced in accompanying notebook at tab 30].

[72] *Id.* at 13.

[73] *Id.*

[74] See Posner, *supra* at 35. [Reproduced in accompanying notebook at tab 30].

[75] *Id*. at 37.

[76] Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgment of the Appeals Chamber, Jul. 21, 2000. [Reproduced in accompanying notebook at tab 10]

[77] *Id.* at ¶ 164.

In this case the defendant complained that the Presiding Judge Mumba's previous activities with the United Nations Commission on the Status of Women ("UNCSW") gave the appearance of bias.[78] The defendant did not allege that Judge Mumba was actually or subjectively biased, but only that a reasonable person might doubt the impartiality of her decision, given her past activities advocating for UNCSW.[79]

Previously Judge Mumba had represented the Zambian Government on the UNCSW, and while she represented the government the UNCSW, she expressed concern over "allegations of mass and systematic rape" and "urged the International Tribunal to give them priority by prosecuting those allegedly responsible."[80] Judge Mumba's previous activities were relevant because the ICTY court convicted Furundzija for rape as a war crime.[81]

A Judge's personal convictions alone may not serve as a basis for disqualification on grounds that the Judge is objectively biased. Indeed, the Court noted that "[a]bsolute neutrality on the part of a judicial officer can hardly if ever be achieved."[82] In rejecting Furundzija's arguments the ICTY Appeals Chamber noted that many of Judge Mumba's previous activities and indeed, many of the UNCSW's goals against rape and for the

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[78] *Id.*

[79] *Id.* at ¶ 169.

[80] *Id.* at ¶ 166.

[81] *Id.* at ¶ 13.

[82] *Id.* at ¶ 203.

rights of women are advocated by the United Nations Charter and Security Council Resolutions.[83]

To measure when outside influence may improperly weigh or seem to weigh on judicial decisions the court noted that international tribunals have a two-part test; one aspect looks at subjective independence and impartiality and the other approach measure objective impartiality and independence.[84] The ICY Appeals Chamber noted that "a Judge "might not bring an impartial and unprejudiced mind" to a case if there is proof of actual bias or of an appearance of bias.""[85] Because of the small nature of the legal community there is often a relationship between a judicial or prosecutorial candidate's necessary experience and his or her past, sometimes conflicting, professional endeavors.[86] Regardless of these issues, judges are presumed to be impartial unless the defendant can advance evidence otherwise.[87]

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[83] *Id.* at ¶ 201.

[84] *Id.* at ¶ 179. See also *Id.* at ¶ 181 quoting the European Court of Human Rights in *Piersack v. Belgium* ("Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 (art.6-1) of the Convention, be tested in various way. A distinction can be drawn in this context between a subjective approach, that is endeavoring to ascertain the personal conviction of a given Judge in a given can, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect."); See Also Prosecutor v. Delalic, *supra* note 3, at ¶ 2 ("Under the objective component of this test, the court must assess relevant circumstances that may give rise to an "appearance" of partiality. If there is "legitimate reason to fear" a lack of impartiality in a judge, her or she must withdraw from the case") [Reproduced in accompanying notebook at tab 6].

[85] Furundzija, *supra* note 61, at ¶ 179 [reproduced in accompanying notebook at tab 9]

[86] See Furundzija, *supra* note 61, at ¶ 205 ("The Appeals Chamber does not consider that a Judge should be disqualified because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements. Judge Mumba's membership of the UNCSW and, in general, her previous experience in this area would be relevant to the requirement under Article 13(1) of the Statute for experience in international law, including human right law. The possession of this experience is a statutory requirement for Judges to be elected to this Tribunal. It would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias.") [Reproduced in accompanying notebook at tab 9].

[87] *Id.* at. ¶ 182, 197.

iii. Bitti's effect on the Pre-Trial Chamber's objective impartiality compared to Judge Mumba in Prosecutor v. Furundzija

In the instant case we must decide whether Mr. Bitti's work as Senior Legal Advisor to the Pre-Trial Chamber weighs on the Judges' impartiality and independence. As previously noted, the OTP has already posited that law clerks and advisors affect the impartiality and independence of judges so that what the judge may not do, neither should those who advise him or her.[88] The OTP's reasoning is based almost exclusively on a jurisdictional analysis noting that "Jurisdictions applying the objective appearance of impartiality test have universally disapproved of judges sitting as arbiters of cases to which they were exposed in some other capacity, including in particular the capacity of prosecutor or investigator."[89]

At the outset it is important to note that, as in *Furundzija,* there is no allegation that any of the judges sitting in the Pre-Trial Chamber are actually biased; but there are concerns that having Mr. Bitti serve as a judicial advisor immediately after serving as an advisor in the Office of the Prosecutor may give the "objective appearance" of bias.[90] This paper looks at the factors other international criminal tribunals have used to substantiate or reject claims of bias and whether Mr. Bitti's conduct involves enough of these factors to deminish the Judges' impartiality and independence. *Furundzija* noted that seemingly incompatible prior activities, without more, will not automatically destroy a judge's impartiality and independence, especially given the factors that favor

[88] Prosecutor's Application, *supra* note 14, at ¶ 40-41. [Reproduced in accompanying notebook at tab 10]

[89] *Id.* at ¶ 46.

[90] *Id.* at ¶ 27 ("Further, the circumstance presented by the Senior Legal Adviser's successive appointments is just one of many possible situations in which as circumstance relating to a legal adviser of a judge could potentially undermine the appearance of impartiality of the judge or the tribunal")

experience in international tribunals coupled with the close-knit international legal community.[91] Indeed, the court noted that when measuring independence or bias one must look from the perspective of a reasonable person.[92] *Furundizija* held that a "reasonable person must be an informed person, with knowledge of all the relevant circumstance, including the traditions of integrity and impartiality that form a part of the background…"[93]

While it is true that the close-knit legal community of the international tribunals seems to favor the view that a more stringent application of the objective independence standard would impinge on court operations, other factors unique to Mr. Bitti's situation weigh against adopting a lax approach to the appearance of bias. In *Furundzija*, Judge Mumba, represented her government, not herself on the UNCSW, but authors of the *amicus curiae* brief and one of the *Furundzija* prosecutors attended a 1998 meeting of the UNCSW while Judge Mumba was still a member.[94] Indeed, Judge Mumba advocated increasing rape prosecutions for the former Yugoslavia before she became an ICTY Judge.[95]

Despite by Judge Mumba's and Mr. Bitti's seemingly contradictory former legal jobs, unlike *Furundzija*, the Office of the Prosecutor in the instant case has raised the

[91] Furundzija, *supra* at ¶ 205. [Reproduced in accompanying notebook at tab 9]

[92] *Id.* at ¶ 190.

[93] *Id.*

[94] *Id.* at ¶ 166.

[95] *Id.*

issue early as the Court suggested in *Furundzija*.[96] Thus, by raising the issue early the OTP hasn't "waived" its rights and indeed, once the OTP discovered Mr. Bitti's conflicting roles it immediately notified the Pre-Trial Chamber.[97]

B. In rare circumstances, given the totality of facts, administrative decisions can reflect more than simple court administration, but could implicate judicial decision-making and thus make usually immune administrative decisions by judges subject to the subjective and objective impartiality tests.

Even if the a judicial officer passes the objective and subjective independence tests, he or she may still be disqualified if his or her outside activities constrain his or her ability to carry out assigned duties.[98] In ICTY case *Prosecutor v. Delalic*[99] defendants sought to disqualify the entire panel of Trial Chamber judges because those judges had previously participated in an administrative matter.[100] Defendants Zejnil Delalic, Zdravko Mucic, Hazim Delic, and Esad Landzo filed a motion under Rule 15 of the Rules of Procedure and Evidence because the judges participated in a plenary session where the judges found that the nomination of Judge Odio Benito as Vice-President of Costa Rica did not destroy her impartiality.[101] The defendants contended that the

[96] *Id.* at ¶ 173 ("First, the Appellant states that he first discovered judge Mumba's associations and personal interest in the case after judgement was rendered, and for this reason, only then raised the matter before the Bureau. Although the Appeals Chamber has decided to consider this matter further, given its general importance, it would point out that information was available to the Appellant at trial level, which should have enabled him to discover Judge Mumba's past activites and involvement with the UNCSW"); See Also *Id.* at ¶ 174 ("The Appeals Chamber considers that it would not be unduly burdensome for the Appellant to find out the qualifications of the Presiding Judge of his trial").

[97] Prosecutor's Application, *supra* note 14, at ¶ 15-16. [Reproduced in accompanying notebook at tab 10]

[98] Prosecutor v. Delalic, *supra* note 3, at ¶ 10. [Reproduced in accompanying notebook at tab 6].

[99] *Id.*

[100] *Id.* at ¶ 2.

[101] *Id.*

resolution of an administrative matter, whether Judge Benito could impartially serve, prejudiced the judges against them.[102] At the time Judge Benito served in the Appeals Chamber and participated in the *Celebici* case.[103]

The *Delalic* Court distinguished between administrative adjudication of judicial disqualification and exercise of judicial decision making.[104] Indeed, the Court noted that the ICTY statute required resolution of a matter questioning a judge's independence at an administrative level.[105] Furthermore, the decision by the judges did not involve the particular issues to be decided on appeal.[106] To prevail, the defendant must have "shown that the activity incompatible with the discharge of judicial functions has a direct and specific impact upon the impartiality of a Judge in a particular case before a Chamber, then the matter comes within the purview of the disqualification procedure."[107]

Applying the Court's standard in the instant case, even if Mr. Bitti satisfied the objective and subjective impartiality requirements mentioned above, then his employer judges could still be disqualified if their previous actions in selecting Mr. Bitti impinge their impartiality. It is important to note that selecting Mr. Bitti as a legal advisor would be a judicial function similar to the issue decided in *Delalic* because it does not invoke a judge's decision-making, but only his or her duties to select staff. Analogous to *Delalic*,

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[102] *Id.* at ¶ 11.

[103] *Id.*

[104] *Id.* at ¶ 15.

[105] *Id.* at ¶ 14. The court noted that it decided a general question regarding the applicability of Article 13 of the ICTY Statute to determine whether Judge Benito could continue her duties. It did not rule on the facts particular to the case.

[106] *Id.*

[107] *Id.* at ¶ 10.

its only when selecting his or her staff improperly links to a judge's decision-making may a party reasonably question a judge's administrative activities.

In both *Delalic* and the Bitti case the relevant judges' administrative decisions were judicial decisions involving similar issues. In *Delalic* the judges were required to administratively determine whether Judge Benito's election to the Costa Rican Vice-Presidency constituted an activity that impinged her ability to carry out her duties *in general*.[108] Furthermore, the same judges had to later determine whether Judge Benito's duties as Vice-President of Costa Rica destroyed her objective impartiality to the *Delalic* defendants, *in that particular case.*[109]

Unlike Mr. Bitti, Judge Benito never performed any function as Vice-President of Costa Rica while she sat as an ICTY Judge and she first gave assurances to her colleagues and the President of Costa Rica that she wouldn't assume any executive roles while on the bench.[110] Thus, the *Delalic* court did not have to resolve an *actual* conflict between administrative and Judicial duties, but only the appearance of a conflict.[111]

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[108] *Id.* at ¶ 12.

[109] *Id.*

[110] *Id.* Judge Benito duties as a judge were twice questioned by officers of the court when she was first made a Cost Rican Vice-President and then when she was promoted to Second-Vice President. On both occasions Judge Benito assured the court that she would take these titles in name only and would not perform any duties of office while she sat on the Court. See also, *Prosecutor v. Delalic*, Decision of the Bureau, 4 September 1998 at § 2 [reproduce in accompanying notebook at tab 5].

[111] The ICTY Court does not have a provision similar to article 40 of the Rome Statute which prohibits outside activities that may affect judicial or prosecutorial function. Since outside activities under Article 40 of the Rome Statute are not clearly delineated perhaps the court could have adopted an *actual conflict* standard in *Delalic* if ICTY had a similar provision as the Rome Statute's article 40 because an appearance standard could lead to a flood of spurious motions to disqualify based on an appearance standard. Indeed, if Article 40 of the Rome Statute delineated outside activities in the small community of international legal participants it could pose many problems since many of the commentators, academics and court officers are more closely linked than in many legal systems, as demonstrated by the Court's reluctance to disqualify Judge Mumba in *Furundzija* because of her previous activites.

Also unlike Judge Benito, Mr. Bitti's activities pose an actual conflict between a Judge's administrative duties and judicial decision-making.[112] While Mr. Bitti will not directly rule on issues his position provides guidance to the judges who will. When selecting Mr. Bitti as a legal advisor, the judges must have known that Mr. Bitti had previously served in the OTP. If the judges knew that Mr. Bitti worked on issues for the OTP and sought his advice on the same issues as Senior Advisor to the Pre-Trial, Chamber then it is likely that their administrative decision (selecting Mr. Bitti as Senior Legal Advisor) would ultimately affect the Chamber's judicial decisions (ruling on the case).

While Mr. Bitti and the Judges may not be actually biased, the appearance of using a seemingly biased legal advisor cannot stand. The Judges should either separate Mr. Bitti so that he doesn't advise the Court on the same issues that he worked on in the OTP, or the Judges in the Pre-Trial Chamber, for whom he works, should recuse themselves from the cases on which he worked while in the Office of the Prosecutor. While the international legal community may be close knit, both *Delalic* and *Furundzija* indicate that even within these close relationships, enough boundaries and safeguards exist to protected judicial independence and shield against the appearance of bias.

C. Application of the objective appearance of bias standard to all judicial staff and officer

[112] Prosecutor v. Delalic, Case No. IT-96-21, Decision of the Bureau on Motion on Judicial Independence, (Sept. 4, 1998) [Reproduced in accompanying notebook at tab 6] (While emphasizing the applicability of the objective impartiality test the court noted "Judge Odio Benito has been holding the position of Vice-President in name only from the date she took the oath of office. She has committed herself not to take up the duties of her post until she has completed her judicial duties. The contention that in the event of the President's absence she may have to assume his role is not one of substance. Under the Constitution of the Republic of Costa Rica there are two other officials who can also undertake such a role – the first Vice-President and the President of the Legislative Assembly… Furthermore, the President of Costa Rica has agreed that she will not assume her duties as Second Vice-President until such time").

In *Prosecutor v. Akayesu*[113] the ICTR rejected defendant's claims that political pressures destroyed the trial chambers independence and impartiality.[114] Akayesu contended that remarks made by judges in "public and in private" coupled with "pressure and special arrangements" tended to show partiality against the defendant.[115] The court noted that the defendant has the burden of showing the court's lack of impartiality or independence by "adequate and reliable evidence"[116] Akayesu couldn't meet the court's test through his bald allegations of bias and selective prosecution.[117]

Most importantly the *Akayesu* court distinguished between judicial bias and prosecutorial discretion by adopting the holding of the ICTY Appeals Chamber in *Celebici.*[118] Furthermore the court not simply cite to *Celebici*'s weak separation between the Office of the Prosecutor and the Tribunal.[119] Indeed the court held that Prosecutorial

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[113] Prosecutor v. Akayesu, Case No. ICRT-96-4, Judgment of the Appeals Chamber, (Jun. 1, 2001) [Reproduced in accompanying notebook at tab 5].

[114] *Id.*

[115] *Id.* at ¶ 90.

[116] *Id.* at ¶ 91. (The court also quoted *Furundzija*, Judgement on appeal, para. 196-197.)

[117] *Id.* at ¶¶ 92-94. The court rejected Akayesu's claims that the Tribunal proceeded to prosecute only Hutu's because of victor's justice.

[118] *Id.* at ¶ 94, quoting Prosecutor v. Delalic, Case No.IT-96-21, Judgment of the Appeals Chamber 613, (Feb. 20, 2001) (hereinafter "Celebici") "In the present context, indeed, in many criminal justice systems, the entity responsible for proesectutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation in indictments." [Reproduced in accompanying notebook at tab 8]

[119] See Celebici, judgment on appeal, para. 613. In *Celebici* the court discussed the relationship between abuse of prosecutorial discretion without making the distinction that the *Akayesu* Tribunal made between judicial and prosecutorial independence. Indeed, the *Celebici* Tribunal discussed evidence of discriminatory effect by the relationship between the prosecutor's conduct and his or her failure or success in charging similarly situated defendants. [Reproduced in accompanying notebook at tab 9]

misconduct in pursuing a discriminatory policy will not weigh on the independence or impartiality of the Tribunal unless there is a casual link between the Prosecutor's office and the Tribunal.[120] Indeed the Prosecutor in his August 31, 2006 Application noted that civil and common law jurisdiction code prevent judges from hearing cases that the judge may have been involved with.[121] Furthermore, both civil and common law jurisdictions prohibit clerks from working on issues for the court that the clerk may have previously worked on in any capacity.[122] The court could have ruled without further explaining the distinctions between the Tribunal and the Prosecutor's office first mentioned in *Celebici.*[123]

Many nations prevent judges from engaging in extrajudicial activities because of the appearance of bias and the likelihood that such activities may interfere with a judicial officer's primary duties.[124] Nations are not alone in regulating court officers extrajudicial activities since several international organizations require the same of officers in the adjudicative processes.[125] The ICC Specifically bans judges from engaging in extrajudicial "activity which is likely to interfere with their judicial functions or to affect

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[120] *Id.* at ¶ 96.

[121] Prosecutor's Application, *supra* note 14, at ¶ 49 [reproduced in accompanying notebook at tab 10].

[122] *Id.* at ¶ 51.

[123] *Id.* As noted earlier, the court could have rested before furthering the distinction between the Office of the Prosecutor and the Tribunal because Akayesu only made "general assertions" of a discriminatory policy and he failed to advance any "adequate and reliable evidence."

[124] Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 Harv. Int'l L. J. 271, 282(Winter 2003). [Reproduced in accompanying notebook at tab 26].

[125] *Id.* See Ruth Mackenzie & Philippe Sand, *supra* note 123, note 285 at notes 50-55. [Reproduced in accompanying notebook at tab 26] See also *Statute of the International Court of Justice*, June 26, 1945 [Reproduced in accompanying notebook at tab 1]; See Also International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000), Rule

confidence in their independence."[126] Indeed many international judicial bodies have similar requirements.[127]

Given the previous discussion, it is likely that the test for whether a staff member's behavior will affect judicial impartiality is based on conduct not title. Thus judicial staff members who have little or no role in advising a judge on cases will likely not raise suspicions of partiality if that staff member were to "switch sides." Likewise a staff member that has advised a court litigant should probably not advise the judge on the same matter. Since, these present question of fact based on individual cases, courts must look to individual circumstances. This does not mean there cannot be a guidepost for proper behavior such as possibly adopting clear conflict of interest rules for staff in the ICC.

IV. PROSECUTORIAL DISCRETION AND INDEPENDENCE

Many participants at the Rome Conference that established the International Criminal Court held conflicting views of the dutites of the Office of the Prosecutor.[128] Several attendees questioned whether the role prosecutors would be analogous to that in their home nations or to that in the other tribunals such as ICTY or the ICTR.[129] An

[126] Rome Statute, *supra* note 2, at art. 40 § 2. [Reproduced in accompanying notebook at tab 1]. See Also Mackenzie, *supra* at 282. [Reproduced in accompanying notebook at tab 26].

[127] See Mackenzie, *supra* note 123 at 282. Mackenzie notes similar provisions in the empowering statutes of the International Court of Justice, European Court of Human Rights, and the International Treaty of the Law of the Seas. [Reproduced in accompanying notebook at tab 26].

[128] Int'l Workshop, The Prosecutor of a Permanent International Criminal Court 136 (Louise Arbour, et al., ed. 2000) [Reproduced in accompanying notebook at tab 15]

[129] Schabas, *supra* note at 512. [reproduced in accompanying notebook at tab 20]

independent Office of the Prosecutor emerged from the conference, but politics quickly challenged the independent prosecutor.[130]

A. Past Prosecutorial Independence

As noted above, Nuremberg serves as the basis for international criminal tribunals. Critics charged that Nuremberg prosecutors and judges were biased.[131] Indeed, many cite the USSR's representative's statement that presumed guilt as proof of Nuremberg's bias.[132] Despite the appearance of a lack of impartiality the Nuremberg Tribunal successfully and fairly dispensed impartial justice.[133] In the aftermath of World War Two "absolute impartiality" was unachievable.[134] Realistically the allied victors appointed the Tribunal's judges.[135] But, there is no evidence that General Nikitchenko's prior statement influenced his judgment of the accused or the decisions of the Tribunal's other judges.[136] Furthermore, even critics of the Tribunal's impartiality realize that the

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[130] *Id.*

[131] Whitney Harris, *supra* note 15, at 500-501 [reproduced in accompanying notebook at tab 14]

[132] *Id.* at 499.

[133] See Whitney Harris, *supra* note 15, 500-501 ("There was nothing improper in this. One who serves as a legislator may later be called to act in the capacity of prosecutor or judge. There is no reason why, in any such subsequent status, he should not apply the law which he helped to draft and to enact. The prosecutor seeks to prove facts under the law. The judge has the duty of determining facts in accordance with the law. Neither function demands any previous dissociation from that law.") [reproduced in accompanying notebook at tab 14].

[134] *Id.* at 500-501. ("The circumstances prevailing at the close of World War II did not afford a simple means for creating a Tribunal composed of members other than those draw from the victorious powers. The International Military Tribunal was an *ad hoc* instrumentality. It was established in the pattern of traditional military commissions, which are always staffed by personnel of the victorious nation. There was no juridical basis upon which it could be insisted that neutral nations appoint judges to the Tribunal. Nor, realistically, could it be said that there were neutral nations in World War II.")

[135] *Id.* at 501.

[136] *Id.* at 500.

court convicted members of the Nazi regime based on ample evidence.[137] The problems faced by the Nuremberg Tribunal are different than those faced by the ICC. Nuremberg serves as the benchmark for the international criminal tribunals, while the ICC serves as modern interpretation of Nuremberg's goal of justice over vengeance.[138] Rationality cautions us against repeating the mistakes of the past. Nuremberg formed quickly after the Second World War's devastating damage while decades passed before the nations agreed to create an International Criminal Court. Furthermore, in those long decades before nations formed the ICC, other international adjudicative bodies, such as the European Court of Human Rights, ICTY and the ICTR formed.

B. Nuremberg constrasted with the ICC

Learning from the past and the experience of the other international courts, it is clear that the ICC framers intended to create an independent prosecutor removed from political restraints.[139] An independent prosecutor is essential to the ICC's operation because otherwise political constraints may prevent the Security Council or a State Party from referring a matter to the ICC.[140] The Prosecutor, his deputies, nor his or her staff may not

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[137] *Id.*

[138] See also *Id.* at pg 501 (explaining how the short comings of the Nuremberg Tribunal were unique and unavoidable).

[139] *See* Howard Ball, Prosecuting War Crimes and Genocide: The Twentieth Century Experience 152 (1999) (noting that after Bosnian conflict there were not widespread cries of "victors justice" among the international community even though mostly ethnic Serbs were indicted) [reproduced in accompanying notebook at tab 11]; *Id.* at 172-173 (noting the Republic of Rwanda's criticism of the ICTR and its prosecutor).

[140] Philippe Kirsch, *Introduction, in* Reflections on the International Criminal Court: Essays in Honour or Adriaan Bos 4 (Herman A.M. von Hebel, *et at.*, ed., 1999) [Reproduced in accompanying notebook at tab 15].

engage in activities that endanger their duties or give the appearance of impropriety.[141] But like the independent judiciary, to protect fairness and impartiality the Office of the Prosecutor is not unaccountable.[142]

At Nuremberg each of the four signatories to the London Agreement appointed a Chief Prosecutor.[143] The American Prosecutor answered directly to President Truman and the British Chief Prosecutor was the UK's Attorney General.[144] The Prosecutors received their resources from their appointing governments and acted in the name of their home states.[145] Together the Chief Prosecutors from each nation acted as a committee to form a prosecutorial plan of action.[146]

Although appointed by their home government, Nuremberg prosecutors did not have to consult with their national government to obtain evidence or apprehend the accused.[147] Indeed, the Prosecutors at Nuremburg and Tokyo did not have the same

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[141] See Rome Statute, *supra* note 2, at art. 42 ("Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independe.") [reproduced in accompanying notebook at tab 1]; See Also *Id.* at art. 44 ("In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, mutatis mutandis, to the criteria set forth in article 36, paragraph 8."); See Also William Schabas, *supra* note 6, at 183 ("Judges, Prosecutor, Deputy Prosecutors, Registrar and the Deputy Registrar are all required to make a solemn undertaking in open court to exercise their functions impartially and conscientiously.", citing Rome Statute, Article 45) [Reproduced in accompanying notebook at tab 19]; See Also Roy S. Lee, *Creating an International Criminal Court – of Procedures and Compromises*, *in* Reflections on the International Criminal Court 150, (Herman A.M. von Hebel, *et al.* ed., T.M.C, Asser Press 1999). [Reproduced in accompanying notebook at tab 14]

[142] *Id.*

[143] Int'l Workshop, *supra* note 127, at 125. [Reproduced in accompanying notebook at tab 14].

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

needs to cajole national governments that can hamper modern war crimes prosecutions.[148] Unlike article 86 of the Rome Statue that requires states to cooperate, the Nuremberg and Tokyo tribunals lacked this requirement because it would be unnecessary.[149] Furthermore, the Allies relied on the fact that they could use their home governments' vast resources and military, their total control of Germany and Japan, and there was no need to request evidence or to apprehend accused war criminals.[150]

C. Structural Safeguards in the Rome Statute to ensure prosecutorial independence

The Rome Statute provides various ways to refer and prevent prosecutions. The independent Office of the Prosecutor is only one of several means to start or prevent a prosecution.[151] Article 16 permits the Security Council to defer any prosecution for up to 12 months under its Chapter VII powers of the UN Charter.[152] The State Parties rejected a draft version that gave the Security Council the power to prevent prosecutions for a case "being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the charter…"[153] Arguably under the proposed

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[148] Kristina Miskowiak, The International Criminal Court: Consent, Complementarity and Cooperation 52-53, (2000). (noting that the Allies faced few problems in gathering evidence since the allies seized all of prosecuted defendants and could rely on the vast resources of their national governments and militaries). [Reproduced in accompanying notebook at tab 18].

[149] *Id.*

[150] *Id.* But See Also, *Id.* at note 121 ("The London Agreement of 8 august 1945, signed by the USA, France, the United Kingdom and the USSR, provided that "[e]ach of the signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The signatories shall also use their best endeavors to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the signatories.")

[151] *Id.*

[152] Rome Statute, *supra* note 2, at art. 16. [reproduced in accompanying notebook at tab 1]

[153] Schabas, *supra* note 6, at 82, citing "Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 May – 22 July 1994, at note 60. [Reproduced in accompanying notebook at tab 19].

version a single member of the Security Council could have prevented prosecutions because it takes only one member's vote to place an item on the Council's agenda.[154] Furthermore the five permanent members of the Security Council could prevent removing the item from the agenda with their veto powers.[155]

Although the State Parties ultimately rejected the proposed version of Article 16 that gave the Security Council greater power to regulate and reject prosecutions, the State Parties failed to take any actions that would have clearly limited the role of politics in ICC prosecutions.[156] While the Article 16 provision that permits Security Council intervention is obviously a compromise, no one attending the Preparatory Committee or the Rome Conference could have foreseen how rapidly a the United States would exploit Article 16.[157] As noted earlier the parties foresaw American disagreement with the treaty and the parties sought ways to placate the United States desires.[158]

D. The United States exploitation of Article 16 to diminish the independence of the Office of the Prosecutor and make sure that all investigations were under its political control

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[154] *Id.* at 82.

[155] *Id.*

[156] See Also Schabas, *supra* at 82-83. [Reproduced in accompanying notebook at tab x]

[157] *Id.*

[158] Goldsmith, Jack. *Centennial Tribute Essay: The Self-Defeating International Criminal Court.* 70 U. Chi. L. Rev. 89 (Winter 2003). at pg 100 ("The implicit assumption is that the ICC framers had the following preference ordering: (1) create an institution immediately acceptable to the United States based on equal justice for all; (2) create an institution based on equal justice for all and hope the United states eventually overcomes its opposition; (3) create an institution of selective justice acceptable to the United States. The framers believed that option (2) was closer to their ideal institution [of equality for all nations] than option (3)." clarification added. [Reproduced in accompanying notebook at tab 23]

Since 2000 the United States has not hidden its disdain for the ICC.[159] Former American President Bill Clinton wrangled with the subject, literally waiting until the last possible moment to sign the treaty on December 31, 2000.[160] Once President George W. Bush assumed office, the United States "unsigned" the Rome treaty.[161] Furthermore the United States took more aggressive actions to ensure that US nationals in states that ratified the Rome Statute or may be subject to its provisions would never be prosecuted by the court.[162] Indeed, the United States began to exploit Article 98(2) of the statute that pre-empts the court's jurisdiction if it would require a nation to breach an agreement with another state.[163] It signed agreements that would protect US national in foreign nations per Article 98(2) requirements.[164]

US actions to protect its nationals culminated with the American Service Members' Protection Act.[165] The law, jokingly referred to as "The Hague Invasion Act" signed by President Bush in August 2002 authorizes the President to use force to recover a US national held by the court.[166] While these actions may seem as mere annoyances

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[159] Schabas, *supra* note 6, at 121 [reproduced in accompanying notebook at tax 19]. See Also Michael Scharf, *Getting Serious About an International Criminal Court*, 6 Pace Int'l L. Rev. 103, (1994) (noting concerns voiced in the United States Senate about ramification for the United States of an International Criminal Court) [reproduced in accompanying notebook at tab 31].

[160] Schabas, *supra* note 6, at 21. [Reproduced in accompanying notebook at tab 19].

[161] See *Id.* (Schabas notes that international law does not allow "unsigning" of treaties, but the practice was envisioned by the Vienna Convention on the Law of Treaties.)

[162] *Id.* at 22.

[163] *Id.*

[164] *Id.*

[165] *Id.* at 23.

[166] *Id.*

and points of disagreement with the United States we have yet to see if these actions will impinge the court's operation or its officers.

Even before the Court began operations the United States used political influence to goad the Security Council to comply with its demands.[167] In June 2002 the United States threatened to use it Security Council veto powers over all future UN peacekeeping missions if the Security Council didn't invoke Article 16 to shield all UN authorized missions.[168] The Security Council, without opposition, invoked Article 16 in Resolution 1442 to shield current and former personnel on peacekeeping missions.[169]

The Resolution immediately sparked controversy and helped to draw attention to an ambiguity in the Rome Statute.[170] The Security Councils invoked Article 16, which allows the Security Council to act "only when there is a threat to the peace, a breach of the peace or an act of aggression."[171] Professor Schabas notes that it's unclear whether any court could review actions of the Security Council by possibly analyzing if by invoking Article 16 under its Chapter VII powers, the Security Council faced the requisite threat to peace or aggression.[172] The ICJ failed to address this issue because it considers itself equal with the Security Council, thus there is no hierarchy body that could review the decisions of the other.[173]

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[167] Schabas, *supra* note 6, at 83. [Reproduced in accompanying notebook at tab 19]

[168] *Id.*

[169] *Id*

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[170] *Id.* at 84.

[171] *Id.*

[172] *Id.*

[173] *Id.*

Schabas contends that while the ICJ may not review Security Council decisions the ICC or *ad hoc* tribunals could review [174] Indeed he cites ICTY's review of Security Council resolution 827 in *Prosecutor v. Tadic* to support review of Security Council actions.[175] Schabas fails to develop his ideas any further by noting the Prosecutor will unlikely prosecute peacekeepers and even if the ICC Prosecutor wanted to charge peacekeepers, most of the time the issue is handled by the peacekeepers home nation.[176]

Schabas theory about the scope of Article 16 opens a floodgate of possible outcome; all touch on the sensitive issue of Judicial and Prosecutorial Independence. Will the ICC have the power of Judicial Review, thus enabling it to rule on the validity of Security Council resolutions when the Council invokes Article 16 allegedly under their Chapter VII powers? Presumably, the ICC could rule on whether the political concerns shaped Security Council decisions to the detriment of the accused. If the ICC rules that a Security Council is invalid, then what actions could the Prosecutor take? Lastly, what is the likely outcome of a power struggle between the ICC and the Security Council?

It seems likely that given these questions then there will be a showdown between advocated of Prosecutorial independence and those concerned about maintaining some degree of control. These fears are grounded on the notion that a prosecutor that is too insulted from political concerns may go on a witch-hunt based on spurious charges.[177]

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[174] *Id.*

[175] *Id.* See Also Schabas, *supra* note 6, at note 65. [Reproduced in accompanying notebook at tab x].

[176] *Id.* at 84-85.

[177] Schabas, *supra* note 6, at pg 120-121. [reproduced in accompanying notebook at tab 19]

Since the end of the Cold War states have increasing used international tribunals to resolve disputes.[178] According to some observers international courts heard more than 80% of the cases between the end of WWII and 2002 within the last 15 year.[179] These bodies have become increasingly independent and have built upon the lessons learned at Nuremburg.[180] Not only have various international tribunals become more independent, but so too have their constituent parts. In the wake that emerged at the end of the Cold War the United Nations created two tribunals; one for the Former Yugolslavia (ICTY) and one for Rwanda (ICTR). Both of these tribunals departed remarkable from those created at Nuremburg and Tokyo.[181] Both ICTY and ICTR created independent prosecutors in contrast to Nuremberg and Tokyo.[182] Both ICTY and ICTR create an independent prosecutor's organ.[183]

Checks and balances ensure that the Prosecutor remains within the bounds of his power and those measures ensure that he or she does not initiate frivolous prosecutions.[184]

It's unlikely that US efforts to protect its nationals from prosecution will fundamentally damage court operations.[185] The United States has only succeeded in

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[178] *Id.*

[179] *Id.* at 915. See Also, *Id.* at note 50.

[180] Helfer, *supra* at 914. [Reproduced in accompanying notebook at tab 24].

[181] *Id.*

[182] *Id.*

[183] Int'l Workshop, *supra* note 123, at 126. [Reproduced in accompanying notebook at tab 14]. See Also ICTY Statute, *supra* Art. 11. [Reproduced in accompanying notebook at tab 1]. See Also ICTR Statute, *supra* at Art. 10. [Reproduced in accompanying notebook at tab].

[184] *Reflections on the International Criminal Court.* Kirsch, P., 1999. [Reproduced in accompanying notebook at tab 15].

getting nations with little political power to sign agreements to protect US citizens from the treaty operations.[186] More importantly several European nations, Canada, Mexico have refused to sign agreements with the United States because they feel that US actions indirectly attack the Court.[187] Furthermore these nations have the most US expatriates and wield significant political and economic power.[188]

If independence means that we should gird against the appearance of impropriety by preventing improper political influence to the detriment of the accused, it also means that we should take steps to ensure that the prosecutor is not abusing his or her power or failing to act.[189] To guard against prosecutorial abuses the statute must first defer to the State parties and may only act when those state parties fail.[190] The Statute also requires the prosecutor to only initiate investigations if he or she has a "reasonable basis" to believe that the accused has committed a crime.[191] Furthermore the Prosecutor must seek

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[185] See Also *Id.* at 23 (Schabas notes that current actions by the United States have done little damage to the court).

[186] See *Id.* at note 70 ("As of 1 April 2003, agreements had been made with Afghanistan, the Dominican Republic, the Gambia, Honduras, India, Israel, Kuwait, the Marshall Islands, Mauritania, Micronesia, Nepal, Palau, Romania, Sierra Leone, Tajikistan, Timor Leste and Uzbekistan.) [Reproduced in accompanying notebook at tab 19].

[187] *Id.* at 22.

[188] *Id.*

[189] See Roy S. Lee, *Creating an International Criminal Court – of Procedures and Compromises, in* Reflections on the International Criminal Court 150, (Herman A.M. von Hebel, *et al.* ed., T.M.C, Asser Press 1999). [Reproduced in accompanying notebook at tab 17].

[190] *Id.*; See Also Rome Statute, *supra* note 2, at art. 17 (noting that a state may challenge the court's jurisdiction if it has already prosecuted the alleged offense.) [Reproduced in accompanying notebook at tab 1].

[191] *Id.* at art. 53 [Reproduced in accompanying notebook at tab 1].

permission from the Pre-Trial chamber to "proceed with an investigation"[192] The ICC statute also contains structural safeguards to ensure that a prosecutor's decision not to prosecute an alleged violation is based on reason and experience.[193]

Understanding the respective roles of the judges of the trial chamber and the role of the prosecutor and his or her officers is key to assessing if the Prosecutor has standing to raise the appearance of bias.

V. CONCLUSION

At the least the Pre-Trial Chamber should ensure that Mr. Bitti does not work on cases that he previously worked on for the Office of the Prosecutor and ensure that Bitti does not influence the work or the Pre-Trial Chamber in the same case. If there has been an actual exchange of information that the Judges feel make the *actually* biased against the defendant then, of course, those judges must recuse themselves. The ICC should supplement its staff rules to ensure that conflict on interest do not occur in the future. When deciding if a staff member affects a judge's impartiality we must take look at that staff member's duties and advices that he or she may give to the judge. Furthermore, Prosecutors should look to the Judiciary for guidance to its long-held traditions of independence and impartiality, but it must also remember that especially in international war crimes tribunals some degree of political interference may enter the field. While the drafters intended for the Office of the Prosecutor to remain as independent as possible,

[192] See Roy, *supra* note 188, at 150 [reproduced in accompanying notebook at tab 17]; See Rome Stature, *supra* note 2, at art. 17. [Reproduced in accompanying notebook at tab 1].

[193] *Id.* ("The Pre-Trial Chamber may also intervene in cases where the Prosecutor decides not to investigate a case or not to take measures to preserve evidence."). See *Id.* at art. 15(4) ("Pre-Trial can authorize an investigation if it has a "reasonable basis""). [Reproduced in accompanying notebook at tab 1].

Article 16 opens Pandora’s box to possible politicalization of international war crimes investigations.