Cour
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International
Criminal
Court

Original : **English**

No.: **ICC-02/04-01/05**
Date: **31 August 2006**

PRE-TRIAL CHAMBER II

Before: **Judge Mauro Politi, Presiding Judge**
Judge Fatoumata Dembele Diarra
Judge Ekaterina Trendafilova

Registrar: **Mr Bruno Cathala**

SITUATION IN UGANDA
IN THE CASE OF
THE PROSECUTOR
***vs.* JOSEPH KONY, VINCENT OTTI, RASKA LUKWIYA, OKOT ODHIAMBO and DOMINIC ONGWEN**

Public Document

Prosecutor's Application to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice Regarding The Case

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Ms Christine Chung, Senior Trial Lawyer
Mr. Ekkehard Withopf, Senior Trial Lawyer

Preliminary Statement

The Office of the Prosecutor ("OTP") respectfully requests that the sole Senior Legal Adviser to the Pre-Trial Division be separated from rendering legal advice to the judges of this Chamber regarding the case *Prosecutor vs. Joseph Kony et al*., because of his previous involvement in the same case while employed as Legal Adviser to the OTP, in 2004 and 2005. An adviser or clerk to a judge has no greater freedom to work on cases in which he or she has already been involved as a prosecuting lawyer, than the judge to whom the adviser or clerk provides legal advice. Indeed, in many civil and common law jurisdictions applying the same "appearance of impartiality" standard which governs in this Court, the globally accepted prohibition that judges cannot work on matters in which they previously were involved as a prosecutor or investigator has expressly been extended to apply to the staff of judges, including court clerks and officers. It is this universal application of the appearance of impartiality standard, and the inability of the OTP to obtain a decision on the merits of this matter from the Presidency or the Pre-Trial Division by administrative means, which compels this filing.

The OTP stresses at the outset of this application that its request should not be construed to raise even the barest allegation about the integrity, skills or professionalism of Mr. Gilbert Bitti, the Senior Legal Adviser at issue. Rather, this request arises from the objective fact of Mr. Bitti's successive employments, and the circumstance that while serving as Legal Adviser in the Legal Advisory Section of the OTP, Mr. Bitti worked in the same cases currently being heard by the Pre-Trial Chambers.

The application poses a vital question about the level of information and personnel which the organs of the ICC appropriately can share, without transgressing universally recognized standards of fair judicial proceedings or undermining the appearance of the impartiality of the judges. The OTP respectfully submits that the Pre-Trial Chamber should take measures under the authority of Art. 41(2), Staff

Regulations 1.2 and 1.3, and Staff Rule 101.3(i) to ensure not merely that justice is done, but to safeguard the appearance of justice as well.

The timing of the OTP's request is strongly influenced by its view that the issue of the scope of Mr. Bitti's duties as Senior Legal Adviser should be addressed before Pre-Trial Chamber II takes the landmark step of conducting the first ICC confirmation hearing, in the case of *Prosecutor vs. Thomas Lubanga Dyilo*, on 28 September 2006. The OTP also is filing a parallel application in that case, because Mr. Bitti also potentially is responsible for rendering legal advice to Pre-Trial Chamber I, after having worked on the DRC investigation and proceedings while a Legal Adviser in the OTP.

Request for Extension of Page Limit

The OTP respectfully requests that the page limit set forth in Regulation 37 be extended. The exceptional circumstance necessitating this request is the inability to describe the factual background, the procedural history, and relevant law, without exceeding the page limitation of 20 pages. In the view of the OTP, the discussion *infra* demonstrates that the application could not have discussed "all relevant legal and factual issues, including details of the articles, rules, regulations or other applicable law relied upon," as required by Regulation 23(d), without exceeding the page limitation imposed by Regulation 37.

I. Background

1. This application follows a series of decisions by the Presidency of the ICC and the President of the Pre-Trial Division, dated from January to June of 2006, each of which declined on procedural grounds to address requests made by the OTP and counsel for Thomas Lubanga Dyilo ("Lubanga") for imposition of the same relief sought in this application. *See* discussion and citations *infra* in Section

I.B.[1] The President of the Pre-Trial Division additionally declined a request from the OTP to provide information about whether the Senior Legal Adviser was rendering legal advice to Pre-Trial Chambers I and II about the DRC and Uganda cases, respectively. As a result of the prior decisions of the Presidency and the President of the Pre-Trial Division, the OTP has exhausted other procedural avenues and seeks adjudication of the matter as part of this judicial case.[2]

A. The Senior Legal Adviser's Successive Employments in the OTP and the Pre-Trial Division

2. This section sets forth the factual background of Mr. Bitti's successive employments in the OTP and the Pre-Trial Division.

3. Mr. Bitti commenced working as the Senior Legal Adviser to the Pre-Trial Division in October 2005. Immediately before that, he had worked for 21 months, since 1 January 2004, in the OTP.

4. Within the OTP, Mr. Bitti had been the P-4 Legal Adviser within the Legal Advisory Section of the OTP (hereinafter, "the LAS of the OTP") during his entire tenure in the office. The LAS of the OTP is a small section, comprised of one lawyer each at the P-5, P-4 and P-2 levels, and a legal assistant.

5. The LAS of the OTP renders advice to the Chief Prosecutor and to the three operational divisions of the OTP (the Investigation Division, the Prosecution Division, and the Jurisdiction, Complementarity and Cooperation Division). During the first year and a half of his time as a member of the LAS of the OTP,

[1] The Presidency consists of the President and First and Second Vice-Presidents of the Court. *See* Art. 38(1), Rome Statute. The Pre-Trial Division is the body from which the Judges of the Pre-Trial Chambers are assigned.

[2] It is the OTP's understanding that counsel for Lubanga currently intends to submit a filing in the *Lubanga* case on the issue raised in this application.

Mr. Bitti and the head of the section (a P-5 position) were the only fixed-term professionals in the section.

6. The LAS of the OTP routinely participated in all legal discussions within the OTP involving any significant questions of interpretation of the Statute or Rules which potentially had an impact upon OTP investigative or prosecutorial policies or routine practices. Either Mr. Bitti or the head of the LAS of the OTP also regularly attended weekly senior management meetings of the OTP. At these meetings, the status of the cases and investigations was addressed as a matter of course.

7. As the Legal Adviser in the LAS of the OTP, Mr. Bitti participated in many meetings convened by senior OTP staff specifically to address legal issues presented in the Uganda and/or DRC investigations, and the investigative and litigation strategies in those cases. Following the commencement of the Uganda and DRC proceedings, and after Mr. Bitti's assumption of his duties as Senior Legal Adviser, a host of issues about which Mr. Bitti had rendered legal advice to the OTP arose before Pre-Trial Chambers I and II. Some of these matters were decided by the Pre-Trial Chambers and/or continue to be considered by those Chambers.

8. For example, as Legal Adviser in the LAS of the OTP, Mr. Bitti had written memoranda addressing the legal requirements under Art. 58 for the issuance of warrants of arrest. During the DRC investigation, in early May 2005, Mr. Bitti received via e-mail an early draft of a potential warrant of arrest to be submitted to Pre-Trial Chamber I. This draft was written for the purpose of facilitating OTP investigative planning and internal OTP discussions about future litigation. The scope of the criminal conduct alleged in this early draft was broader than in the draft warrant application assessed by Pre-Trial Chamber I, in January and February 2006. The early draft warrant application, however, encompassed child

conscription counts in which Lubanga was named, as did the application submitted to Pre-Trial Chamber I, and the warrant ultimately issued by that Chamber, on 10 February 2006.[3] Child conscription charges naming Lubanga also feature in the Indictment which has been proposed by the OTP for confirmation.[4]

9. Mr. Bitti also had participated in ongoing OTP discussions about pre-confirmation disclosure and, as part of those discussions, commented about the interpretation of Art. 67(2), and Rules 121 and 131, as well as the nature of *inter partes* disclosures, the scope of disclosures to the Pre-Trial Chamber, the timing of disclosures, and the role of the Registry in pre-confirmation disclosure. Many of the disclosure issues upon which Mr. Bitti advised, whilst the OTP was formulating policies and strategies in the last half of 2004, became relevant in the *Lubanga* case after Lubanga's arrest and were adjudicated by Pre-Trial Chamber I.[5] The parties in that case continue to operate under the system of disclosure established by this Chamber's successive rulings.

10. Throughout his term as Legal Adviser in the LAS of the OTP, Mr. Bitti also participated in internal OTP discussions of the potential interpretations of the term

[3] *See Le Procureur c. Thomas Lubanga Dyilo*, Mandat d'arrêt, ICC-01/04-01/06-2, 10 février 2006.

[4] *See Prosecutor v. Thomas Lubanga Dyilo*, Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3), ICC-01/04-01/06-356, 28 August 2006.

[5] *See Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04-01/06-102, 15 May 2006, Annex 1: Discussion of the Decision on the Final System of Disclosure, paras. 7-15 (addressing whether Art. 67(2) requires disclosure to defence of entire Prosecution file), 24-27 (addressing Registry's role in disclosure), 28-37 (addressing meaning of "communication" in Rule 121), 39-49 (discussing subsections of Rule 121 addressing communication of disclosed materials to the Pre-Trial Chamber), 50-58 (whether Art. 67(2) and Rule 121, among other provisions, requires filing of material upon which parties do not intend to rely on material at confirmation), 61-76 (role of the Registry in disclosure process), 119-133 (addressing Art. 67(2) and timing and scope of disclosure of potentially exonerating information); *Prosecutor v. Thomas Lubanga Dyilo*, Decision Requesting Further Observations from the Prosecution and the Duty Counsel for the Defence on the System of Disclosure, ICC-01/04-01/06-58, 27 March 2006; *Prosecutor v. Thomas Lubanga Dyilo*, Decision Requesting Observations of the Prosecution and the Duty Counsel for the Defence on the System of Disclosure and Establishing an Interim System of Disclosure, ICC-01/04-01/06-54, 23 March 2006.

"victim," as that term is used in the Rome Statute. He authored, or helped author, a number of legal memoranda regarding the extent of victims' participation rights and victim and witness protection. Some of the same victim-related issues on which Mr. Bitti advised and was a party to internal OTP strategic discussions – particularly those relating to victims' participation – have been adjudicated by Pre-Trial Chamber I this year as matters relating to the DRC situation and case, following Mr. Bitti's appointment as Senior Legal Adviser to the Pre-Trial Division.[6] It can be expected that applications for victim-participants as victims in both in the *Lubanga* case and the DRC situation will continue to be filed and considered by Pre-Trial Chamber I.[7]

11. In the Uganda case, just as in the DRC situation, some of the important legal issues as to which Mr. Bitti rendered legal advice, proposed OTP strategies, and participated in internal OTP discussions later became the subject of litigation before the Pre-Trial Chamber. For example, Mr. Bitti received and participated in commenting upon two drafts of the warrant application in the Uganda case, in October 2004 and May 2005. The October 2004 draft was written primarily to

[6] Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, et VPRS 6, ICC-01/04-101, 17 January 2006 (granting rights of participation to victims in the investigation phase, based on interpretation of Art. 68(3) and Rule 85(a), among other provisions); Décision relative à la requête du Procureur sollicitant l'autorisation d'interjeter appel de la Décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procedure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, ICC-01/04-135, 31 Mars 2006 (denying leave to appeal granting of rights of victims' participation during investigation phase), and s*ee Le Procureur c. Thomas Lubanga Dyilo*, Décision sur les demandes de participation à la procédure présentées par les Demandeurs VPRS 1 à VPRS 6 dans l'affaire *Le Procureur c. Thomas Lubanga Dyilo*, ICC-01/04-01/06/172, 29 Juin 2006 (denying right of participation to VPRS 1 to VPRS 6 in case); *Le Procureur c. Thomas Lubanga Dyilo*, Décision sur les demandes de participation à la procédure a/0001/06, a/0002/06 et a/0003/06 dans le cadre de l'affaire *Le Procureur c. Thomas Lubanga Dyilo* et de l'enquête en République démocratique du Congo, ICC-01/04-01/06-228, 28 juillet 2006 (granting right to participate in the situation and the case as victim-participants). *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Defence Motion for Leave to Appeal, ICC-01/04-01/06-338, 18 August 2006.

[7] Forty-three applications to participate in the case are currently pending and are being commented upon by the parties. *See* ICC-01/04-01/06-144-Conf-Exp ICC-01/04-01/06-154-Conf-Exp to ICC-01/04-01/06-157-Conf-Exp, ICC-01/04-01/06-216-Conf-Exp to ICC-01/04-01/06-221-Conf-Exp, ICC-01/04-01/06-237-Conf-Exp to ICC-01/04-01/06-267-Conf-Exp, ICC-01/04-01/06-269-Conf-Exp, filed between 7 June 2006 and 3 August 2006.

formulate investigative planning, in the midst of the investigation, and the May 2005 draft was written and circulated following the collection of what the OTP believed to be legally sufficient evidence. Even the earlier draft bore substantial similarities to the warrant application ultimately evaluated by this Pre-Trial Chamber after its submission in May 2005. That application in turn formed the basis for the warrants of arrest issued in July 2005 and unsealed in October 2005.[8]

12. As another example relevant to the Uganda case, Mr. Bitti participated in numerous discussions relating to the division of duties between the Pre-Trial Chamber and the OTP during the pre-trial phase, including but not limited to the respective duties of the PTC and the OTP under Article 53. These discussions occurred as early as the summer of 2004. In December 2005, after the issuance of the arrest warrants, Pre-Trial Chamber II ordered a status conference to take place to explore "the status of the investigation of the situation in Uganda in relation to the application of Article 53" and the possibility that "any decision" purportedly taken by the OTP could implicate "the Chamber's powers under article 53, paragraph 3(b) of the statute."[9] Mr. Bitti had participated in internal OTP discussions, and authored OTP legal memoranda relating to some of the same legal issues identified in this Chamber's decision of 2 December 2005 relating to Art. 53.

13. The issues just identified are merely a portion of the legal topics on which Mr. Bitti rendered advice while Legal Adviser in the LAS of the OTP and which later

[8] The May 2005 draft application specified the same individuals and counts which were submitted on 6 May 2005 for the consideration of Pre-Trial Chamber II, see Prosecutor's Application for Warrants of Arrest Under Article 58, ICC-02/04-4-US-Exp, 6 May 2005, and set forth in the warrants subsequently issued by this Chamber, *see* Decision on the Prosecutor's Application for Warrants of Arrest Under Article 58, ICC-02/04-01/05-1, 8 July 2005. These warrants were unsealed on 13 October 2005. See Warrants of Arrest in case of *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-53 to ICC-02/04-01/05-57, 13 October 2005.

[9] *See* Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Art. 53, ICC-02/04-01/05-68, 2 December 2005, paras. 12 and 17. The status conference was postponed once and conducted on 13 January 2006.

became relevant in case-related litigation.[10] He either researched and wrote, or supervised the research and writing, of over 50 legal memoranda while in the OTP. Some of these memoranda were requested by the Chief Prosecutor, trial lawyers or investigators expressly to address issues that had arisen, or were expected to arise, in the Uganda and/or DRC investigations or prosecutions.[11] Others addressed possible interpretations of statutes and/or rules which were expected by the OTP to become equally relevant in all of its first investigations or prosecutions.

14. Mr. Bitti now holds a position which makes him the sole Senior Legal Adviser at a P-5 level to the Pre-Trial Division. The only other legal advisers to the judges of that Division, at any level, are associate legal officers at a P-2 level. The vacancy announcement for the position of Senior Legal Adviser to the Pre-Trial Division, *see* Annex A, makes clear the likelihood that Mr. Bitti has already participated, or will be asked to participate, as Senior Legal Adviser in cases in which he also was involved while a member of the OTP. Among the duties of the Senior Legal Adviser, according to the vacancy announcement, are to "provide independent and specialized legal advice to the Pre-Trial Chambers . . . on questions of procedural, evidentiary and substantive law," to "provide advice and assistance to the Judges and the Chambers' legal support staff on practical and legal issues relating to the cases before the Chambers," to "assist the Pre-Trial Chambers in the preparation and holding of status conferences and other

[10] The OTP cannot be exhaustive in this application about all of the matters which are relevant to this application. Some of the relevant court litigation in the Uganda and DRC cases, including matters currently under consideration, have been sealed and thus cannot be referenced here.

[11] Many memoranda were factual and/or related to concrete practices adopted by the investigators or steps taken in the investigations. For example, Mr. Bitti rendered advice relating to a proposed forensic examination in the DRC investigation, and the matter was later litigated in Pre-Trial Chamber I under Art. 56(1)(a). *See* Decision on the Prosecutor's Request for Measures under Article 56, ICC-01/04-21, 26 April 2005. Mr. Bitti also advised on the possibility of certain coercive measures contemplated in the DRC investigation and helped formulate investigative practices used in all investigations, such as the advice of rights required by Art. 55(2).

relevant hearings," and to "undertake other tasks as required by the Chambers or the President of the Pre-Trial Division."[12]

B. The Attempts of the OTP and Defence Counsel To Seek Redress from the Presidency and the Pre-Trial Division

15. Neither the OTP nor the other parties or participants in the *Lubanga* case, have been privy to the cases-related assignments of Mr. Bitti since he became the Senior Legal Adviser to the Pre-Trial Division. On 7 December 2005, it first came to the attention of the OTP that Mr. Bitti might be rendering legal advice in the Uganda case because Mr. Bitti attended on that date a status conference before Pre-Trial Chamber II. During this conference, the judges of Pre-Trial Chamber II retired at one point to confer, and Mr. Bitti retired with the judges.[13]

16. 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 an OTP Legal Adviser, the OTP filed a notice in this proceeding and in the DRC 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 Chambers.[14] On the next morning, the OTP submitted to the Presidency an internal ICC memorandum which specified that the relief being sought by the OTP was for the Presidency under the authority of Art. 38(3)(a) to isolate the Senior Legal Adviser from the same cases upon which he previously

[12] A copy of the Vacancy Announcement is annexed hereto as Annex A.

[13] On 28 March 2006, the OTP received information suggesting that Mr. Bitti might be rendering legal advice to Pre-Trial Chamber I. On that date, it came to the OTP's attention that Mr. Bitti was listed on an e-mail distribution list of those entitled to receive the transcript of an *in camera* proceeding conducted by the Single Judge, Judge Sylvia Steiner, on 17 March 2006. The proceeding related to the unsealing of the warrant of arrest naming Lubanga.

[14] *See* Notice of OTP Request Addressed to the Presidency, ICC-02/04-01/05-75, 10 January 2006; Notice of OTP Request Addressed to the Presidency, ICC-01/04-97, 10 January 2006.

worked while a Legal Adviser in the OTP. The OTP sought in the alternative that the same relief be considered by the Plenary, under Art. Art. 41(2).

17. The OTP's 9 January 2006 internal memorandum described the substantial work that the current Senior Legal Adviser to the Pre-Trial Division had previously performed while a Legal Adviser for the OTP, in the manner set forth above. It examined the applicable legal standards for separating judges – and their legal advisers – from cases in which they had previously worked in some other capacity. These legal standards were derived from both internationally recognized human rights, international criminal tribunals, and common and civil law jurisdictions which apply the same "appearance of impartiality" standard imposed by the Rome Statue, *see* Art. 41(2). The OTP urged that it was necessary to erect a "wall" between the Senior Legal Adviser and the pending Uganda and DRC proceedings, to ensure fairness to all the parties and participants and to foreclose future legal challenges to the appearance of impartiality of the judges advised by the Senior Legal Adviser.[15]

18. In its memorandum to the Presidency, the OTP also noted its own "duty to present the issue of the scope of Mr. Bitti's duties to avoid the possible infringement of the rights of accused persons and victims and to expose the risk that the judges of the Pre-Trial Chamber may become subject to applications for disqualification."[16] The OTP stated that it would "consider it a legal and ethical duty to inform accused persons and victims of the same factual circumstances related in this memorandum, in order to enable them to assess independently any impairment of their right to a tribunal which is not only fair in fact, but also presents an impartial appearance to the public."[17]

[15] The OTP memorandum did not address the Darfur or Central African Republic situations.
[16] *See* 9 January 2006 OTP Memorandum, p. 4.
[17] *See id*.

19. By memorandum dated 26 January 2006, the Presidency found that it lacked the "competence to examine the substantive issue which the Prosecutor has put before it."[18] The Presidency reasoned that questions relating to the "role" of the legal staff of the judges fall outside the sphere of "proper administration of the Court," as that phrase is used in Article 38(3)(a), which defines the competence of the Presidency.[19] Instead, in the view of the Presidency, the matter raised by the OTP related to the performance of judicial functions and was "necessarily inherently linked to the judicial process itself."[20] The Presidency determined formally to communicate the Prosecutor's request "to the judges of Pre-Trial Chambers I and II for any use that they may deem appropriate."[21] The Presidency also determined that it was "open to the Prosecutor to decide whether he wishes to raise this matter with Pre-Trial Chambers I and II."[22]

20. The Pre-Trial Division also subsequently issued a determination in which, like the Presidency, it declined to consider the matter on the merits. On 10 February 2006, the President of the Pre-Trial Division, Judge Hans-Peter Kaul, addressed an internal memorandum to the Prosecutor, in which he stated that the Pre-Trial Division on its own initiative was considering the OTP's request for the "walling" of the Senior Legal Adviser.[23] According to the memorandum of the President of the Pre-Trial Division, the matter "remain[ed] under active

[18] *See* 26 January 2006 Presidency Memorandum, para. 25. The Presidency has expressed that it has no objection to the Judges of the Pre-Trial Chambers making the contents of the Presidency's decision public, should they deem it appropriate at any stage. *Id.*, para. 34. For its part, the OTP has previously expressed in a memorandum to the Presidency dated 10 February 2006 that there is no legal basis for this matter to be non-public. This application quotes only the portions of this memorandum and the decisions of the Pre-Trial Division which are necessary to explain the basis for this application, but the OTP has no objection to the publication of the entirety of the Presidency's decision and the decisions of the Pre-Trial Division.

[19] *See id*., para. 21.
[20] *See id*., para. 20.
[21] *See id*., para. 33.
[22] *See id*.
[23] *See* 10 February 2006 Pre-Trial Division Memorandum (one page only).

consideration by the judges of the Pre-Trial Division."[24] A month later, by memorandum dated 15 March 2006, the President of the Pre-Trial Division informed the Prosecutor that "the Division cannot act on the basis of the [OTP's] request" because the OTP request was not "formally" addressed to the Pre-Trial Division or to the Pre-Trial Chambers,[25] and there was no "procedural basis for considering a request made by a participant to the proceeding for the isolation of the Senior Legal Adviser . . . ."[26] Despite the Pre-Trial Division's determination of an inability to act, the President of that Division also "stress[ed] that nothing in this internal memorandum prevents you from presenting any of the arguments raised in your request in a proper procedural form."[27]

21. By memorandum dated 28 March 2006, the Prosecutor responded by requesting to know, for the purpose of "minimizing the possibility of any misunderstanding," whether the Senior Legal Adviser was "currently rendering advice regarding the proceedings related to the situations in the DRC and in Uganda," and "whether it is anticipated that the Senior Legal Adviser will do so."[28] The OTP also offered to respond to any inquiries from the judges of the Pre-Trial Division regarding its request.[29]

22. Before the OTP's request was answered, by letter dated 4 May 2006, counsel for Lubanga, who had first appeared in the *Lubanga* case on 20 March 2006, notified the President of the Pre-Trial Division that he was joining the request of the OTP that the duties of the Senior Legal Adviser not include rendering legal advice in that case.[30] Defence counsel's correspondence noted that his request followed the OTP's notification of defence counsel, by letter dated 31 March

[24] *See id.*
[25] *See* 15 March 2006 Pre-Trial Division Memorandum, p. 1.
[26] *See id.*, p. 2.
[27] *See id.*
[28] *See* 28 March 2006 OTP Memorandum (one page only).
[29] *See id.*
[30] *See* 4 May 2006 Defence Counsel Memorandum (one page only).

2006, of the extent and nature of Mr. Bitti's activities as Legal Adviser in the OTP and the remedies sought by the OTP from the Presidency.[31]

23. On 17 May 2006, the President of the Pre-Trial Division notified the OTP that the Pre-Trial Division had determined not to disclose the Senior Legal Adviser's case-related duties. After quoting portions of the Pre-Trial Division's earlier determination not to consider limiting the duties of the Senior Legal Adviser, the President stated that on the same basis, "it is not appropriate for me to respond to your question in your internal memorandum of 28 March 2006."[32]

24. About a month later, by letter dated 16 June 2006, the President of the Pre-Trial Division responded to the request of defense counsel for Lubanga for the segregation of the Senior Legal Adviser from the DRC case.[33] The new letter repeated the reasons stated in the President's 15 March 2006 memorandum for declining to consider the merits of the question of whether the scope of Mr. Bitti's duties should be limited.[34] The President of the Pre-Trial Division also identified for the first time "factual elements," which he stated might "help [defence counsel] to form a considered view on the matter."[35] The letter stated that: (1) on 8 July 2005, a member of the OTP had taken part in the Selection Committee's endorsement of the interviewing panel's recommendation to offer to Mr. Bitti the post of Senior Legal Adviser; and (2) on 13 July 2005, the OTP "was made aware" of the fact that Mr. Bitti would be recruited for the post of Senior Legal Adviser but had not "registered" any "objections" after that date, until 9 January 2006, when the OTP submitted its request to the Presidency.[36] The President of the Pre-Trial Chamber also noted that Mr. Bitti, while serving as Senior Legal Adviser, "is not attached to any particular judge or chamber,"

[31] *See id*.
[32] *See* 17 May 2006 Pre-Trial Division Memorandum, p. 2.
[33] *See* 16 June 2006 Pre-Trial Division Letter. The letter was not copied to the OTP.
[34] *See id*., para. 6.
[35] *See id*., para. 8.
[36] *See id*., para. 8.

and that the judges "have personal legal assistants who assist them in the daily casework."[37]

II. The Procedural Basis for This Application

25. The primary reason for the filing of this application in the pending DRC and Uganda cases is the exhaustion, as of June 2006, of other remedies which the Presidency or the Pre-Trial Division might have made available, and the strong suggestion in the decision of the Presidency, in particular, that the remedy sought by the OTP and the defence must be requested from the Chambers, as part of the Court's judicial proceedings. As is discussed below, the OTP continues to believe that the separation of the Senior Legal Adviser from the DRC and Uganda cases can be accomplished administratively, by application of the Staff Regulations, whether the administrative action is taken by the Presidency, the Pre-Trial Division, or even the Chambers themselves. Under this view, this application serves to notify the Chambers formally of the OTP's request for relief, as the Presidency appears to have preferred, but the application itself need not become the subject of judicial decision-making. Instead, this application might merely serve as the impetus for the imposition of administrative relief, which once made known to the parties might even eliminate any need for adjudication. The OTP believes alternatively that although it is unnecessary to reach a judicial determination of the matter, it is also within the competence of the Pre-Trial Chambers to order the relief sought in this application, not as an administrative action but as part of judicial decision-making.

26. If this Chamber decided that this judicial proceeding is *not* the proper forum for the requested relief to be considered, contrary to the suggestion made in the Presidency's 29 January 2006 memorandum that any relief must be sought from

[37] *See id*., para. 9.

the Chambers, the OTP intends to submit a further request to the Presidency and to other judicial bodies. This is because the OTP believes that it is a legal necessity that the ICC, as a whole, furnish a means by which the clear legal conflict presented by the current Senior Legal Adviser's successive employment by the OTP and the Pre-Trial Division can be addressed. As discussed *infra* in Section III.C, there is universal agreement among the relevant legal authorities that the legal adviser to the judge, no less than a judge himself or herself, should be "walled" from working on any case in which he previously was involved as a member of the prosecuting office.

27. Further, the circumstance presented by the Senior Legal Adviser's successive appointments is just one of many possible situations in which a circumstance relating to a legal adviser of a judge could potentially undermine the appearance of impartiality of the judge or the tribunal. A legal adviser who renders advice to a Chamber on a particular case could also turn out to have made prior public statements about the accused, or to be a friend or relation of an OTP trial attorney in the same case, or to have demonstrated animus against the victims' representative. It cannot be that the Court is powerless even to assess the propriety of any remedy – either administrative or judicial in nature – until the degree of the staff member's lack of appearance of impartiality progresses to the point where a party is compelled to seek disqualification of the judges advised by the staff member. Such an approach impedes both efficiency and fairness because the delay itself can foster doubt about the appearance of impartiality of the tribunal.

28. The Presidency appears to have favoured the legal reasoning that an application to separate the Senior Legal Adviser from working in the Uganda and DRC cases should be considered by the Pre-Trial Chambers upon presentation of an application formally filed in the judicial proceedings. The Presidency found that the OTP's request was "necessarily inherently linked to the judicial process

itself" and to "judicial functions," within the meaning of Art. 40(1).[38] Specifically, the Presidency reasoned that because "judges utilize their legal staff during the course of their judicial work," "the role performed by those legal staff [falls] outside the sphere of the 'administration' of the Court and within the domain of the judicial functions of the individual judges and their chambers."[39]

29. It is the OTP's view that a number of procedural options exist by which the judges could consider the OTP's request to separate the Senior Legal Adviser from rendering legal advice in the Uganda and DRC cases.

30. First, the Chamber could find that it has the authority to consider and impose the relief requested in this application, purely as an administrative matter. Mr. Bitti, like any employee or staff person of the court, is tasked in his duties, and operates under the admonition stated in the ICC Staff Regulations and Rules that ICC staff members "shall avoid any action . . . that *may adversely reflect on their status or on the* integrity, independence and *impartiality* that are required by that status."[40] The prohibition notably requires not merely actual impartiality, but impartiality, as objectively viewed, and impartiality constitutes one of the "core values" of the ICC, as identified in the Staff Regulations authored by the Assembly of States Parties.[41] The Staff Regulations also make apparent that the propriety of any individual staff member's conduct should be assessed against

[38] *See* 26 January 2006 Presidency Memorandum, paras. 20, 21.

[39] *See id.*, para. 21. The Presidency specifically noted its concerns that deciding the OTP's request might lead the Presidency: (1) to interfere with the ability of the judges to perform impartially and independently their "judicial functions," within the meaning of Art. 40(1), *see id*.; and (2) wrongly infringe on the procedures set forth in Art. 41(2) and Rules 34 and 35 for the disqualification of judges from judicial proceedings, to the extent that the OTP was raising an issue about the impartiality of the judges, *see id.*, para. 22.

[40] *See* Staff Regulation 1.2(f), Staff Rule 101.3(i).

[41] Staff Regulation 1.2, Core Value (b) provides that Staff members of the Court "shall uphold the highest standard of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, compliance with the relevant standards on confidentiality established by the Court, probity, *impartiality*, fairness, honesty and truthfulness in all matters affecting their work and status."

the "aims, principles and purposes of the Court" as a whole. Indeed, by "accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct *with the interest of the Court only* in view."[42]

31. In addition, as is the case with any ICC employee, Mr. Bitti's duties may also be limited or changed as a matter of administration by any body or individual who properly serves as a supervisor of his work. The specific entities which were expected to task Mr. Bitti, according to the Vacancy Announcement for the Senior Legal Adviser's position, were the Pre-Trial Chambers and the President of the Pre-Trial Division. *See* Annex A. In this view, Mr. Bitti's duties could be changed or limited by the individual Chambers – just as Mr. Bitti's duties probably already are assigned and modified on a regular basis. Any such imposition of a change in duties would not require an act of judicial decision-making, but instead merely an internal, administrative directive.[43]

32. Second, under the same reasoning, the President, or the Pre-Trial Division, or the Presidency, could equally make an administrative, or "personnel," decision to limit the scope of Mr. Bitti's duties. The President is, by operation of Staff Regulations 1.2(c) and 1.3(a), Mr. Bitti's ultimate supervisor and the person to whom Mr. Bitti is accountable.[44] Staff Regulation 1.2(c), for example, states that "Staff members of the Court are subject to the authority of the President, the Registrar or the Prosecutor, as appropriate, and to assignments by them to any of the relevant activities or offices of the Court." Accordingly, it is undeniable that

[42] Staff Regulation 1.2(e).

[43] While the Presidency rejected the view that the Presidency itself could determine the request to isolate Mr. Bitti, based on its jurisdiction over the "proper administration of the Court," *see* 29 January 2006 Presidency Memorandum, para. 21, the Presidency expressed no opinion about whether another judicial body could take administrative action.

[44] Staff Regulation 1.3(a) provides: "Staff members of the Court are accountable to the President, the Registrar, or the Prosecutor, as appropriate, for the proper discharge of their functions."

the President could limit or change Mr. Bitti's duties. The Presidency is responsible for "the proper administration of the Court, with the exception of the OTP," *see* Art. 38(3)(a), and thus can permissibly be seen as an entity with the authority to limit or change Mr. Bitti's duties so as to protect the functioning of the Court. The Pre-Trial Division, insofar as it is the entity to which Mr. Bitti is formally assigned, also logically holds the power either to assign or not to assign certain work to Mr. Bitti.

33. For the foregoing reasons, there is plainly a procedural mechanism available to address the request for separation, and it is the same authority under which Mr. Bitti is currently given tasks and assignments: the Staff Regulations and Rules. Contrary to the suggestion which might be inferred from the Pre-Trial Division's citing of Art. 41 and Rule 34,[45] the parties and the Court are not unable to act unless and until a potential threat to the appearance of impartiality of the tribunal, posed by a staff member, has become so extensive that a formal application to disqualify the judges has already become necessary.

34. Third and finally, if the Pre-Trial Chamber rejects the viability of any administrative remedy, the authority to isolate Mr. Bitti in the alternative may reasonably be implied from the authority cited by the Pre-Trial Division: Art. 41(2)(a). Art. 41(2)(a) is limited by its terms to applications by the OTP or the defence to disqualify *a judge* when, *inter alia*, "that judge has previously been involved in any capacity in that case before the court . . . " or there is any other circumstance in which the judge's "impartiality might reasonably be doubted on any ground." Article 41(2)(a) recognizes the vital objective of safeguarding the appearance of impartiality of the judges, and the ultimate power of judges to excuse themselves or disqualify judges, upon application of the parties, to preserve the appearance of impartiality. The objective of Art. 41(2)(a), however,

[45] *See* 15 March 2006 Pre-Trial Division Memorandum, p. 2.

could not be fulfilled – and indeed would be frustrated – *absent some means for judges to adjudicate challenges to allegedly inappropriate appearances created by judicial staff*. It cannot be, for example, that the Rome Statute furnishes a ready remedy, for example, when the accused's sibling is serving as a judge, while providing none if that sibling serves as the sole or main legal adviser to the judge.[46]

35. In addition, the authority that judges already possess to excuse themselves under Art. 41(1) necessarily subsumes an authority to regulate their own contacts and relations so as to protect the appearance of impartiality. If a judge may take the ultimate remedy of excusing one's self so as to preserve the appearance of impartiality, the judge must also possess the authority to separate himself or herself from a circumstance which might create the need for excusal, or disqualification. The variety of remedies, limitations and impediments which judges may impose and enforce upon legal advisers and judicial staff, to serve the important objective of preserving their own appearance of impartiality, are indeed recognized in caselaw and in statutory provisions, as is discussed in Section III.C *infra*.[47]

[46] Art. 41(2)(a) would not require the question of the separation of the Senior Legal Adviser to be decided by the Plenary, in the view of the OTP. Although Art. 41(2)(c) requires the disqualification of a judge to be decided by "an absolute majority of the judges," a determination that the Chamber also possessed authority to enter a judicial order separating Mr. Bitti would not necessarily require the Chamber also to find that this separation must be accomplished by the same means which apply when disqualification of a judge is at issue.

[47] The reasoning in the Presidency's memorandum of 26 January 2006 relies upon a similar rationale: that the Chambers must retain an inherent power to regulate matters not specifically addressed in Art. 41(2)(a) but potentially relating to the judges' own appearance of impartiality. The Presidency noted that its determination not to consider the OTP's request on the merits was based on concerns of a "potential interference" with judicial functioning and the making of some determination "as to the disqualification of judges" which might "pre-emptive[ly] control" that issue. *See* 26 January 2006 Presidency Memorandum, paras. 21, 22. The Presidency's determination implicitly recognizes that it would be inconsistent and incomplete for the Chambers to be charged with receiving challenges to the judges' impartiality without being deemed to possess a corollary power to determine other questions which might be seen to affect the Chambers' judicial functioning and/or the appearance of the Chambers' impartiality.

36. In summary, it can be expected that the ICC, because it is a new judicial institution, may yet develop employment rules, like those in other judicial systems, which will entirely prevent the risk that a member of the judicial staff may jeopardise the appearance of the tribunal's impartiality.[48] The particular remedy requested here, in any event, consists of a simple and readily available administrative action: the limitation of an ICC staff member's duties. This remedy could be imposed on the initiative of the Chamber or any other administrative entity to which Mr. Bitti reports. It could also be imposed by the Chamber as part of a formal adjudication which it carries out by means of authority implied under Art. 41(2)(a).

37. None of the procedural avenues just described, moreover, would be barred by any of the "factual elements" identified by the President of the Pre-Trial Division in the 16 June 2006 letter to defence counsel. At the threshold, the OTP strongly disputes the facts as related in that memorandum. During the process of interviewing and selecting Mr. Bitti to serve as Senior Legal Adviser to the Pre-Trial Division, the OTP was never consulted by the interviewing panel.[49] The 16 July 2006 letter of the Pre-Trial Division suggests that the OTP

[48] In other jurisdictions, internal employment rules prevent any "appearance of partiality" from developing when a single person works successively as a representative of one of the parties and a judge, or vice versa. *See, e.g.*, Leidraad onpartijdigheid van de rechter (Dutch Guideline on the Impartiality of the Judge), Recommendation 5 (deputy judges who are simultaneously prosecutors may not preside in the criminal section of the same court in which his prosecutor's office is seated); Ordonnonce N°58-1270 portant loi organique relative au statut de la magistrature (French Ordinance enacting the Judicial Service Institutional Act), Ch. I, Art. 9-1 (current and former members of the judicial service cannot serve as counsel within the jurisdiction of the court at which they served within the preceding five years); United States Attorneys' Manual, Title 1-4.620 (barring federal prosecutors who supervise or personally handle a matter from representing any other party in that matter for two years after the supervisory responsibility ends).

The codes, guidelines and other cited material that are not officially available in English, have been unofficially translated into English by the OTP and are being filed as Annex B to this application.

[49] In May 2005, an interviewing panel which interviewed Mr. Bitti for a position in the Registry did consult the OTP, by contrast. At that time, the OTP informed the panel that although Mr. Bitti's assumption of that post would not create a conflict *per se*, a conflict might arise depending on the cases to which Mr. Bitti was assigned.

endorsed the appointment of Mr. Bitti as Senior Legal Adviser because on 8 July 2005, the staff member of the OTP who served "on the Selection Committee took part in this Committee's endorsement" of the interviewing panel's recommendation that the post of Senior Legal Adviser be offered to Mr. Bitti.[50] The members of the Selection Committee, however, do not sit on that Committee to express the views of the organs in which they work. Section 2.1 of the Selection Committee Guidelines provides expressly: "In performing their duties, members of the Selection Committee shall act independently and shall not take instructions."[51] By the time the OTP was first made aware of Mr. Bitti's recruitment for the post of Senior Legal Adviser, on 13 July 2005, a week after the Selection Committee met, the interviewing and selection process had already ended and the position had already been offered to Mr. Bitti.[52]

38. It is respectfully submitted that the recitation in the letter authored by the President of the Pre-Trial Division has no legal consequence. Nothing attempted or not attempted by the OTP at the time of the hiring negates the independent obligation of the judiciary to take the steps necessary to safeguard the appearance of impartiality of the judges. Moreover, it has never been the position of the OTP that Mr. Bitti could not be appointed to serve as Senior Legal Adviser at all; any potential conflict of interests would only arise if he were permitted as Senior Legal Adviser to work on the same cases in which he

[50] 16 June 2006 Pre-Trial Division Letter, p. 3.

[51] *See* Selection Committee Guidelines, Section 2.1. The Committee's primary function is to review the work and recommendations of the interviewing panel to determine whether the interviewing panel followed the procedures set forth in the Staff Regulations and, for example, took into consideration principles of geographical representation, gender balance, and language requirements. *See* Sections 1.2 & 1.3.

[52] The OTP is prepared to substantiate these facts, like others specified in this memorandum.

was involved while an OTP Legal Adviser.[53] In the six months following the Pre-Trial Division's hiring of Mr. Bitti, the OTP did not complain of Mr. Bitti's hiring for a simple reason: it had no indication in that period that Mr. Bitti had not already been "walled," or separated himself, from advising in the Uganda and DRC proceedings. It was only in December 2005 that Mr. Bitti was first seen attending a status conference in the Uganda case.[54]

39. In sum, the OTP accepts the Presidency's apparent view that this request properly may be filed as part of this judicial proceeding and also maintains that the Chamber, the Presidency, the President, and the Pre-Trial Division all possess the authority to impose the relief requested. The OTP also has no objection should the Chamber wish to solicit the views of external experts, as *amicus curiae*, should the Chamber believe that it would find those views helpful in evaluating either the procedural issue addressed in this section, or the existence of a legal requirement to separate Mr. Bitti.

III. The Legal Basis For Separating the Senior Legal Adviser from the Cases in Which He Was Involved as OTP Legal Adviser

A. Introduction

40. The principles governing judicial impartiality give rise to the requirement, at a minimum, that Mr. Bitti prospectively be separated from rendering any advice about the pending DRC and Uganda cases to the Chamber. For that reason, this section describes, in turn, the principles governing the appearance of impartiality of judges and the rules relating to the disqualification of judicial legal advisers.

[53] For example, the OTP has not thus far sought any relief with respect to the Darfur and Central African Republic situations. It reiterates that it is willing to respond to any inquiries about Mr. Bitti's involvement or lack of involvement in those situations while a member of the LAS of the OTP.

[54] *See supra*, para. 15.

41. The starting point of the legal analysis is the universally accepted principle that in any judicial system requiring judges to maintain an objective appearance of impartiality – as in the ICC by virtue of Art. 41(2)(a) of the Rome Statute – no judge is permitted to act in a case in which he or she has previously been involved as a member of a prosecuting office. As is discussed below, a judge is plainly prohibited from sitting in judgment of any case or dispute if he or she previously: (1) has dealt personally with the case or dispute as a prosecutor or investigator, or (2) has been a member of a prosecuting or investigating office with duties which logically could have involved him or her in investigating or prosecuting the same case or dispute.

42. It is submitted that this same prohibition extends to advisers or clerks to judges. In common and civil law jurisdictions applying the same "appearance of impartiality" standard adopted in the Rome Statute, the rule is that judicial clerks and judicial staff are equally prohibited from any conduct which would be prohibited to the judge. In particular, the prohibition that judges cannot work on matters in which they intervened as a prosecutor or investigator has explicitly been extended, in both common and civil law jurisdictions, to apply to the staff of judges, including court clerks and officers. This standard recognizes that while not every characteristic of an adviser or clerk will necessarily impugn the impartiality of the judge for whom he or she works, a legal adviser's conflict of interest can rise to the level where it impugns the judge, as an objective matter, regardless of any subjective impartiality.

43. The meaning of the express requirement contained in the ICC Staff Regulations and Rules – that each ICC staff member maintain the "appearance of impartiality" required by his or her status and serving "the interest of the Court" – is necessarily informed by the widespread acceptance of the rule that advisers and clerks to judges, no less than judges themselves, cannot act in cases and matters in which they have already been involved as prosecutors. ICC staff

members are obligated to uphold "the highest standards" of conduct.[55] Here, the highest standard of conduct is simultaneously the prevailing standard, and this standard requires the separation of a judicial adviser from cases in which he previously worked as a prosecuting lawyer.

B. The Standards Relating to the Appearance of Judicial Impartiality

1. The Universal, Objective Standard Adopted in the Rome Statute

44. The Rome Statute provides that "A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground." *See* Art. 41(2)(a). By expressly incorporating a "reasonableness" standard, this provision adopts the familiar, universal standard requiring the judiciary to maintain an objective appearance of impartiality, in addition to subjective freedom from bias. The standard derives directly from the maxim that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly seen to be done." *See King* v. *Sussex Justices, Ex parte McCarthy* [1924] K.B. 256, 259.[56] In expressing the same standard, the European Court of Human Rights has stated: "What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused."[57]

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[55] *See* Staff Regulation 1.2, Core Value (b).

[56] *See also Mežnarić v. Croatia*, ECHR Application no. 71615/01, 15 July 2005, para. 32 (Art. 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms requires that "justice must not only be done, it must also be seen to be done").

[57] *Piersack v. Belgium*, ECHR Application no. 8692/79, 1 October 1982, para. 30(a). The applicability of principles of international law, and general principles of law derived from national laws of legal systems of the world, is supported by Art. 21 of the Rome Statute and its drafting history. The Appeals Chamber of the ICTY in the *Furundzija* case, after exhaustively surveying international and domestic standards relating to judicial impartiality, found the existence of a "general rule," derived from the European Court of Human Rights and domestic civil and common law systems as well. This rule requires not only that "a Judge should . . . be subjectively free from bias," but also that "there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias." *Prosecutor v. Anto Furundzija*, Case no. IT-95-17/1-A, Judgement on Appeal, 21 July 2000, para. 189; *see also Prosecutor v. Radoslav Brdanin, et al.*, Case no. IT-99-36-PT, Decision on Application by Momir Talic for the Disqualification and Withdrawal

45. When it can be said that a hypothetical reasonable person, informed of all the relevant facts and circumstances, would apprehend bias,[58] the remedy is to nullify completely any decisions rendered by a judge who operated under the appearance of bias.[59] The much-publicized Augusto Pinochet extradition, *see Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte [2000], 1 A.C.* 119, provides a well known example of a proceeding involving international justice in which facts demonstrating only the

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of a Judge, 18 May 2000, para. 14. Under this standard, it is "the tribunal" which "must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect." *Findlay v. United Kingdom*, ECHR Application no. 22107/93, 25 February 1997, para. 73.

The objective standard of impartiality has also been recognized in Africa. Art. 7(1)(d) of the African Charter on Human and Peoples' Rights provides that an individual has "The right to be tried within a reasonable time by an impartial court or tribunal." This provision has been interpreted to require the appearance of impartiality and actual impartiality. *See* Communication No 60/91: *Constitutional Rights Project v. Nigeria* (In respect of Wahab Akamu, G. Adega and Others), reprinted in *Compilation of decisions on communications of the African Commission on Human and People's Rights Extracted from the Commission's Activity Reports 1994-2001,* Institute for Human Rights and Development in Africa, April 2002, Dakar, p. 196, para. 14; *see also Professor Isaac Newton Ojok. v. Uganda* [1993] VI KALR 31, p. 40, 44-45 (impartiality of judiciary is judged by "expectations of reasonable right-minded people . . . . We must so administer justice as to satisfy reasonable persons that the Court was impartial and unbiased").

[58] *Prosecutor v. Anto Furundzija*, Case no. IT-95-17/1-A, Judgment on Appeal, 21 July 2000, para. 190; *Edouard Karemera et al., v. The Prosecutor*, Case no. ICTR-98-44-AR15bis.2, Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004, para. 66 (there is "an unacceptable appearance of bias if: . . . the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias"; quoting *Furundzija*, para. 189); *Prosecutor v. Zejnil Delalic et al.*, Case no. IT-96-21-A, Judgement on Appeal, 20 February 2001, para. 683 (same); *see* also *Hauschildt v. Denmark*, ECHR Application no. 10486/83, 24 May 1989, para. 48 ("Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance . . . . Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw . . . ").

[59] *See, e.g., Edouard Karemera, et al.,. v. The Prosecutor*, Case no. ICTR-98-44-AR15 bis.2, Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004, para. 68-72 (ordering re-trial to entirely new Trial Chamber because appearance of bias of one judge extended to all judges of the trial panel); *Edouard Karemera, et al,.,v. The Prosecutor*, Case no. ICTR-98-44-PT, Decision on Severance of Andrew Rwamakuba and Amendments of the Indictment, Art. 20(4) of the Statute, Rule 82(B) of the Rules of Procedure and Evidence, 7 December 2004, paras. 14, 21 (nullifying interlocutory orders and decisions entered by tainted Trial Chamber relating to the presentation of evidence, as well as decision granting amendment of indictment).

most remote possibility of bias on the judge's part led to the disqualification of a judge and the nullification of a critical decision in which he or she participated.[60]

2. The Requirement That A Judge Disqualify Himself or Herself From Any Case in Which The Judge Was Previously Involved as Prosecutor or Investigator

46. 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.

47. First, the ICC Statute and Rules of Procedure and Evidence expressly incorporate the prohibition. Article 41(2)(a) provides as an example of a disqualifying circumstance: "A judge shall be disqualified from a case . . . 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 investigated or prosecuted." Rule 34 of the Rules of Procedure and Evidence includes as possible additional bases for finding an appearance of bias sufficient to disqualify a judge, prosecutor, or deputy prosecutor:

> (1) (c) performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, . . . that, objectively, could adversely affect the required impartiality of the person concerned.

See Rule 34(1)(c). Significantly, this provision prohibits, more explicitly than Art. 41(2)(a), the performance of functions, prior to taking office, during which

[60] Lord Hoffmann was disqualified because of his service as director and chairman of a charity which was not itself involved in the extradition matter, solely because the charity he directed in turn had close links to Amnesty International, an *amicus curiae* in the case. *See id.*, at 129-31, 132-34. This tenuous link was deemed sufficient by the House of Lords to disqualify Lord Hoffmann, despite the fact that no party was impugning Lord Hoffmann's actual fairness or alleging any pecuniary interest on his part. *See id.* The decision required the House of Lords to nullify the extradition previously ordered, and to direct a rehearing of the matter before a differently constituted committee. *See id*., at 125, 137, 139, 143, 146.

the judge "could be expected to have formed an opinion . . . *on the parties or on their legal representatives* that, objectively, could adversely affect" his or her required impartiality. *See id*.[61]

48. Second, the European Court of Human Rights has held that a judge cannot sit in judgment of any case, if he previously acted on the case or issue as a prosecutor or investigator, while that case or issue was being litigated. *See Piersack v. Belgium*, ECHR Application no. 8692/79, 1 October 1982, paras. 30-31 (when judge presiding at assize court had previously acted as head of the section of the Brussels public prosecutor's department which had been responsible for dealing with accused's case, the impartiality of the court "was capable of appearing open to doubt"). In the *Piersack* judgement, the Court emphasized that the appearance of impartiality may fatally be compromised even if the judge himself or herself participated only in name as a prosecuting lawyer in the case.[62] The disqualifying factor is the wrongful appearance created by the circumstance that the judge's prior duties in the prosecutor's office *could have* involved him or her, as a prosecuting lawyer, in the same case or matter, even assuming the judge never actually participated as a prosecutor in the same case. The Court stated:

> If an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality.

Piersack v. Belgium, para. 30.[63]

[61] All of these provisions apply by their terms equally to all judges in all divisions of the ICC.

[62] In the *Piersack* case itself, the only actual personal involvement of the judge in the case, while he was serving in the Public Prosecutor's Office, had been to initial some documents. *See id*., para. 29.

[63] The principle derives from the rule that a judge cannot previously have served as a lawyer or representative of one of the parties or participants, *see Mežnarić v. Croatia*, ECHR Application no. 71615/01, 15 July 2005, paras. 31-36 (finding violation of principle of objective appearance of impartiality when judge played "dual role . . . in a single set of proceedings" by serving briefly as

49. Third, codes of conduct and criminal procedure in national jurisdictions, in both civil and common law systems, routinely prohibit judges from hearing cases if the judge was previously involved in the same case or dispute as a prosecutor, investigator, or advocate for one of the parties.[64]

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lawyer for applicant's opponents in contract case commenced by applicant, was replaced by daughter for a time after his withdrawal as lawyer, and later sat as judge in the constitutional court which dismissed the applicant's complaint), and prohibits "confusion of roles between complainant, witness, prosecutor and judge," *see Kyprianou v. Cyprus*, ECHR Application no. 73797/01, 14 December 2005 (Grand Chamber), paras. 126-28 (granting application complaining of violation of Art. 6(1) of the Convention, when applicant had been adjudged in contempt by the same judges who had also commenced the charges). In other cases, the ECHR has found violations of Art. 6(1) because of successive *judicial* functions performed by one individual in the same or related cases – for example, ordering detention or assessing and issuing warrants of arrest and later sitting as a trial judge. These cases involve only an issue of pre-judgment in the successive exercise of judicial functions – not confusion of judicial/prosecutorial roles – and accordingly are substantially less relevant. *See Bulut v. Austria*, ECHR Application no. 17538/90, 23 February 1996, Separate Opinion of Judge De Meyer, paras. 1-18 (discussing evolution of standards in cases involving successive judicial functions but distinguishing cases involving judges who previously served as lawyers in the same case; "it is obviously not appropriate that someone who has already dealt with a case as a party or representative of a party, whether on the prosecution side or the defense and even if only minimally or purely formally, should subsequently deal with it as a member of a trial court").

[64] *See, e.g.*, French Code of Criminal Procedure, Book IV, Title VII (entitled "Challenges"), Art. 668(5) (grounds for challenging any first instance or appeals judge include "if the judge was involved in the case in the capacity of judge or prosecutor, arbitrator or counsel . . ."); German Criminal Procedure Code, Part One, Ch. III (entitled "Exclusion and Challenge of Court Personnel"), Section 22.4 (barring judge from exercising "his judicial office . . . if he acted in the case as an official of the public prosecution office, as a police officer, as attorney-at-law of the aggrieved party, or as defense counsel"); Il Codice di Procedura Penale (Italian Code of Criminal Procedure), Book I, Title I, Ch. 7 (entitled "Incompatibility, Abstention and Challenge of the Judge"), Arts. 34(3) & 36(1)(c) ("incompatibility" arises, requiring judge's abstention, if he has "acted as a public prosecutor, or has carried out actions of criminal investigation, or has served as a defence counsel, special solicitor, guardian of one of the parties" or "has given advice or expressed his opinion on the object of the proceedings, outside the exercise of his judicial functions"); Code Judiciaire (Belgian Judicial Service Act), Section IV, Book 2, Title III, Ch. V (entitled "Recusals"), Art. 828(9) ("Any judge may be withdrawn . . . if the judge has advised, pleaded, or written in respect of the dispute"); Swedish Code of Judicial Procedure), Part One, Ch. 4, Section 13(9) (providing for the disqualification of a judge "if he has served in the case as an attorney for, or counseled, one of the parties, or has been a witness or an expert therein"). *See additionally* American Bar Association, Model Code of Judicial Conduct, Canon 3.E(1)(b) (A judge "shall" disqualify himself when his impartiality might reasonably be questioned, including when "the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter"), as well as the codes of Spain, Portugal,and the Southern and Central American and Central European jurisdictions referenced *infra* in paras. 55 and 56.

The Bangalore Principles of Judicial Conduct also express the principle succinctly. Value 2.5.2, relating to "impartiality," states that "a judge shall disqualify himself or herself from participating in any proceedings in which . . . it may appear to a reasonable observer that the judge is unable to decide the matter impartially," including the circumstance when "the judge previously served as a

C. The Standards Relating to the Appearance of Impartiality of Judicial Staff

50. The requirement that a member of Chambers refrain from working on any matter previously encountered as a prosecutor or investigator applies not only to judges, but equally to clerks or advisers to judges. Because the "appearance of impartiality" standard inquires about the perceptions of a hypothetical reasonable observer, a judge's association with a third person logically can serve as a basis for disqualifying the judge, if the quality of that association gives rise to an apprehension of bias on the part of the judge. Thus, for example, the ICTY, ICTR and SCSL Rules provide that disqualification may be necessary on the basis of "*any association* which might affect [the judge's] impartiality."[65]

51. The rule specifically forbidding judges' clerks, staff, or advisers from working on the same cases and issues they addressed in some prior employment is clearly expressed in jurisdictions in which judges employ advisers who function like the legal officers and advisers in this Court. For example, in *King v. Sussex Judges*,[66] the King's Bench Division in Great Britain ruled that a deputy clerk to a panel of justices, who was available to consult with those magistrates "upon any point of law," or upon the evidence, *id.* at 257, should have been treated by the magistrates as "unfit to act as clerk to the justices in the criminal matter [*i.e.*, a charge of dangerous driving]," *id.* at 259, because he also was the member of a firm of solicitors engaged in conducting civil proceedings against the accused,

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lawyer or was a material witness in the matter in controversy." The Bangalore draft was the product of a series of meetings among a Judicial Group on Strengthening Judicial Integrity, which consulted judges from numerous international and national courts, as well as national codes and international instruments, as a means of identifying "core values" and principles of judicial conduct.

[65] The caselaw from the tribunals and national jurisdictions presents many examples of how a judge's associations with third parties and the acts and associations in turn of those parties – friends, organizations, relatives – can serve as a basis for a disqualifying appearance of bias.

[66] *King v. Sussex Judges, Ex parte McCarthy* [1924] 1 K.B. 256.

for damages arising out of the same accident which led to the criminal charge. *See id.*, at 257. The court found that the appearance of impartiality of the magistrates was fatally compromised, requiring quashing of the criminal conviction, even though the clerk, had in fact "scrupulously abstain[ed]" from offering any legal advice in the criminal case upon retiring with the judges. *See id.*, at 259. The court ruled that the appearance of bias was unacceptable, notwithstanding "what was actually done," *see id.*, because of the "manifest contradiction" in the clerk's "twofold position." *Id.* The court stated: "What is objectionable is his presence at the consultation, when he is in a position which necessarily makes it impossible for him to give absolutely impartial advice." *Id*., at 260.

52. In the United States, a jurisdiction in which the objective standard is applied and where "law clerks" are routinely hired to serve as legal advisers to judges, numerous reported cases exist in which: (1) the appearance of impartiality of a judge is questioned based on the clerk's association with a former or future employer who is also a party litigating before the judge; and (2) the case holds that the appearance of impartiality is compromised unless the judge took steps to prohibit the clerk from giving legal advice to the judge on the same cases or issues being presented by the former or future employer.[67]

53. The general rule stated in these cases is that although a judge is not necessarily forbidden to do all that is prohibited to each of his or her clerks, a "clerk is forbidden to do all that is prohibited to the judge." *See id*., at 1525.[68] The

[67] *Compare, e.g., Byrne v. Nezhat*, 261 F.3d 1075, 1099-1103 (11th Cir. 2001) (no disqualification of judge necessary, where judge's law clerk was formerly employed by firm representing one of litigants in case before judge, because judge had "isolated [the clerk] from the case and assigned the matter to another law clerk") with *Parker v. Connors Steel Co., et al.*, 855 F.2d 1510, 1523-25 (11th Cir. 1988) (trial judge failed to maintain appearance of impartiality of the court, and erred in failing to disqualify himself, after he neglected to prevent his clerk, the son of a partner in a law firm representing a litigant before him, from reviewing documents relevant to the case).

prohibition exists in acknowledgment of the role a law clerk plays as a legal adviser to the judge:

> Law clerks are not merely the judge's errand runners. They are sounding boards for tentative opinions and legal researchers who seek the authorities that affect decisions. Clerks are privy to the judge's thoughts in a way that neither [the] parties to the lawsuit nor [the judge's] most intimate family members may be.

Hall v. Small Business Administration, 695 F.2d 175, 179 (5th Cir. 1983). In light of this relationship, "even if the judge has no reason to recuse herself based on her own circumstances, a law clerk's relationship might cause the impartiality of decisions from that judge's chambers in which the clerk participates reasonably to be questioned."[69]

54. Civil law jurisdictions in which judicial clerks and staff play a role in advising judges analogous to the advisers in this Court also routinely observe the rule that conduct forbidden to the judge is also forbidden to judicial advisers.[70] In these civil law jurisdictions, judicial staff members, including clerks and officers of the judges, are categorically subject to the same rules of disqualification as the judges themselves. Typically, the prohibition is expressly set out in codes of criminal law and criminal procedure, and in those codes, any circumstance deemed to create an "impediment" to acting as a judge is equally deemed to create an "impediment" for the adviser.

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[68] The quotation is drawn from *Hunt v. American Bank & Trust Co*., 782 F.2d 1011, 1015-16 (11th Cir. 1984).

[69] *See Hamid v. Price Waterhouse*, 51 F.3d 1411, 1416-17 (9th Cir. 1995); *see also Onishea v. Hopper*, 126 F.3d at 1323, 1340 (11th Cir. 1997) ("It is true that a law clerk's involvement in a case and his or her relationship to one of the parties may constitute grounds for the judge's disqualification").

[70] Positions analogous to that of a "legal adviser" at the ICC are not common in most Western European civil law jurisdictions.

55. In Spain and Portugal, for example, the criminal codes follow a formulation common to civil law countries in which judicial clerks render legal advice. One code provision forbids a judge from acting in proceedings in which he or she previously represented the prosecutor's office, and a second code provision expressly extends the same ground for disqualification to "court officials" and "court clerks." For example, in Spain, a judge is required to abstain himself, without waiting to be recused, if he, "having been the defence lawyer or representative of any of the parties, issued an opinion on the lawsuit or action [in question] as counsel, or [took] part in it as a prosecutor, expert, or witness."[71] The Spanish Criminal Procedure Act then addresses the topic, "Concerning Challenges Brought Against Court and Tribunal Assistants,"[72] and provides that "challenges may be brought against the clerks of municipal courts, criminal investigation courts (*juzgados de instrucción),* high courts (*Audiencias),* and the Supreme Court," and also "court officers," on the exact same grounds listed in the Organic Law of the Judiciary.[73] In Portugal, a judge is prohibited from exercising his function in a criminal proceeding "where he has taken part in the proceedings as a representative of the Public Prosecutor, a body of the judicial police, defence attorney, counsel for the party entitled to bring a private prosecution or to bring a private action for damages or expert."[74] In the same chapter of the Code of Criminal Procedure, Art. 47 extends this same impediment to "experts, interpreters and court officials," and provides a summary process for disqualification of these officials.[75]

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[71] *See* Ley Orgánica del Poder Judicial (Spanish Organic Law of the Judiciary), Book III, Title II, Ch. V (entitled "Abstentions and Challenges"), Arts. 217 & 219(6).

[72] *See* Ley de Enjuiciamiento Criminal (Spanish Criminal Procedure Act), Book I, Title III, Ch. 4.

[73] *See id*., Book I, Title III, Chapter I, Art. 54 & Chapter IV, Art. 84.

[74] *See* Código de Processo Penal (Portuguese Code of Criminal Procedure), Book I, Title I, Ch. VI, Art. 39(1)(c).

[75] *See id.*, Book I, Title I, Ch. VI, Art. 47(1).

56. The same formulation – of requiring the disqualification of judicial staff on the same grounds applicable to the judges themselves – has been enacted in criminal codes of jurisdictions in South America (including Argentina, Brazil, Paraguay, Colombia, and Bolivia),[76] Central America (including Costa Rica),[77] and Mexico,[78] and also is observed in Central European countries (Kosovo).[79]

[76] Argentine law requires a judge to abstain from hearing a case in which he has previously intervened as "official of the Public Prosecutor's Office, defence lawyer, denouncer (*denunciante*), plaintiff (*querellente*), or plaintiff claiming damages (*actor civil*) . . . ." *See* Código Procesal Penal (Argentine Code of Criminal Procedure), Book I, Title III, Ch. 4 (entitled "Disqualification and Challenges"), Art. 55(1). Art. 63 of the same chapter provides that "court clerks and assistants must disqualify themselves and may be challenged on the grounds described in Art. 55 . . . ." In Brazil, a judge "may not exercise jurisdiction" in proceedings in which he or she, or his or her spouse or relative, "has acted as defence counsel or lawyer, representative of the Public Prosecution service, police authority, officer of the court or expert witness." *See*, Código de Processo Penal (Brazilian Code of Criminal Procedure), Book I, Title VIII, Ch. I (entitled "Incompatibilities and Disqualifications"), Art. 252 I & II. A separate article in Chapter V states that "The provisions on the recusation of judges shall apply to clerks of the court and judicial officials, in matters applicable thereto." *See id.*, Art. 274. In Paraguay, the law stating that a judge should be excused if he or she previously intervened in the proceedings "as a party, legal representative, proxy, defence lawyer, expert, or witness" is applied equally "to court clerks and anyone who provides any type of judicial assistance in proceedings." *See* Código Procesal Penal (Paraguayan Code of Criminal Procedure), Book One, Title I, Ch. IV (entitled "Grounds for Disqualification and Challenges"), Arts. 50(8) & 51. Colombia and Bolivia have essentially the same code provisions. *See* Código de Procedimiento Penal (Colombian Code of Criminal Procedure), Book I, Title I, Ch. 7, Arts. 56(12) & 63; Código de Procedimiento Penal (Bolivian Code of Criminal Procedure), Part II, Book I, Title I, Chapter 5, Arts. 316(1) & 322.

[77] The Code of Criminal Procedure of Costa Rica, s*ee* Código Procesal Penal (Code of Criminal Procedure), Book I, Title I, Ch. 2 (entitled "Disqualification and Challenges"), Arts. 55(1)(a) and 60 (Art. 55(1)(a) requires disqualification from hearing a case if "in the course of the same proceedings," the judge "has been involved as an official of the Public Prosecutor's Office, legal representative, denouncer (*denunciante*), or plaintiff (*querellente*)," and Art. 60 applies the same rule to "court clerks and anyone who provides some kind of judicial assistance in proceedings").

[78] The Ley Orgánica del Poder Judicial de la Federación *(*Basic Law of the Judiciary of the Federation of Mexico) bars a judge from "hearing matters" if he or she has "been an agent of the Public Prosecutor's Office, . . . attorney or defence lawyer in the matter in question," or has "previously taken action or made recommendations on the matter in favour of or against any of the interested parties." *See* Ley Orgánica del Poder Judicial de la Federación *(*Basic Law of the Judiciary of the Federation of Mexico), Tenth Title, Ch. II (entitled, "Concerning Impediments"), Art. 146.XVII. The Código Federal de Procedimientos Penales (Federal Code of Criminal Procedure) applies the same impediment to "court clerks." *See* Eleventh Title, Second Section, Ch. II (entitled "Impediments, disqualification and challenges"), Arts. 444 & 460.

[79] In Kosovo, a judge may be excused if "in the same criminal case" he or she acted among other, as prosecutor, defence counsel or legal representative. These grounds are applicable "*mutatis mutandis*" to public prosecutors or their representatives, as well as recording clerks, interpreters, specialists and

57. A single principle, then, garners overwhelming support in the codes and jurisprudence of common and civil law jurisdictions which apply the same objective standard enshrined by Art. 41(2)(a): that the "appearance of impartiality" standard demands the same conduct of a legal adviser which is required of a judge. The ICC Staff Regulations and Rules explicitly obligate a staff member to observe an appearance of impartiality, just as a judge must do. The law in the preceding text and footnotes makes apparent that the conduct in which a legal adviser engages, under the "appearance of impartiality" standard applicable to staff, can be no different from that of the judge he or she advises. In the case of legal advisers no less than judges, then, disqualification or separation should result from: (1) prior involvement in the case "in any capacity," *see* Art. 41(2)(a); or (2) "performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned." *See* Rule 34(1)(c). Under this standard, Mr. Bitti is clearly prohibited from rendering legal advice in the pending DRC and Uganda cases.

IV. The Application of the Legal Standard in the Circumstances Presented

58. Based on the legal standards described above, including the Rome Statute and the ICC Staff Regulations and Rules, Mr. Bitti should be segregated from working in this case. All parties and participants have strong interests which are protected by the rule that a legal adviser, no more than a judge, can serve

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expert witnesses. *See* Provisional Criminal Procedure Code of Kosovo, Part I, Ch. III, Arts. 40(4) & 45. The Romanian Criminal Procedure Code contains similar grounds for disqualification of judges under the section entitled "Incompatibility." A judge "is incompatible to try" if among other, he "has been involved in criminal prosecution or has supervised criminal prosecution. . . ." Under Art. 49(1) these grounds are extended to the prosecutor, the assistant magistrate and the session clerk. *See* Codul de Procedura Penala (Romanian Criminal Procedure Code), Section I, Title II, Ch. II, Arts. 48(1)(e) & 49(1).

successively in the same case as a legal adviser to the prosecuting office and to the judges.

59. The OTP has a role in this proceeding, by design of the Statute, *see* Art. 54(1), as a minister of justice who carries the responsibility of acting objectively and ensuring the fairness and integrity of the proceedings. In the same manner that it would be obliged to appeal a wrongful conviction of an accused, *see* Art. 81, the OTP is compelled to raise issues concerning the fairness of the proceedings.

60. The rights of the defence must be seen as paramount here, and the defence – even if not yet present in this case – has a strong entitlement to the requested separation of the Senior Legal Adviser from this case.[80] Here, the scope of the work that Mr. Bitti performed while in the OTP involved a wide range of issues which either already have arisen in this case or could arise in this litigation, and this circumstance results in an appearance of a lack of impartiality. Indeed, nearly every issue about which Mr. Bitti rendered legal advice while a Legal Adviser in the OTP – whether it pertained to the legal standards for the sufficiency of a warrant application, the actual sufficiency of draft warrant applications, the scope of victims' participation, or the scope and means of disclosure – could reasonably be seen to have had an implication for the rights of the defence. Accused persons are entitled to a reasonable apprehension about the ability of the legal adviser to provide independent advice to the judges, when, as here, the adviser has previously advised the OTP – and himself arguably has been "tainted" by exposure to the OTP's views and strategies – with respect to matters which have already arisen or can be expected to arise before the Chamber. The prohibition on legal advisers serving in the same case

[80] The clear interest of the defence in the issues raised by this application is underscored by the fact that counsel for Lubanga also requested the Pre-Trial Division to separate Mr. Bitti. The OTP respectfully requests, *see infra* at para. 65, that *ad hoc* defence counsel be appointed in this case, for the purpose of giving views on this application on behalf of future accused persons in this case.

in different capacities is intended to provide precisely the guarantee of an appearance of impartiality to which the parties are entitled.

61. Victims, no less than accused persons, may feel that it violates the principle of objective impartiality to be subjected to judicial decision-making which could be influenced, directly or indirectly, by arguments or views privately exchanged between the OTP and its then-Legal Adviser, rather than the arguments advanced formally by the participants. In the Uganda case, for example, Mr. Bitti not only advised the OTP about legal issues relating to victims, he also was privy to information furnished by victims and about victims. Victims, like the other participants, are entitled to a warranty of the Senior Legal Adviser's non-involvement in the pending cases, so that there is not even an appearance that judicial determinations could be affected by victim-related information exchanged while the Senior Legal Adviser worked in the OTP.

62. Finally, the OTP, in its role as a litigant whose rights and entitlements are also adjudicated by the Chamber, is also entitled to adjudication which is based on legal views and advice which cannot have been tainted either by prior involvement in the case or association with the parties. With respect to judges, Art. 41(2)(a) and Rule 34(1)(c) confer this right, in conformity with national practice, which routinely grants prosecution offices a right to seek disqualification of any judge who previously acted in the case in a different capacity. As is discussed previously, the same rationale applies with equal force to a legal adviser to the judges.

63. In addition, the potential for possible pre-judgment of the issues or the parties is not the exclusive justification for the remedy of separation. Each of the 50 or so legal memoranda, the writing of which was accomplished or supervised by Mr. Bitti, was written and reviewed for the purpose of developing and strengthening the OTP's positions in court. This planning and strategizing extended to all

aspects of potential litigation: the legal sufficiency of anticipated OTP applications, the circumstances and manner in which disclosures specified in the Rome Statute might be ordered, the adequacy of OTP investigative steps, and the viability of potential theories of criminal responsibility. One of the manifest purposes of the rule forbidding judicial staff from serving successively as prosecutor and judicial adviser in the same case is to insulate the prosecuting office from any risk that its own confidences and strategies may be revealed to the adjudicating body.[81] It is for all of these reasons that the OTP has a strong interest in seeking the isolation of the Senior Legal Adviser.

V. Information About The Senior Legal Adviser's Duties in the Case

64. The "appearance of impartiality" standard also presents, as a matter of logic, the issue of whether the Chamber might furnish information to the participants about whether and to what extent the Senior Legal Adviser has rendered legal advice to the Chamber to date. The parties previously had requested this information of the Pre-Trial Division, to minimize the possibility of any factual misunderstanding, and the Pre-Trial Division declined to respond to the request. The legal framework provides that judges and prosecutors are obligated to be

[81] The need for the legal remedy of "disqualification" or separation of the legal adviser, importantly, is independent of the adviser's obligation to maintain confidentiality, because the standard of objective impartiality demands more than the maintenance of confidences in fact. In the context of conflicts of interest of lawyers, for example, it is plain that a lawyer is wholly barred from representing different parties successively in the same proceeding, notwithstanding the usual bar on disclosing one client's confidences to the second. *See, e.g.*, Art. 12(1) of the ICC Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, adopted on 2 December 2005. The lawyer must decline the second representation altogether, notwithstanding his or her intention to maintain client confidences, because it is the *knowledge* of the attorney which creates the conflict, and the client is entitled to protection against *any* risk of disclosure of the attorney's knowledge. *See, e.g.*, Code of Conduct for Lawyers in the European Union (CCBE), § 3.2.3 (test is whether "there is *a risk* of a breach of confidence" or if "*the knowledge* which the lawyer possesses . . . would give an undue advantage to the new client"); Il Codice Deontologico Forense di Consiglio Nazionale Forense (National Forensic Code of Conduct of Italy), Title IV, Art. 51(I) (successive representation permitted only after a lapse of time and in a different matter, and when "in any case *no possible* use could be made of the information previously acquired").

proactive in preserving the appearance of impartiality,[82] and that this duty to act encompasses a duty to disclose any circumstance that could be considered to warrant disqualification.[83] Mr. Bitti has an independent obligation to disclose any circumstance which might warrant his own isolation from this case.[84] As a

[82] Rule 35, for example, obligates any Judge, Prosecutor, or Deputy Prosecutor to excuse himself or herself if he or she believes that "a ground for disqualification exists," without "wait[ing] for a request for disqualification to be made. . . ." Domestic jurisdictions extend the obligation to judicial staff. *See also* Código Processal Penal (Brazilian Code of Criminal Procedure), Book I, Title VI, Ch. III, Art. 112 (judges, clerks of the court or judicial officials "shall refrain from acting in proceedings when there is an incompatibility or legal disqualification."); Código de Procedimiento Penal (Colombian Code of Criminal Procedure), Book I, Title I, Ch. VII, Art. 57 (any "court officer" to whom grounds for disqualification apply "should inform the Criminal Division of the Supreme Court of Justice or the criminal division of the district tribunal, as appropriate, so that he can be removed from the case");中华人民共和国刑事诉讼法 (Criminal Procedure Law of the People's Republic of China), Part I, Ch. III, Art. 28 (that "member[s] of the judicial, prosecutorial or investigatory personnel . . . voluntarily withdraw" when implicated in any of the grounds for disqualification).

[83] *See, e.g.*, Swedish Code of Judicial Procedure, Part One, Ch. 4, Section 14 ("if a judge knows of any circumstance that can be considered to warrant disqualification, he is obliged to disclose it on his own accord"); Latin American Institute of Procedural Law, Código Procesal Penal modelo para Iberoamérica, (Procedural Penal Code – Model for Latin America), Book I, Title II, Ch. I, Section 4, Art. 24 ("A judge who is implicated in any of the grounds [for disqualification] stated . . . in Art. 22, must issue a denunciation immediately in relation to being aware of the situation . . . . Silence and omission on his part shall be considered to be a serious offence."); Kosovo, Code of Ethics and Professional Conduct for Judges, Section II.A(3)(c), ("if a judge is in a situation which might be questioned he/she is under the obligation to disclose it to the parties involved . . . ."); *Metropolitan Properties Co (F.G.C.) Ltd. v. Lannon and Others*, [1968] 19 P. & C.R. 856, p. 874 (in United Kingdom, if administrative adjudicator is implicated in a conflict, he should either refrain from acting in the matter, or should disclose the conflict in order to provide the parties an opportunity to object or to waive the conflict. Non-disclosure may raise doubts as to the adjudicator's impartiality).

[84] *See, e.g.*, Código de Processo Penal (Brazilian Code of Criminal Procedure), Book I, Title VI, Ch. III (entitled "Incompatibilities and Disqualifications"), Art. 112 (obligating judges, representatives of the Public Prosecution Service, and clerks of the court or judicial officials and expert witnesses to declare any ground of incompatibility or disqualification "in the record of the proceedings"); Código de Procedimiento Penal (Colombian Code of Criminal Procedure), Book I, Title I, Ch. 7, Art. 57 (any court officer finding a ground for impediment under Art. 56 "should inform the Criminal Division of the Supreme Court of Justice or the criminal division of the district tribunal, as appropriate"); Codul de Procedura Penala (Romanian Criminal Procedure Code), Section I, Title II, Ch. II, Art. 50 (requiring the prosecutor, assistant magistrate, or session clerk to declare any incompatibility which attaches to them); Nigeria, Code of Conduct for Judicial Officers, Rule 2B (3) (requiring judicial officers to "immediately take adequate steps to report" any "unethical or unprofessional conduct by another judicial officer or a legal practitioner"); Code of Conduct of Judicial Employees (U.S. State of Alaska), Canon 3(f)(3) ("When a judicial employee knows that a conflict of interest may be presented, the judicial employee should promptly inform his or her appointing authority. The appointing authority, after determining that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the judicial employee's performance of official duties in such a matter so as to avoid a conflict or the appearance of a conflict of interest.")

matter of pragmatism, if Mr. Bitti has rendered advice to the Chamber about this case, or is currently doing so, each day of the practice arguably strengthens the appearance of partiality of the judges advised by him. Disclosure about the extent of Mr. Bitti's duties, either by the Chamber or by Mr. Bitti, would enable the case to continue unencumbered by any potential misunderstanding about a circumstance which could later be deemed to undermine the appearance of fairness of the tribunal.

Request for Appointment of *Ad Hoc* Counsel

65. The clear interest of the defence in the issues raised by this application is underscored by the fact that counsel for Lubanga in the *Lubanga* case also requested the Pre-Trial Division to separate Mr. Bitti. The OTP respectfully requests that *ad hoc* defence counsel be appointed in this case, under Regulation 103, for the purpose of giving views on this application on behalf of future accused persons in this case.

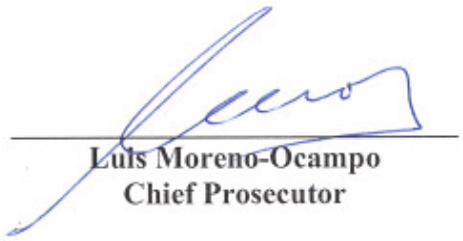
Request for Provisional Relief

66. The OTP respectfully requests that in the event Mr. Bitti is currently rendering legal advice relating to this case, he be separated from the case while this application is pending before the Chamber. For the reasons discussed above, it would effectively deny the application if the requested remedy were not imposed, at a minimum, while the request is being considered.

Conclusion

In the circumstance presented, one lawyer had held two senior positions within the court without interruption, and has worked in the same cases initially as legal adviser to the OTP and next as legal adviser to judges. The protective measure which appropriately safeguards the parties' rights to a fair proceeding is the universally approved remedy of a "wall" preventing the lawyer from rendering legal advice about the cases in which he previously worked. Additionally the Chamber

might consider furnishing information about the extent of the Senior Legal Adviser's duties on the case to date. These are the measures which comport with jurisprudence regarding internationally recognized human rights, accepted standards of international criminal tribunals, and the laws and rules of national legal systems, and thus best carry forward this Court's undoubted aspiration of applying the highest legal and ethical standards required for fair criminal proceedings.



Luis Moreno-Ocampo
Chief Prosecutor

Dated this 30th day of August 2006
At The Hague, The Netherlands

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