Cour Pénale Internationale

International Criminal Court

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N° **ICC-Pres-RoC72-01-08:**
Date : **16 January 2008**

THE PRESIDENCY

Before :	**Judge Philippe Kirsh, President** **Judge Akua Kuenyehia, First Vice-President** **Judge René Blattmann, Second Vice-President**
Registrar :	**Mr Bruno Cathala**

Public
Application for Review of Decision of the Registrar's Division of Victims and Counsel dated 2 January 2008 not to Admit Prof. Dr. Sluiter to the List of Counsel

Mr Göran Sluiter

Reasons for Filing

On 2 January the Head of the Division of Victims and Counsel (DVC) –part of the ICC's Registry- refused to admit me to the list of counsel (see annex 1). This decision is unlawful and is on that basis challenged in this application, pursuant to Rule 21 (3).

Factual and Legal Issues

There is no disagreement over factual issues. I agree with the assessment of the DVC that I fulfil three out of the four criteria for admission to the list (one provisionally). I also agree with the DVC that my experience -as a judge- in criminal proceedings is at present 5 years -and three months to be precise-, and that this falls short of the criterion of 10 years of relevant experience imposed by Regulation 67 (1).

It is this criterion itself that I challenge. The application of the 10 years-requirement, without any possibility of exception, violates elements of the right to a fair trial and should not be applied on that basis. Furthermore, as the 10 years-requirement is inconsistent with internationally protected human rights, the Judges –by adopting this provision- have exceeded the scope of their legislative powers.

I wish to emphasise that my objection focuses not on requiring 10 years experience in itself, but on the following factors essentially:

- no exception is provided for in individual and compelling cases
- no distinction is made between lead counsel and co-counsel
- no provision is made for taking into account specific wishes of defence teams.

For sake of simplicity, when reference is made to the '10 years requirement' in the arguments set out below it means the absolute and unconditional application of this requirement, without taking into account the aforementioned factors.

1. Inconsistency of Regulation 67 (1) with Internationally Protected Human Rights

At the outset I wish to note that Regulations which in their application produce results inconsistent with internationally protected human rights are invalid. This follows from the hierarchy in sources –with the Regulations being inferior to the Statute and Rules, as acknowledged by Regulation 1- and the superior authority of international human rights law, in accordance with Article 21 (3) and fully confirmed in ICC case law.[1]

As was already referred to, the problem with Regulation 67 (1) is not the imposition of standards aimed at improving the quality of counsel. What does affect the Regulation's legality is the imposition of an unreasonably high standard, without possibility of exception in individual cases and which applies discriminatorily among the professional participants in ICC proceedings. Below I will offer my reasons.

a. The right to counsel[2]

Inherent in the right to counsel is a tension between the accused's freedom in organising his defence and the State's duty to ensure a certain degree of quality. Obviously, an appropriate balance has to be struck in this tension, in such a manner that both the 'quality' and 'free choice' elements in the right to counsel are

[1] Cp. ICC Appeals Chamber in *Lubanga*:
'Article 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety' (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, Case No. ICC-01/04-01/06-772, A. Ch., 14 December 2006, para. 37)
[2] The right is protected in Article 21 (4) (d) of the ICTY Statute, Article 20 (4) (d) of the ICTR Statute, Article 67 (1) (c) of the ICC Statute, and Article 17 (4) (d) of the SCSL Statute. See also Article 14 (3) (d) of the ICCPR, Article 6 (3) (c) of the ECHR, and Article 8 (2) (d) and (e) of the ACHR.

sufficiently respected. The starting point in this assessment is that these rights should be not theoretical or illusory but real and effective.[3] As a result, it is improper to overly and unreasonably to attach to the one element of the right to counsel –quality of defence- greater weight than to the other –free choice of counsel-. This is especially so when the 'quality' requirement is established on the basis of the arbitrarily chosen and insensitive criterion of a certain number of years of relevant experience, which is fixed regardless of the character of the experience in question.

International human rights law has no issue with a variety of means of ensuring quality of defence counsel. It is, in fact, quite normal that any (at least professional) defence activity is restricted to persons who are qualified as lawyers, who are permitted to practise law in the particular jurisdiction, and who are certified as capable of effectively appearing before the competent courts.[4] Clearly, this reduces the number of available counsel and thus limits the accused in his choice, and –in a concrete situation- may even be fully inconsistent with free choice (when the accused wishes to be represented by a person who is not qualified to do so). But these restrictions are generally regarded as reasonable and proportionate in view of the need to ensure quality of defence.[5] This is the case because these national requirements concern a minimum standard of competence, which is reasonably open for qualification by all who have passed relevant exams and training, and tends to apply equally among professional participants.

The absolute condition of having relevant experience of at least 10 years is, however, unknown to national jurisdictions, not only because this would create practical problems in legal practice (a kind of problem that does not concern –at least not yet- the ICC), but also because it is plainly incommensurate and amounts to an unreasonable interference with the accused's right of choice as to how to organise his defence. In this respect, one frequently encounters in national jurisdiction recognition of the importance of free choice of counsel.[6]

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[3] Cp. –among many decisions- *Kamasinski v. Austria*, 9783/82 [1989] ECHR 24 (19 December 1989).

[4] ECHR, V. v. UK Application No. 11465/85.

[5] Cp. S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005.

[6] Cp. e.g. United States v. Lewis, 759 F.2d 1316, 1326 (8th Cir. 1985) and United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978)).

Before moving on to the legal arguments, it is submitted here that there can be no doubt that the 10-year requirement restricts a defendant significantly in his choice of counsel. It cannot be disputed that this requirement makes a significant number of undoubtedly qualified and experienced persons allowed to practice in their national jurisdiction ineligible for assignment as counsel before the ICC. In contacts between the Registrar's Office and the Katanga Defence team (see infra sub 3), members of that Office used the following or similar language in relation to my application:

'you would be amazed how many and who we had to turn down'

Although I would be glad to be informed about the numbers of unsuccessful applications, it is my firm impression that a significant number of persons were denied access to the list, solely on account of the 10-year requirement. The fact is that this exclusion severely limits a defendant in his choice of counsel.

This brings us to the question of whether this policy of widespread and systematic exclusion from the list of counsel can be regarded as consistent with the ICC's applicable law.
Since national jurisdictions do not impose this type of restriction, there is no directly relevant (international human rights) case law to guide us, except for the fact that any interference in the right to counsel must be reasonable and proportionate. Regulation 67 (1) fails both these tests.

The absolute and unconditional restriction of the choice in counsel is unreasonable and arbitrary, on at least four grounds.

First, demanding 10 years of experience is unreasonably high and fully arbitrary. There is no basis for it in general principles of criminal procedure. In no national jurisdiction –even in the most complicated cases- is this required in addition to having been accepted to practice.

Second, the requirement expressed in a number of years is an arbitrary and merely quantitative standard. As a means to ensure quality of defence, it is disproportionate in that it affects the provision of fair trial and, more specifically, the freedom to choose counsel in the way that is not necessary for the attainment of that goal in which particular case. This is due to the fact that the requirement fails to give due consideration to the quality of the experience and thus does not assess the conditions of every candidate individually. I would argue that daily experience as a defence counsel or a prosecutor in a national war crimes case for –say- 3 years should 'equal' the experience of counsel in 'ordinary' cases for –say- 5 years. Moreover, the condition does not distinguish between the different roles. The experience of being judge –a task with more responsibilities and for which generally more intensive training is required- could be seen as carrying more weight than the experience of defence counsel. Finally, on this point, one wonders how the interruption in one's professional experience is taken into account. For example, one may be a member of a national bar for 10 years, but only in one-third of this period has one actually practised as a lawyer. How is this treated? It is my view that the condition is also arbitrary in its enforcement.

Third, the condition arbitrarily and discriminatorily concerns only the defence counsel, as one of the three participants in the professional arena. For Judges and Prosecutor the legal framework of the ICC does not impose a standard of experience expressed in a specific number of years. As far as Judges are concerned, the Statute requires 'the necessary relevant experience' in criminal law and criminal procedure –with reference to a role as judge, prosecutor or defence counsel- (Article 36 (3) (b) (i)). And this requirement is not even absolute for all judges, as there may also be judges with no experience in criminal proceedings at all (Article 36 (3) (b) (ii)).[7] As to the argument that in a Trial or Pre-Trial Chamber there is always one Judge with 'the necessary relevant experience' in criminal proceedings,[8] this could also apply to a defence team. For example, the imposition of the condition that in case of representation by more than one counsel at least one of them should have 'the necessary relevant experience' appears reasonable and offers comparable conditions of appointment to that of Judges. Also, a defence team has the right to decide upon its composition in conformity with the specific exigencies of international criminal law.

There is no reasonable explanation for this extreme discrepancy in the requirement of practical experience between judges and counsel, especially if one bears in mind the scope of distinctive responsibilities between them. A point worth noting is that the judges have imposed the challenged requirement on defence counsel, without themselves having to meet similar requirements.

As to the Prosecutor's office, where the Prosecutor delegates much os his work in the courtroom to trial attorneys, the recruitment of staff is not subjected in the law of the ICC to a 10-year requirement of relevant experience. The fact that there may be a policy to recruit experienced staff is in this regard irrelevant, because it does not carry the same legal force and may –as is usually the case with 'policies'- not be applied in individual cases.

In light of the above, it is arbitrary that the defence counsel is singled out for the imposition of a condition that is not applicable in the same terms to other professional participants. I know of no legal system where this is the case, where the highest office –that of judge- is on this point subject to far less demanding conditions. It should be regarded as nothing else than an arbitrary –and thus unlawful- interference with the right to counsel.

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[7] Basing myself on the c.v.'s of judges, judges without any experience in criminal proceedings have been appointed and are currently active in the Court (Judges Usacka, Blattmann and Kaul).

[8] Article 39 (1) ICCSt. Provides in relevant part as follows:
The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

Fourth, Regulation 67 (1) imposes an unreasonable condition in light of the accused's right to defend himself in person. This right is currently recognised in international criminal law in rather broad terms and also finds protection in the ICC Statute (Article 67). Furthermore, exercise of this right is anticipated in the context of the ICC in Rule 21 (4). The availability of this right creates a huge gap between an accused representing himself –for which no qualification at all can be imposed- and representation by counsel –who must have 10 years' experience. Rather, one would expect that where the alternative is self-representation, one should welcome every form of professional defence by counsel who is reasonably qualified to offer it. As it cannot be denied that counsel with less than 10 years' experience is still capable of a very good defence –certainly far better than an accused representing himself- the requirement's unreasonable and arbitrary nature is further exacerbated.

The interference with the free choice of counsel needs to be proportionate to the pursued objective, in this case enhancing the quality of the defence in international criminal proceedings. If one concedes that some requirement of practising experience serves a legitimate purpose,[9] an imposition of inflexible 10 years' criterion and its application in the present case, where the applicant possesses necessary qualifications and 5 years of judicial experience, including complex international crimes cases, is clearly disproportionate.

b. Equality of arms[10]

[9] This in my view still needs to be convincingly proven. There are certainly also a considerable number of bad defence counsel with many years of experience, and there are certainly excellent young and energetic lawyers with limited experience. Furthermore, a possible disadvantage in requiring more than 10 years experience –which in my opinion the drafters have failed to take into consideration- is that such persons may be firmly rooted in their domestic legal systems and no longer flexible enough to adapt to the unique and high demands of the international criminal justice system.

[10] This right is an element of the right to a fair hearing and finds protection in Article 21 (2) of the ICTY Statute, Article 20 (2) of the ICTR Statute, Article 67 (1) (chapeau) of the ICC Statute, and Article 17 (2) of the SCSL Statute; furthermore, there is a duty imposed upon trial chamber to ensure the fairness of the trial: Article 20 (1) of the ICTY Statute, Article 21 (1) of the ICTR Statute, and Article 64 (2) of the ICC Statute.

Equality of arms, as an element of the right to a fair trial, entails that

'each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent'.[11]

The right is procedural in nature and does not require substantive equality. One thus has to focus on the legal framework applicable to the defence and the prosecutor and examine whether this legal framework imposes unreasonable demands and/or restrictions upon the defence, inapplicable to the Prosecutor.

This is indeed the case with the condition set out in Regulation 67 (1). It places the defence at a disadvantage vis-à-vis its opponent, the Prosecutor, who is not hindered in the composition of his team and thus also in the preparation of his case by a statutory requirement of 10 years' experience.

Defence teams at the ICC are thus not only confronted with clearly substantive inequality –which is permitted from a human rights perspective, although the interests of justice demand that this inequality be kept within reasonable limits-. It also has to face the procedural inequality –which is unlawful- as different standards apply to the composition of the OTP team and the Defence team.

c. The Right to Adequate time and facilities to Prepare One's Defence[12]

The free choice of counsel is obviously connected to an individual's right to adequate time and facilities to prepare his or her defence. Problems pertaining to the free choice of counsel negatively affect the preparation of a defence. More concretely, arbitrary restrictions on the choice of counsel are inconsistent with the Court's positive obligations to endow a defendant with the necessary facilities.

[11] *Bulut v. Austria*, 17358/90 [1996] ECHR 10 (22 February 1996), para. 47.

[12] The right finds protection in Article 21 (4) (b) of the ICTY Statute, Article 20 (4) (b) of the ICTR Statute, Article 67 (1) (b) of the ICC Statute, and Article 17 (4) (b) of the SCSL Statute. See also Article 14 (3) (b) of the ICCPR, Article 6 (3) (a) of the ECHR, and Article 8 (2) (b) ACHR.

It is therefore submitted that Regulation 67 (1) is inconsistent with a defendant's right to have adequate facilities for the preparation of his or her defence.

2. The Adoption of Regulation 67 (1) Was Ultra Vires

The adoption of the Regulations has been delegated to the Judges by virtue of Article 52 of the Statute. Generally speaking, delegation of legislative powers to the judicial branch should be a matter of the greatest caution, for a variety reasons.
First, as a matter of principle and of internationally protected human rights, the judicial branch should be independent. While in the international context, this independence may take on a somewhat different dimension, given the absence of central legislative and executive branches, even here the accumulation of functions should be avoided.
Second, the accumulation of incompatible functions makes the judicial branch particularly vulnerable. For example, the Judges apparently are of the opinion that different standards apply to defence counsel than to prosecution counsel. This view may be regarded as a form of bias in favour of the Prosecution, which might be a ground for disqualification.[13]
Third, the accumulation of incompatible functions may amount to an improper interest in a case, if one is called upon to decide on the validity of the Regulations, the so-called *iudex in sua causa* problem. In this concrete situation, the President is called upon to judge upon the product of his own legislative activity, which beforehand raises the question if this can expected to be done impartially (the President may be perceived to have an interest in this case, and so have all Judges).

It is with this in mind that two remarks must be made. The Regulations can –for very good reason, as explained above- only be confined to matters concerning the 'routine functioning' of the Court. Furthermore, the Regulations have very limited authority

[13] Grounds for disqualifications are set out –although not exhaustively- in Article 41 (2) ICCSt. and Rule 34 of the RPE. Since the Regulations can be regarded as a collective publication of all judges there is a connection with the ground set out in Rule 34 (1) (d).

and should be set aside or interpreted flexibly when the interests of justice so require. I will elaborate on both points.

As was already mentioned and as may –in my view- be supported by figures, it is indisputable that Regulation 67 (1) seriously restricts a defendant in his choice of counsel and raises a number of human rights issues, which have been addressed above. Although Rule 22 offers the Judges in their legislative activity a mandate to set criteria for qualification of counsel, this is by no means a *carte blanche*. In other words, whether or not the developed criteria can pass the test of Rule 22 –which clearly refers to the right to counsel- and the test of Article 52 of the Statute –referring to the 'routine functioning' of the court, depends on the scope and content of these criteria. The imposition of 10 years' experience is an extraordinary criterion in light of all national criminal jurisdictions, is therefore controversial and thereby the Judges have exceeded their legislative powers under the Statute. The result must be that the Judges lacked the competence to adopt this particular Regulation and that it is invalid on this basis.

In reaching this conclusion, I have interpreted 'routine functioning' of the Court in accordance with Article 52's object and purpose. The drafting history of this provision clearly shows that the States negotiating the Rome Statute were reluctant to leave the drafting of more substantial rules to the judges. In this light, the meaning of the words 'necessary for its routine functioning' will have to be construed narrowly.[14] The drafting history supports the interpretation that the routine functioning includes the internal organisation and administration of the Court, but not its relations to the parties before it.[15] In other words, regulations that affect the right to a fair trial –and thus by definition the Court's relations to the parties before it- exceed the scope of the legislative mandate attributed to the Judges by Article 52.

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[14] Hans-Jörg Behrens, 'Article 52', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Baden-Baden, 1999, at 697.
[15] Ibid.

The limited authority of the Regulations is not only evidenced by the fact that they are inferior to the Statute and Rules, and may only deal with the Court's 'routine functioning'. It should be noted that the Regulations are not part of the Court's applicable law, as set out in Article 21 of the Statute. This qualification underlines the very limited relevance of these Regulations, which must be applied flexibly and set aside when their application would produce results that are inconsistent with the interests of justice in a broad sense.

At this juncture, I wish to offer an observation that formally exceeds the scope of this application, but is nevertheless highly relevant in this concrete situation.

To the extent that interference with the right to counsel affects the right to a fair trial in a concrete situation (see infra sub 3), Chambers within the Court should address this (cp. Article 64 (2)), and have the power to do so (cp. Articles 57 (3) (b) and 64 (6) (f)). The legal standards to be applied in that context, would exclude the Regulations from the applicable law. Thus, instead of Regulation 67 (1), a Chamber must apply Rule 22 (1), which refers to 'necessary relevant experience' and better corresponds to a case-by-case determination.

3. The Case of Mr Katanga

My application has relevance for the case of Mr. Katanga, currently detained on the basis of an ICC arrest warrant. I am a member of his defence team, in the capacity of 'assistant to counsel', on the basis of a provisional admission –awaiting the submission of documents the production of which take some time- to the list of assistants to counsel, dated 2 January 2008 (see annex 2). In this capacity I currently assist Mr David Hooper in the defence of Mr Katanga. This does, however, not make this application moot or void of interest. The fact remains that the non-admission to the list of counsel arbitrarily deprives Mr Katanga and his lead counsel of the possibility to compose a defence team as they see fit, now or maybe at a later stage. As the assignment of counsel –including co-counsel- is made conditional upon admission to the list, it is submitted that Mr Katanga is currently arbitrarily restricted as to the composition of his defence team, which is inconsistent with his right to a fair trial. Ensuring an individual's right to a fair trial is not only a relevant matter for Chambers dealing with this concrete case, but directly concerns other organs of the Court as well, including the Presidency in the exercise of its functions.

On the basis of the aforementioned arguments, the decision not to admit me to the list of counsel amounts to an arbitrary interference with Mr. Katanga's right to a fair trial.

Relief sought

I request the Presidency

1.

To nullify the Registrar's decision of 2 January 2008 in which I was denied access to the list of defence counsel

2.

To order the Registrar to make a *de novo* assessment of my application

To order the Registrar that in this assessment Regulation 67 (1) shall not be applied

To order the Registrar to base his assessment in respect of the required standard concerning experience on the test of Rule 22 (1) exclusively ('the necessary relevant experience').

3.

In the alternative to the relief sought under 2

To assess my application *de novo* directly

Not to apply Regulation 67 (1) in this assessment

To base this assessment in respect of the required standard concerning experience on Rule 22 (1) exclusively ('the necessary relevant experience').

4.

To decide on this application expeditiously, in the interests of the preparation of the defence of Mr. Katanga and with a possible view -when necessary- to submit to competent chambers within their respective mandates a similar application.
It is requested that a decision is taken well in advance of the confirmation hearing in the Katanga case.

Respectfully submitted

Göran Sluiter

Mr Göran Sluiter

The 16th January 2008

At Amsterdam/The Hague, The Netherlands

Annex 1 attached: Decision not to admit Prof. Dr. Sluiter to the list of ICC Counsel
Annex 2 attached: Decision to admit Prof. Dr. Sluiter to the list of assistants to ICC Counsel

Cc: Mr. David Hooper – Defence Counsel for Mr Katanga