

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-Pres-RoC72-01-8**

Date: **10 July 2008**

THE PRESIDENCY

Before: **Judge Philippe Kirsch, President**
 Judge Akua Kuenyehia, First Vice-President
 Judge René Blattmann, Second Vice-President

Public Document

**Reasons for the “Decision on the ‘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’”**

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

Counsel for the Defence

Mr David Hooper, Counsel for Mr Germain
Katanga

Mr Göran Sluiter

REGISTRY

Registrar

Ms Silvana Arbia

Division of Victims and Counsel

Mr Didier Preira, Head, Division of Victims
and Counsel

The Presidency of the International Criminal Court (hereinafter “the Court”) has before it the application of Mr Göran Sluiter for judicial review of the decision of the Registrar refusing to include him in the list of counsel.

The application is dismissed for the reasons set out below.

I. PROCEDURAL HISTORY

1. Mr Göran Sluiter (hereinafter “applicant”) applied to the Registrar for inclusion in the list of counsel that is maintained by the latter pursuant to rule 21(2) of the Rules of Procedure and Evidence (hereinafter all references to rules are to those of the Rules of Procedure and Evidence), with the intention of acting as associate counsel for Mr Germain Katanga.¹ On 2 January 2008, that application was rejected by the Registrar, in accordance with regulation 70(2) of the Regulations of the Court (hereinafter all references to regulations are to those of the Regulations of the Court), on the ground that the applicant did not meet one of the four criteria for inclusion in the list of counsel; namely, ten years’ relevant experience in criminal proceedings as set out in regulation 67(1).² On 16 January 2008, the applicant sought from the Presidency judicial review, pursuant to rule 21(3), of the decision of the Registrar refusing to include him in the list of counsel (hereinafter “Impugned Decision”) on the ground that it was unlawful (hereinafter “Application”).³

2. The applicant, who has over five years of experience as a judge in criminal proceedings, is not challenging the Registrar’s decision that he does not meet the ten-year criterion for inclusion in the list of counsel.⁴ The applicant is challenging the ten-year criterion itself.⁵

¹ See Application, page 12. The applicant uses the term ‘co-counsel’ in his Application. The term ‘associate counsel’, which is used in the legal aid scheme of the Court, will be used in this decision except for where reference is made to the arguments of the applicant. The term ‘lead-counsel’ is used to differentiate from associate or co-counsel.

² See Annex 1 to the Application. The applicant also applied to the Registrar for inclusion in the list of assistants to counsel that is maintained by the latter pursuant to regulation 125(1) of the Regulations of the Registry. On 2 January 2008, the Registrar decided that the applicant met the requirements for inclusion in that list and granted the application on a provisional basis pending the receipt of outstanding documents from the applicant, see Annex 2 to the Application. The applicant is currently engaged as a member of the defence team for Mr Katanga as an assistant to counsel, see Application, page 12.

³ 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. ICC-Pres-RoC72-01-08-1, page 2

⁴ Application, page 2.

⁵ Application, page 2.

The relief sought by the applicant is the nullification of the Impugned Decision.⁶ Furthermore, the applicant requests the Presidency to order the Registrar to: assess, *de novo*, his application for inclusion in the list of counsel; disapply regulation 67(1) in that assessment; and base the assessment of relevant experience exclusively on the test set out in rule 22(1).⁷ In the alternative, the applicant requests the Presidency to: assess his application for inclusion in the list of counsel itself; disapply regulation 67(1) in that assessment; and base the assessment of relevant experience exclusively on the test set out in rule 22(1).⁸ On 29 January 2008, the Registrar responded to the Application, pursuant to regulation 72(3), thereby requesting the Presidency to find the Application inadmissible and, in the alternative, to deny the Application (hereinafter “Response to the Application”).⁹ On 26 June 2008, the Presidency dismissed the Application.¹⁰ The reasons for that decision are set out below.

II. ADMISSIBILITY

A. The submissions of the Registrar

3. The Registrar contests the admissibility of the Application on the ground that it was improperly brought before the Presidency pursuant to rule 21(3). The Registrar argues that the aforementioned provision only applies to the judicial review of a decision of the Registrar refusing a request for the assignment of counsel and is not the proper legal basis for an application to the Presidency for the judicial review of a decision of the Registrar refusing to include a person in the list of counsel.¹¹ The Registrar submits that applications of this nature may only be made pursuant to regulation 72(1)(a).¹² Furthermore, the Registrar argues that since the applicant is not challenging the factual assessment upon which the Impugned Decision was based but is instead challenging the ten-year criterion set forth in regulation 67(1), he should have followed the procedure laid down in regulation 6 for proposing amendments to the Regulations of the Court.¹³ To the extent that the

⁶ Application, page 13.

⁷ Application, page 13.

⁸ Application, pages 13 and 14.

⁹ Registrar’s Response Pursuant to Regulation 72(3) of the Regulations of the Court to the “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” filed on 16 January 2008, ICC-Pres-RoC72-01-08-6-tENG, page 9.

¹⁰ Decision on the “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”, ICC-Pres-RoC72-01-08-9.

¹¹ Response to the Application, paragraph 3.

¹² Response to the Application, paragraph 2.

¹³ Response to the Application, paragraph 4

Application is based solely on rule 21(3), the Registrar argues that it should be declared inadmissible.¹⁴

B. Determination by the Presidency

4. By virtue of rule 21(2), prior to assignment as counsel in proceedings before the Court, within the scheme of legal assistance paid by the Court, a person must be included in the list of counsel. No distinction is made in the procedure for the assignment of associate counsel.

5. The applicant brought his Application before the Presidency pursuant to rule 21(3), which provides, in relevant part, that “[a] person may seek from the Presidency a review of a decision to refuse a request for assignment of counsel”, due to the fact that he views the Registrar’s failure to include him in the list of counsel as tantamount to a failure to assign (associate) counsel to Mr Katanga.¹⁵

6. By his Application, the applicant is in fact challenging a decision of the Registrar, which was taken pursuant to regulation 70(2), failing to include him in the list of counsel and, thereafter, seeking appointment as associate counsel for Mr Katanga. Clearly, the Application would have been admissible had it been brought pursuant to regulation 72(1)(a), which provides that an application may be made to the Presidency for the judicial review of a decision of the Registrar, taken pursuant to regulation 70(2), refusing to include a person in the list of counsel.¹⁶ In all the circumstances of the present case and in the interests of judicial expediency, the Presidency will not determine the scope of rule 21(3) and the admissibility of the Application pursuant to that specific provision. Instead, the Presidency will examine the Application pursuant to regulation 72(1)(a).

7. By his Application, the applicant seeks to challenge the legality of regulation 67(1) and to expunge the ten-year criterion contained in that regulation from the Regulations of the Court, entailing a *de facto* amendment to that text. The power to amend the Regulations of the Court lies with the plenum of judges, in accordance with article 52 of the Rome Statute (hereinafter all references to articles are to those of the Rome Statute), the procedure for

¹⁴ Response to the Application, paragraph 5.

¹⁵ Application, pages 12 and 13.

¹⁶ The Application was filed within 15 days of notification of the Impugned Decision, in compliance with regulation 72(2), which lays down the time-limit for applications brought pursuant to regulation 72(1)(a).

which is that set out in regulation 4(4) and regulation 6. As such, the Application will be considered in so far as it entails a determination of whether the Registrar erred in law by the Impugned Decision.¹⁷ In so far as it requests the Presidency itself to amend the Regulations of the Court, the Application will not be entertained.¹⁸

III. THE MERITS

A. The submissions of the parties

1. The arguments of the applicant

8. Essentially, the applicant argues that the ten-year requirement imposed upon counsel by regulation 67(1) (which allows for no exceptions in individual and compelling cases, makes no distinction between lead counsel and co-counsel and makes no provision for taking into account the specific wishes of defence teams) violates elements of the right to a fair trial.¹⁹ It is further argued that the ten-year requirement is inconsistent with internationally protected human rights and that the judges, by adopting the aforementioned regulation, exceeded the scope of their legislative powers.²⁰

(a) Inconsistency of regulation 67(1) with internationally protected human rights

9. The applicant argues that regulations which produce results that are inconsistent with internationally protected human rights are invalid, in accordance with article 21(3).²¹

(i) The right to counsel

10. The applicant argues that an appropriate balance must be struck between the right of the accused to choose counsel and the duty of the Court to ensure the quality of counsel; it is improper to attach greater weight to one element than to the other.²² Whilst the applicant concedes that the aim of ensuring the quality of defence counsel is a legitimate one,²³ it is

¹⁷ See paragraphs 21-25 below.

¹⁸ See paragraph 26 below.

¹⁹ Application, page 2. Where reference is made to the ten-year requirement by the applicant it encompasses these factors.

²⁰ Application, page 2.

²¹ Application, page 3.

²² Application, page 4.

²³ Application, pages 3 and 4.

argued that the inflexible ten-year requirement imposed upon those wishing to act as counsel is incommensurate and restricts a defendant significantly in his choice of counsel.²⁴ Any interference with the right to counsel must be reasonable and proportionate to the pursued objective of enhancing the quality of the defence and regulation 67(1) fails both of these tests.²⁵ First, demanding ten years' experience is "unreasonably high and fully arbitrary" and has no basis in general principles of criminal procedure.²⁶ Second, the requirement expressed in a number of years is a "merely quantitative standard" which fails to give due consideration to the quality of a person's experience and, thus, does not assess each candidate individually. Moreover, it is argued that the requirement does not distinguish between experiences gained in different roles in criminal proceedings, for example, sitting as a judge as opposed to appearing as defence counsel.²⁷ Third, the requirement discriminatorily concerns only defence counsel; as the legal texts of the Court do not impose a standard of experience expressed in a specific number of years upon judges or upon the Prosecutor and his staff.²⁸ Fourth, there is an unreasonably large gap between the right of a lay person to self-representation – for which no qualification can be imposed – and representation by counsel who must possess ten years of experience.²⁹

(ii) *Equality of arms*

11. By reference to jurisprudence of the European Court of Human Rights, the applicant argues that the principle of equality of arms as an element of the right to a fair trial provides 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".³⁰ However, it is submitted that, contrary to that principle, defence teams at the Court are unlawfully faced with procedural inequality in that regulation 67(1) places them at a disadvantage *vis-à-vis* the Prosecutor, who is unhindered by the ten-year requirement in the composition of his team and, thus, in the preparation of his case.³¹

²⁴ Application, pages 3 and 4.

²⁵ Application, pages 5 and 8. In this vein, the applicant argues that the application of regulation 67(1) in his case, where he possesses over five years of judicial experience, including in complex international crimes, is clearly disproportionate.

²⁶ Application, page 5

²⁷ Application, page 6

²⁸ Application, pages 6 and 7.

²⁹ Application, page 8

³⁰ Application, page 9, referring to *Bulut v Austria*, Application No 17358/90, Judgment of 22 February 1996, paragraph 47

³¹ Application, page 9

(iii) *The right to adequate time and facilities to prepare one's defence*

12. The applicant submits that arbitrary restrictions on the choice of counsel are inconsistent with the Court's positive obligations to endow a defendant with the necessary facilities to prepare his or her defence as provided for in article 67(1)(b).³²

(b) The adoption of regulation 67(1) was *ultra vires*

13. The applicant submits that whilst the adoption of the Regulations of the Court is delegated to the judges, by virtue of article 52, the "delegation of legislative powers to the judicial branch should be a matter of the greatest caution".³³ First, in keeping with the doctrine of separation of powers, the judicial branch should be independent.³⁴ Second, the "accumulation of incompatible functions" within the judiciary renders the judicial branch particularly vulnerable, in this case to disqualification on the basis of bias and, third, may amount to an "improper interest in a case" if a judge is called upon to decide the validity of regulations.³⁵

14. It is argued that the mandate given by rule 22 to the judges to set the criteria for the qualifications of counsel is by no means a *carte blanche*.³⁶ Any criteria developed must be compatible with the right to counsel, to which reference is made in rule 22, and the regulations themselves may only be confined to matters concerning the "routine functioning" of the Court, in accordance with article 52.³⁷ Furthermore, it is submitted, by reference to scholarly literature, that in light of the object and purpose of article 52, the term "routine functioning" must be construed narrowly.³⁸ Regulations that affect the right to a fair trial and, by definition, the Court's relations to the parties before it, exceed the scope of the legislative mandate attributed to the judges by article 52,³⁹ the result of which must be that the judges "lacked the competence to adopt [regulation 67(1)] and that it is invalid on this basis".⁴⁰ Moreover, the applicant argues that the Regulations of the Court are not part of the Court's applicable law, as set out in article 21, and thereby have limited

³² Application, pages 9 and 10.

³³ Application, page 10.

³⁴ Application, page 10.

³⁵ Application, page 10.

³⁶ Application, page 11.

³⁷ Application, pages 10 and 11.

³⁸ Application, page 11.

³⁹ Application, page 11.

⁴⁰ Application, page 11.

authority and should be set aside or interpreted flexibly when the interests of justice so require.⁴¹

(c) The case of Mr Germain Katanga

15. Notwithstanding the fact that the applicant is engaged as a member of the defence team for Mr Katanga as an assistant to counsel,⁴² he argues that his exclusion from the list of counsel “arbitrarily deprives” Mr Katanga and his lead counsel, Mr David Hooper, of the possibility of composing a defence team as they see fit since the assignment of co-counsel is conditional upon inclusion in the list of counsel.⁴³ As such, it is argued that Mr Katanga is unduly “restricted as to the composition of his defence team” which is inconsistent with his right to a fair trial.⁴⁴

2. The arguments of the Registrar

(a) Compliance of the Impugned Decision with the texts of the Court

16. The Registrar submits that in managing the list of counsel, he is bound to adhere strictly to the relevant texts of the Court which are in force and must be satisfied that an applicant for inclusion in the list of counsel meets the stipulated criteria before such inclusion can occur.⁴⁵

17. By reference to the jurisprudence of the Appeals Chamber, the Registrar submits that the cumulative criteria set out in rule 22(1) and regulation 67 must be met before a person may be included in the list of counsel, namely: “(1) established competence in international or criminal law and procedure, (2) excellent knowledge of and fluency in at least one of the working languages of the Court (English or French), (3) at least ten years of experience in criminal proceedings, and (4) must never have been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court”.⁴⁶

⁴¹ Application, pages 3, 10, 11 and 12.

⁴² See footnote 2 above

⁴³ Application, page 12.

⁴⁴ Application, pages 12 and 13.

⁴⁵ Response to the Application, paragraph 7.

⁴⁶ Response to the Application, paragraph 8.

18. The Registrar submits that the applicant has failed to demonstrate how the Impugned Decision is inconsistent with rule 22 and regulation 67.⁴⁷ The Registrar further submits that the ten-year requirement expressly imposed by regulation 67(1) was intended, by the drafters of the Regulations of the Court, to ensure that persons involved in proceedings before the Court receive quality legal representation.⁴⁸ It is argued that to allow the Application would lead to a challenge to the legal regime governing the criteria for inclusion in the list of counsel, as well as to a violation of the texts of the Court.⁴⁹

(b) Freedom of choice in the appointment of counsel

19. In relation to the right to the freedom of choice in the appointment of counsel, the Registrar submits that such a right is restricted to counsel who, fulfilling the criteria outlined in rule 21(2) and regulation 67, are included in the list of counsel or agree to be included therein.⁵⁰ The Registrar further submits that this right applies solely to the appointment of counsel and does not extend to the appointment of associate counsel or to other members of the defence team, since the appointment of the latter is the responsibility of counsel who is in charge of the team and who may consult his or her client on the matter.⁵¹ It is argued that the practice of the Court is in line with international practice.⁵²

B. Determination by the Presidency

20. The Presidency has had previous occasion to lay down the standard applicable to the judicial review of administrative decisions of the Registrar.⁵³ It is concerned with the propriety of the procedure by which the Registrar reached a particular decision and the outcome of the latter's decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into

⁴⁷ Response to the Application, paragraph 10.

⁴⁸ Response to the Application, paragraph 11.

⁴⁹ Response to the Application, paragraphs 11 and 12.

⁵⁰ Response to the Application, paragraph 17.

⁵¹ Response to the Application, paragraph 17.

⁵² Response to the Application, paragraph 18.

⁵³ The standard of judicial review was defined in the decision entitled "Decision on the application to review the Registrar's decision denying the admission of Mr Ernest Midagu Bahati to the list of counsel", 20 December 2005, ICC-Pres-RoC72-02-5, paragraph 16. That standard was supplemented in the decision entitled "Decision on the application to review the decision of the Registrar denying Mr Balembo privileged visits with Mr Lubanga Dyilo, under regulation 221 of the Regulations of the Registry", 27 November 2006, ICC-01/04-01/06-731-Conf, paragraph 24.

account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.

21. In determining whether the Registrar erred in law by the Impugned Decision, the Presidency first turns to the arguments of the applicant that regulation 67(1): goes beyond the “routine functioning” of the Court, contrary to article 52; infringes upon the right to choose counsel freely; and that the judges thereby exceeded the scope of their legislative powers by adopting that regulation.

22. By virtue of article 52(1), the States Parties endowed the judges with the mandate to establish Regulations of the Court necessary for its routine functioning. The Presidency does not accept the argument of the applicant that regulation 67(1) goes beyond that mandate. The States Parties provided, in rule 21(2), that counsel must “meet the criteria set forth in rule 22 *and the Regulations*” and, in rule 22(3), that “[i]n the performance of their duties, [c]ounsel for the defence shall be subject to the Statute, the Rules, *the Regulations*, the Code of Professional Conduct for Counsel [...] and any other document adopted by the Court that may be relevant to the performance of their duties” (emphasis added). In so doing, the States Parties themselves viewed the definition of criteria applicable to counsel as part of the routine functioning of the Court and bestowed upon the judges the mandate to define such criteria. By the same token, the States Parties did not confer upon the judges the mandate to determine the criteria applicable to judges or the Prosecutor and his staff. In this context, it is noted that article 42(2) provides, in relevant part, that the Prosecutor “shall have full authority over the management and administration of [his] Office, including the staff, facilities and other resources thereof”.

23. In relation to the arguments of the applicant that regulation 67(1) infringes upon the right to the free choice of counsel, the Presidency considers that this right, which is enshrined in article 67(1)(d) and rule 21(2), is limited to a person’s choice of lead counsel as opposed to other members of the defence team, including associate counsel, who act under the authority of lead counsel. This is not to rule out the possibility of lead counsel consulting the person whom he or she is representing upon the composition of the defence team as a matter of good practice.

24. The Presidency has had previous occasion to consider the scope of the right before the Court to choose counsel freely. In its decision of 29 June 2007, the Presidency held that this

right is not absolute and is necessarily subject to certain limitations.⁵⁴ One such limitation is that counsel must be deemed qualified to appear before the Court. The qualifications to be met by counsel, within the scheme of legal assistance paid by the Court, are set out in rule 22(1) which provides, in relevant part, that counsel for the defence shall possess the “necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings”. The “necessary relevant experience” to which reference is made in rule 22(1) is currently set at ten years by virtue of regulation 67(1), which does not provide for any waiver in the application of that criterion. The requirement that counsel possess a specific number of years of experience is not unknown to international criminal courts.⁵⁵ The Presidency rejects the applicant’s arguments that regulation 67(1) should be set aside and rule 22(1) applied exclusively. There is no apparent conflict between rule 22(1) and regulation 67(1) that would warrant such action. The judges, exercising their functions pursuant to article 52(1), have defined the necessary relevant experience to be held by counsel in unambiguous terms. Furthermore, under the existing regime, the requirement of ten years experience is also applicable to associate counsel. Neither rule 22(1) nor regulation 67(1) differentiate between different types of counsel or the requirements in relation thereto.

25. For the reasons set out above, the Presidency rejects the argument that regulation 67(1) should be set aside as *ultra vires*. The judges have the power to draw up regulations which define the criteria applicable to counsel and have exercised that power. The Presidency confirms that the criteria applicable to counsel, including associate counsel, are cumulatively found in rule 22(1) and regulation 67.⁵⁶ It follows that the Registrar did not err in law in the assessment of the applicant’s request for inclusion in list of counsel.

26. The Presidency will not proceed further to consider the necessary relevant experience, i.e. the specific number of years, laid down by regulation 67(1). If the Presidency were so minded, granting the Application would, as stated at paragraph 7, in effect, expunge the

⁵⁴ Decision entitled “Decision on the ‘Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves’ and on the ‘Urgent Request for the Appointment of a Duty Counsel’ filed by Thomas Lubanga Dyilo before the Presidency on 7 May and 10 May, respectively”, (re-filed as public) ICC-01/04-01/06-937, paragraph 25

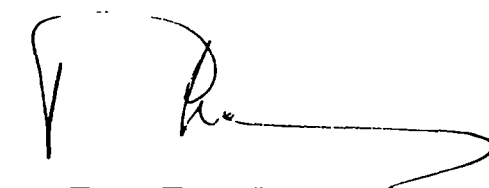
⁵⁵ The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) impose seven years of experience upon those wishing to act as counsel for indigent persons before those tribunals. See ICTY Rules of Procedure and Evidence, rule 45(B)(iii), IT/32/Rev.41, 28 February 2008 and Directive on the Assignment of Defence Counsel, article 14(A)(iv), IT/73/REV.11, 11 July 2006, and ICTR Rules of Procedure and Evidence, rule 45(A), 14 March 2008, and Directive on the Assignment of Defence Counsel, article 13(i), No. 1/96, 14 March 2008.

⁵⁶ See also the Decision of 29 June 2007, paragraph 33.

ten-year criterion in regulation 67(1) from the Regulations of the Court, thereby entailing a *de facto* amendment to that text. Having said that, the Presidency will recommend that the necessary relevant experience applicable to counsel is given further consideration by the plenum of judges.

The Application is dismissed.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized 'P' followed by a long, horizontal, slightly wavy line that ends in a small loop.

Judge Philippe Kirsch
President

Dated this 10 July 2008

At The Hague, The Netherlands