

**Cour
Pénale
Internationale**



La Présidence

**International
Criminal
Court**

The Presidency

Reference: ICC-Pres-RoC72-02-05

Date: 20 December 2005

THE PRESIDENCY

Before: Judge Philippe Kirsch, President
Judge Akua Kuenyehia, First Vice-President
Judge Elizabeth Odio Benito, Second Vice-President

Registrar: Mr Bruno Cathala

Public Document

**DECISION ON THE APPLICATION TO REVIEW THE REGISTRAR'S
DECISION DENYING THE ADMISSION OF MR ERNEST MIDAGU BAHATI
TO THE LIST OF COUNSEL**

Applicant: Mr Ernest Midagu Bahati

I. THE APPLICATION

1. The Presidency of the International Criminal Court has before it an application under regulation 72 of the Regulations of the Court ("the Regulations") for a review by the Presidency of the decision of the Registrar of 6 October 2005 refusing to include the applicant in the list of counsel which the Registrar is required to create and maintain pursuant to rule 21 of the Rules of Procedure and Evidence of the International Criminal Court ("the Rules").

II. THE FACTS

A. The application for inclusion in the list of counsel

2. On 30 August 2005, the Registry received an application for inclusion in the list of counsel from the applicant.

3. In his application, the applicant stated, *inter alia*, that

(i) he has been a practising lawyer at the Kinshasa/Gombe Bar since February 2002. His application form indicates that he is "a judge, lawyer or prosecutor" with the following experience:

Years of experience in criminal proceedings:
3 years

...field of expertise and years of experience in that field:
Corporate: 5 years

Total number of years of experience:
5 years

(ii) he has experience as counsel at the International Criminal Tribunal for Rwanda ("ICTR"). He enclosed a letter certifying that in January 2005 he was assigned as lead counsel for an accused person before the ICTR; and

(iii) he has been a professor of law at the University of Kinshasa since 1988, specialising in corporate law.

B. The decision of the Registrar of 6 October 2005

4. By letter of 6 October 2005 the Registry notified the applicant that his application had been refused. The letter stated, in relevant part:

On behalf of the Registrar of the International Criminal Court, I regret to inform you that, after careful review of your application for inclusion in the list of counsel, you do not currently meet the requirements set out in rule 22 of the Rules of Procedure and Evidence and regulation 67 of the Regulations of the Court.

The condition concerning relevant experience of at least ten years in accordance with regulation 67 (1) of the Regulations of the Court has not been met. Based on the information you provided to us, it appears that you do not have relevant experience of at least 10 years whether as judge, prosecutor, advocate or in other similar capacity. You indicated that you have 5 years of experience as judge, advocate or prosecutor and that you took an oath to become an advocate at the Kinshasa/Gombe Bar in February 2002.

Accordingly, your application for inclusion in the list of counsel is hereby refused.

C. The application for review

5. By letter of 11 October 2005 the applicant wrote to the President of the Court seeking a review of the decision of the Registrar of 6 October 2005. The letter stated, in relevant part:

I have been a professor of law since 1988 and a practicing attorney since 2000, the year my law office was opened, even though I did not take my oath until 2002.

The ICTR in Arusha based its decision to assign me as principal defence counsel for Mr Gaspard Kanyarukiga essentially on the basis of my first qualification.

In view of the above and following the example of the ICTR, I would request, Mr President, that you consider the fact that I am a professor of law as "other similar capacity" and instruct the Registrar to include my name on the list of defence counsel.

D. The response of the Registrar to the application for review

6. On 2 November 2005 the Presidency received the response of the Registrar to the application for review of the decision of 6 October 2005. The response has not, to date, been transmitted to the applicant.

7. The response submitted that the application for review ought to be dismissed "for want of merit".

8. At paragraph 6 of the response, as part of the section headed "Facts", the Registrar stated as follows:

By a letter dated 6 October 2005, the Registry, in accordance with Regulation 70.2 of the Regulations, notified the Applicant that his application for admission to the List was denied due to his failure to meet the requisite criteria stipulated in Rule 22 of the Rules and Regulation 67 of the Regulations. In particular, that the Applicant lacked the necessary 10 years of *relevant* experience in *criminal proceedings* as either a judge, prosecutor, advocate or in other similar capacity. (emphasis in the original)

9. In the section of the response headed "The merit of the application", the Registrar submitted that "the Applicant does not possess the necessary 10 years of relevant experience in criminal proceedings". He contended, *inter alia*, that: (i) "the applicant himself concedes in his application that he merely has three (3) years of relevant experience in criminal proceedings"; (ii) "The legal framework and standards of the ICTR relating to assignment of counsel are different than those espoused by the ICC"; and (iii) "during the Applicant's tenure as a professor of law, he has devoted his teaching entirely to fields of law that have no relevance to the work of the Court".

III. RELEVANT LEGAL PROVISIONS

A. Requirements for inclusion in the list of counsel

10. Rule 21(2) of the Rules provides, in relevant part:

The Registrar shall create and maintain a list of counsel who meet the criteria set forth in rule 22 and the Regulations.

11. Rule 22(1) of the Rules provides, in relevant part:

A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings.

12. Regulation 67(1) of the Regulations provides:

The necessary relevant experience for counsel as described in rule 22 shall be at least ten years.

B. Notification, and application for review, of the decision as to whether a person shall be included in the list of counsel

13. Regulation 70(2) of the Regulations provides:

The decision as to whether a person shall be included in the list of counsel shall be notified to that person. If the application is refused, the Registrar shall provide reasons and information on how to apply for review of that decision in accordance with regulation 72.

14. Regulation 72 of the Regulations provides, in relevant part:

1. Application may be made to the Presidency for review of:

(a) A decision under regulation 70, sub-regulation 2, refusing to include a person in the list of counsel;

...

2. Applications as described in sub-regulation 1 shall be set out in accordance with regulation 23 and be filed within 15 days of notification of the relevant decision of the Registrar.

3. The Registrar may file a response within 15 days of notification of the application as referred to in sub-regulations 1 and 2.

4. The Presidency may ask the Registrar to provide any additional information necessary to decide on the application. The decision of the Presidency shall be final.

IV. THE NATURE OF REVIEW PROCEEDINGS IN APPLICATIONS UNDER REGULATION 72

15. The responsibility to create and maintain a list of counsel vests with the Registrar pursuant to rule 21(2) of the Rules. The Registrar is the principal administrative officer of the Court (Article 43(2) of the Statute of the International Criminal Court). Decisions taken by the Registrar in relation to the creation and maintenance of the list are necessarily administrative in nature.

16. Having been guided by standards applied by both international and national courts in reviews of administrative decisions, the Presidency determines that the review of the administrative decision of the Registrar under regulation 72(1)(a) of the Regulations is concerned with the propriety of the procedure by which the Registrar reached the particular decision and the manner in which he reached it. The review involves a consideration of whether the Registrar has acted without jurisdiction, has committed an error of law, has failed to act with procedural fairness, has taken into account irrelevant factors or failed to take into account relevant factors, or has reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.

17. The precise remedy for an error of a nature described in the preceding paragraph lies within the discretion of the Presidency. In general terms, where there has been a failure within the decision-making process, the resulting decision is liable to be quashed and, where appropriate, remitted to the Registrar for further consideration or action in the light of the decision of the Presidency on the application for review.

V. THE REQUIREMENTS OF REGULATION 70(2)

18. Under regulation 70(2) of the Regulations, the Registrar must provide reasons for the decision refusing to include a person in the list of counsel. The purpose of providing such reasons is twofold: they should inform the applicant why his or her application has been unsuccessful; and they should enable the applicant appropriately to assess whether he or she has any ground to apply for review of the adverse decision.

19. It follows from the above that the reasons for the decision should always be clear. They need not be elaborate. In many instances it may be possible to express them briefly. The level of detail required will necessarily depend upon the facts of the individual case. What is paramount is that the applicant should be able clearly to understand the factual and legal basis upon which the decision has been taken.

VI. THE MERITS OF THE PRESENT APPLICATION

20. The Presidency refers to the manner in which the applicant was informed that he did not fulfil the requirements of rule 22 and regulation 67(1) in the decision of 6 October 2005 (quoted in full at paragraph 4 above). The Presidency reiterates the reasoning that was given to the applicant:

Based on the information you provided to us, it appears that you do not have relevant experience of at least 10 years whether as judge, prosecutor, advocate or in other similar capacity. You indicated that you have 5 years of experience as judge, advocate or prosecutor and that you took an oath to become an advocate at the Kinshasa/Gombe Bar in February 2002.

21. The Presidency notes that, in the decision, no mention is made of the requirement, set out in rule 22(1), to have at least ten years of relevant experience *in criminal proceedings*. It is thus not possible to discern, from the face of the decision, whether the Registrar had this requirement in mind when arriving at his decision. This is particularly so in the light of the reference to the applicant's "5 years of experience as judge, advocate or prosecutor" in total, as opposed to referring only to his three years of such experience in criminal proceedings. In any event, the decision certainly did not make the requirement of relevant experience *in criminal proceedings* explicit.

22. Furthermore, the Presidency notes that there is no reference at all in the decision to the 17 years of experience that the applicant has as a professor of law. The fact that the decision merely stated that the applicant did not have "relevant experience of at least 10 years...in other similar capacity" – without stating that such experience was required in criminal proceedings – could have given the impression that the applicant's 17 years of academic experience had not been appropriately taken into account.

23. In the absence of any reference in the decision to the relevant experience under rule 22(1) being required in criminal proceedings or to the applicant's 17 years of experience as a professor of law, the applicant applied for review of the decision

on the ground, primarily, that the fact that he has been a professor of law since 1988 should be regarded as relevant experience in "other similar capacity".

24. The submissions put forward by the Registrar in his response of 2 November 2005 to the application for review are set out at paragraphs 7 to 9 above. In that response it is emphasised that the ten years of relevant experience are required *in criminal proceedings* and it is further submitted, *inter alia*, that the academic experience of the applicant is not relevant to the work of the Court.

25. It appears, according to the response of the Registrar, that these factors were essential to the decision that was taken. Yet they were not stated in the decision. For the reasons set out at paragraphs 18 to 19 above, essential reasoning must be stated in the body of the decision itself. In any event, it should not be introduced, for the first time, in response to an application for review.

26. In the circumstances, the Presidency finds that the reasons given in the decision of 6 October 2005 were not sufficiently clear to comply with the requirement for reasons to be provided under regulation 70(2) of the Regulations, or to comply with the general requirement to act with procedural fairness, so as to enable the applicant to know the basis upon which his application to be included in the list of counsel was refused.

27. The Presidency therefore quashes the decision of 6 October 2005. It remits the matter to the Registrar to provide the applicant with a decision under regulation 70(2) which provides clear reasons for the refusal to include him in the list of counsel. On the facts of the present case the Registrar may feel able to provide such reasons in no more than a few sentences. What is important is that he bears in mind paragraphs 18 and 19 above in formulating his decision.

28. Upon being notified of that decision, the applicant will be able to consider whether, and, if so, upon what grounds, to apply for a review pursuant to regulation 72 of the Regulations. This decision of the Presidency therefore puts the applicant

back in the position that he would have been in had the original decision provided him with clear reasons, which it should have done.

29. The Presidency makes one additional point about the procedure followed in this case. Regulation 72(3) of the Regulations does not explicitly state with whom the response of the Registrar to an application for a review of a decision under regulation 70(2) is to be filed. The Registrar therefore cannot be faulted for having filed his response only with the Presidency in this case. However, in the interests of transparency, the Presidency is of the view that the response should, as a matter of practice, generally be provided to the applicant by the Registrar at the same time as it is filed with the Presidency. If, in exceptional circumstances, the Registrar considers that there are specific reasons on the facts of an individual case as to why this should not be done he is able to draw any such reasons to the attention of the Presidency prior to providing the applicant with the response.

VII. THE ORDER

30. For the above reasons, the Presidency:

- 1) quashes the decision of the Registrar of 6 October 2005;
- 2) remits the matter to the Registrar to provide the applicant with a decision under regulation 70(2) of the Regulations which provides clear reasons for the refusal to include the applicant in the list of counsel; and
- 3) directs the Registrar to provide the applicant with a copy of the response of 2 November 2005, together with this decision, forthwith.

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

A handwritten signature in black ink, consisting of a stylized 'P' followed by a series of loops and a long horizontal stroke.

Judge Philippe Kirsch
President

Dated this 20th day of December 2005

At The Hague, The Netherlands