Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-**
Date: **10 October 2011**

THE PRESIDENCY

Before: **Judge Sang-Hyun Song, President**
Judge Fatoumata Dembele Diarra, First Vice-President
Judge Hans-Peter Kaul, Second Vice-President

SITUATION IN

IN THE CASE OF
THE PROSECUTOR v.

Public Document

Application for Review

(Regulation 72(1)(a) of the Regulations of the Court)

Source: **Allison Turner, Attorney**

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

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Victims and Witnesses Unit

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Victims Participation and Reparations Section

Other

TO THE PRESIDENCY OF THE INTERNATIONAL CRIMINAL COURT, THE APPLICANT RESPECTFULLY SUBMITS:

BACKGROUND

1. I, the undersigned, Allison Turner have been a member of the Quebec Bar since 28 May 1993 and I am based in Montreal, Canada. I practiced civil law full-time from 1993 until 2001 when I began studies towards a master of laws degree specializing in international criminal law. My thesis entitled "*Defining the Crime of Aggression: Cutting the Gordian Knot?*" was completed in 2005 and I then went on to represent three accused persons charged with genocide, war crimes, crimes against humanity and criminal contempt before the International Criminal Tribunal for Rwanda.[1] The present application seeks the review and reversal of a registry decision refusing to admit me to the List of Counsel.[2]

2. In 2008 I submitted my first application to be admitted to the ICC List of Counsel ("List") pursuant to RoC Regulation 69, which was denied.[3] I applied a second time on 6 January 2011. On 28 January the Counsel Support Section ("CSS") emailed me a form containing additional questions which I completed and returned on 31 January 2011. On 15 September, CSS sent me additional questions to which I responded by letter the same day.[4]

3. On 22 September 2011, CSS sent me a letter indicating that I did not fulfill all requirements for admission to the List, and providing a detailed assessment of my candidacy as well as the overall results:

   1. *Competence in international or criminal law and procedure (Rule 22-1, RPE) – Fulfilled*
   2. *Knowledge of languages (Rule 22-1, RPE – Fulfilled)*
   3. *Absence of criminal and/or disciplinary sanctions (Regulation 67-2 RoC) – Fulfilled*
   4. *Ten (10) years of relevant experience in criminal proceedings (Rule 22-1 RPE & Regulation 67-1 RoC) – Not fulfilled (see details below)*[5]

[1] I was Co-Counsel for Col. Théoneste Bagosora (*Prosecutor* v. *Bagosora et als* ,"*Military I*" Case No.: ICTR-98-41-T), Co-Counsel for Emmanuel Rukundo (*Prosecutor* v. *Rukundo*, Case No.: ICTR-01-70-T) and Lead Counsel for Léonidas Nshogoza, an ICTR Defence investigator charged with criminal contempt (*Prosecutor* v. *Nshogoza*, Case No.: ICTR Case No. 07-91-T , and on appeal).
[2] *Annexure 1*, Letter from Chief of Counsel Support Section dated 20 September and accompanying email dated 22 September 2011.
[3] At the time of my first application, I understood that Rule 22 of the ICC Rules of Evidence and Procedure required "necessary relevant experience" in criminal proceedings. I was not aware that RoC Regulation 67 provided such experience needed to be "at least ten years", and therefore did not to refer to every piece of potentially relevant criminal procedurally-related experience in my background.
[4] *Annexure 2*, Email from Mr Shoamanesh dated 15 September 2011 requesting additional information and applicant's reply of same date including completed ICC form dated 31 January 2011.
[5] The requirement that an applicant possess ten years of relevant experience in criminal proceedings is referred to herein as « Requirement 4 ».

4. "*Based on the aforesaid,*" the Impugned Decision reads, "*a careful and detailed review of your application materials demonstrates that you have, at best, seven years and two months of experience in total in relevant criminal proceedings. Therefore we confirm that you do not possess the requisite 10 years of relevant experience in criminal proceedings as required by the applicable legal texts (...)".* The seven years and two months of my 18 years at the bar that have been credited towards meeting Requirement 4 include two months in 1993 during which I had carriage of a single DUI case (representing 5-10% of my practice), and seven years where my practice is strictly limited to international criminal law.

RELIEF SOUGHT

5. This application for review challenges the factual assessment of my candidacy to the extent that Requirement 4 is applied arbitrarily. I do not question its legality.[6] I dispute the procedural fairness of applying Requirement 4 liberally for general practitioners and strictly in cases such as mine where counsel specializes in either civil or criminal law. Based on the Impugned Decision and Annexure 3, the registry considers partial criminal experience in a general practice "criminal proceedings experience". Lawyers possessing the equivalent of fewer than ten years of exclusive criminal proceedings experience, therefore, are being admitted to the ICC List of Counsel.

6. I request that the Presidency review the Impugned Decision and direct the Registrar to admit me to the List of Counsel upon a) drawing three years of my civil practice year into the assessment of my "relevant experience" to ensure that I am treated on a par with general practitioners who have the equivalent *or less than* my seven years of exclusively criminal experience, or b) "upgrading" my seven years of *highly relevant* international criminal experience such that each of my years qualifies as 1.5 years for the purposes of Requirement 4 (my relevant experience would then be 10.5 instead of seven). If the Presidency does not reverse the Impugned Decision and I am not admitted to the List of Counsel, I seek confirmation that each member of the List of Counsel possesses at a minimum the equivalent of ten years *exclusive* criminal proceedings experience.[7]

[6] In 2008 Mr Goran Sluiter challenged Criterion 4 itself. Decision of the Presidency, ICC-Pres-RoC72-01-8, dated 10 July 2008, ("Sluiter Decision").

[7] This question has been asked but not yet answered. In my letter of 15 September I asked the following: *1) Has the ICC in its records received written confirmation from each lawyer on its List of Counsel that, at the time of their application, they had ten years of criminal proceedings where each year comprised 100% criminal*

STANDARD APPLICABLE FOR JUDICIAL REVIEW

7. The standard applicable to the Presidency's judicial review of administrative decisions by the Registrar was set out, *inter alia*, in the *Sluiter Decision*. The Presidency is concerned with the propriety of the procedure by which the Registrar reached the impugned decision as well as its outcome. It will consider 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 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.[8]

ARGUMENT

8. According to the Impugned Decision and Annexure 3, the practice of the registry is to apply Requirement 4 liberally and not require ten years of exclusive criminal experience for lawyers who concurrently practice civil and criminal law.[9] In my case, where I first specialized in civil law and then in international criminal law, this practice has not followed through. Consequently, when viewed side-by-side the dossiers of general practitioners, my application has received inconsistent and disparate treatment. The assessment of their relevant experience has included *civil* experience and mine has not.

9. The Impugned Decision and the sampling of practices under Annexure 3 indicate that Requirement 4 is interpreted so broadly that candidates with mixed practices are not held to the same standard. Carriage of a single criminal case in a largely civil practice is equated with exclusively hands-on criminal trial work. Domestic experience is treated on a *par* with international criminal proceedings experience and, generally, candidates are not required to confirm that they have the equivalent of ten years exclusively criminal experience. Thus, as currently applied Requirement 4 falls short of ensuring procedural fairness, it fails to credit highly relevant international criminal proceedings experience, and it includes the time general practitioners spend on their civil caseload. Respectfully, no sensible person who has properly applied his or her mind to the issue can maintain that

proceedings work? 2) Can the ICC confirm that each lawyer on its List of Counsel had ten years of full-time (100%) criminal proceedings experience when they applied for the List? See Annexure 2.

[8] Sluiter Decision, para. 20.

[9] My two months of carriage of a criminal law case during my predominantly civil practice was credited as "relevant experience" towards the requisite ten years of criminal proceedings. General practitioners ("les *généralistes*") from the Civil Law tradition are admitted to the List of counsel even if their practice is comprised of less than 50% criminal proceedings work.

an 18-year general practitioner with a 30 % criminal caseload (or less than six years of exclusively criminal work) meets Requirement 4 while a candidate with seven years of exclusively international criminal proceedings experience and 11 years of civil, does not.

10. It would also appear that some lawyers on the list may well have a practice comprised of less than 30% criminal. Based on a non-exhaustive internet search of nearly 30 lawyers whose names appear on the latest ICC List of Counsel, I found that approximately 24 of the 30-odd names looked at indicated a general practice covering a host of areas such as family law, construction law, labour law, banking and finance, real estate law, insurance law etc...[10] One lawyer was called to the Bar on 30 October 2001,[11] and for six of the names, neither international law, nor criminal law, nor international criminal law appeared in the description of their respective practices.[12]

11. The application of Requirement 4 is inherently arbitrary. In its assessment and quantification of relevant experience, the registry has applied the numerical "face value" of Requirement 4 to general practitioners without taking into account the candidates' true experience underlying these years.[13] If the registry admitted to the List a candidate whose ten or twenty year practice includes a fraction (less than half) criminal proceedings work then, *a fortiori*, my candidacy should equally meet with success as I have seven full years of international criminal and 11 civil years. The difference between our cases is superficial: the mixed nature of my practice is sequential whereas that of general practitioners is concurrent. Consequently, it is arbitrary to admit one to the List and not the other.

12. The Impugned Decision recognized my extensive civil experience prior to developing an expertise in international criminal law and indicated that it "*cannot be considered in the assessment of relevant experience in criminal proceedings as required by applicable legal*

[10] See Annexure 3.
[11] At the date of filing, this would indicate that the lawyer did not have the requisite ten years at the Bar when they were admitting to the List – nor at the date of filing of the present Application.
[12] See Annexure 1, List of areas of practice for list counsel. The names of the lawyers whose practices are listed can be provided if necessary, upon request. Various internet sites were visited on 4 October 2011.
[13] The Candidate Application Form List of Counsel asks the following questions: "If you are a judge, lawyer or prosecutor, please indicate: "*Years of experience in criminal proceedings*" and "*Your field of expertise and years of experience in that field*", and "Total number of years of experience". If a general practitioner with 20 years at the Bar has a practice comprised of 70% civil and 30% criminal, because the questions do not ask for "the equivalent of full-time criminal proceedings experience", it is safe for an applicant to respond thusly: "20 years of experience in criminal proceedings"; "Expertise is general practitioner with 20 years experience" and "Total number of 20 years experience". In reality, however, this lawyer's practice would have only included the equivalent of six (6) years of full-time criminal proceedings work.

texts ... ".[14] If this guideline informs the application of Requirement 4, then to be fair the civil law experience of general practitioners should, too, be excluded. If I am mistaken and the general practitioners saw Requirement 4 apply to them in the same strict manner as it is being applied to me, then the Registry should be in a position to confirm that every List counsel, including every general practitioner, has the functional equivalent of ten years of exclusively criminal experience. Otherwise, procedural fairness would require that either the strict interpretation of Requirement 4 apply equally to all candidates or conversely, its liberal interpretation to general practitioners be applied to all candidates.

13. While Professor Sluiter advanced a related argument on the application of Requirement 4 in his case, it was in relation to a separate point.[15] He argued that work of a judge was of greater value than that of a defence counsel, and the Presidency did not address this point. I am arguing that the substantive experience underlying the relevant years needs to be examined and treated evenly across the board. I am not suggesting that my colleagues are unqualified. My aim is to see that Requirement 4 is applied fairly. If lawyers possessing the equivalent of seven or fewer years of exclusively criminal experience (be it international or domestic) are on the List, then there is no reasonable basis to exclude me.

14. The Impugned Decision refers to the Presidency's decision in the Sluiter matter which concluded, "*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.*"[16] If this is so, and general practitioners possessing less than the equivalent of ten years of exclusive criminal proceedings experience appear on the List, then *de facto* waivers are applied by the Registry to recognize mixed practices *in toto*. Again, I am not suggesting that my colleagues are not fit to be on the List; rather, the policies that inform the application of Requirement 4 should be neutral.

[14] *"While we note your extensive experience as a lawyer in civil litigation matters, as you can appreciate, this experience cannot be considered in the assessment of relevant experience in criminal proceedings as required by the applicable legal texts of the Court cited above."* Annexure 1, Impugned Decision, page 4.

[15] "*... 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.*" Sluiter Decision, para. 10.

[16] Sluiter Decision, para. 24.

15. The Impugned Decision credits my carriage of a single criminal case in 1993 while I had a predominantly civil caseload the same way it recognizes my extensive hands-on international criminal trial work. While the credit of two months is very much appreciated, the decision nonetheless reflects the arbitrariness in Requirement 4's application. If the registry credits periods during which one practiced in areas of civil law, then there is no indication how long this period can be. CSS credited my two months of part-time criminal work. If it can take into account this civil work, it can equally take into account three of my civil practice years to bring me to the required ten years. Only in so doing would I then be treated on a level playing field. If "carriage" of a file is significant in assessing relevant experience, then CSS should be in possession of data indicating that all List Counsel have carriage of criminal cases for each year of their practice.

16. If the Presidency is not inclined to overturn the Impugned Decision on the basis that my relevant experience should include three civil litigation years (to comprise a total of ten) based on the foregoing, then I would request that it reverse the Impugned Decision on the grounds that it failed to consider the highly relevant experience of seven years of exclusively international criminal proceedings practice as being the *most* useful experience one can have to get on the List of Counsel. Accordingly, to accord the appropriate value to this experience, I would submit that each year of international criminal proceedings be upgraded to, for example, 1.5 years of "relevant criminal proceedings experience". In this event, my seven years of exclusively international criminal proceedings experience would qualify me for the List as I would then have 10.5 years for the purposes of Requirement 4.

17. In conclusion, this application is brought in the spirit of ensuring administrative procedural fairness for all applicants to the List of Counsel. In my case, Requirement 4 has been applied in an unduly strict manner that I have not seen with respect to general practitioners. To avoid the appearance of being arbitrary, the assessment of relevant experience under Requirement 4 must be applied using a single standard, be it liberal or strict, and its results should be easily and empirically verifiable in relation to all candidacies. Finally, applying Requirement 4 reasonably would not require a formal regulatory amendment; guidelines such as those submitted above could be applied as a matter of an articulated and transparent policy.

WHEREFORE, MAY IT PLEASE THE PRESIDENCY,

REVIEW and **REVERSE** the Impugned Decision, and **DIRECT** the Registrar to admit me to the ICC List of Counsel, or alternatively,

DIRECT the Registry to provide confirmation that each member of the ICC List of Counsel possesses a minimum of ten years of exclusively criminal proceedings experience.

THE WHOLE RESPECTFULLY SUBMITTED

Allison Turner

Allison Turner, Attorney

Dated this 10 October 2011

At Montreal, Canada

At [place, country]