

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-RoC72-01/21**

Date: **7 June 2021**

THE PRESIDENCY

Before: Judge Piotr Hofmański, President
Judge Luz del Carmen Ibáñez Carranza, First Vice-President
Judge Antoine Kesia-Mbe Mindua, Second Vice-President

Public

**Decision on the Application to review the decision of the Registrar denying admission of
Mr Juan Branco to the list of counsel**

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

Applicant
Mr Juan Branco

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section
Mr Esteban Peralta Losilla

Detention Section

Division of Court Services

The Presidency of the International Criminal Court (the ‘Court’) has before it the application of Mr Juan Branco (the ‘Applicant’) dated 31 March 2021 for judicial review of a decision of the Registrar, issued on 29 March 2021, denying him inclusion in the list of counsel maintained by the Registrar pursuant to rule 21(2) of the Rules of Procedure and Evidence (the ‘Rules’ and the ‘Application’, respectively).¹

I. PROCEDURAL HISTORY

1. On 5 October 2020, the Registry received from the Applicant a request for inclusion in the list of counsel, dated 25 September 2020 (the ‘Request for Inclusion’),² together with supporting documentation.³ Following the Registry’s request, the Applicant provided additional information on 22 December 2020.⁴
2. On 29 March 2021, the Applicant was notified of the Registrar’s decision to reject his Request for Inclusion (the ‘Impugned Decision’).⁵
3. On 31 March 2021, the Applicant filed the present Application seeking judicial review of the Impugned Decision pursuant to regulations 72(1)(a) and (2) of the Regulations of the Court (the ‘Regulations’).⁶
4. On 14 April 2021, the Registrar responded to the Application in accordance with regulation 72(3) of the Regulations (the ‘Registrar’s Observations’).⁷
5. On 15 April 2021, the Applicant filed a response to the Registrar’s Observations (the ‘Applicant’s Response’).⁸

¹ Applicant, Appeal of a decision regarding an application to the list of Counsels, 31 March 2021, ICC-RoC72-01/21-1.

² Registrar, Candidate Application Form, Annex III of the Registrar’s Observations on “Appeal of a decision regarding an application to the list of Counsels” (ICC-RoC72-01/21-1), 14 April 2021, ICC-RoC72-01/21-2-Conf-Exp-AnxIII.

³ Registrar, *Curriculum Vitae*, Annex IV of the Registrar’s Observations on “Appeal of a decision regarding an application to the list of Counsels” (ICC-RoC72-01/21-1), 14 April 2021, ICC-RoC72-01/21-2-Conf-Exp-AnxIV.

⁴ Registrar, Additional Information Form, , Annex VI and Email from the Registry to the Applicant, Annex VII of the Registrar’s Observations on “Appeal of a decision regarding an application to the list of Counsels” (ICC-RoC72-01/21-1), 14 April 2021, ICC-RoC72-01/21-2-Conf-Exp-AnxVI and ICC-RoC72-01/21-2-Conf-Exp-AnxVII.

⁵ Registrar, Impugned Decision, Letter from the Chief of CSS to the Applicant, 29 March 2021, CSS/2021/176, ICC-RoC72-01/21-2-Conf-Exp-AnxVIII, pp. 1-2.

⁶ Application, ICC-RoC72-01/21-1.

⁷ Registrar, Registrar’s Observations on “Appeal of a decision regarding an application to the list of Counsels” (ICC-RoC72-01/21-1), 14 April 2021, ICC-RoC72-01/21-2-Conf-Exp, with Annexes I- VIII.

⁸ Applicant, Response to the Registrar’s Observations on “Appeal of a decision regarding an application to the list of Counsels” (ICC-RoC72-01/21-1), 15 April 2021, ICC-RoC72-01/21-3-Conf.

6. On 21 April 2021, the Registrar filed a confidential and *ex parte* Addendum to the Registrar's Observations, transmitting additional information which had been communicated to him from an external source, disputing certain information contained in the Application (the 'Additional Information').⁹
7. On 22 April 2021, the Applicant submitted a response to the Additional Information (the 'Response to Additional Information').¹⁰

II. IMPUGNED DECISION

8. In the Impugned Decision, the Chief of the Registry's Counsel Support Section informed the Applicant that following a careful review, the Request for Inclusion was denied on the basis that the Applicant does not have the required work experience set forth in rule 22 of the Rules and regulation 67(1) of the Regulations.¹¹ In this regard, the Impugned Decision notes that ten years of experience in criminal proceedings as judge, prosecutor, advocate or in a similar capacity are required to be included in the list of counsel and that, according to the Request for Inclusion, he has extensive professional experience, but only five years and six months of work experience in criminal proceedings.¹²

III. SUBMISSIONS

9. The Applicant seeks judicial review of the Impugned Decision and challenges the Registry's evaluation of his professional experience.¹³ He submits that the Registry erred in failing to take into account his experiences as a civil servant and academic in international criminal law, highlighting that these functions were directly connected to international criminal proceedings, involving regular interventions in criminal proceedings¹⁴ and direct interactions with judges, lawyers, clients, prosecutors and victims.¹⁵ He provides the Presidency with a list of those experiences, including

⁹ Registrar, Addendum to the "Registrar's Observations on 'Appeal of a decision regarding an application to the list of Counsels' (ICC-RoC72-01/21-1)", 14 April 2021, ICC-RoC72-01/21-2-Conf-Exp, 21 April 2021, ICC-RoC72-01/21-4-Conf-Exp, with Annex I, ICC-RoC72-01/21-4-Conf-Exp-AnxI.

¹⁰ Applicant, Response to the Registry new Submission, 22 April 2021, ICC-RoC72-01/21-5-Conf.

¹¹ Impugned Decision, ICC-RoC72-01/21-2-Conf-Exp-AnxVIII, p. 1.

¹² Impugned Decision, ICC-RoC72-01/21-2-Conf-Exp-AnxVIII, pp. 1-2.

¹³ Application, ICC-RoC72-01/21-1, p. 3.

¹⁴ Application, ICC-RoC72-01/21-1, p. 4.

¹⁵ Application, ICC-RoC72-01/21-1, p. 5.

providing some further details, which he considers should be regarded as “analog” to experience as a judge, prosecutor or advocate in criminal proceedings, referring to rule 22(1) of the Rules in this regard.¹⁶ He submits that his experience as a civil servant and academic nourished important and direct contributions to international criminal law proceedings¹⁷ and that the prestige of the institutions in which he gained these experiences, their connections to international criminal proceedings, the systematic correlation with practice and the factual and verifiable inputs that they have triggered, are arguments to consider the experience as admissible.¹⁸ He argues that the Guide for Applicants to the ICC List of Counsel and Assistants to Counsel (the ‘Guide for Applicants’) states that academic experience in law should be taken into account, as far as this work has been accompanied by interventions in Courts and criminal proceedings.¹⁹ He requests the Presidency to consider his experiences as a civil servant and academic admissible and to determine that they go beyond the minimal requirements for admission to the list of counsel, estimating that they would amount to a total of 10,5 to 12 years of professional experience.²⁰ The Applicant requests the Presidency to re-evaluate his work experience and overturn the Impugned Decision.²¹

10. In response, the Registrar submits that the Applicant’s experience as a civil servant and academic cannot be counted as relevant experience in criminal proceedings.²² Submitting that the Applicant bears the burden to sufficiently demonstrate the required qualifications, the Registrar emphasises that it cannot be presumed that reference to a legal position speaks for itself or automatically qualifies as work experience for the list of counsel and that the Request for Inclusion lacks sufficient detail in this respect.²³ The Registrar submits that the Applicant’s Guide states that professors of law can only be admitted if they have intervened in criminal proceedings as a judge, prosecutor, advocate or in another similar capacity for a minimum of ten years.²⁴ The Registrar further observes that the Applicant declared himself to have only four years of experience in criminal proceedings.²⁵ The Registrar’s Observations emphasise that the Application

¹⁶ Application, ICC-RoC72-01/21-1, p. 4.

¹⁷ Application, ICC-RoC72-01/21-1, p. 5.

¹⁸ Application, ICC-RoC72-01/21-1, p. 5.

¹⁹ Application, ICC-RoC72-01/21-1, p. 5.

²⁰ Application, ICC-RoC72-01/21-1, p. 5.

²¹ Application, ICC-RoC72-01/21-1, p. 4.

²² Registrar’s Observations, ICC-RoC72-01/21-2-Conf-Exp, paras 11, 14-15.

²³ Registrar’s Observations, ICC-RoC72-01/21-2-Conf-Exp, para. 11.

²⁴ Registrar’s Observations, ICC-RoC72-01/21-2-Conf-Exp, para. 14.

²⁵ Registrar’s Observations, ICC-RoC72-01/21-2-Conf-Exp, para. 17.

contained new information, which hence could not have been taken into account during the assessment of the Request for Inclusion,²⁶ and that some of the information provided in the Application diverges from information provided in the Request for Inclusion.²⁷ The Registry concludes that further clarification and verification on the Applicant's experience is necessary.²⁸

11. In response to the Registrar's Observations, the Applicant submits that the procedure for inclusion in the list of counsel is of a formal nature, that questions should only be raised in case of doubt and that he responded to all questions put forward by the Registry immediately. Therefore he concludes that the Registry could not invoke the 'lack of detail' in the Request for Inclusion.²⁹ He submits further details about his work, including clarifications and corrections³⁰ and suggests that the Presidency may render a decision on the basis of new details he provided in his Application.³¹
12. The Additional Information contains information pertinent to whether the Applicant completed a certain professional engagement listed in his Application,³² in respect of which the Applicant provides additional information and context in his Response to Additional Information.³³

IV. DETERMINATION OF THE PRESIDENCY

A. Standard of review

13. The Presidency recalls that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that 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

²⁶ Registrar's Observations, ICC-RoC72-01/21-2-Conf-Exp, paras 18-19.

²⁷ Registrar's Observations, ICC-RoC72-01/21-2-Conf-Exp, para. 21.

²⁸ Registrar's Observations, ICC-RoC72-01/21-2-Conf-Exp, paras 20, 22.

²⁹ Applicant's Response, ICC-RoC72-01/21-3-Conf, paras 5, 7.

³⁰ Applicant's Response, ICC-RoC72-01/21-3-Conf, paras 16-22, 24-28.

³¹ Applicant's Response, ICC-RoC72-01/21-3-Conf, para. 8.

³² Additional Information, ICC-RoC72-01/21-4-Conf-Exp-AnxI.

³³ Response to Additional Information, ICC-RoC72-01/21-5-Conf.

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.³⁴

14. The Presidency notes that the above standard of judicial review clarifies that it is not the function of the Presidency to itself render decisions on applications for inclusion in the list of counsel, particularly in view of the provision of further information and details which were not provided or sufficiently explained to the Registrar in the initial Request for Inclusion.

B. Preliminary Matters

15. The Presidency further observes that, in addition to the Registrar's Observations in accordance with regulation 72(3) of the Regulations, it received three additional filings. As a preliminary matter, the Presidency will determine whether these have been validly filed and should be considered in its determination of the merits of the Application.
16. Turning first to the Applicant's Response to the Registrar's Observations, the Presidency recalls that regulation 72 of the Regulations does not provide applicants for judicial review with an automatic right to respond or reply to submissions or information provided by the Registrar. Furthermore, the Presidency has previously clarified that applicants should seek leave of the Presidency to reply to the Registrar's Observations.³⁵ Moreover, the Presidency notes that the Applicant's Response is limited to providing additional details and repeating arguments of his Application. In light of the above, the Presidency decides to disregard the Applicant's Response in its consideration of the merits of the Application.
17. Second, the Presidency notes that after the filing of the Registrar's Observations, the Registrar had received Additional Information from a third party, potentially pertinent to the matter. The Presidency considers it entirely appropriate that the information was merely transmitted to the Presidency by the Registrar, with no further submissions or arguments, for the Presidency to make its own assessment on the relevance of the provided information. The Presidency notes that the Additional Information contained

³⁴ The standard of judicial review was defined by the Presidency in its decision of 20 December 2005 (Presidency, 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-RoC72-02/05, para. 16), and supplemented in its decision of 27 November 2006, ICC-01/04-01/06-731-Conf, para. 24. *See also* Decision on the application to review the decision of the Registrar denying the admission of Ms Magdalena Ayoade to the list of experts, 6 August 2009, ICC-RoR56-01/09-2, para. 11.

³⁵ Presidency, Decision on the request to review the decision of the Registrar denying the inclusion of Ms Ana Cristina Rodríguez Pineda in the list of counsel, 20 April 2018, ICC-RoC72-01/18-6, para. 19.

information pertinent to the Applicant's employment history. Given its potential degree of relevance, the Presidency will consider the Additional Information as necessary in its assessment of the Application.

18. In light of its content and the unforeseeable nature of the Additional Information, the Presidency considers it in the interest of justice to accord the Applicant a right to respond and therefore it will accept the Applicant's Response to Additional Information as being validly before it.

C. Merits

19. The Registrar is responsible for creating and maintaining a list of counsel who meet the criteria to be appointed as counsel for the defence.³⁶ These criteria are, *inter alia*, set forth in rule 22(1) of the Rules and regulation 67(1) of the Regulations, which provide the following:

Rule 22

Appointment and qualifications of Counsel for the defence

1. 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. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise.

Regulation 67

Criteria to be met by counsel

1. Subject to regulation 78, sub-regulation 2, the necessary relevant experience for counsel as described in rule 22 shall be at least ten years for lead counsel and at least eight years for associate counsel.

20. The Impugned Decision recognises that the Applicant possesses five years and six months of necessary and relevant experience in criminal proceedings, whether as judge, prosecutor, advocate or in other similar capacity, as required by rule 22(1) of the Rules and regulation 67(1) of the Regulations. This falls short of the ten years of experience required by the latter for inclusion in the list of counsel. The Applicant contends, however, that the Registrar erred in failing to take into account his other experience as a

³⁶ See rule 21(2) of the Rules.

civil servant and academic within the meaning of ‘other similar capacity’ when assessing his experience for the inclusion in the list of counsel in rule 22(1) of the Rules.³⁷

21. The Presidency clarifies the distinction drawn in rule 22(1) of the Rules between, on the one hand, the requirement of possessing at least ten years of necessary relevant experience, whether as a judge, prosecutor, advocate or similar capacity, in criminal proceedings and, on the other hand, the competence in ‘international or criminal law and procedure’. These two requirements are distinct, as is made clear in the language of “as well as” in the first sentence of rule 22(1) of the Rules. The competence in ‘international or criminal law and procedure’ was correctly found to be established by the Impugned Decision, in respect of which most of the Applicant’s experience as a civil servant and academic was clearly relevant.
22. The Presidency notes that the Applicant is required to demonstrate that he possesses the necessary relevant experience in criminal proceedings pursuant to rule 22(1) of the Rules, which is at least ten years for lead counsel and eight years for associate counsel. The Presidency emphasises that rule 22(1) of the Rules enumerates the positions which are considered as constituting the necessary relevant experience to be admitted to the list of counsel: namely judge, prosecutor and advocate. This group of positions is extended by the complement of ‘other similar capacity’.³⁸
23. The Presidency has previously determined that ‘the scope of ‘other similar capacity’ can be best elucidated through the application of the interpretation principle of *ejusdem generis*- namely, that a general phrase shall be interpreted to include only items of the same class as those previously listed’.³⁹ In this regard, the Presidency concurs with the following prior elucidation of the meaning of ‘other similar capacity’ in such context:

It follows that the general category of ‘other similar capacity’ encompasses necessary relevant experience gained in the conduct of criminal proceedings (whether in the courtroom or in a supporting capacity). The Presidency notes that such an interpretation is consonant with the aim of ensuring that defendants, as well as victims, benefit from representation by counsel who are not only competent in international or criminal law and procedure, but are also sufficiently experienced in handling criminal proceedings – an aim dictated by the inherent

³⁷ Application, ICC-RoC72-01/21-1, p. 4.

³⁸ In the French version: ‘*autre fonction analogue*’, the expression that the Applicant referred to in his Application, see Application, ICC-RoC72-01/21-1, p. 4.

³⁹ Presidency, Decision on the request to review the decision of the Registrar denying he inclusion of Ms Ana Cristina Rodríguez Pineda in the list of counsel, 20 April 2018, ICC-RoC72-01/18-6, para. 22.

complexity of the Court's proceedings, in conjunction with the statutory requirements of fairness and expeditiousness of proceedings.⁴⁰

The Presidency observes that the Request for Inclusion provided no information or elaboration as to the extent to which his experience as a civil servant and academic was connected to the conduct of criminal proceedings nor whether they were analogous to the role of 'judge, prosecutor or advocate' in such context.

24. As to the Applicant's submission that all his functions included regular interventions in criminal proceedings,⁴¹ the Presidency observes that the relevant details of these interventions were not specified in the Request for Inclusion. The Presidency recalls, that at any time, an Applicant bears the burden to demonstrate her or his qualifications for the inclusion in the list of counsel.⁴² The Applicant cannot assume that either the simple listing of legal positions, especially those not listed in rule 22(1) of the Rules, or a generic phrase of 'regular interventions in criminal proceedings' speak for themselves. The Presidency recalls that it is the Applicant's responsibility to demonstrate that he possesses the required experience. In this instance he acknowledges himself that he has only four years of work experience in criminal proceedings⁴³ and did not provide sufficient details on how work as a civil servant and academic fulfilled required criteria. The Presidency consequently concludes that the Request for Inclusion lacked sufficient information to enable the Registrar to be satisfied that he had the necessary relevant experience in criminal proceedings.

25. With respect to the Applicant's argument that, according to the Applicant's Guide, academic experience in law is to be taken into account as a full-time experience, if it has been accompanied by interventions in courts and criminal proceedings, the Presidency notes that the Applicant's Guide unequivocally states that '[p]rofessors of law meet this requirement only where they have intervened in criminal proceedings for a minimum of ten years in one of the capacities listed above; otherwise, they can be admitted to the List of Assistants [to Counsel]'.⁴⁴ This means that academic work of itself is generally not

⁴⁰ Presidency, Decision on the request to review the decision of the Registrar denying the inclusion of Ms Ana Cristina Rodríguez Pineda in the list of counsel, 20 April 2018, ICC-RoC72-01/18-6, para. 23.

⁴¹ Application, ICC-RoC72-01/21-1, p. 4.

⁴² See Presidency, Decision on the request to review the decision of the Registrar denying the inclusion of Ms Ana Cristina Rodríguez Pineda in the list of counsel, ICC-RoC72-01/18-6, para. 25.

⁴³ Registrar, Candidate Application form, Annex III of the Registrar's Observations on "Appeal of a decision regarding an application to the list of Counsels" (ICC-RoC72-01/21-1), 14 April 2021, ICC-RoC72-01/21-2-Conf-Exp-AnxIII, p. 6.

⁴⁴ Applicant's Guide, p. 6.

considered as necessary relevant experience in criminal proceedings within the meaning of rule 22(1) of the Rules and that even a professor of law (which the Applicant is not) is required to have intervened in criminal proceedings for at least ten years in one of the explicitly listed roles to be considered for the inclusion to the list of counsel.

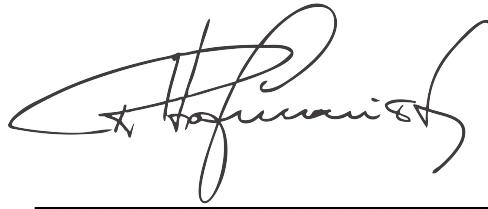
26. Based on the foregoing, the Presidency notes that the Applicant has not shown any errors in the Impugned Decision's finding that the Applicant failed to demonstrate sufficient years of necessary relevant experience and, accordingly, confirms the Impugned Decision.
27. Notwithstanding that the Presidency does not identify any error in the Impugned Decision, the Registrar's Observations themselves clarify that the Applicant provided in his Application further details and information, with the Registrar expressing the view that further verification of certain new information is required prior to determining whether it has any impact on the relevance and duration of the Applicant's necessary relevant experience.⁴⁵ The Presidency clarifies that the above finding does not prevent the Registrar from conducting additional assessment of information which has been newly provided in the course of the present procedure, as necessary, nor does it preclude the Applicant from making a fresh application for inclusion in future, if and when he is able to fully substantiate the requirement of ten years necessary relevant experience in criminal proceedings.
28. As to the Additional Information and without prejudice to the veracity thereof or of the Response to the Additional Information, the Presidency notes that the Applicant does not dispute that he included a professional experience in his Application (and Request for Inclusion) which he was unable to complete, without providing any further explanation. Regardless of the circumstances of such non-completion and the veracity of the Applicant's explanations, the information provided in the Application may appear misleading in this regard.

THE PRESIDENCY HEREBY

CONFIRMS the Impugned Decision.

⁴⁵ Registrar's Observations, paras 20 and 22.

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



Judge Piotr Hofmański
President



Judge Luz del Carmen Ibáñez Carranza
First Vice-President



Judge Antoine Kesia-Mbe Mindua
Second Vice-President

Dated this 7 June 2021

At The Hague, The Netherlands