



Original: **English**

No.: **ICC-RoC72-01/18**

Date: **20 April 2018**

THE PRESIDENCY

Before: **Judge Chile Eboe-Osuji, President**
 Judge Robert Fremr, First Vice-President
 Judge Marc Perrin de Brichambaut, Second Vice-President

Public

**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**

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

Applicant

Ms Ana Cristina Rodríguez Pineda

REGISTRY

Registrar

Mr Peter Lewis

The Presidency of the International Criminal Court (the ‘Court’) has before it the request of Ms Ana Cristina Rodríguez Pineda (the ‘Applicant’) dated 8 February 2018 for judicial review of a decision of the Registrar, dated 23 January 2018, denying her 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 ‘Request’, respectively).¹

The Request is rejected for the reasons set out below.

I. BACKGROUND

1. On 14 October 2016, the Registry received from the Applicant an application for inclusion in the list of counsel.² Following a request for additional information, the Applicant completed her application on 17 October 2016.³
2. On 23 January 2018, the Registry informed the Applicant that it was not in a position to respond favourably to her application for inclusion in the list of counsel (the ‘Impugned Decision’).⁴
3. On 8 February 2018, the Applicant submitted the Request, attaching a number of documents in support thereof, including a letter dated 4 February 2018 and addressed to the President of the Court from a Foreign Ministry Official, providing information about the Applicant’s employment with the Permanent Mission of Guatemala to the United Nations (the ‘Letter of 4 February 2018’).⁵
4. On 1 March 2018, the Registrar submitted his response to the Request, pursuant to regulation 72(3) of the Regulations of the Court (the ‘Regulations’ and the ‘Response’, respectively).⁶ On 6 March 2018, upon the Presidency’s instruction, the Registrar filed, on a confidential basis, three documents which formed part of the Applicant’s application for inclusion in the list of counsel (the ‘Addendum’).⁷

¹ ‘Request for Review of the decision by the Registry concerning Ms. Ana Cristina Rodríguez Pineda’s Application to the List of Counsel of the International Criminal Court’, 8 February 2018, ICC-RoC72-01/18-1. The Request was filed on 13 February 2018.

² ICC-RoC72-01/18-3-Conf-Anx2; ICC-RoC72-01/18-3-Conf-Anx1.

³ ICC-RoC72-01/18-1-AnxII. *See also* ICC-RoC72-01/18-3-Conf-Anx3.

⁴ ICC-RoC72-01/18-1-AnxI.

⁵ ICC-RoC72-01/18-1-AnxIII.

⁶ ‘Response of the Registrar to the “Request for Review of the decision by the Registry concerning Ms. Ana Cristina Rodríguez Pineda’s Application to the List of Counsel of the International Criminal Court”’, 1 March 2018, ICC-RoC72-01/18-2.

⁷ ‘Addendum to Response of the Registrar to the “Request for Review of the decision by the Registry concerning Ms. Ana Cristina Rodríguez Pineda’s Application to the List of Counsel of the International

5. On 7 March 2018, the Applicant filed, on a confidential basis, additional submissions (the ‘Additional Submissions’).⁸
6. On 29 March 2018, the Registrar transmitted, on a confidential basis, a letter addressed to the President of the Court, dated 21 March 2018, asking that the Letter of 4 February 2018 be disregarded as the relevant Ministry does not approve nor subscribe to the contents thereof.⁹

II. MERITS

A. Impugned Decision

7. The Impugned Decision rejects the Applicant’s request for inclusion in the list of counsel. In support of his decision, the Registrar notes that while the requirements of ‘competence’ (rule 22(1)), ‘knowledge of languages’ (rule 22(1)) and ‘absence of criminal and/or disciplinary sanctions’ (regulation 67(2)) are fulfilled, the requirement of ‘ten years of experience in criminal proceedings’ (rule 22(1) and regulation 67(1)) is not met.
8. With respect to the latter requirement, the Registrar considers that the Applicant has only three years and nine months of relevant experience, noting the Applicant’s experience as *Chef de cabinet* to the President of the International Criminal Tribunal for the former Yugoslavia (two years, two months) and as Associate Attorney at Law in Guatemala (one year, seven months). The Registrar indicates that diplomatic activity, such as the Applicant’s position at the Permanent Mission of Guatemala to the United Nations, ‘cannot be considered as relevant experience in criminal proceedings for the purposes of the List of Counsel.’

Criminal Court”, 6 March 2018, ICC-RoC72-01/18-3-Conf. See ICC-RoC72-01/18-3-Conf-Anx1; ICC-RoC72-01/18-3-Conf-Anx2-Corr; ICC-RoC72-01/18-3-Conf-Anx3.

⁸ ‘Additional filing responding to the Addendum to Response of the Registrar to the “Request for Review of the decision by the Registry concerning Ms. Ana Cristina Rodríguez Pineda’s Application to the List of Counsel of the International Criminal Court”, 7 March 2018, ICC-RoC72-1/18-4-Conf. The Additional Submissions were filed on 8 March 2018.

⁹ Annex to ‘Transmission of correspondence received by the Registrar’, 29 March 2018, ICC-RoC72-01/18-5-Conf-Anx.

B. Submissions

1. *The arguments of the Applicant*

9. The Applicant seeks judicial review of the Impugned Decision on three grounds: (i) the Registrar's alleged incorrect application of rule 22 of the Rules; (ii) the Registrar's alleged error not to take into account her experience at the Permanent Mission of Guatemala to the United Nations; and (iii) the alleged arbitrary, unfair and discriminatory character of the Impugned Decision.
10. With respect to the first ground, the Applicant submits that in the Impugned Decision, the Registrar has reformulated the applicable requirement of experience under rule 22 as 'relevant and necessary' experience whereas rule 22 requires 'relevant necessary' experience, resulting in a narrow interpretation and application of the two-prong test of rule 22. The Applicant further submits that the Registrar has failed to provide a 'clear understanding' of the criterion and methodology used to assess experience 'in other similar capacity' and to even address this category in the Impugned Decision.¹⁰
11. Under the second ground, the Applicant explains that in her application for inclusion in the list of counsel, she had provided a brief overview of her experience at the Permanent Mission of Guatemala to the United Nations on the assumption that 'it clearly spoke for itself' that the legal work in such capacity would be considered as necessary relevant experience in criminal proceedings.¹¹ The Applicant now provides extensive details about the work she undertook in various capacities while working with the Permanent Mission of Guatemala to the United Nations, arguing that such work was related to the substance of criminal law and procedure 'through discussions, deliberations, drafting, research, taking measures and negotiations' and that such work falls within the 'other similar capacity' category.¹²
12. In relation to the third ground, the Applicant contends that the Registrar's application of a 'narrow interpretation' of rule 22 of the Rules 'reduces even more the chances for someone like [her], a woman from a Group of Latin American and Caribbean

¹⁰ Request, paras. 8-10. Under the first ground, the Applicant also submits that she assumed, at the time of her application for inclusion in the list of counsel, that her recruitment as *Chef de cabinet* to the President of the International Criminal Tribunal for the former Yugoslavia – a position requiring a minimum of ten years of progressively responsible professional experience at the international level in the field of international law, in particular in organizations or institutions dealing with international criminal law matters, and requiring extensive knowledge and practical experience in international criminal law and international relations – 'would demonstrate in itself [her] eligibility for admission to the list of Counsel': Request, para. 6.

¹¹ Request, para. 11.

¹² Request, paras. 12-13.

(“GRULAC”) nationality to be included [in the list of counsel]’.¹³ The Applicant further refers to the example of a male individual from the Western Europe and Others Group region recently included in the list of counsel, whose public professional profile appears not to demonstrate ten years of experience all of a legal nature, as an illustration of the differentiated treatment to which her application was subjected.¹⁴

13. In the Additional Submissions, the Applicant explains that the reference to ‘three’ years in the ‘Additional Information Form’ attached to her request for inclusion in the list of counsel relates to experience in the form of ‘effectively’ intervening in criminal proceedings, as is asked in the ‘Additional Information Form’. The Applicant underscores that the standard under rule 22 of the Rules is different and that her reference to three years in the ‘Additional Information Form’ does not substitute her over ten years of experience in legal work related to the substance of criminal law and procedure within the ‘other similar capacity’ category.¹⁵

2. *The arguments of the Registrar*

14. In response, the Registrar submits that the Registry has consistently interpreted and applied the second requirement of rule 22(1) of the Rules (‘necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings’) as requiring experience in connection with criminal litigation, as suspects and accused are charged with the most serious crimes and, as such, should be represented by counsel with ample experience in connection with criminal litigation. The Registrar submits that the Applicant’s experience in drafting and negotiating treaties and in preparing rules of procedure, while relevant in establishing competence in international law, does not meet the threshold of experience in criminal proceedings.¹⁶

15. With respect to the Applicant’s submissions regarding a differentiated treatment of her application for inclusion in the list of counsel, with reference to the profile of another individual included in the list of counsel who appears not to have ten years of necessary relevant experience in criminal proceedings, the Registrar indicates that

¹³ Request, para. 15.

¹⁴ Request, paras. 17 and 18, *referring to* Annex V to the Request.

¹⁵ Additional Submissions, paras. 4-5.

¹⁶ Response, para. 4.

according to the file submitted by the candidate, this candidate did meet the criteria for inclusion.¹⁷

C. Determination of the Presidency

1. Applicable law

16. Pursuant to rule 21(2) of the Rules, the Registrar shall create and maintain a list of counsel who meet certain criteria. The requirements for inclusion in such list are enumerated in rule 22 of the Rules and regulation 67 of the Regulations, which provide, in relevant part:

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. [...]

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.
2. Counsel should not 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.

17. The Presidency recalls that the judicial review of decisions of the Registrar, including decisions on the inclusion in the list of counsel, 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 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.¹⁸

¹⁷ Response, para. 5.

¹⁸ See 'Reasons for the "Decision on the "Application for Review of Decision of the Registrar's Division of Victims and Counsel dated 2nd January not to Admit Prof. Dr. Sluiter to the List of Counsel"', 10 July 2008, ICC-RoC72-01/08-10, para. 20.

2. Preliminary matters

18. The Presidency notes that the procedure for judicial review of decisions on inclusion in the list of counsel is governed by regulation 72 of the Regulations.
19. The Presidency notes that the applicant filed the Additional Submissions on 7 March 2018, a procedural step which is not expressly envisaged by regulation 72 of the Regulations. The Presidency appreciates, as noted by the Applicant,¹⁹ that the Applicant only did so in response to an argument introduced by the Registrar which had not previously been addressed in the Impugned Decision or the Response.²⁰ Nevertheless, the Presidency notes that regulation 72 does not provide applicants for judicial review with an automatic right to respond or reply to submissions or information provided by the Registrar. While, in the interests of justice and to ensure that all issues relevant to the Presidency's consideration of the Request are fully addressed, the Presidency will exceptionally consider the Additional Submissions, the Applicant should have sought leave of the Presidency to file the Additional Submissions.²¹

3. Analysis

20. The Applicant contends that the Registrar failed to provide a 'clear understanding' of the criterion and methodology used to assess experience 'in other similar capacity' for the purposes of determining whether she had ten years of necessary relevant experience in criminal proceedings, and to even address this category in the Impugned Decision. The Presidency notes that although not explicitly stated, it is evident from the Impugned Decision that the Registrar assessed the Applicant's experience at the Permanent Mission of Guatemala to the United Nations under all capacities enumerated in rule 22(1) of the Rules, including that of 'other similar capacity'.²² Further, the Presidency is satisfied that in characterising the above experience as

¹⁹ Additional Submissions, paras. 1-3.

²⁰ Addendum, para. 2.

²¹ Similarly, the Presidency notes that regulation 72 of the Regulations does not expressly envisage any party other than the Registrar or the Applicant placing information before the Presidency. The Presidency recalls that it has before it the Letter of 4 February 2018, addressed by the Minister of Foreign Affairs of Guatemala. Given the analysis set out below, the Presidency notes that there has been no need for it to take into account the Letter of 4 February 2018.

²² Before explaining that '[d]iplomatic activity, such as your position at the Permanent Mission of Guatemala to the United Nations, cannot be considered as relevant experience in criminal proceedings for the purposes of the List of Counsel', the Registrar makes the general finding that 'it is not demonstrated that you have minimum 10 years of relevant and necessary experience in criminal proceedings, as a judge, prosecutor, advocate, or *similar capacity*' (emphasis added).

‘diplomatic activity’ which cannot be considered as relevant experience in criminal proceedings for the purposes of inclusion in the list of counsel, the Registrar has provided the Applicant with sufficient notice of the basis on which he denied her inclusion in the list of counsel.²³

21. The Presidency will now determine whether the Registrar committed any error of law in finding that the Applicant’s experience at the Permanent Mission of Guatemala to the United Nations could not be regarded as ‘necessary relevant experience’ for the purposes of inclusion in the list of counsel. At stake is the interpretation of the phrase ‘in other similar capacity’ in the context of the requirement of ten years of necessary relevant experience in criminal proceedings under rule 22(1) of the Rules and regulation 67(1) of the Regulations.
22. The Presidency notes that the phrase ‘in other similar capacity’²⁴ is of general nature, but complements an enumeration of specifics – ‘judge’, ‘prosecutor’ and ‘advocate’. The Presidency further notes that the enumeration is preceded by the word ‘whether’ and not the phrase ‘such as’ or any other comparable expression. In such context, 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.²⁵ The application of the interpretation principle of *ejusdem generis* in the present context is further warranted in light of the use of the word ‘*analogue*’ in the French version of rule 22(1).
23. The Presidency notes that judges, prosecutors and advocates (‘*avocat*’ in the French version of rule 22) have in common that they are key actors in criminal proceedings. 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 complexity of the Court’s proceedings,

²³ See e.g. Presidency, ‘Decision on the application to review the Registrar’s decision denying the admission of Mr Ernest Midagu Bahati to the list of counsel’, 29 December 2005, ICC-Pres-RoC72-02-05, paras. 18-19.

²⁴ ‘[Q]uelque autre fonction analogue’ in the French version of rule 22(1).

²⁵ See *Black’s Law Dictionary* (10th ed., 2014), Thomson Reuters, at p. 631.

in conjunction with the statutory requirements of fairness and expeditiousness of proceedings.²⁶

24. In view of the above, the Presidency discerns no error in the Registrar's decision not to regard the Applicant's experience at the Permanent Mission of Guatemala to the United Nations as 'necessary relevant experience' in criminal proceedings for the purposes of inclusion in the list of counsel.
25. The Presidency observes that the Applicant provides in the Request extensive details about her experience at the Permanent Mission of Guatemala to the United Nations which had not originally been provided as part of her application for inclusion in the list of counsel. The Presidency stresses that an applicant bears the burden to demonstrate his or her qualifications for inclusion in the list of counsel, including the details of the relevant necessary experience in criminal proceedings. It cannot be presumed that a reference to legal work in the application for inclusion 'speaks for itself', nor that having held a particular level of position within the United Nations' system necessarily fulfils the very specific criteria for inclusion in the list of counsel.²⁷ Nonetheless, the Presidency notes that the additional information provided in the Request, whilst demonstrating extensive competence in international or criminal law and procedure, a criteria which was already recognised as having been fulfilled in the Impugned Decision, does not demonstrate additional relevant necessary experience in criminal proceedings in a capacity comparable to those outlined at paragraph 23 above.²⁸
26. With respect to the Applicant's contention of differentiated treatment, the Presidency notes this allegation is entirely unsubstantiated. It will not engage in speculation based on professional/social media profiles of individuals on the list of counsel. As set out in paragraph 24 above, the Impugned Decision was taken in accordance with the statutory criteria. While the Presidency fully supports the laudable objective of ensuring increased regional and female representation on the list of counsel, all applicants must satisfy the applicable criteria.

²⁶ Article 64(2) of the Statute.

²⁷ Cf. Request, paras. 6, 11.

²⁸ See, in particular, the Applicant's curriculum vitae: ICC-RoC72-01/18-3-Conf-Anx1, pp. 1-2.

The Request is *hereby rejected*.

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

A handwritten signature in blue ink, consisting of a long horizontal line followed by a stylized, cursive 'E' and 'O'.

Judge Chile Eboe-Osuji
President

Dated this 20 April 2018

At The Hague, The Netherlands